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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 12 COUNTY OF SACRAMENTO

15 CALIFORNIA MANUFACTURERS AND
 TECHNOLOGY ASSOCIATION AND
 16 SOLANO COUNTY TAXPAYERS
 ASSOCIATION,

Petitioners,

18 v.

19 STATE WATER RESOURCES CONTROL
 20 BOARD,

21 Respondent.

Case No. 34-2014-80001850

STATE WATER BOARD'S OPPOSITION
 BRIEF

Date: August 26, 2016
 Time: 1:30 p.m.
 Dept: 44
 Judge: Hon. Christopher E. Krueger
 Trial Date: n/a
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INTRODUCTION

Hexavalent chromium is a carcinogen found in drinking water. (Administrative Record (AR) 3830, 3832.) In 1987, chromium (hexavalent compounds) became one of the first substances identified as a carcinogen under California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). (Cal. Code Regs., tit. 27, § 27001.) The hazards of chromium exposure gained nationwide attention beginning in March 2000, with the release of the movie *Erin Brockovich* (Universal Pictures 2000). (*Avila v. Willits Envtl. Remediation Trust* (9th Cir. 2011) 633 F.3d 828, 843.)

The Legislature mandated that the California Department of Public Health (Department) adopt a drinking water standard for hexavalent chromium, known as a Maximum Contaminant Level (often referred to as MCL), to protect public health. (Health & Saf. Code, § 116365.5.) Pursuant to the Health and Safety Code, that standard must be "as close as feasible" to the public health goal, which is 0.02 parts per billion (ppb). (*Id.*, § 116365, subd. (a).) The Department analyzed seven alternative standards, including the cost of compliance for each,¹ and concluded by setting the standard at 10 ppb. Although this standard is 500 times higher than the public health goal – so it would have been within the Department's discretion to set the standard much lower than it did – Petitioners California Manufacturers and Technology Association and Solano County Taxpayers Association still contend that the 10 ppb standard for this carcinogen is too restrictive and too expensive.

But the standard selected by the Department is consistent with the Legislature's mandate to "plac[e] primary emphasis on the protection of public health." (Health & Saf. Code, § 116365, subd. (a).) Moreover, since hexavalent chromium is not only toxic but a carcinogen, the Department was, "to the extent technologically and economically feasible," required to "avoid[] any significant risk to public health." (*Ibid.*) While Petitioners disagree with the Department about what is economically feasible, the Department exercised its discretion within the constraints

¹ Petitioners concede that the Department did this economic analysis: "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." (Petitioners' Opening Brief, at p. 9:3-4.)

1 imposed by the Legislature and supported its determination with substantial evidence, so its
2 hexavalent chromium drinking water standard must be upheld and the petition must be denied.

3 **FACTUAL AND LEGAL BACKGROUND**

4 In the Safe Drinking Water Act, the Legislature prescribed the “policy of the state to reduce
5 to the lowest level feasible all concentrations of toxic chemicals that when present in drinking
6 water may cause cancer, birth defects, and other chronic diseases.” (Health & Saf. Code, §
7 116270, subd. (d).)

8 Prior to adopting a drinking water standard, the Department was required to consider any
9 Public Health Goal that had been previously adopted by the Office of Environmental Health
10 Hazard Assessment (OEHHA). The Public Health Goal is a risk assessment that contains an
11 estimate of the level of the contaminant in drinking water that is not anticipated to cause or
12 contribute to adverse health effects, or that does not pose any significant risk to health. (Health &
13 Saf. Code, § 116365, subd. (c).) In other words, the Public Health Goal represents a level that
14 would pose no significant harm to health for individuals consuming the water on a daily basis
15 over a lifetime. (July 2011 Public Health Goal, Administrative Record (AR) 3825.)

16 In July 2011, OEHHA adopted a Public Health Goal for hexavalent chromium at a level of
17 0.02 ppb.² (Amended Petn. for Writ of Mandate, ¶ 19, at p. 7.) There was no timely legal
18 challenge to the Public Health Goal.

19 In August 2013, the Department proposed a Maximum Contaminant Level for hexavalent
20 chromium of 10 ppb³ and formally commenced a rulemaking proceeding pursuant to the
21 Administrative Procedure Act (APA). (Gov. Code, § 11340, et seq.; Petn. for Writ of Mandate, ¶
22 25.) That rulemaking concluded with the adoption of the hexavalent chromium Maximum
23 Contaminant Level in April 2014. (Petn. for Writ of Mandate, ¶ 28.) The hexavalent chromium
24 Maximum Contaminant Level is set forth at California Code of Regulations, title 22, section
25 64431, and became effective on July 1, 2014, over 18 months ago. (Cal. Code Regs., tit. 22, §

26
27 ² Levels are alternately expressed as “mg/L” (milligrams per liter), which are parts per
million, or “µg/L” (micrograms per liter), which are parts per billion.

28 ³ Sometimes expressed as 0.010 mg/L or parts per million. (AR 275.)

1 64431, Table A.) The regulation applies to two of three types of public water systems,
2 community and nontransient noncommunity water systems (it does not apply to transient
3 noncommunity water systems). (Health & Saf. Code, § 116270, subds. (h), (i), (k), and (o).)

4 Effective July 1, 2014, the drinking water program previously administered by the
5 Department of Public Health was moved to the State Water Resources Control Board (State
6 Water Board). (Health & Saf. Code, § 116271.)⁴

7 In 2015, after adoption of the regulation, the Legislature passed and the Governor signed
8 Senate Bill 385, which added Health and Safety Code section 116431. This section gives public
9 water systems until January 1, 2020, to come into compliance with the hexavalent chromium
10 maximum contaminant level. It provides that a public water system “shall not be deemed in
11 violation of the primary drinking water standard for hexavalent chromium while implementing an
12 approved compliance plan.” (Health & Saf. Code, § 116431, subd. (e).) It further provides that
13 no additional compliance with the APA is required when the State Water Board implements and
14 approves compliance plans. (Health & Saf. Code, § 116431, subd. (g).)

15 Health & Safety Code Requirements

16 When it adopted the hexavalent chromium drinking water standard, the Department was
17 bound to follow several legal requirements. First, drinking water standards “shall be set at a level
18 that is as close as feasible to the corresponding public health goal placing primary emphasis on
19 the protection of public health . . .” (Health & Saf. Code, § 116365, subd. (a), underline added.)
20 Second, the Department was to set a standard that, “to the extent technologically and
21 economically feasible . . . [w]ith respect to carcinogens, or any substances that may cause chronic
22 disease, avoids any significant risk to public health.” (*Ibid.*) When assessing technological and
23 economic feasibility, the Department was required to consider “costs of compliance to public
24 water systems, customers, and other affected parties with the proposed primary drinking water
25 standard, including the cost per customer and aggregate cost of compliance, using best available
26 technology.” (Health & Saf. Code, § 116365, subd. (b)(3).) Adoption of a hexavalent chromium

27 ⁴ For purposes of this litigation, the respondent is the State Water Board, but since all
28 actions were taken by the Department of Public Health, it is referred to throughout.

1 primary drinking water standard was mandated by the Legislature in Health and Safety Code
2 section 116365.5.

3 Government Code Requirements

4 The Administrative Procedure Act in the Government Code required the Department to
5 consider various factors when adopting the Maximum Contaminant Level regulation for
6 hexavalent chromium. The Associations raise three applicable statutes, Government Code
7 sections 11342.2, 11346.3, and 11346.9.

8 Government Code section 11342.2 merely states that a regulation adopted to implement a
9 statute must be consistent with and reasonably necessary to effectuate the statute. Here, the
10 regulation is statutorily required by Health & Safety Code section 116365.5, so the regulation is
11 inherently "reasonably necessary." The only question is consistency, and the regulation is
12 consistent with Health & Safety Code section 116365 if it meets the requirements of that section
13 (e.g., it is as close as feasible to the corresponding public health goal placing primary emphasis on
14 the protection of public health), as addressed below.

15 Government Code section 11346.3 establishes requirements for regulations that may have
16 adverse economic impacts on California business enterprises and individuals, and requires
17 agencies to consider potential impacts. An "economic impact assessment" shall be included in
18 the initial statement of reasons (ISOR) for proposed regulations. (*Id.* at subd. (a)(3).) The only
19 economic impact assessment the Department was required to submit was that described in
20 Government Code section 11346.3, subdivisions (a)(3) and (b). The Department addressed the
21 four required elements in the Initial Statement of Reasons. (AR 296-297.) The Department also
22 prepared a Fiscal Impact Statement form and Cost Estimating Methodology document in
23 compliance with this section. (AR 359-369.) The administrative record also includes numerous
24 documents relating to the economic feasibility of the regulation, including an extensive study of
25 chromium treatment research and a cost analysis by the City of Glendale. (AR 377-502, 3581-
26 3600, 3601-3603.)

27 Government Code section 11346.9 requires an agency adopting a regulation to submit a
28 final statement of reasons including a summary of public comments and responses regarding each

1 objection or recommendation. (*Id.* at subd. (b)(3).) The Department complied with this
2 requirement by receiving comments, holding two public hearings, and preparing extensive
3 responses to the public comments. (May 23, 2014, Final Statement of Reasons, AR 4624-4693.)
4 The Office of Administrative Law approved the regulations on May 28, 2014, effective July 1,
5 2014. (AR 0001.)

6 STANDARD OF REVIEW

7 The Department's adoption of a drinking water standard was a quasi-legislative action
8 subject to deferential review. (*Western States Petroleum Ass'n. v. Department of Health Services*
9 (2002) 99 Cal.App.4th 999, 1006-1007 (*Western States*).) Here, "there is no question that the
10 Department had authority to adopt" a drinking water standard for hexavalent chromium; "in fact,
11 it was required to do so by express legislative directive." (*Ibid.*) Petitioners apparently do not
12 challenge the standard on that basis.

13 Petitioners' "dissatisfaction is with the Department's determination of the appropriate level
14 at which the standard should be set." (*Western States, supra*, 99 Cal.App.4th at p. 1006.) "That
15 necessarily involved a determination and weighing of the facts and policy considerations
16 appropriate to the decision. This is a distinctively legislative process, and a court does not have
17 the authority to exercise its independent judgment with respect to the performance of legislative
18 functions." (*Id.* at pp. 1006-1007.) The regulation comes with "a strong presumption of
19 validity." (*Id.* at p. 1007.) The Court must uphold the agency action unless the action is
20 arbitrary, capricious, or lacking in evidentiary support. (*California Hotel & Motel Assn. v.*
21 *Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211-212.)

22 Petitioners have the burden of proof to show that the decision is unreasonable or invalid as
23 a matter of law. (*City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th
24 1392, 1408-1409.) If the Court is satisfied that the rule in question lay within the lawmaking
25 authority delegated by the Legislature, and that it is reasonably necessary to implement the
26 purpose of the statute, judicial review is at an end. (*Yamaha Corp. of America v. State Bd. of*
27 *Equalization* (1998) 19 Cal.4th 1, 10-11.) In the exercise of scientific expertise, administrative
28

1 agencies should be afforded great deference. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805,
2 812; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 112-113.)

3 ARGUMENT

4 I. THE DEPARTMENT PROPERLY ANALYZED ECONOMIC COSTS AND FEASIBILITY

5 In considering a standard for hexavalent chromium, the Department was required to
6 consider technological and economic feasibility, “placing primary emphasis on the protection of
7 public health” and avoiding “any significant risk to public health.” (Health & Saf. Code, §
8 116365, subd. (a).) The Health and Safety Code emphasizes public health, especially with
9 respect to carcinogens. The economic analysis requires only that the standard be “feasible.”
10 (*Ibid.*) The Department was to start with the Public Health Goal and establish a Maximum
11 Contaminant Level as close as feasible to the Public Health Goal. (*Ibid.*)

12 The petitioners challenge the Department’s economic feasibility analysis, looking to federal
13 law and the California Environmental Quality Act (CEQA). (Petitioners’ Opening Brief, at pp.
14 16:25 – 17:5.) But the Health and Safety Code and APA state what is required for analysis of
15 economic feasibility, and there is no basis for looking at other statutes and federal law. The
16 Health and Safety Code required an analysis of the cost of compliance for public water systems,
17 customers, and other affected parties, including cost per customer and aggregate cost. (Health &
18 Saf. Code, § 116365, subd. (b)(3).) The Department did this statutorily required analysis, as
19 discussed below, and the writ petition should be denied.

20 In compliance with the requirement to consider the potential economic impact of the
21 hexavalent chromium Maximum Contaminant Level, the Department prepared an economic
22 feasibility analysis to support its proposed adoption of the regulation. (Initial Statement of
23 Reasons, August 4, 2013, AR 264, 275-290, and 296-299.) That analysis considered seven (7)
24 possible alternative levels, including more and less restrictive alternatives, and divided public
25 water systems into four categories based on their respective number of service connections. (AR
26 275, 286.) The factors considered included:

- 27 • The availability and costs of analytical methods for determining the presence of
- 28 hexavalent chromium;

- The availability and costs of appropriate technologies for mitigating its presence;
- The estimated costs to the regulated water systems for contaminant monitoring; and
- The estimated costs for treatment to the regulated water systems with sources that violate the MCL and must be treated to come into compliance.

(*Id.* at AR 275.)

Monitoring Feasibility and Costs:

The Department determined that U.S. EPA Method 218.6 is an available sampling protocol/test for detection of hexavalent chromium in water, and the average cost per sample was \$86, with a range from \$30 to \$200. (AR 275, 278.) For the proposed Maximum Contaminant Level of 10 parts per billion, estimated annual costs for monitoring treated water ranged from \$13,400 to \$157,000 (12 samples/year), depending on the size of the service connection group. (AR 279-280.)

Treatment Technology Availability and Costs:

The Department determined that the “weak base anion exchange treatment with disposable resin” method was the appropriate best available technology to use as the basis for its estimate of costs associated with treating sources in violation of the Maximum Contaminant Level, because it was the only full-scale demonstrated treatment at the time. (AR 280.) To estimate capital and operation and maintenance (O&M) costs, the Department used the approach developed for the City of Glendale, with adjustments. (AR 281.) For the proposed Maximum Contaminant Level of 10 parts per billion, annualized treatment costs ranged from \$3.8 million to \$101.2 million (capital costs amortized over 20 years), depending on service connection group size. (AR 282-283.) The analysis noted that “Treatment costs for small water systems are significantly higher than those for large water systems.” (AR 284.)

Economic Feasibility:

Having considered potential costs of compliance, the Department next looked at the feasibility of those costs in terms of estimated annual cost per system, source, service connections, and theoretical excess cancer cases reduced. For the proposed Maximum Contaminant Level of 10 parts per billion, annual cost per system ranged from \$251,000 to

1 \$2,983,000. (AR 286.) This translated to an estimated annual cost per service connection of \$64
2 to \$5,630, with the highest cost for compliance for the smallest category of service connection
3 group. (AR 287.) The standard was estimated to avoid approximately 12 cancer cases per year,
4 at a cost of from \$11 million to \$122 million for each theoretical cancer case avoided. (AR 287-
5 288.)

6 Thus, for the largest service connection groups with impacted water sources, serving the
7 most people, monthly cost of compliance is estimated as low as \$5.33 per service connection.
8 Moreover, the Department did *not* select the most restrictive alternative that it analyzed. The
9 Department considered seven (7) possible Maximum Contaminant Levels, including 1, 5, 10, 15,
10 20, 25, and 30 parts per billion, respectively, and selected 10 parts per billion as the appropriate
11 level. (AR 275.) The economic analyses conducted by the Department included the more
12 restrictive alternative levels. (AR 275-287.)

13 In addition, the Department prepared a document entitled Cost Estimating Methodology,
14 which described the manner by which it calculated various costs of compliance with the
15 regulation. (AR 359-367.) This document computed the estimated total annual statewide cost of
16 compliance at \$155.8 million. (AR 367.) Given that there were 12.5 million households in
17 California in 2009-2013, this is an estimated cost of only \$12.46 per household. (United States
18 Census Bureau, 2014, <http://quickfacts.census.gov/qfd/states/06000.html>, last visited Feb. 4,
19 2016.) (Of course, this cost per household is only an estimate, as hexavalent chromium is not
20 distributed equally throughout the state, but it gives an indication of the overall cost to society.)

21 For the smallest service connection groups (representing the fewest number of ratepayers),
22 the estimated annual cost per service connection was \$5,630, or \$470 per month. (ISOR, at p. 24,
23 AR 287.) While this number is high for an average family, the projected number of users affected
24 by this number is small, and these public water systems may have alternative means of
25 compliance available—exemptions, blending of water sources, and alternative sources. (AR
26 282.) In the Final Statement of Reasons, the Department noted that “Some water systems may
27 incur costs exceeding those provided in the [Initial Statement of Reasons], while other may incur
28 less costs utilizing other options for compliance.” (AR 4643.) With respect to Small Water

1 Systems, the Department recognized that it “has no discretion to set a different ‘affordable’
2 [Maximum Contaminant Level] applicable to [Small Water Systems] that is less protective of
3 public health.” (*Ibid.*) In other words, customers of small water systems need to have their health
4 protected just as much as everyone else. The Department also pointed to certain statutory
5 variances that might apply to certain treatment systems. (Health & Saf. Code, §§ 116425 and
6 116430, AR 4643.) In addition, the provision of safe drinking water by all public water systems
7 provides a benefit to the general population that relies on safe drinking water at a variety of
8 locations other than primary residence, such as work, schools, and other public locations.

9 The Associations’ argument on feasibility is a micro argument, looking only at a sliver of
10 the regulated community to declare a lack of feasibility. The regulatory agency, however, was
11 faced with regulating for the public health of the entire state population, 38.8 million people.
12 (United States Census Bureau, 2014, <http://quickfacts.census.gov/qfd/states/06000.html>, last
13 visited Feb. 4, 2016.) The majority of those people live in cities and will be economically
14 impacted at a feasible level that can be fairly shared among water users. There is no requirement
15 that the agency regulate only for the outliers that will suffer a greater economic impact,
16 particularly when public health is at stake and alternative means for compliance are available.
17 Nor was there any requirement on the agency to measure the economic impact on discrete,
18 individual public water systems and the communities they serve, as petitioners seem to suggest.

19 Further, the statutory mandate on the Department was to adopt a Maximum Contaminant
20 Level “as close as feasible to the corresponding public health goal.” (Health & Saf. Code, §
21 116365, subd. (a).) Here, the public health goal is 0.02 parts per billion. (July 2011, Public
22 Health Goal, AR 3823, 3933.) The Maximum Contaminant Level adopted by the Department is
23 10 parts per billion. (August 2013, Initial Statement of Reasons, AR 264, 275.) Thus, the level
24 selected by the Department is 500 times the public health goal level. It can hardly be argued by
25 the Associations that the Department was acting too conservatively. In fact, various public
26 comments argued that the adopted standard was not sufficiently protective of public health, and
27 that the Department overestimated costs of compliance. (E.g., October 11, 2013, Correspondence
28 from various groups, AR 5353-5365.) Many people argued that the Department should select a

1 level more protective of public health, and that doing so would result in reduced medical costs,
2 which would more than offset the costs of compliance with the new standard. (Public Comments,
3 AR 5367-5603.) Even the California Municipal Utilities Association supported the adopted
4 standard at 10 parts per billion, expressing concern only “if the hexavalent chromium MCL is set
5 below 10 parts per billions (ppb).” (October 11, 2013, Comment Letter, AR 6245.) Another
6 commenter pointed out that the chemical industry has spent over two decades attempting to
7 manipulate the science surrounding hexavalent chromium, to downplay risks and protect the
8 industry. (October 7, 2013, Comment Letter, AR 5050, and Egilman and Scout, Commentary:
9 Corporate Corruption of Science—The Case of Chromium(VI), Int’l. Journal of Occupational
10 Env’tl Health (2006), AR 5046.)

11 As noted above, in 2015 the Legislature adopted Health and Safety Code section 116431,
12 which gives non-compliant systems additional time, in some cases until 2020, to come into
13 compliance. This legislation was signed by the Governor on September 4, 2015, and, as urgency
14 legislation, became effective immediately. (Senate Bill 385.⁵) This legislation is significant
15 because it was passed against the backdrop of the existing 10 parts per billion Maximum
16 Contaminant Level for hexavalent chromium and if it had wanted to, the Legislature could have
17 modified or withdrawn the standard. It did not, instead it chose to give more time for affected
18 entities to come into compliance, evidencing a legislative intent that the new standard should
19 apply universally commencing no later than 2020, regardless of long-term economic impacts. In
20 effect, the Legislature’s action adopting Senate Bill 385 was legislative ratification of the existing
21 regulatory standard, and the writ should be denied.⁶

22 ⁵ The legislation was sponsored and supported by the water industry throughout
23 California, which supported the existing standard and did not advocate for a less stringent
24 standard. Numerous support letters made statements such as “Safe drinking water is important to
25 our community and SB 385 doesn’t ... change the standard in any way” and about being
26 “committed to meeting the state’s new drinking water standard for chromium VI.” (Ex. A to
27 Request for Judicial Notice, support letters.) The bill’s sponsor, the Association of California
28 Water Agencies, stated: “The bill creates a path for systems *to work expeditiously toward*
compliance while avoiding higher financing charges and reducing costs for potential enforcement
actions....” (*Id.*, italics added.) There was no industry opposition to the bill. (Senate Committee
on Environmental Quality, Bill Analysis, at pp. 5-6, Ex. B.)

⁶ In 2015, the Legislature also considered Assembly Bill 1531, which, as introduced,
would have deleted in its entirety Health & Safety Code section 116365.5, the statute requiring
(continued...)

1 Petitioners rely on *City of Portland, Ore. v. U.S. EPA* (D.C. Cir. 2007) 507 F.3d 706, to
2 argue that “feasibility” means “technically possible and affordable.” (Petitioners’ Opening Brief,
3 at p. 16.) However, federal law is not controlling, not when, as here, there is no parallel federal
4 standard and the state statutory scheme itself spells out the requirements. Further, petitioners
5 misapply *Portland*. They cite *Portland* for the proposition that a cost-benefit analysis is
6 insufficient to determine feasibility. (Petitioners’ Opening Brief, at p. 16:27-28.) Actually, in
7 *Portland*, the court upheld the challenged drinking water standard even though EPA had not done
8 a cost-benefit analysis. (*Portland, supra*, 507 F.3d at p. 712.) Here, the Department did do a
9 cost-benefit analysis, so, under *Portland*, the Department did *more* than what was required, not
10 less. In any event, the Legislature did not define feasibility in the statutory scheme, leaving it to
11 the Department’s discretion to determine feasibility in a case-by-case basis.⁷

12 Given that Health & Safety Code section 116365 places a primary emphasis on protection
13 of public health, the Department selected the 10 parts per billion Maximum Contaminant Level
14 alternative. (AR 288.) The Department concluded that the drinking water Maximum
15 Contaminant Level provides increased public health protection by reducing the potential risk of
16 adverse health effects associated with exposure to hexavalent chromium, considering the overall
17 relatively minor increase in costs associated with compliance with the new level. The
18 Department’s economic analysis was more than adequate, and met the applicable requirements of
19 Government Code section 11346.3 to include an assessment of potential adverse economic
20 impacts and avoid imposition of unnecessary or unreasonable regulations. The regulation was
21 necessary because it was statutorily required. Potential economic impacts were identified,
22 described, and assessed. The Department could have selected an even more stringent alternative,

23 (...continued)

24 the establishment of a hexavalent chromium standard. (March 23, 2015, AB 1531, Ex. C.) The
25 bill was subsequently amended to remove the deletion (July 9, 2015, amendment, Ex. D) and
ultimately signed into law without the deletion. (October 9, 2015, chaptered bill, Ex. E.)

26 ⁷ The dictionary and CEQA definitions offered by petitioners are unhelpful to their
27 position: neither mention “affordability” as a criterion. Petitioners want this entire case to be
28 about affordability, but clean drinking water has a price, the Legislature was aware of that when it
passed Health & Safety Code section 116365.5, and the Department was under a mandate to
adopt a standard. The Legislature did not specify a standard that is affordable according to the
beliefs of the petitioners.

1 but did not. The Department was not required to adopt the most economically efficient
2 regulation, but the one that was most protective of public health while still being feasible.
3 Petitioners have not demonstrated that the Department's action was unreasonable and the writ
4 petition should be denied.

5 **II. THE COST ANALYSIS WAS BASED ON REASONABLY AVAILABLE COST DATA**

6 The Associations contend that the Department improperly based its economic feasibility
7 analysis on an incomplete dataset because it ignored certain small public water systems.
8 (Petitioners' Opening Brief, at pp. 18-24.) This is incorrect. The cost analysis did not
9 underestimate the number of systems that would be impacted by the regulation. First, the vast
10 majority of the water users in the state are served not by the smaller systems, but by the three
11 other systems analyzed: medium, large, and largest systems. The Associations argue that the
12 Department lacked data for about half the State's water sources, and about 60 percent of the small
13 system sources statewide. (Petitioners' Opening Brief, at p. 19.) Only certain data was lacking,
14 from water sources that were non-vulnerable to hexavalent chromium, from water systems that
15 may have received a monitoring exemption, or from water systems where the monitoring results
16 were not submitted electronically to the Department. (ISOR, at p. 13, AR 276.) Even if more
17 data were available, it would not have substantially changed the cost per service connection,
18 which is more pertinent than total cost.

19 The Department had extensive amounts of available data to analyze: the Department had
20 nine years of monitoring data for hexavalent chromium, specifically. (ISOR at p. 13, AR 276.)
21 In addition, the Department had data for total chromium, regulated at the 50 parts per billion
22 Maximum Contaminant Level in California since 1977. (Petitioners' Opening Brief, at p. 5:2.)
23 As the Department pointed out in its Initial Statement of Reasons, only certain sources were
24 exempted from monitoring for hexavalent chromium, if they had demonstrated no detections of
25 total chromium: "[A]ll sources are considered vulnerable to hexavalent chromium unless a
26 screening using chromium analysis indicates by a nondetect that a source is not vulnerable."
27 Screening for hexavalent chromium using chromium analysis required a chromium reporting limit
28 of 0.001 mg/L or better." (ISOR at p. 13, AR 276.) Thus, many of the sources that were

1 excluded from the Department's analysis were those that had not shown any historic detections of
2 total chromium, and thus were not at risk for hexavalent chromium, because the concentration of
3 hexavalent chromium in a sample cannot exceed the concentration of total chromium in the
4 sample.

5 Second, the Department proceeded with the dataset that was available. As stated above, it
6 had nine years of available information, and was under a statutory deadline to complete the
7 regulatory process. Waiting to collect additional data was not an option. The Associations argue
8 that the Department could have extrapolated from existing data to non-sampled sources and
9 assumed a higher incidence of hexavalent chromium requiring treatment, which in turn would
10 have increased cost estimates. The Associations speculate that "the actual capital costs for a 10
11 ppb MCL will be significantly higher than \$870 million—perhaps double that amount."

12 (Petitioners' Opening Brief, at pp. 20:28-21:2.)⁸ Even if the Associations are correct, compliance
13 with the regulation would still be feasible at an estimated annual cost of \$24.92 per household.
14 Using the Association's hypothetical cost number of \$1.74 billion, the annual cost per person for
15 statewide implementation is approximately \$44.85 per person or \$139.20 per household. These
16 are feasible cost numbers, and it was in the Department's discretion to make that determination.

17 The Department did not extrapolate from existing data, because doing so would have also
18 required the Department to extrapolate additional health benefits, which might have also
19 increased, so the cost-benefit analysis might have been effectively unchanged, or might have
20 resulted in even lower costs, depending on assumptions that might be used in extrapolation.
21 Moreover, while extrapolation might have increased total costs, as the Associations suggest, the
22 change in the cost per service connection might not be substantial, or might even be reduced. The
23 Department also did not extrapolate costs downward as a result of compliance costs often being
24 less than the identified (analyzed) treatment costs, due to the fact that public water systems often
25

26 ⁸ The Associations' speculation is based on extrapolation of existing data to non-sampled
27 sources, and that is without foundation, given the uncertainties and unpredictability surrounding
28 extrapolation from existing data. The Department's view was that public health protection is
better served by not extrapolating from existing data to non-sampled data.

1 achieve compliance with a Maximum Contaminant Level in a more cost effective manner, such as
2 blending or relying on a compliant water source and no longer using a contaminated source.

3 Petitioners suggest the Department should have used total chromium data for sources where
4 it lacked hexavalent chromium data. (Petitioners' Opening Brief, at p. 20:16-17.) The record,
5 however, supports the decision to only use hexavalent chromium in evaluating occurrence data,
6 rather than also use total chromium data. (State of the Science of Hexavalent Chromium in
7 Drinking Water, AR 4005, 4011, et seq., discussing distinctions and issues with sampling
8 methods for total and hexavalent chromium.)

9 The Associations point to "system-specific data" to argue that the Department's analysis
10 was flawed. (Petitioners' Opening Brief, at p. 21.) Again, there is no citation to any statute
11 requiring the agency to consider system-specific costs, only the aggregate costs. Moreover, the
12 data relied on by the Associations is itself flawed. For example, the Associations cite to a cost
13 estimate of \$518 million for the Coachella Valley Water District. (Petitioners' Opening Brief, at
14 p. 21.) On the same page, in footnote 13, the Associations quote a revised cost estimate of \$200
15 million. (*Ibid.*) In two years, the District's cost estimate dropped by over half. Further, as the
16 Associations point out, the District "estimate[d] that our customers will see their monthly
17 domestic water bills increase by about \$30 to \$50, just to cover the cost of compliance." (*Ibid.*)
18 Such an increase, while unpleasant, is hardly beyond feasible. Similarly, the data cited by the
19 Associations on page 22 of their brief, that customers' monthly water bills "will double or triple
20 due to this regulation," (Petitioners' Opening Brief, at p. 22:10) and that "annual cost for water
21 service would increase by approximately \$695 to \$949 per customer" (*Id.* at p. 22:21-22),
22 amounting to \$58 to \$79 per month, do not demonstrate unfeasible costs. Safe drinking water has
23 a price. The Department was required to regulate primarily for the public health, and did so in a
24 reasonable, feasible manner.

25 The Associations also cite to more recent data that they contend supports their argument
26 that the Department underestimated costs due to data gaps. (Petitioners' Opening Brief, at p. 23.)
27 That data was not available to the Department during the regulatory proceeding, is not in the
28 administrative record, and is irrelevant and objectionable in this judicial proceeding. The State

1 Water Board objects to the Association's Request for Judicial Notice, Exhibits F and G, as
2 improper extra-record evidence.

3 **III. THE DEPARTMENT CONSIDERED ECONOMIC IMPACTS ON CALIFORNIA BUSINESSES**

4 The Associations next argue that the Department failed to consider the adverse economic
5 impacts on California businesses, as required by Government Code section 11346.3 of the APA.
6 (Petitioners' Opening Brief, at pp. 24-27.) Much of the Department's analysis of economic
7 feasibility under the Health and Safety Code – including its analysis of compliance costs for
8 different sizes of public water systems and sources and per service connection (e.g., businesses
9 and individual households) addressed above, under Argument I – also satisfied the economic
10 impact analysis required under the APA, and, in fact, went beyond what was required under the
11 APA. So, for instance, the Department's determination of the compliance costs for public water
12 systems (AR 287), broken down by number of service connections, included the cost to
13 nontransient noncommunity water systems (NTNCWS), contrary to Petitioners' assertion that the
14 Department neglected this analysis. (Petitioners' Opening Brief, at pp. 26:15 – 27:7.) After all,
15 the Department's determination that the hexavalent chromium standard was feasible required it to
16 analyze its economic impacts.

17 Section 11346.3 of the APA also has some specific requirements as part of the economic
18 assessment separate from what was required by the Health and Safety Code's economic
19 feasibility analysis. Subdivision (a) required the Department to "consider the proposal's impact
20 on business, with consideration of industries affected including the ability of California
21 businesses to compete with businesses in other states," and the specific requirements for that
22 assessment are in subdivision (b), which required the Department to assess:

23 whether and to what extent it will affect the following:

24 (A) The creation or elimination of jobs within the state.

25 (B) The creation of new businesses or the elimination of existing businesses within
26 the state.

27 (C) The expansion of businesses currently doing business within the state.

28 (D) The benefits of the regulation to the health and welfare of California residents,
worker safety, and the state's environment.

1 The Department's analysis did consider the required issues listed in subdivision (a) and did assess
2 the items listed in subdivision (b). (ISOR, pp. 32-33, AR 295-296.)

3 Public water systems are unlike most other regulated entities. For instance, they do not
4 compete with each other. And their size is a function of the number of individuals and businesses
5 in their service areas. (AR 295.) Therefore, the Department's economic impact analysis of this
6 regulation necessarily had to be adapted to the fact that the entities being regulated were public
7 water systems, not businesses.

8 Moreover, at the time that the Department proposed the hexavalent chromium standard, in
9 August of 2013, the APA's requirement for an economic impact assessment did not require the
10 Department to try to estimate indirect or induced costs of the regulation. The authority on which
11 petitioners rely for their definition of "economic impact" as including direct, indirect, and induced
12 costs, did not exist when the regulation was proposed. California Code of Regulations, title 1,
13 section 2000, subsection (e) was added October 29, 2013, operative November 1, 2013, after the
14 regulation at issue was proposed by the Department in August 2013. Similarly, the version of the
15 State Administrative Manual in effect at the time the regulation was proposed contained no
16 definition of "economic impacts" and did not require analysis of indirect costs. (State
17 Administrative Manual, section 6602, revised March 2009, Ex. F.)⁹ Instead, it required the
18 Department to determine how much it would cost for the regulated entities – public water systems
19 – to comply with the proposed standard.¹⁰ The APA did not require the Department to speculate
20 about whether the public water systems would be able to pass those costs on to their customers
21 and, if so, how those customers might be impacted. An agency is required to assess potential
22 costs based on facts, not speculation or subjective belief. (*California Ass'n. of Medical Products*
23 *Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 306.) Nevertheless, the Department did

24 ⁹ A subsequent version, adopted after the regulation was proposed, inserted a new
25 definition of "economic impacts" that did expressly include direct, indirect, and induced costs in
26 the required analysis, for regulations proposed after November 1, 2013, that meet the definition of
27 "major regulation." (State Administrative Manual, section 6602, revised June 2014, Ex. G.)

28 ¹⁰ Government Code section 11342.535 defines "cost impact" to mean "the amount of
reasonable range of direct costs, or a description of the type of direct costs, that a representative
private person or business necessarily incurs in reasonable compliance with the proposed action."
(*Ibid.*, underline added.)

1 prepare and consider detailed cost estimates and hard facts based on actual data, including
2 estimates of the cost per service connection (i.e., customer) for each size of public water system.
3 (AR 287.)

4 Given that public water systems are not businesses, and the state of the law when the
5 regulation was proposed, the Department found that the regulation would not have an impact on
6 business or affect any business's ability to compete with those in other states. (AR 295.) After
7 all, since public water systems do not compete with systems in other states, the regulation could
8 not have any effect on their ability to compete. But the Department did determine the costs for
9 each size of public water system (AR 286), and this satisfied the requirements of section 11346.3,
10 subdivision (b).

11 The Department's Initial Statement of Reasons concluded there was no significant effect on
12 the creation or elimination of jobs, the creation of new businesses or the elimination of existing
13 businesses, or the expansion of current businesses. (ISOR, at p. 32-33, AR 295-296;¹¹ Gov. Code
14 §11346.3, subd. (b)(1)(A)-(C).) For instance, the Department determined "that there would not
15 be any significant change in public water system or regulatory personnel needed for compliance
16 with the new requirements." (AR 296.) And "[s]ince public water system size is basically a
17 function of the number of service connections (consumers) served, the proposed regulations
18 should not have any effect on expansion." (AR 295.) Further, the Department determined that
19 the proposed regulations would improve the protection of the public's health and welfare. (ISOR
20 at p. 33, AR 297; Gov. Code § 11346.3, subd. (b)(1)(D).) Therefore, the Department met the
21 requirements of section 11346.3, subdivision (b)

22 This case is very similar to *Western States, supra*, 99 Cal.App.4th 999, in which another
23 drinking water standard was challenged. Just like here, the plaintiffs attacked the Department's
24 economic analysis. But the court upheld the standard, finding that the Department had done the
25 economic analysis properly, but just not the way that plaintiffs wanted:

26
27 ¹¹ Pages 295 and 296 of the Administrative Record were inadvertently copied in reverse
28 order.

1 Plaintiffs complain that the Department did not consider economic factors in setting
2 the secondary drinking water standard for MTBE. In fact, the Department did address
3 economic considerations, but it employed reasoning and reached conclusions contrary
4 to plaintiffs' views.

5 (*Id.* at p. 1015.) Furthermore, in *Western States*, the court held the Department's discretion over
6 economic considerations was constrained by the Legislature's directive to establish a drinking
7 water standard:

8 First, the Legislature already had determined that, despite any adverse economic
9 considerations, a secondary drinking water standard for MTBE is necessary. (§
10 116610, subd. (d).) Accordingly, any economic consequences that would arise simply
11 from the adoption of a standard for MTBE are beyond the Department's purview....

12 In summary, by enacting section 116610, subdivision (d), the Legislature required the
13 Department to set a secondary drinking water standard for MTBE and required the
14 standard to meet the criteria of section 116275, subdivision (d) and not exceed a level
15 of consumer acceptance. Within these restrictions, the Department was vested with
16 broad discretion to determine the appropriate standard.

17 (*Western States, supra*, 99 Cal.App.4th 999, 1015-1016, underline added.) The Legislature gave
18 the Department the same sort of mandate here, to establish a drinking water standard for
19 hexavalent chromium. (Health & Saf. Code, § 116365.5.)

20 A regulation will not be invalidated simply because of disagreement over the strict accuracy
21 of cost estimates on which the agency relied to support its initial determination. All that is
22 required is substantial compliance. Government Code section 11346.5, subdivision (c), states:

23 This section shall not be construed in any manner that results in the invalidation of a
24 regulation because of the alleged inadequacy of the notice content or the summary or
25 cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates,
26 if there has been substantial compliance with those requirements.

27 (*Id.*, underline added.) Here, the agency complied with the cost analysis requirement and the
28 regulation should be upheld.

29 **IV. THE DEPARTMENT PROPERLY RESPONDED TO PUBLIC COMMENTS**

30 Next the Associations contend the Department failed to substantively respond to certain
31 public comments. (Petitioners' Opening Brief, at pp. 27-30.) In its Final Statement of Reasons
32 for the adoption of the Maximum Contaminant Level, the Department prepared an extensive, 47-
33 page summary of public comments received both in favor of and against the regulation, including

1 responses to all comments. (AR 4624-4693.) Many of the Associations' arguments in this
2 section of their brief duplicate their arguments on the merits already addressed above and the
3 State Water Board incorporates its Arguments I-III, above, without repeating them here.

4 **A. Economic Feasibility**

5 The Associations contend that the Department did not adequately respond to comments
6 regarding cost feasibility. (Petitioners' Opening Brief, at p. 28.) In the Final Statement of
7 Reasons the Department noted that "Some water systems may incur costs exceeding those
8 provided in the [Initial Statement of Reasons], while other may incur less costs utilizing other
9 options for compliance." (AR 4643.) With respect to Small Water Systems, the Department
10 recognized that it "has no discretion to set a different 'affordable' [Maximum Contaminant Level]
11 applicable to [Small Water Systems] that is less protective of public health." (*Ibid.*) The
12 Department also pointed to certain statutory exemptions and variances that might apply to certain
13 public water systems. (Health & Saf. Code, §§ 116430 and 116425, AR 4643.) In any event, the
14 Department devoted seven pages in the Final Statement of Reason to responses to public
15 comments on cost feasibility. (FSOR, at pp. 13-19, AR 4642-4651.) Additionally, as detailed in
16 Argument I, above, the Department spent considerable time and resources analyzing the
17 feasibility of the regulation, in both the Initial Statement of Reasons (AR 264, 275-290, and 296-
18 299) and the Cost Estimating Methodology document. (AR 359-367.)

19 **B. Rate Increases and Affordability**

20 The Associations contend the Department failed to address public comments that rate
21 increases would be unaffordable for many individuals. (Petitioners' Opening Brief at pp. 28-29.)
22 This is incorrect, as already detailed above. The Department's economic analysis demonstrated
23 that estimated monthly rates would increase as little as \$5.33 per service connection to as much as
24 \$470 per service connection for the smallest water systems (AR 284-287), with the majority of
25 water users being impacted at the lower amount. Moreover, the Department did address the
26 public comments at pages 13-22 of the Final Statement of Reasons. (AR 4642-4655.)

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The Department recognizes that additional data may have been more recently submitted, however, it is necessary, as a practical matter, to conduct analysis against a static rather than dynamic data set. ... Due at least in part to the nature of state rulemaking procedures, the development of estimated costs cannot be a dynamic process, where the most recent data can be used to continually update the cost estimates during the regulatory process. Thus, a certain point in time has to be chosen that will define the data set for purposes of estimating cost.

(AR 4646.) Thus, petitioners' assertion that the Department did not explain why it chose 2009 as the cut-off date, instead of a more recent date, is incorrect and controverted by the record. (*Ibid.*)

The Department thoroughly and adequately responded to all public comments.

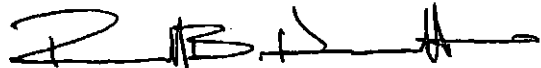
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1 Dated: February 8, 2016

Respectfully Submitted,

2 KAMALA D. HARRIS
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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: ***California Manufacturers and Technology Assoc. v. State Water Resources Control Board***

Case No.: **Sacramento County Superior Court no. 34-2014-80001850**

I declare:

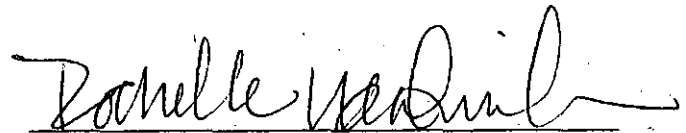
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: «Firm Contact Address: Type Service».

On February 8, 2016, I served the attached **STATE WATER BOARD'S OPPOSITION BRIEF** by placing a true copy thereof enclosed in a sealed envelope with **GOLDENSTATE OVERNIGHT**, addressed as follows:

Clifton J. McFarland, Esq.
Olivia M. Wright, Esq.
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Attorneys for Petitioners

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 8, 2016, at Sacramento California.

Rochelle Uda-Quillen
Declarant


Signature