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SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

**CALIFORNIA MANUFACTURERS AND
TECHNOLOGY ASSOCIATION AND
SOLANO COUNTY TAXPAYERS
ASSOCIATION,**

Petitioners,

v.

**STATE WATER RESOURCES CONTROL
BOARD,**

Respondent.

Case No. 34-2014-80001850

**STATE WATER BOARD'S OPENING
SUPPLEMENTAL BRIEF**

Dept: 44
Judge: Hon. Christopher E. Krueger
Trial Date: n/a
Action Filed: May 29, 2014

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INTRODUCTION

At the suggestion of the Court, in its November 15, 2016 Order Vacating Submission and Ordering Additional Briefing, the State Water Resources Control Board (State Water Board or Board) met with Plaintiffs four times to see if the parties could agree on any of the terms or the scope of a remand. Both sides conducted research concerning the status of Public Water Systems' efforts to comply with the Maximum Contaminant Level (MCL) for hexavalent chromium, and the parties shared this research with each other. While useful, this did not lead to a stipulation. In the meantime, uncertainty regarding the legal status of the MCL may be interfering with some Public Water Systems' progress in achieving the MCL. As a result, the Board determined that it was time to return to the Court and to provide its responses to the issues raised in the Court's Order concerning the scope and terms of a remand. Those responses are as follows.

ARGUMENT

I. THE MCL SHOULD REMAIN IN PLACE WHILE THE BOARD REDOES THE ECONOMIC FEASIBILITY ANALYSIS.

In its November 15, 2016 Order Vacating Submission and Ordering Additional Briefing, after oral argument, the Court re-stated its conclusion that the Department's economic feasibility analysis was deficient and it ordered further briefing on the issue of how best to remedy this. In selecting a remedy, the Court is "not limited to choosing between invalidation of the regulation and no remedy at all." (*POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 756 ("*POET*").) It has authority to consider the public interest and "tailor the remedy to the circumstances." (*Id.* at 697.) Here, the Court's remedy can ensure that the Board corrects the deficiencies in its feasibility analysis without jeopardizing the progress being made towards removing a carcinogen from drinking water. It can do this in one of two ways, each of which have been utilized by the California Supreme Court in comparable circumstances.

1 **A. An Interlocutory Remand Would be the “Eminently Practical” Solution, in**
2 **Accordance with California Supreme Court Precedent.**

3 This Court’s first option is to order an interlocutory remand, giving the Board a chance to
4 do a proper feasibility analysis, while the Court retains jurisdiction. If the Board corrects the
5 deficiencies to the Court’s satisfaction, then a final judgment can be issued, denying the petition.
6 If the Court concludes that the Board’s subsequent analysis is deficient, then the final judgment
7 can grant the petition and vacate the standard. This is the approach approved by the California
8 Supreme Court in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th
9 499.

10 In *Voices of the Wetlands*, an environmental group challenged the water board’s issuance of
11 a permit to draw cooling water for a power plant, pursuant to section 1094.5 of the Code of Civil
12 Procedure. The trial court ruled that one of the board’s findings – that the power plant’s cooling
13 water system used the best technology available to minimize environmental impacts – was
14 unsupported by the weight of the evidence. (*Voices of the Wetlands, supra*, 52 Cal.4th at p. 512.)
15 But the court did not want to interrupt the power plant’s operations, so it rejected the
16 environmental group’s proposed order that would have granted their petition for writ of mandate
17 and set aside the permit. (*Id.* at pp. 512-513.) Instead, the court remanded the case to the board
18 so that the board could further analyze its finding about the best technology available. (*Id.* at p.
19 513.) The court further ordered that the board should notify the court when its analysis was
20 complete so that the court could then hold a status conference. (*Ibid.*) Thus, the court did not
21 issue a final judgment at that time and retained jurisdiction of the case.

22 On remand, the board solicited written testimony and held a public hearing. (*Voices of the*
23 *Wetlands, supra*, 52 Cal.4th at p. 513.) It concluded that the weight of the evidence supported its
24 original determination. (*Ibid.*) The case then resumed in the trial court, which ruled that the
25 board’s analysis on remand was sufficient and it entered judgment denying the writ. (*Id.* at p.
26 514.)

27 On appeal, the environmental group argued that the trial court had erred by ordering an
28 interlocutory remand rather than entering a final judgment in the group’s favor and ordering a

1 post-judgment remand. The California Supreme Court disagreed, finding that the interlocutory
2 remand was proper:

3 Decisions have long expressed the assumption that the court in a mandamus action
4 has inherent power, in proper circumstances, to remand to the agency for further
proceedings prior to the entry of a final judgment. [Citations].

5 (*Voices of the Wetlands, supra*, 52 Cal.4th at p. 527.) The Court's holding was based in part on
6 Code of Civil Procedure section 187, which gives trial courts wide latitude to adopt "any suitable
7 process or mode of proceeding," so long as that process does not conflict with any other statute.

8 Further, the Court described the trial court's resolution as "eminently practical." (*Id.* at p.
9 529.) This was particularly so because the trial court had found that only one part of the power
10 plant's permit – the best technology available determination – was deficient. (*Ibid.*) Had the trial
11 court chosen instead to invalidate the permit, the board said it would have had to start the permit
12 process over from square one. (*Id.* at p. 512.)

13 An interlocutory remand would be an eminently practical resolution here, as well. The
14 Court's concern is focused on just a single aspect of the Department's administrative process in
15 setting the hexavalent chromium standard: the economic feasibility analysis. Nothing in either
16 the Safe Drinking Water Act or the Administrative Procedure Act (APA) (Gov. Code, § 11340, et
17 seq.) precludes the Court from ordering an interlocutory remand to give the Board an opportunity
18 to fix the deficiency. As in *Voices of the Wetlands*, the Board can do the proper analysis,
19 determine whether the current standard is economically feasible, provide an opportunity for
20 public comment, and notify the Court when the process is completed. Then the Court can
21 determine whether that analysis was done properly this time and deny the writ if it finds that it
22 was done properly. During the remand and until the Court issues a final judgment, the current
23 standard would stay in place.

24 **B. Even if the Court Grants the Writ, the Standard Should be Left in Place**
25 **during the Post-Judgment Remand.**

26 If the Court chooses to instead enter a final judgment now, the hexavalent chromium
27 standard should still be left in place during the post-judgment remand. This procedure would be
28

1 consistent with an earlier California Supreme Court case, *Laurel Heights Improvement*
2 *Association v. Regents of University of California* (1988) 47 Cal.3d 376.

3 In Laurel Heights, the university relocated a research facility, which was using toxic
4 chemicals and radioactive materials, to a residential neighborhood. A neighborhood association
5 challenged the environmental impact report (EIR) for this project, asserting that it violated the
6 California Environmental Quality Act (CEQA). The California Supreme Court agreed that the
7 EIR was deficient, but it refused to enjoin existing operations at the facility while the university
8 redid the EIR. (*Laurel Heights, supra*, 47 Cal.3d at p. 422.)

9 In reaching this conclusion, the Court focused on the “primary purpose of CEQA.” (*Laurel*
10 *Heights, supra*, 47 Cal.3d at p. 424; see also *Id.* at p. 423, fn. 23, citing *Amoco Production Co. v.*
11 *Village of Gambell*, AK (1987) 480 U.S. 531, 544 [“the Ninth Circuit erroneously focused on the
12 statutory procedure rather than on the underlying substantive policy the process was designed to
13 effect”].) Applying traditional equitable principles, the Court balanced the absence of evidence
14 that allowing the research to continue would hurt the environment against the harm from
15 interrupting the university’s research. (*Laurel Heights, supra*, 47 Cal.3d at pp. 423-424.) It
16 found that the trial court should terminate the facility’s operations only if it became clear that the
17 university would not promptly prepare an adequate EIR. (*Id.* at p. 424.)

18 The California Supreme Court reached a similar conclusion in a challenge to the
19 Department of Toxic Substances Control’s interpretation of a fee on companies that use
20 hazardous materials. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324.) The
21 Department had not complied with the APA, erroneously believing that the interpretation was not
22 a regulation. The Court held that the trial court should give the Department a reasonable
23 opportunity to comply with the APA and that, in the interim, the fee system as presently
24 interpreted should remain in effect. (*Id.* at pp. 341-342; see also *POET, supra*, 218 Cal.App.4th
25 at p. 697 [allowing regulations to remain operative while agency complied with the CEQA and
26 APA requirements it had failed to satisfy, thereby avoiding “the irony of violations of an
27 environmental protection statute being used to set aside a regulation that restricts the release of
28 pollutants into the environment”].)

Whether the Court here chooses to order an interlocutory remand or a post-judgment remand, it should follow the Supreme Court's lead in the cases cited above and leave the hexavalent chromium standard in effect while the Board corrects any inadequacies in its analysis. This would be in keeping with both the Legislature's mandate to "plac[e] primary emphasis on the protection of public health," (Health & Saf. Code, § 116365, subd. (a)) and Senate Bill 385, which did not change the standard. By maintaining the status quo, the Court will ensure that water systems throughout the state will continue to move towards compliance and will be more likely to meet the 2020 deadline set by Senate Bill 385. It will also spur continued research and development into cheaper methods of meeting the standard. (Decl. of Mark Barston, ¶¶ 14-15.) Keeping the standard in effect will prevent water systems that have already come into compliance from backsliding by, for instance, bringing contaminated wells back on-line or turning off water treatment systems. If the MCL were to be suspended or invalidated, there would be a disruption to projects currently under construction or moving towards construction. Moreover, some systems may have to repay agencies, such as the U.S. Environmental Protection Agency, that have funded projects. (Decl. of Mark Bartson, ¶ 19.)

II. IF THE MCL CANNOT BE LEFT IN PLACE DURING THE REMAND, THEN IT SHOULD BE INVALIDATED JUST AS TO SMALL WATER SYSTEMS.

If the Court rejects the Board's proposals for leaving the standard in place while the Board redoes the economic feasibility analysis, then at least the invalidation of the standard should be limited to address the Court's main concern. In the August 26, 2016 tentative ruling issued for this case, the Court indicated that "it has some concerns about the MCL's economic feasibility for small water systems and their users." (Tentative Ruling, at p. 8.) The Court went on to note specifically that small water system bills were estimated to go up by \$5,630 per year, or \$469.17 per month, and expressed its concern that at least some customers would not be able to afford such an increase. (Tentative Ruling, at pp. 9-10.) If the Department failed to adequately analyze economic feasibility, the impact is on small water system users, and the remedy in this case should be tailored and limited to small water systems. (*POET, supra*, 218 Cal.App.4th at 697.) "Injunction process ought never to go beyond the necessities of the case and only to the extent

1 required to preserve the rights of all parties.” (*Enos v. Harmon* (1958) 157 Cal.App.2d 746, 750.)
2 Like a request for injunctive relief, a proceeding for a writ of mandate is an equitable proceeding.
3 (*Crestlawn Memorial Park Ass’n v. Sobieski* (1962) 210 Cal.App.2d 43, 51; see also *Lockyer v.*
4 *City and County of San Francisco* (2004) 33 Cal.4th 1055, 1121 [“the writ of mandate is an
5 equitable remedy that will not issue if it is contrary to ‘promoting the ends of justice,’” citing
6 *McDaniel v. City etc. of San Francisco* (1968) 259 Cal.App.2d 356, 361, and *Bartholomae Oil*
7 *Corp. v. Superior Court* (1941) 18 Cal.2d 726, 730.)

8 Therefore, if the Court decides to invalidate the standard at all, the invalidation should be
9 narrowly prescribed to apply only to small water systems with less than 200 service connections,
10 in order to best effectuate the intent of the Legislature that drinking water be safe throughout
11 California.

12 **III. INVALIDATION OF THE CURRENT MCL WOULD NULLIFY SB 385.**

13 The Legislature provided in SB 385 for additional time for water systems to comply with
14 the MCL, to January 1, 2020. (Health & Saf. Code, § 116431.) But it did more than just provide
15 additional time, it imposed an entirely new scheme for water systems to demonstrate their
16 inability to comply with the regulation, based on their economic condition. (Health & Saf. Code,
17 § 116431, subd. (b)(1)(A) [public water system shall submit a compliance plan that includes a
18 “compelling reason why it is not feasible for the system to presently comply with the primary
19 drinking water standard for hexavalent chromium”].) In doing so, the Legislature shifted the
20 economic feasibility analysis requirement from the Board to those systems that believe they need
21 additional time to comply with the standard. The Legislature was addressing precisely the same
22 economic feasibility issue that the Court is now grappling with in this case. Because the
23 Legislature already addressed the issue, the Court need not.

24 Perhaps the term “legislative ratification” was not the right one to use in this context, but
25 mootness certainly is. (*County of San Diego v. Brown* (1993) 19 Cal.App.4th 1054, 1087-1090
26 [realignment legislation created new method of funding, rendering moot the trial court’s order
27 directing the promulgation of funding regulations].) Even if the Department failed to adequately
28 analyze economic feasibility, the Legislature mooted that issue by imposing a new and different

1 feasibility analysis requirement. The Legislature imposed this new feasibility analysis on the
2 regulated entities, not the State Water Board. The bottom line is that the impacted water systems
3 went to the Legislature seeking relief from the compliance requirement and deadline, and they got
4 the relief they asked for. The Legislature was well aware of the MCL at the time it enacted SB
5 385. (Stats. 2015, ch. 272, § 3 [“The state’s regulation setting the new maximum contaminant
6 level for hexavalent chromium VI went into effect on July 1, 2014.”]; see also *Cooper v.*
7 *Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170–71 [“It is to be presumed that
8 the Legislature in enacting section 1265 was aware of the regulation. Thus, the Legislature in
9 adding section 1265 explicitly did not intend any substantive change either in section 2656 or in
10 title 22, California Administrative Code, section 2601.1(1).”].)

11 The Court states in footnote 1 of its November 15, 2016 Order Vacating Submission and
12 Ordering Additional Briefing that “the history of the bill contains no evidence that the Legislature
13 considered one way or another whether the Department had appropriately determined the MCL
14 was economically feasible, which is the key issue in this case.” One of the primary purposes of
15 SB 385, however, was to address the economic feasibility issue that some water systems were
16 having with compliance with the new standard. The Legislature developed and imposed a new
17 procedural regime for addressing that very economic feasibility issue. The Legislature thus
18 substituted a new economic feasibility analysis and economic impact assessment for those
19 required under the Health and Safety Code and APA, respectively. If the Court were to invalidate
20 the MCL, under these circumstances, it would effectively nullify the Legislature’s intent under
21 SB 385 that the MCL continue to exist, at the 10 ppb level. If the Legislature had wanted to
22 invalidate or change the standard to accommodate impacted water systems, it could have done so.

23 **IV. PUBLIC WATER SYSTEMS ARE ALREADY MOVING TOWARD COMPLIANCE.**

24 There are currently a total of 7,588 public water systems in California. Of this total, there
25 are 4,430 Community Water System and Non-Transient, Non-Community public water systems
26 that are subject to the monitoring requirements for hexavalent chromium. Of these, there are 197
27 public water systems that have or had one or more water source with hexavalent chromium
28 monitoring results with an average of 10 micrograms per liter or more. Of this 197,

1 approximately 65 have taken corrective action or are in compliance because additional
2 monitoring showed no further exceedances. Most of these 65 Public Water Systems came into
3 compliance by removing one or more wells from service, performing additional monitoring, or
4 installing a treatment system to reduce the level of hexavalent chromium to less than the MCL in
5 the water delivered to the public. (Decl. of Mark Bartson, ¶ 11.)

6 The State Water Board tracks the remaining systems (approximately 132) for compliance
7 status with the hexavalent chromium standard. Of these, approximately 99 systems have
8 submitted a compliance plan in accordance with Health and Safety Code section 116431 (Senate
9 Bill 385), which requires them to come into compliance by January 1, 2020. Thus, all but
10 approximately 33 systems have come into compliance or submitted compliance plans which will
11 bring them into compliance with the standard. Of these 33 Public Water Systems, approximately
12 22 serve fewer than 200 service connections. (Decl. of Mark Bartson, ¶ 11.)

13 Some systems have expended substantial sums to come into compliance. For example, the
14 Indio Water Authority self-funded an improvement project that provided treatment at 3 wells and
15 placed 13 of 20 wells into standby mode to avoid violating the MCL. The standby wells can be
16 used to meet peak demand. The cost of the treatment project was \$6.8 million dollars. (Decl. of
17 Mark Bartson, ¶ 16.) These funds might not be recouped if the Court invalidates the MCL.

18 Some Public Water Systems have successfully installed treatment facilities to avoid
19 violations, including the Soquel Creek Water District (serving about 37,000 people), the
20 California Water Service Company—Dixon (serving about 9,300 people), and the California
21 Water Service Company—Willows (serving about 7,000 people). (Decl. of Mark Bartson, ¶ 17.)

22 Other systems have been able to achieve compliance in ways that are less complex and
23 costly than the installation of centralized treatment, by placing wells in standby, removing wells
24 from service, and using an existing treatment system that can treat hexavalent chromium, such as
25 reverse osmosis. (Decl. of Mark Bartson, ¶ 18.) There are several methods for bringing a Public
26 Water System into compliance with the MCL. These methods include treatment, consolidation
27 with a nearby Public Water System, blending, developing a new source (well or surface water),
28 purchasing water from an adjacent Public Water System, removing a source from service

1 permanently, or placing a source into standby mode, which allows the system to use the source
2 for emergency purposes. Consolidation, either physical or operational, is an especially useful
3 means for Public Water Systems serving fewer than 200 service connections to come into
4 compliance. Another method available to small Public Water Systems serving fewer than 200
5 connections is the use of Point of Use or Point of Entry Water Treatment Devices (POU/POE) at
6 each home and business served by the system. These devices are in lieu of other, centralized
7 methods, and can be less expensive. (Decl. of Mark Bartson, ¶ 12.)

8 Moreover, there have been significant recent developments in treatment technologies
9 available for hexavalent chromium. These developments have resulted in reduced capital costs
10 and operation and maintenance expenses compared to those analyzed by the Department in 2014
11 for the adoption of the MCL. Most recently, the Coachella Valley Water District is evaluating an
12 alternative treatment method that is likely to result in significant cost savings, perhaps as high as
13 50% in construction costs. The development of this alternative was stimulated by the MCL for
14 hexavalent chromium. (Decl. of Mark Bartson, ¶ 15.) Such a result is not uncommon in
15 environmental and public health statutory schemes, which often have the effect of technology-
16 forcing. Suspension or invalidation of the MCL would slow the development of improved
17 solutions. (Decl. of Mark Bartson, ¶ 19.)

18 If the Court suspends or invalidates the current MCL, then many of the systems that are
19 already well under way towards coming into compliance will discontinue making the progress
20 necessary to meet the SB 385 deadline in the next three years. Additionally, if the standard is re-
21 adopted after being suspended or invalidated, it will then be too late for water systems to meet the
22 Legislature's 2020 deadline.

23 **V. THE TIME NEEDED FOR REMAND DEPENDS ON WHAT PROCESS THE BOARD IS**
24 **REQUIRED TO FOLLOW.**

25 The Board believes it can prepare a new economic feasibility analysis pursuant to Health
26 and Safety Code section 116365, subdivision (b)(3), in approximately 180 days, including an
27 opportunity for public comment on a draft report. If, however, the Court determines that the
28 Board failed to comply with the requirements of the APA, and a new public process is necessary,

1 the time needed to undertake such a review could be three years or more. The Board would need
2 to prepare a new administrative record, prepare a completely new economic assessment, consider
3 new technologies that were not available in 2014, and open the new assessment up for public
4 comment and response.

5 For all the reasons stated in its February 8, 2016 Opposition Brief, the Board believes the
6 APA and Health and Safety Code requirements were all satisfied. To address the Court's fourth
7 bullet point on page 3 of the November 15, 2016 Order Vacating Submission and Ordering
8 Additional Briefing, the answer to the question of whether the Board must start again at square
9 one depends entirely on whether the Court determines there was, or was not, a failure to comply
10 with the APA, and the nature of that failure.

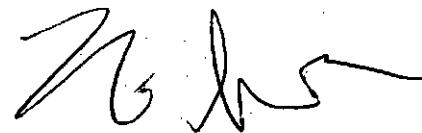
11 CONCLUSION

12 For the reasons stated above, the Court should issue an interlocutory order that requires the
13 Board to redo its economic feasibility analysis and to submit it to the Court for review within 180
14 days. During the interim, the MCL should remain in effect. Then, if the Court determines that
15 the revised economic feasibility analysis is adequate, then the petition should be denied.
16 Alternatively, if the Court determines that it will grant the petition now, then the MCL should
17 remain in place while the Board redoes its economic feasibility analysis. Or, if the MCL must be
18 invalidated at all, it should be just as to the small water systems, with fewer than 200 service
19 connections.

20 Dated: March 10, 2017

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **California Manufacturers and Technology Assoc. v. Department of Public Health**

No.: **34-2014-80001850**

I declare:

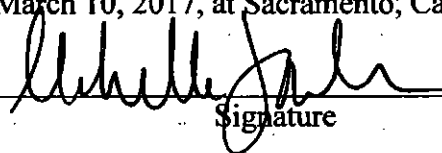
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 10, 2017, I served the attached **STATE WATER BOARD'S OPENING SUPPLEMENTAL BRIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Andrew L. Collier, Esq. DOWNEY BRAND LLP 621 Capitol Mall, 18 th Floor Sacramento, CA 95814 acollier@downeybrand.com <i>Attorneys for Petitioners</i>	Clifton J. McFarland, Esq. MITCHELL CHADWICK LLP 3001 Lava Ridge Court, Suite 120 Roseville, CA 95661 cmcfarland@mitchellchadwick.com <i>Attorneys for Petitioners</i>
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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 March 10, 2017, at Sacramento, California.

Michelle Fowler
Declarant


Signature