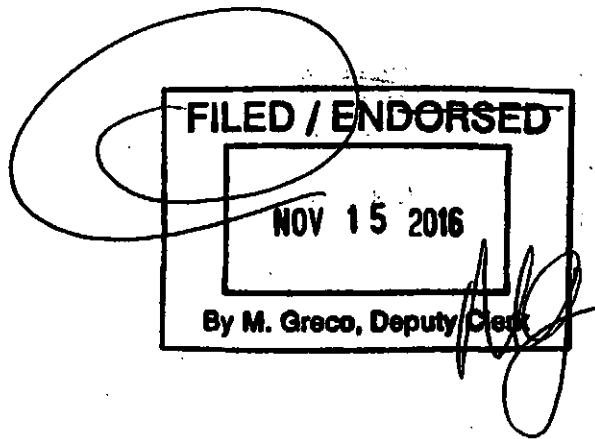




SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

CALIFORNIA MANUFACTURERS
AND TECHNOLOGY ASSOCIATION, et
al.,

Petitioners,

v.

STATE WATER RESOURCES
CONTROL BOARD,

Respondent.

Case No.: 34-2014-80001850

ORDER VACATING SUBMISSION AND
ORDERING ADDITIONAL BRIEFING

On August 26, 2016, hearing was held on the court's tentative ruling on the petition for writ of mandate. In that tentative ruling, the court found that the Department failed to adequately consider the economic feasibility of complying with the MCL it had adopted, but declined to find that the MCL was not economically infeasible. It thus tentatively determined that Petitioners were entitled to a writ of mandate remanding this case to the Department with instructions to consider the economic feasibility of complying with the MCL. It also stated, however, that it was not definitively holding the MCL was not economically feasible, because the Legislature has entrusted that determination to the Department, not to this court. The court thus recognized it was entirely possible that, after properly considering and determining economic feasibility upon remand, the Department would once again set the MCL at 10 ppb.

The court remains concerned that simply coming up with cost estimates for seven of the MCLs being considered and then selecting one of those MCLs is not equivalent to considering

the economic feasibility of complying with the MCL. How best to remedy this deficiency, however, is not immediately clear. The court has identified several issues that should be addressed before it can fashion an appropriate remedy and set the terms and scope of the remand order. These additional matters constitute good cause under Rule 2.900 of the California Rules of Court for vacating the prior submission. Accordingly, the court VACATES the minute order placing this matter under submission and ORDERS further briefing as set forth below.

At the hearing, counsel for the Department urged the court not to invalidate or suspend operation of the current MCL during any remand. As authority for this argument, it cited *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681. That case held: “a court’s decision to void the approval of a regulation . . . does not necessarily require the court to invalidate or suspend the operation of the regulation Instead in extraordinary cases, the court may exercise its inherent authority to maintain the status quo and allow the regulation to remain operative” while the problem that required voiding its approval is cured. (*Id.* at 761.) The court is considering doing so in this case. Because this argument was not raised until the hearing, it has not been briefed. The court thus asks the parties to address whether *POET* is applicable to this case, and whether it should invalidate or suspend operation of the current MCL during the remand process.

The court also asks the parties to address the following additional issues regarding the scope and terms of the remand:

- If the court invalidates the current MCL, how will that affect those public water systems that have already either begun complying or fully complied with the MCL? The court posed this question in its tentative ruling, but did not get an answer at the hearing. The court asks this question because it is concerned that some public water systems have already spent substantial sums complying, or attempting to comply, with the current MCL. If it knows, the Department may also wish to address how many public water systems have fully complied with the MCL and how many are in the process of complying.
- Should the court impose time limits on the Department by which to complete the remand process? If yes, what time limits should it impose? In asking this question the court is cognizant of the fact that the Legislature directed the Department to adopt

an MCL for hexavalent chromium by January 1, 2004. (Hlth. & Saf. Code § 116365.5, subd. (c).) We are now almost 13 years past that date.

- If the court invalidates the current MCL, how will that affect Health and Safety Code § 116431, which was enacted in 2015 by Senate Bill 385, and which gives public water systems additional time to comply? Section 116431 is repealed by operation of law on January 1, 2020, which is the date by which all public water systems are to comply with the current MCL. Will invalidating the current MCL essentially render SB 385 moot?¹ What if the Department re-adopts 10 ppb as the MCL after properly considering economic feasibility, but by the time it does so, the additional time granted by SB 385 is all but gone?
- Must the Department comply with all aspects of the APA on remand? In other words, must the Department essentially start again at square one? Does the answer to this question depend on whether the court ultimately determines there was no failure to comply with the APA in this case? Does it depend on whether the court ultimately determines the failure to comply with the APA was not substantial?

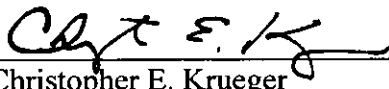
The parties may also address any other issues they believe are relevant to the scope and terms of the remand.

Simultaneous opening briefs addressing these issues shall be filed on or before December 9, 2016, and simultaneous responses shall be filed on or before December 23, 2016. The parties are free to stipulate to a different briefing schedule. Opening briefs may not exceed 10 pages, and response briefs may not exceed 5 pages. The parties are strongly encouraged to meet and confer regarding these issues prior to filing their briefs, to see if they can agree on any of the terms or the scope of the remand. If there are areas of agreement, the parties should so state in their briefs. Once the court has reviewed the briefs, it will let the parties know whether it intends

¹ In its tentative ruling, the court invited the parties to discuss whether the Legislature effectively ratified the MCL when it enacted SB 385. Petitioners argued the answer was no; the Department argued it was yes. Upon further reflection, the court is not convinced it can interpret SB 385 as having effectively ratified the MCL, because the history of the bill contains *no* evidence that the Legislature considered one way or another whether the Department had appropriately determined the MCL was economically feasible, which is the key issue in this case. The court thus concludes that SB 385 is simply too weak a reed upon which to base a finding of ratification.

to schedule another hearing. If no such hearing is scheduled, the case will be deemed submitted on the date responses are due.

Dated: November 15, 2016



Christopher E. Krueger
Judge of the Superior Court of California,
County of Sacramento

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Gordon D. Schaber Sacramento County Courthouse
720 – Ninth Street
Sacramento CA 95814

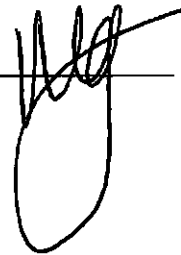
Case Title: California Manufacturers and Technology Association vs. California Department of
Public Health

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER
34-2014-80001850

I certify that I am not a party to this cause. I certify that a true copy of the attached, clerk's certificate of service by mail and **ORDER VACATING SUBMISSION AND ORDERING ADDITIONAL BRIEFING**, 11/15/2016, was mailed following standard court practices in a sealed envelope with postage fully prepared, addressed as indicated below. The mailing and the certification occurred at Sacramento, California, on 11/15/2016

TIMOTHY AINSWORTH, Clerk of the Court, by M. Greco, 11/15/2016
Interim Chief Executive Officer



, Deputy

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CLERK'S CERTIFICATE OF SERVICE BY MAIL