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FILED
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2016 MAR 14 PM 3:42
GORDON COURTHOUSE
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

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.

STATE WATER RESOURCES CONTROL BOARD,

Respondent.

CASE NO. 34-2014-80001850

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

Date: August 26, 2016
Time: 1:30 p.m.
Dept: Dept 44
Judge: Hon. Christopher E. Krueger

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I. INTRODUCTION

The Department of Public Health ("DPH") has promulgated a new drinking water maximum contaminant level ("MCL") for Chromium-6, essentially lowering the standard from 50 parts per billion ("ppb") to 10 ppb. The federal MCL is 100 ppb. DPH considered potential MCLs ranging from 1 ppb to 30 ppb, and indicated that to some extent all of the levels it considered would be health protective. The Legislature struck a balance between public health protection and fiscal responsibility by requiring that the MCL be set as close to the public health goal as is technologically and economically feasible.

The principal question at issue here is whether DPH analyzed economic feasibility and determined that the new MCL was economically feasible. The record clearly indicates it did not. The evidence shows the DPH only went as far as calculating the costs of compliance. And they are enormous. Based on new data mandated by the MCL regulation and the underlying estimates, the capital costs alone will exceed $1 billion. These costs will ultimately be borne by the households and businesses who are customers of the affected water systems.

The Safe Drinking Water Act required DPH to consider the cost per household, the cost per water system and the aggregate costs of compliance, and to determine whether the MCL was economically feasible. However, DPH did not analyze the relevant costs and did not determine whether the MCL was economically feasible. Further, the occurrence data upon which DPH relied in calculating costs contained data for only about half the state's water sources. Recent data, collected pursuant to the new MCL, shows that there are at least 448 impacted sources—substantially more than the 311 that DPH had identified at the time of the rulemaking. Most of the newly-discovered impacted sources are small water systems, where economic feasibility concerns are the most acute.

Dozens of parties commented that the 10 ppb MCL was not economically feasible. DPH now takes the unfortunate, and unsupported, position that it was not required to consider these comments. In addition, DPH did not assess the impact of the new MCL on California businesses, even though the Administrative Procedures Act ("APA") clearly requires it to do so. As a result, the MCL should be held to be void and DPH's successor agency should be directed to issue an MCL in conformance with the relevant provisions of the Safe Drinking Water Act and the APA.

II. LEGAL ARGUMENT

A. DPH Did Not Determine Whether the MCL Is Economically Feasible

DPH agrees with Petitioners about the applicable statutory standards. First, DPH concedes that it was required to set the Chromium-6 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." (Health & Saf. Code § 116365, subd. (a); *see* Opp. at 3:16-4:2.) Second, DPH concedes that for "the purposes of determining economic feasibility," it was required to "consider the costs of compliance to public water systems, customers and other affected parties with the [MCL], including the cost per customer and aggregate cost of compliance, using best available technology." (Health & Saf. Code § 116365, subd. (b)(3).) However, DPH's arguments tacitly, and necessarily, concede that it failed to comply with these mandates.

1. DPH Did Not Conduct An Analysis Of Economic Feasibility

In their opening Brief, Petitioners showed that DPH did not actually determine the economic feasibility of the 10 ppb Chromium-6 MCL and did not make a determination that the MCL was, in fact, economically feasible. (Brief at 15:22-25.) In its opposition brief ("Opposition"), DPH claims it did examine economic feasibility and purports to explain the steps it undertook in that regard. (*See* Opp. at 7:14-9:8.)

First, DPH stated that it determined the aggregate costs of compliance for the four sizes of water systems—small, medium, large and very large. (Opp. at 7:19-21.) Second, DPH states it "looked at the feasibility of those costs in terms of estimated annual costs per system, source, service connection, and theoretical excess cancer cases reduced." (*Id.* at 7:25-27.) Third, DPH prepared of a document that described the manner by which it calculated the various costs. (*Id.* at 8:13-15.) What this apparently means is that DPH calculated the aggregate costs of compliance for each of the four system size categories and then divided the aggregate costs by: (1) the number of systems in each category; (2) the number of water sources in each category; and (3) the number of service connections (generally thought of as the number of households) in each category.[1] This yielded average costs per system, average costs per water source, and average cost per household for each of the four categories of system sizes. DPH states that it then "looked at the feasibility of [the aggregate] costs" in terms of the average cost per system, per water source and per customer.

However, DPH does not explain, either in its Opposition or in the record, what this "look" entailed. Rather, it appears that DPH's "look" entailed—as the term suggests—simply "eyeballing" the cost numbers and making subjective judgments about affordability. For example, DPH stated:

- The annual cost per service connection for smallest service connection groups is "high for an average family," but the "projected number of users affected by this number [$5,630 or $470 per month] is small" (Opp. at 8:21-24 [citation and parenthetical omitted]);
- Assuming the aggregate cost of compliance was double what was estimated, the capital costs, spread out over the entire population, would be $44.85 per person and $139.20 per household and "[t]hese are feasible cost numbers" (Opp. at 13:12-16);[2]
- Increases in monthly bills from $30 to $50 might be "unpleasant," but such increases are "hardly beyond feasible" (Opp. at 14:16-18 [citation omitted]);
- Increases from $695 to $949 per customer, or $58 to $79 per month, "do not demonstrate unfeasible costs" (Opp. at 14:20-22 [citation omitted]).[3]

These assertions are not drawn from, or tethered to, any sort of economic feasibility

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[1] The calculation of the number of theoretical cancer cases reduced is arrived at by a different set of calculations. This calculation is a way of looking at the benefits of the MCL—not the cost of the regulation. As a result, it does not factor into the statutory provisions at issue here, which require that the costs of the MCL be economically feasible.

[2] These costs are the capital costs to build the needed treatment plants, spread over every household in the state. Because Chromium-6 is not distributed equally throughout the state, these do not represent the costs that will be borne by affected households. Those costs will be much higher. DPH also asserts that "the total annual statewide cost of compliance [is] $155.8 million. Given that there were 12.5 million households in California in 2009-2013, this is an estimated cost of only $12.46 per household." (Opp. at p. 8:15-17.) Again, these are annual costs spread out over every household in the entire state. (*Id.* at p. 8:19-20.) The cost per affected household will be much higher.

[3] Petitioners argued that affordability is a key aspect of economic feasibility. (Brief at 16:25-17:8; *City of Portland, Ore. v. U.S. EPA* (D.C. Cir 2007) 507 F.3d 706, 712 (feasibility means "technically possible and affordable"); Black's Law Dictionary (10th ed. 2014) (feasibility means "the possibility that something can be made, done or achieved, or that is reasonable; practicability"). DPH takes issue with these definitions and that economic feasibility includes affordability. (Opp. at 11:1-11.) However, all of its assertions, above, regarding economic feasibility are essentially subjective judgments about *affordability*.

analysis that can be examined, critiqued, or even cited. Rather, in each of these examples, DPH has made an assertion about economic feasibility, apparently based on subjective judgment alone, as to whether the costs were affordable. While DPH feels that an increase from $50 to $79 per month might be "unpleasant," it is editorializing when it claims this is "hardly beyond feasible." We do not know whether this is indeed the case; nor did DPH when it promulgated the new MCL. Even now, it remains unclear whether an economic analysis would conclude that costs of this magnitude are actually feasible for the water system customers who are being asked to bear them.

Similarly, while DPH feels that the estimated increases to monthly water bills for customers of affected small systems ($470 per month) will be "high for an average family," it is again editorializing when it claims these increases do not need to be considered because the number of people impacted will be "small." DPH does not provide a basis for its conclusion. It does not provide an estimate of how many people are involved and it does not indicate how these costs will be funded. What is known is that the number of impacted small and medium-sized systems is significantly larger than what DPH assumed when it promulgated the MCL. In fact, recently collected data shows that the number of impacted small systems will exceed 149 (rather than the 65 systems assumed by DPH) and the number of impacted medium-sized systems will exceed 20 (rather than the 13 systems assumed by DPH). (Brief at 24:1-12.)

There is no evidence that DPH actually analyzed in any meaningful way the types of costs it was required to consider or that it actually determined whether the MCL was economically feasible. There is only evidence that DPH undertook mathematical calculations of "the costs of compliance to public water systems," "the cost per customer," and the "aggregate cost of compliance." However, the statute requires more than the mere calculation of these items—DPH is statutorily required to ***consider*** these items in ***determining*** economic feasibility. (*See* Health & Saf. Code § 116365, subds. (a), (b)(3).) Calculating these cost items are only the means to an end, not the end itself—the end being compliance with the statutory mandate and a determination of economic feasibility.

The statute requires that DPH take these inputs—the cost per system, costs per customer, and aggregate cost of compliance—and analyze them to determine whether the MCL was, in fact, economically feasible. How can we confirm that the MCL is "hardly beyond feasible" or that the data "demonstrate" that the new MCL is feasible? The answer is that we cannot—all we have are DPH's flat assertions. This is regulation by *ipse dixit.* DPH's explanation is essentially circular, and illustrates that there is no analytical bridge between the statute's mandate and DPH's conclusions. DPH asserts that it calculated the cost per water system, the cost per customer and the aggregate cost of compliance. DPH then asserts that it determined the economic feasibility of the costs "in terms of" these costs themselves. As DPH puts it, and with unessential words removed, "having considered the potential costs, the Department next looked as the feasibility of those costs in terms of …cost[s]." (Opp. at 7:25-27.)

What is absent from DPH's explanation is a description of how it actually determined economic feasibility in light of the cost data. The record contains no indication that DPH conducted any type of analysis of economic feasibility. And DPH does not cite to any evidence in the record that it analyzed the costs per system, costs per customer, and aggregate costs in determining whether the MCL was economically feasible. DPH's asserted "determination" of economic feasibility lacks evidentiary support and, thus, is invalid.

Petitioners do not argue that DPH conducted a feasibility analysis and reached the wrong result. Petitioners' argument is that DPH did not conduct a feasibility analysis at all. Instead, DPH asserted economic feasibility by relying on speculative belief rather than an evaluation based on facts. Looking at the aggregate costs in terms of average costs per system and per customer does not amount to a meaningful examination of economic feasibility. The statute's mandate is not ambiguous, and compliance with the mandate was not impractical. In fact, several methodologies were available to determine the economic feasibility of drinking water regulations.

In its 2013 report, the U.S. Conference of Mayors ("USCM") examined some of these methodologies. (USCM, *et al.*, Affordability Assessment Tool for Federal Water Mandates *available at* usmayors.org/urbanwater.)[4] USCM described two methods that EPA developed in 1995. The first methodology involves a comparison of the total annual water bill for an affected

[4] The U.S. Conference of Mayors is the official non-partisan organization of cities with populations of 30,000 or more. There are 1,407 such cities. Each city is represented by its mayor or chief elected official.

household, including the cost of the new regulation (not the ***incremental*** cost of the regulation), against the median household income ("MHI") of the household's municipality. (*Id.* at p. 4.) The second methodology involves a scoring system using six economic indicators, including bond rating, net debt, MHI and the unemployment rate in the affected municipality. (*Id.* at p. 4.)

USCM urges that economic feasibility should not be determined on a municipality-wide basis, but instead by comparisons of water costs to the MHI of relevant segments of the affected municipality (e.g., those in the lowest quintile (20%) of income; on a census track-by-census track basis). (*Id.* at p. 4-6.) USCM also suggests weighing new regulatory mandates against several factors in determining affordability (e.g., "are projects with lower public health benefits driving out projects that might be of greater value to the community.") (*Id.* at 7-8.) The point is not that any one of these particular methodologies should have been used by DPH, but rather that methodologies were available to assess economic feasibility, but none were used.

2. DPH's Assertion That Some Systems May Avoid High Costs Is Speculative

DPH asserts that high costs of compliance with the 10 ppb MCL, particularly for customers of small systems, are nonetheless economically feasible because these costs may not actually be incurred. (Opp. at p. 8:23-25.) The first time this argument appears, DPH states that: "[w]hile this number is high [additional costs of $470 per month] for an average family, ... these public water systems ***may*** have alternative means of compliance available—exemptions, blending of water sources, and alternative sources."[5] (*Id.* [citing AR 282; emphasis added].) The second time this argument appears, DPH states that there is no requirement that DPH regulate only for "outliers" when "alternative means for compliance ***are*** available." (Opp. at 9:14-16 [emphasis added].) The record uses the precatory, "may." (*See* AR 282.)

In any event, this argument is wholly speculative. All that is stated is that "some" systems

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[5] With respect to small water systems, DPH states that it has no discretion to set a different affordable MCL applicable to small water systems that is less protective of public health. DPH goes on to say that: "In other words, customers of small water systems need to have their health protected just as much as everyone else." (Opp. at 9:3-4) Petitioners do not mean to suggest that different MCLs should pertain to different systems. Rather, Petitioners believe that DPH should determine whether an MCL of 10 ppb is economically feasible. If it is, that should be the statewide MCL. If it is not, DPH should determine whether an MCL of 15 ppb is economically feasible. And so forth. Ironically, in its zeal to promote the 10 ppb MCL as economically feasible, it is DPH that suggests that small water systems obtain a variance from the MCL and purvey water containing Chromium-6 above the MCL.

"may" be able to achieve compliance with the MCL through less expensive means. (*See id.*) There is no evidence in the record that any systems will actually be able to achieve compliance in a less expensive way and there is no quantification of the number of such systems that could be expected to comply in a way that would result in more affordable water rates. This type of speculation does not satisfy DPH's mandatory duty to determine economic feasibility.

3. DPH Does Not Know The Extent To Which The MCL Is Infeasible

DPH asserts that Petitioners' argument that a feasibility analysis was not conducted is "a micro argument, looking only at a sliver of the regulated community to declare a lack of feasibility." (Opp. at 9:9-10.) DPH misses the principal point of Petitioners' argument. Petitioners' argument is that DPH did not conduct the required analysis to determine whether the 10 ppb MCL is—or is not—economically feasible. (Brief at 15:20-16:16.)

Petitioners simply pointed to the estimated annual increase of about $5,600 per household for affected small water systems as an ***example*** of the lack of an economic feasibility analysis—a point which illustrates the larger argument. (Brief at 17:9-10.) The cost in this example (an annual water rate increase of $5,600) does not appear to be affordable and there is no analysis or explanation showing whether it is. Further, based on recently collected data, there are at least 149 affected small water systems in California—significantly more than the 65 estimated by DPH when it promulgated the MCL. (*Id.* at 24:1-10.) To take another example, DPH estimated that annual water bills would increase by about $860 per household for affected medium-sized water systems. (AR 287.) It is not clear that a number of this magnitude, compared to the range of household incomes in California, is economically feasible, and DPH conducted no analysis showing whether it is feasible. To take a third example, dozens of commenters stated that the rate increases necessary to pay for the MCL would make it difficult or impossible for people in their communities to afford water. (*See* Brief at 17:19-25.) Again, there is no analysis or explanation as to whether the rate increases pointed to by these commenters are feasible.

DPH asserts that the majority of affected ratepayers "live in cities and will be economically impacted at a feasible level that can be fairly shared among water users." (Opp. at 9:13-14.) This may be true; may be partly true; or may not be true. While DPH's estimate that annual water bills would increase by about $65 per household for affected very large water systems may be feasible for many, it is also the case that some of the most economically disadvantaged communities in the state are located in urban areas. The parties to this action can dispute whether an increase of $65 per year is economically feasible for all urban water customers. However, there is nothing in the record to resolve that dispute.

Moreover, nothing in the statute supports DPH's claim that it may promulgate an MCL that is not economically feasible for entire classes of water systems (small water systems and NTNCWS). The Legislature required DPH to set the MCL at a level that is economically feasible without qualification. (Health & Saf. Code § 116365, subds. (a), (a)(2).)

4. The Legislature Did Not Ratify The MCL

DPH notes that in 2015, the Legislature passed Senate Bill 385, which generally provided affected water systems an additional five years to achieve compliance with the MCL. (Health & Saf. Code § 116431.) DPH interprets passage of this bill as providing "legislative ratification" of the MCL and suggests that the writ petition should be denied on that ground. (Opp. at 10:19-21.)

However, DPH does not provide any evidence from the legislative history of Senate Bill 385 that the Legislature actually contemplated whether the MCL was set at the appropriate level, let alone that the Legislature affirmatively determined that it was. The half-page argument presented by DPH does not contain any citation to the legislative history. Petitioners have reviewed the legislative history and do not find the ratification about which DPH speculates.

Senate Bill 385 could itself be considered evidence of the problematic nature of the MCL. The five-year compliance extension indicates that the new MCL that required all water systems to meet the 10 ppb standard by July 1, 2015, was not feasible. (BLACK'S LAW DICTIONARY (10th Ed. 2014) ["The possibility that something can be made, done, or achieved, or that is reasonable; practicability"].) There is evidence that Senate Bill 385 was, in part, a response to concerns that were not taken into account as part of an economic feasibility analysis. For example:

- The Coachella Valley Water District, a district serving approximately 200,000 people, stated that: "Capital costs will likely exceed $200 million, with annual operation and 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." (Request for Judicial Notice ("RJN") in Support of Brief ("Initial RJN"), Exh. I [Legislative History, p. AP2-54 (June 30, 2015)].)

- The City of Watsonville, a district serving approximately 65,000 people, stated that: "The City of Watsonville is recognized as an Economically Disadvantaged community by the State of California. The adopted chromium-6 regulation is incredibly challenging for the City to comply with as currently mandated, and will require 79% of the City's water to be treated. The capital cost to comply is approximately 20 million dollars. This has created an extreme economic hardship for a City with an annual capital improvement budget of only $500,000 per year." (RJN in Support of Reply Brief ("Reply RJN"), Exh. A [Legislative History, p. SP2-43 (Mar. 26, 2015)].)
- The Santa Ynez Water Conservation District, Improvement District No. 1 stated that it was "in compliance [with the] new MCL. However, this action has come at a great expense and significantly impacts the ability to serve water to its 2,600 customers' accounts." (Reply RJN, Exh. B [Legislative History, p. SP2-31 (Apr. 22, 2015)].) It estimated that "$17.5 million in infrastructure and capital improvements" will be needed. (*Id.*)

These comments echo the comments made by Petitioner SCTA and its members with regard to the two water systems in Solano County that serve them. (*See* Brief at 22:5-26.) The Legislature may have enacted a stopgap measure to prevent wholesale non-compliance with the MCL. However, the underlying problems with compliance remain and the passage of Senate Bill 385 seems to suggest that the MCL is infeasible.

B. <u>The Database That DPH Used Was Unreliable</u>

The statute requires DPH to calculate certain cost numbers, including the cost per water system, cost per customer and the aggregate cost of compliance. (Health & Saf. Code § 116365, subd. (b)(3).) These cost numbers are then to be among the items considered in determining which of the candidate MCLs are economically feasible. (*Id.*) The foundation for all of the cost calculations, and the feasibility determination, was a Database that contained concentration data for only about half of the water sources in the state. Thus, even if DPH was correct in its argument that calculating costs is the functional equivalent of an economic feasibility analysis, its cost calculations were based on a fundamentally flawed data set.

The evidence indicates that the Database on which DPH relied substantially underestimated the occurrence of Chromium-6 in the state's waters. (Brief at 19:5-21:6.) It is also apparent that DPH had every opportunity to collect sufficient data, but did not avail itself of that opportunity.

1. The Database Underestimates The Occurrence Of Chromium-6

Petitioners demonstrated that DPH only had data for about half of the state's water sources when it promulgated the Chromium-6 MCL.[6] DPH was well aware of this deficiency. DPH previously stated that "the dataset cannot be assumed to be complete at the time of the download" and listed several reasons why it was incomplete. (AR 276.) DPH referred to this deficiency as the "monitoring data gap" and stated that for "sources previously not monitored, the rate of detection may be comparable to that for sources previously monitored." (AR 284.) DPH also stated that "some [additional] sources may be found to be contaminated during routine monitoring required under the new regulations ... which would increase the cost of compliance." (*Id.*)

Given these acknowledgments, it is odd to see DPH now claiming "the cost analysis did not underestimate the number of systems that would be impacted by the regulation." (Opp. at 12:8-9.) DPH knew its Database was incomplete and indicated it would rely on the monitoring required by the new MCL regulation to identify additional affected systems. (AR 276.) The additional data upon which DPH intended to rely has shown that the occurrence of Chromium-6 is substantially higher than what was originally estimated. (Brief at 24:1-14.) In all, the new monitoring data shows that at least 448 water sources are affected, rather than the 311 estimated during the rulemaking. (*Id.* [149 small systems affected instead of 65; 20 medium systems affected instead of 13; 105 large systems affected instead of 81; 174 very large systems affected instead of 152].)

The old, incomplete Database indicated that 311 sources exceeded 10 ppb and 67 sources exceeded 20 ppb. (AR 287; *see also* Brief at 19:21-22.) The current, more comprehensive database shows that 448 sources exceed 10 ppb while 86 sources exceed 20 ppb. (Initial RJN,

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[6] DPH indicated that it had data for about 59% of the state's water sources. (AR 273, 276 [results were submitted "from over 7,000 [of 11,827] water sources"].) An expert commenter concluded that "only 45% of all sources have measured [Chromium-6] data." (AR 6839.) For purposes of briefing this action, Petitioners have essentially split the difference and have stated that Chromium-6 data was submitted "for about half of the State's [ ] water sources." (Brief at 6:10.)

Exhs. F, G.) So, while the number of sources exceeding 10 ppb appears to be significantly higher than was estimated (137 additional sources), the number of sources exceeding 20 ppb is less relatively unchanged (19 additional sources). It is unclear what impact this would have had on an economic feasibility analysis. However, the new, more comprehensive database underscores the importance of a reliable database when economic feasibility is analyzed and an MCL developed.

DPH now asks that the new monitoring data not be considered. (Opp. at 14:27-15:2.) DPH should be estopped from raising this objection. DPH previously indicated that it would rely on this very data to identify additional affected sources. (AR 277.)

2. DPH Did Not Avail Itself Of The Opportunity To Collect The Data It Needed

DPH states that it proceeded with the Database that it had at the time of the rulemaking and that waiting to collect additional data was not an option, given that it was under a statutory deadline. (Opp. at 13:5-7.) However, DPH had many years to collect sufficient occurrence data.

In January 2001, DPH promulgated Monitoring Regulations on an emergency basis that required all water systems to conduct one round of Chromium-6 sampling by December 2002. (22 Cal. Code Reg. § 64450.) At that time, DPH announced it had a plan to "obtain the information needed to determine if Chromium-6 should be regulated." The Legislature noted this plan approvingly. (Brief at 5:20-26.) However, exemptions, exceptions and reporting issues resulted in the submission of data from only about half of the state's water sources, which undermined the utility of the Database. (AR 276-277.)

DPH had the opportunity to collect the additional data it needed from about December 2002, when it knew or should have known that its Monitoring Regulations had resulted in a monitoring data gap, through about August 2012, when it was sued in Alameda Superior Court for its failure to promulgate an MCL. DPH could have promulgated another monitoring regulation (without the exemptions and exceptions that undermined the first Monitoring Regulation) or DPH could have informally contacted the systems from which it was missing data to obtain the needed data. But DPH did neither of these things.

As the Alameda Superior Court stated: "[DPH] identifies no significant work undertaken to create a[n MCL] from SB 351's effective date of January 1, 2002, through the Office [of

Environmental Health Hazard Assessment]'s issuance of a PHG in July 2011. This is so despite the fact of the Office having released draft PHGs in both 2009 and 2010." (Initial RJN, Exh. E [*NRDC v. DPH*, Alameda County Super. Ct., No. RG12-643520 (Dec. 17, 2003), at pp. 5-6].) The Alameda Superior Court also concluded that DPH had not "devoted sufficient resources and exercised all reasonable diligence" to produce the MCL. (*Id.* at pp. 16-17.)

Here, DPH knew its Database was inadequate, knew the Database understated the occurrence of Chromium-6 and had ample time to correct the monitoring data gap. It would set a dangerous precedent to ratify an MCL based on an inadequate database under the factual scenario present in this case. Such a result would encourage the establishment of future MCLs based on inadequate occurrence data. DPH has no one but itself to blame for having inadequate data to determine the number of water sources impacted and the aggregate cost of compliance.

3. DPH Did Not Take Into Account Public Comment On Economic Feasibility

Petitioner SCTA argued that the two water systems serving its members in Solano County—Cal Water and the Dixon-Solano Water Agency—would experience cost increases that were both economically infeasible and far in excess of what DPH had estimated. (Brief at 22:5-26.) Cal Water commented that its customers' monthly water bills would "double or triple due to this regulation." (AR 4377-4380, 4416-4417, 6372-6374.) The Dixon-Solano Water Agency commented that annual water service for its customers would increase by about $695 to $949 per customer. (AR 4383-4384, 4418, 6393-6398.)

In its Opposition, DPH argues that increases of this magnitude—doubling or tripling of monthly water bills and increases "amounting to $58 to $79 per month do not demonstrate unfeasible costs." (Opp. at 14:18-22.) However, DPH does not provide any rationale or basis for its conclusion beyond its own unsupported assertion.

More fundamentally, DPH takes the position that it does not have to consider comments like the above from water systems or their customers. (Opp. at 14:10-11 ("there is no citation to any statute requiring the agency to consider system-specific costs, only the aggregate costs").) Two pages earlier, DPH took the opposite position—that "cost per service connection [ ] is more pertinent than total cost." (Opp. at 12:17-18.) Setting this inconsistency aside, there are two statutes that require DPH to consider such system-specific costs.

First, the Safe Drinking Water Act requires DPH "in determining economic feasibility ... [to] consider the costs of compliance to ... customers, and other affected parties with the proposed [MCL], including the cost per customer ...." (Health & Saf. Code § 116365, subd. (b)(3).) Because it must consider the costs of compliance to water system customers, information indicating that the actual costs to customers (as calculated by water systems themselves) will be significantly higher than what DPH estimated must be considered. Information that the costs to customers will not be affordable must also be considered.

Second, pursuant to the notice and comment rulemaking requirements of the APA, an agency that proposes a regulation is required to consider relevant comments submitted by members of the public. (Gov't Code § 11346.9(a)(3).) In fact, the agency is required to explain "how the proposed action has been changed to accommodate each objection or recommendation or the reasons for making no change." (*Id.*) Comments from public water systems that the cost numbers that DPH has calculated for cost per water system and cost per customer are understated are clearly relevant. Comments from water system operators that their hands-on experience in operating their own systems indicates that the costs will be higher than DPH estimated are the types of comments that should lead to "change[s] to accommodate each objection or recommendation." (*Id.*; *see, e.g., Cal. Hotel & Motel Ass'n v. Industrial Welfare Comm'n* (1979) 25 Cal.3d 200, 215, *superseded by rule on other grounds as stated in Brinker* [invalidating regulation for failure to adequately respond to public comments].)

C. <u>DPH Did Not Analyze Impacts On Business</u>

The California Administrative Procedure Act also required DPH to assess and consider the impact of the proposed MCL on business. In particular, the APA required DPH to:

- "assess the potential for adverse economic impact on California business enterprises and individuals" (Gov't Code § 11346.3, subd. (a)); and
- "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)).

1. DPH Analyzed Impacts On Water Systems Instead Of Businesses

In its Opposition, DPH makes it clear that it did not assess the "economic impact on California business" or consider the "impact on business" at all. Instead, DPH assessed the economic impacts of the proposed MCL on public water systems. DPH states that its "economic impact analysis of this regulation necessarily had to be adapted to the fact that the entities being regulated were public water systems, not businesses." (Opp. at 16:5-7.)

DPH reads the APA as though it requires an assessment of the "economic impact on ***regulated entities***" and consideration of the "impact on ***regulated entities***." However, that is not what the APA requires. Rather, the APA requires an assessment of the "economic impact on California business" and consideration of the "impact on business." (Gov't Code § 11346.3, subds. (a), (a)(2).) By essentially rewriting the statute, DPH has avoided the requirement that it assess the MCL to determine its economic and other impacts on California businesses.

DPH looks to the State Administrative Manual ("SAM") for support for its position. (Opp. at 16:14-19; RJN in Support of Opp., Exh. F.) The section of the SAM that DPH points to, section 6602, contains the definitions applicable to section 6601. Section 6601 provides interpretative guidance on Government Code section 11346.5, which governs estimates of costs to local entities for regulations that impose a mandate on local agencies. The requirement that agencies conduct assessments of the economic and other impacts on California businesses is contained in Government Code section 11346.3, and the SAM sections cited are not relevant to those types of assessments. In any event, the SAM is only a guidance document, and the cited sections consist of non-binding interpretations of certain APA procedural requirements. (*Cal. Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 505-506 [agency interpretations regarding the procedural requirements of the APA are not entitled to judicial deference].) Moreover, guidance documents cannot be read to alter or overrule statutory requirements. (*Bodinson Mfg. Co. v. Cal. Employment Comm'n* (1941) 17 Cal.2d 321, 325-326.)

2. DPH Erroneously Limited Its Analysis To Direct Impacts

DPH also argues that the requirement that it assess economic and other impacts of the MCL to California business is limited to an assessment of "direct" impacts. (Opp. at 16:8-10.)

Because the direct impacts fall only upon public water systems, so the argument goes, DPH need not assess the economic and other impacts of the MCL on California businesses.

DPH does not point to any authority for its *de facto* insertion of the word "direct" into the two statutory subsections quoted above. By unilaterally amending the APA, DPH has rendered the two subsections at issue void in the context of promulgating MCLs. Instead of complying with the statutory requirement that it assess the adverse economic impact of the MCL on California business enterprises, DPH has concluded that it need do nothing. (*See* Gov't Code § 11346.3, subd. (a).) And instead of complying with the requirement that it consider the MCL's impact on business, including the ability of California businesses to compete with businesses in other states, DPH has again concluded that it need do nothing. (*See id.* § 11346.3, subd. (a)(2).)

Petitioners referenced the regulatory definition of "economic impact," a term which appears in subdivision (a) of the relevant statutory section. That definition provides that: "'Economic impact' means all costs or all benefits (direct, indirect or induced) …." (1 Cal. Code Reg. § 2000(e).) DPH points out that definition did not become operative until November 1, 2013. The timeline for the MCL regulation runs as follows: On August 23, 2013, DPH proposed the MCL. The public comment period was open from August 23, 2013 to October 11, 2013. DPH considered public comments and revisions to the MCL from October 11, 2013 to April 15, 2014. DPH filed the regulation with the Office of Administrative Law on April 15, 2014. The regulatory definition of "economic impact" became operative during the pendency of the MCL regulatory process, albeit a little over two months after the MCL was proposed. DPH seizes on this timeline to suggest that its unilateral amendment of subdivision (a) of the statute is permissible. Petitioners believe that the existence of a regulatory definition that is diametrically opposite of DPH's position, and which became operative during the pendency of the MCL regulatory process, points in the opposite direction.

The term "economic impact" does not appear in subdivision (a)(2) of the relevant statutory provision. The operative term in subdivision (a)(2) is simply "impact." Again, DPH points to no authority for its limiting the scope of this subdivision to direct impacts.

3. DPH Did Not Assess The Direct Impacts To Businesses Operating NTNCWS

To the extent that DPH believes that its statutory obligation is limited to assessing only direct impacts on business enterprises, there is one category of business enterprise that will clearly suffer direct adverse economic impacts. That category is comprised of businesses that operate non-transient non-community water systems ("NTNCWS"). These are businesses, located largely in rural areas, that cannot connect to public water systems and that therefore provide water, generally from a private well, to their employees, customers and visitors. Typical NTNCWS include food processors, commercial nurseries, wineries and other agricultural operations. It was estimated that 65 impacted NTNCWS would be affected by the 10 ppb MCL, out of an estimated total of 331 affected water sources statewide. (AR 367.)

DPH states that it determined the cost of the MCL to NTNCWS by including those systems in its cost calculations. (Opp. at 15:11-14.) This may be true. However, DPH did not assess the potential for the MCL to have adverse economic impacts on businesses that operate NTNCWS and did not consider the MCL's impact on businesses operating NTNCWS, including the ability of those businesses to compete with businesses in other states. (*See* Gov't Code § 11346.3, subds. (a), (a)(2).) DPH does not claim to have done so.

Among other considerations, unemployment in rural areas of California is higher than in urban areas. (Cal. Employment Training Panel, High Unemployment Areas, ETP HUA Eligibility (Mar. 7, 2016) *available at* ept.ca.gov/hua.cfm.) Assessing whether a regulation would have adverse economic impacts on businesses located in rural areas, which could thereby exacerbate the rural unemployment problem, would be sound policy. Such an assessment is also required by the APA. (Gov't Code § 11346.3, subds. (a), (a)(2).)

4. The Statutory Duties At Issue Here Were Not At Issue In *WSPA*

DPH urges that this matter is similar to *Western States Petroleum Assn. v. Dep't of Health Services* (2002) 99 Cal.App.4th 999 ("*WSPA*"), and argues it should be similarly decided. However, *WSPA* is inapposite. *WSPA* involved a challenge to a ***secondary*** drinking water standard, also known as a "taste-and-odor" standard. This matter involves a challenge to an MCL, a ***primary*** drinking water standard. Different statutory requirements apply to MCLs and secondary drinking water standards. For example, the statute requires DPH to set MCLs at a level that avoids any significant risk to public health "to the extent technologically and economically feasible." (Health & Saf. Code § 116365, subd. (a); *id.* § 113635.5, subd. (a) [requiring adoption of an MCL for Chromium-6 "that complies with the criteria established under Section 116365"].) For secondary drinking water standards, however, there is no requirement that the standard be economically feasible.[7] (*See id.* § 116275, subd. (d); *id.* § 116610, subd. (d) [requiring DPH to adopt a secondary standard for MTBE "that complies with the criteria established under subdivision (d) of Section 116275"].) *WSPA*'s discussion of DPH's mandatory and discretionary duties in adopting a secondary standard for MTBE is irrelevant to whether DPH complied with its entirely different mandatory duties in adopting an MCL for Chromium-6.

DPH attempts to downplay these critical differences in the legal requirements. However, the inapplicability of the holdings and dicta in *WSPA* quoted by DPH, when viewed in the context of these statutory differences, is clear. DPH cites to a statement in *WSPA* that, because "the Legislature had already determined that, despite any adverse economic considerations, a secondary drinking water standard is necessary[,] … any economic consequences that would arise simply from adoption of a standard for MTBE are beyond the Department's purview." (Opp. at 17:22-18:15.) DPH asserts that "the Legislature gave [DPH] the same sort of mandate here," apparently implying that economic consequences arising from DPH's adoption of an ***MCL*** are also beyond its purview. (*Ibid.*) This is not correct.

As the court in *WSPA* explained, when the Legislature required DPH to set a secondary drinking water standard for MTBE, DPH "was vested with broad discretion to determine the appropriate standard" provided it complied with the criteria of section 116275, subdivision (d), which ***does not*** include an economic feasibility requirement. (*WSPA,* 99 Cal.App.4th at pp. 1015-

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[7] The only criteria for secondary drinking water standards are that DPH determine the standard is "necessary to protect the public welfare," and that the contaminant "may adversely affect the odor or appearance of water and may cause a substantial number of persons served by the public water system to discontinue its use," or "may otherwise adversely affect public welfare." (*Id.* § 116275, subd. (d) [stating further that secondary drinking water standards "may vary according to geographic and other circumstances and may apply to any contaminant in drinking water that adversely affects the taste, odor, or appearance of the water when the standards are necessary to ensure a supply of pure, wholesome, and potable water."].)

1016.) Here, in contrast, the Legislature has required that DPH comply with section 116365 in adopting the Chromium-6 MCL, which ***does*** require DPH to consider economic feasibility ***and*** to set the MCL at an economically feasible level. (Health & Saf. Code §§ 116365, subd. (a), 116365.5.) Analyzing economic feasibility of an MCL and making the feasibility determination is a non-discretionary duty. (*Id.*)

5. The Contents Of The Regulatory Notice Are Not At Issue

Finally, DPH urges that Government Code section 11346.5, subdivision (c), provides that that section of the APA should not be construed to invalidate a regulation due to immaterial deficiencies in the regulatory notice contents, summaries or cost estimates. (Gov't Code § 11346.5, subd. (c).) This code section governs the content of regulatory notices, and Petitioners are not arguing that notice of proposed rulemaking was inadequate. As a result, the savings clause in subdivision (c) is not at issue. Rather, Petitioners are arguing that DPH did not determine that the 10 ppb MCL is economically feasible under Health and Safety Code section 116365, subdivisions (a) and (b)(3).

D. <u>DPH Did Not Respond To All Public Comments</u>

The California Administrative Procedures Act requires that DPH provide a summary of each comment received by the public, "together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." (Gov't Code § 11346.9, subd. (a)(3).) Given how few substantive changes DPH made to its proposed regulation, DPH's responses to comments would have principally taken the form of its reasons for making no changes.

Petitioners argued that DPH did not substantively respond to all public comments, including comments that: (1) the 10 ppb MCL would be unaffordable to many public water systems, and (2) DPH underestimated the number of sources impacted by the MCL. (Opp. at 28:28-29:20.) California law is clear that an agency has a legal duty to substantively respond to all public comments and that failure to do so undermines "meaningful public participation in the rulemaking process." (*Sims v. Cal. Dept. of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1069; *see also Cal. Hotel & Motel Ass'n v. Industrial Welfare Comm'n* (1979)

25 Cal.3d 200, 215 [invalidating wage and hour order for, *inter alia*, failing to "address salient comments and alternatives presented during the public hearings" on the proposed order].)

1. DPH Concedes It Did Not Respond To Public Comments On Costs

Petitioners argued that DPH did not respond to comments providing specific cost of compliance information and elected not to utilize information provided by commenters to develop more accurate compliance cost estimates. (Brief at 29:6-9.) The voluminous comments from public water systems providing specific cost of compliance information were all distilled down to the following consolidated comment in the record (AR 4643):

> A number of commenters stated that [DPH's] estimates for costs of treatment were underestimated, often providing their own estimates for potential costs of treatment for their [public water system] (or referencing other commenters' cost estimates).

DPH's response stated that (AR 4645):

> The purpose of [DPH] determining estimated average treatment costs is to provide values useful to [DPH] in determining the extent to which an MCL is economically feasible. The values presented in the regulation package are estimates based on the cost of a particular [technology], as mandated by statute. [DPH] recognizes that some water systems may incur costs exceeding those provided, while others may incur significantly less costs ....

For DPH to take dozens of comments from public water systems about the very high costs of compliance they anticipated, boil them down to essentially one sentence, and dismiss them almost out-of-hand undermines "meaningful public participation in the rulemaking process." (*Sims*, *supra*, 216 Cal.App.4th at p. 1069.) DPH now essentially concedes that it did not consider these comments. (Opp. at 14:10-11 (there is no "statute requiring the agency to consider system-specific costs").) The APA requires DPH to consider public comments on its proposed regulations. It is hard to imagine more relevant comments on a proposed MCL than those regarding feasibility provided by public water systems.

2. DPH Did Not Respond To Comments On The Monitoring Data Gap

DPH had data from only about half of the public water systems in the state when it promulgated the MCL. DPH counted up the systems exceeding the various candidate MCLs to estimate the number of impacted sources, without correcting for the monitoring data gap. (Brief at 20:22-26.) Petitioners noted that DPH did not substantively respond to comments that DPH had underestimated the number of sources impacted by the proposed MCL. (Brief at 29:15-20.)

DPH consolidated the various comments about the monitoring data gap and subsequent underestimation of the number of impacted sources into the following: "[C]ommentators referred to the data gap acknowledged in the ISOR by [DPH]." (AR 4645.) DPH responded to other comments about its underestimation of the number of impacted sources, but did not respond at all to the comments regarding the monitoring data gap. In addition, DPH stated that one commenter indicated that there were 65 NTNCWS operating as businesses that would be severely impacted by the 10 ppb MCL. (AR 4642.) DPH acknowledged that another commenter expressed concern regarding the costs for NTNCWS operating as private businesses. DPH responded to these comments with a cross-reference. (AR 4643.) The cross-referenced response contained a definitional analysis of the term, "business," but did not respond at all to the comments on cost impacts to NTNCWS. (AR 4657-4658.)

As it turns out, data collected pursuant to the new MCL demonstrates that DPH significantly underestimated the number of impacted sources. (*See* Brief. at 24:1-14.) Most problematically, DPH estimated that 65 small systems sources would be impacted, while recent data shows that at least 149 small water systems will be impacted. (*Id.*) Apparently, all 65 of the small water systems that DPH estimated would be impacted were NTNCWS—small water systems operated by businesses. (AR 4642.) It thus appears that DPH promulgated an MCL that will cause severe impacts on small public water systems without any information about how many small public water systems would be impacted.

III. <u>CONCLUSION</u>

The Chromium-6 MCL is an enormously expensive regulation, with capital costs alone exceeding $1 billion. The Legislature struck a balance in this important area. California law protects water ratepayers—individuals and businesses alike—from MCLs that are not economically feasible. DPH was required by statute to make a determination that the MCL it promulgated was economically feasible. DPH did not perform this non-discretionary duty, while setting aside countless comments from affected persons that its regulation was not feasible. As a result, the MCL should be held to be void.

DATED: March 14, 2016

DOWNEY BRAND LLP

By: ______________________

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California 95814-4686. On **March 14, 2016,** I served the within document(s):

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

☐ **BY E-MAIL:** by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

☒ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.
Executed on **March 14, 2016,** at Sacramento, California.

Linda Puzar