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CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION and SOLANO COUNTY TAXPAYERS ASSOCIATION

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' SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE PURSUANT TO THE COURT'S NOVEMBER 15, 2015 ORDER** Dept: Dept 44 Judge: Hon. Christopher E. Krueger

I. The MCL Should Not Remain in Effect on Remand

A. By Failing to Address *POET*, the State Board Concedes It Does Not Apply

The Court asked whether the *POET* case is applicable to this dispute. Its question followed the State Board's reliance on *POET*—not having briefed it—at the end of oral argument. Petitioners analyzed the case at length in their supplemental brief and explained why it does not apply. For its part, the State Board has not met the call of the very question that it prompted. Instead, the State Board uses a brief that was supposed to be about *POET* to introduce several *new* cases into the mix. But, like *POET*, those cases do not apply. The continually evolving alternative forms of relief that the State Board offers up—we have now moved from *POET*, to "interlocutory" remand, to "partial" remand—are simply not available here. A court can either grant or deny relief and, in this case, the Court should grant the Petition.

B. The *Voices* Case and Code of Civil Procedure Section 1094.5 Do Not Apply

First, the State Board urges this Court to issue an "interlocutory" remand pursuant to *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 ("*Voices*"). However, *Voices* does not apply because it involved administrative, not traditional, mandamus. There are two types of mandate: traditional mandamus pursuant to Code of Civil Procedure section 1085, and administrative mandamus pursuant to Code of Civil Procedure section 1094.5. (*Bunnett v. Regents of Univ. of Cal.* (1995) 35 Cal.App.4th 843, 848.) Traditional mandate applies to quasi-legislative or ministerial acts, and administrative mandate applies to quasi-judicial acts. (*McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785.)

Here, Petitioners seek *traditional* mandamus pursuant to Code of Civil Procedure section *1085* to correct the State Board's failure to perform ministerial (mandatory) duties to determine economic feasibility and the effects on business in adopting the MCL. (Amended Petition at 1:23-24 & Prayer.) *Voices* is about interpretation and application of sub-sections (e) and (f) of Code of Civil Procedure section *1094.5*, which concern a court's power to order "reconsideration" in connection with *administrative* mandamus. (*Voices* at 529-530.) Sub-sections (e) and (f) of section 1094.5 do not apply here, and the State Board's reliance on *Voices* is therefore unwarranted.

C. ***Laurel Heights*** **Is Another CEQA Case that Does Not Apply**

The State Board's reliance on *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376 ("*Laurel Heights*") is similarly misplaced. Like *POET*, *Laurel Heights* interprets and applies the remedial provisions in CEQA, including Section 21168.9. There is no analogy that can be plausibly drawn between the facts and issues in *Laurel Heights* and the present dispute. As it did with *POET*, the State Board cites *Laurel Heights* entirely out of context. *POET* and *Laurel Heights* are about the interpretation and application of the remedial provisions of CEQA and there is nothing in either decision to suggest those provisions should apply here. (*Voices* at 540 ("CEQA contains its own detailed and balanced remedial scheme…").)

The State Board then briefly discusses *Morning Star Company v. State Board of Equalization* (2006) 38 Cal.4th 324 ("*Morning Star*"). In *Morning Star*, the Department's fee schedule was invalidated because it constituted an "underground regulation" which had not been promulgated pursuant to the APA. The decision to allow the fee schedule to remain in effect while the Department complied with the APA was based on concerns about undermining the "continued viability" of the hazardous materials fee program which had already been in place for five years. Here, although the MCL has been adopted, systems are still struggling to comply. Full compliance is clearly not the status quo, and there is a serious question as to whether the MCL is "viable" at all.

Finally, if it is even entertained, the decision whether to preserve the status quo depends on the "seriousness" of the deficiencies in the agency's actions. (*Morning Star* at 342.) In *Morning Star*, the chief deficiency with the Department's action was its failure to comply with the rule-making procedures under the APA. In this case, however, the State Board not only failed to comply with portions of the APA, but it also failed to satisfy its core substantive, mandatory duty to determine economic feasibility. Petitioners have located only four cases that cite the holding in *Morning Star* upon which the State Board relies. None of those cases, including *POET*, apply here. *Morning Star* simply does not articulate a rule of general applicability which propagates throughout the case authorities. Even if it did, circumstances that would justify application of such a rule (including the existence of a status quo to be "preserved") are not present here.

Morning Star is consistent with the line of traditional mandamus cases which provide that the remedy for promulgation of a regulation not in accordance with law is invalidation of the regulation and remand for proceedings consistent with the APA. (Petitioners' Supp. MPA at 7:3-8:12) (if a regulation is inconsistent with the underlying statute, the court must strike down the regulation).)

II. The MCL Should Be Invalidated for All Sizes of Water Systems

The State Board argues that the MCL should be invalidated only for small water systems (serving 200 or fewer households) due to the large increases expected in these households' water bills. This argument fails for several reasons.

First, as noted above and in Petitioners' opening brief, this is not a CEQA case where a reviewing court can invalidate a regulation "in part." (Pub. Res. Code § 21168.9(a).) Second, limiting remand to small systems would not cure the basic problem here because, in determining economic feasibility, the State Board is required to not only examine cost per household, but aggregate costs as well. (Health & Safety Code § 116365(b)(3).) Aggregate costs cannot be determined absent evaluation of *all* of the systems that comprise the parts of that sum. Third, the premise for the State Board's approach—that small systems' customers are the only customers who will experience unaffordable rate increases—is simply not true. Water rates for customers of a number of larger systems (like the Coachella Water Authority, City of Kerman, and City of Winters) will increase by factors of two, three or four. (Petitioners' Supp. MPA at 4:8-18.)

The State Board is "tracking" 130 systems. Thus, the universe of affected water systems is discrete enough that a proper economic feasibility analysis can be conducted with respect to *all* systems, consistent with the statutory mandate.

III. Invalidation of the MCL Would Not "Nullify" SB-385

The State Board once again argues that SB-385 addressed precisely the same economic feasibility determination that is at issue in this case, and that the Legislature substituted a new economic feasibility analysis for the requirements under the Health and Safety Code and the

APA. This argument still fails. The issues here are whether the State Board determined that a 10 ppb MCL is economically feasible and whether it considered the impacts of the MCL on businesses. The Legislature did not evaluate these issues, but rather extended the compliance deadline conditioned on compliance plans. Notably, a number of small water systems cannot even afford a compliance plan. (Ortega Decl. at ¶14.) More importantly, there is no evidence in the record that the Legislature intended SB-385 to substitute or supersede the State Board's statutory obligation to determine economic feasibility.

IV. Public Water Systems Are Struggling to Comply

The State Board suggests that many water systems are making "progress" toward compliance with the MCL. However, the information collected during the parties' meet and confer process, which was shared with the State Board, indicates otherwise. Most water systems have spent less than one percent of their total expected compliance costs. (Petitioners' Supp. MPA at 3:21-23.) Further, just because a water system has submitted a compliance plan does not mean that compliance will be economically feasible. For example, the Cities of Coachella, Winters, and Kerman have submitted compliance plans, but expect to have to increase water rates by factors of two, three or four—increases that are unaffordable. Also, dozens of small water systems do not have a viable path to compliance. (Ortega Decl. at ¶13.)

At the end of February, the State Board declined to continue the briefing schedule, which truncated the purveyor survey. The State Board also indicated that it did not have any information about purveyors that had spent substantial sums in complying with the MCL. (McFarland Decl. at ¶22.) The State Board now points to the Indio Water Authority ("IWA") as having spent $6.8 million to treat three wells in order to comply. However, IWA will need to spend an additional $22 million to treat ten additional wells. (Declaration of Brian Macy at ¶7.)

From one example of a system that purportedly spent substantial sums (but actually must spend much more), the State Board moves to Soquel Creek as one of several systems that have installed treatment facilities and are now in full compliance. However, in reality, Soquel Creek will need to remove the temporary treatment system later this year because it cannot afford the system vendor's new rental rate. (Declaration of Taj Dufour at ¶4.) The other two systems the

State Board offers as examples of purveyors that have installed treatment systems are owned by Cal Water (an investor-owned water utility) and appear to be "the exception that proves the rule;" that is, the vast majority of water systems are not far down the path to compliance and appear to be struggling with the enormous costs involved.

Finally, the State Board speculates about the implementation of new treatment technology that it claims will result in substantial cost savings for all affected systems. Petitioners understand that this technology is undergoing pilot tests in several systems, but that at least one of those systems has already concluded that the technology is not affordable. (Dufour Decl. at ¶10.)

V. **<u>It Should Be Possible to Complete the Remand Reasonably Promptly</u>**

The State Board asserts that a remand that complies with the APA could take three years. This is essentially the same position the State Board took in the NDRC lawsuit that established the deadline for the current Chromium-6 MCL. (Petitioners' RJN, Ex. E; *Natural Resources Defense Council v. California Dept. of Public Health*, Case No. RG12-643520 (Alameda County Super Ct., Dec. 17, 2013).)

In the NRDC case, the State Board had taken two years from the time the public health goal was published to propose the MCL. (RJN Ex. E at 18.) The State Board sought an additional year to promulgate the final MCL. (RJN Ex. E at 18-19.) The NRDC court noted that the Legislature had mandated that the entire Chromium-6 standard setting process, including establishing a public health goal and an MCL, take no more than two years. (*Id.* at 23-24; Health & Safety Code § 116365.5.) The court required that the final MCL be submitted to OAL four months after the hearing (and nine months after the publication of the proposed MCL). (*Id.* at 24-25.) The same reasoning should apply here. The Legislature mandated the *entire* process take no more than two years. It follows that a *fraction* of the process should take less than two years.

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DATED: March 24, 2017

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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 24, 2017,** I served the within document(s):

PETITIONERS' SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE PURSUANT TO THE COURT'S NOVEMBER 15, 2015 ORDER

☐ **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.

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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 24, 2017,** at Sacramento, California.

Linda Puzar

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