SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME JUDGE	AUGUST 26, 2016, 1:30 p.m. HON. CHRISTOPHER KRUEGER	DEPT. NO CLERK	44 M. GRECO
CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, et al., Petitioners, v. STATE WATER RESOURCES CONTROL BOARD, Respondent.		Case No.: 34-2014-80001850	
Nature of Proceedings:	PETITION FOR WRIT OF MANDATE		

The court's tentative ruling is to grant the petition for writ of mandate.

INTRODUCTION

This case involves a challenge to Respondent Department of Public Health's promulgation of a regulation setting a maximum contaminant level (or MCL) for hexavalent chromium in drinking water.[1] The Department adopted the MCL pursuant to the Safe Drinking Water Act, and it set the MCL at 10 parts per billion. Petitioners – the California Manufacturers and Technology Association and the Solano County Taxpayers Association – believe the MCL is too low, and that compliance will be, in their words, "massively expensive." They claim the Department failed to comply with substantive and procedural requirements imposed by the Safe Drinking Water Act and the Administrative Procedures Act when it set the MCL. They seek a writ of mandate ordering the Department to withdraw the current MCL and to promulgate a new

[1] Effective July 1, 2014, after the regulation was promulgated and after this lawsuit was filed, the State Water Resources Control Board ("the Board") became responsible for drinking water standards. (Health. & Saf. Code § 116271.) On June 1, 2015, the Board was formally substituted in as the Respondent in place of the Department. Like the parties, the court continues to refer to the Respondent as the Department, although it recognizes that, if it adopts this tentative ruling, the case will actually be remanded to the Board.

MCL. For the reasons stated below, the petition is *tentatively* granted, in part, and this case is remanded to the Department to consider the MCL's economic feasibility. The court stresses that tentative rulings are just that – tentative. This is a close case and the court has concerns which are discussed below, and which the parties are encouraged to address at the hearing.

BACKGROUND

The Relevant Law

The Safe Drinking Water Act (sometimes referred to as "the Act") was enacted "to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable." (Health. & Saf. Code § 116270, subd. (e).)[2] One of the ways the Act achieves this goal by requiring the Department to "adopt primary drinking water standards for contaminants in drinking water." (§ 116365, subd. (a).) These standards are generally expressed in terms of "maximum contaminant levels" or MCLs. (See § 116275, subd. (c).)

Pursuant to the Act, the Legislature has specifically directed the Department to establish a primary drinking water standard, or MCL, for hexavalent chromium. (§ 116365.5.) The establishment of a standard for hexavalent chromium, like all such standards, is subject to certain criteria. As relevant here, those criteria include the following:

- The standard "shall not be less stringent than the national primary drinking water standards adopted by the United States Environmental Protection Agency." (§ 116365, subd. (a) [emphasis added].) The U.S. EPA has adopted an MCL for total chromium, but not specifically for hexavalent chromium. Total chromium is essentially the sum of hexavalent chromium and trivalent chromium, which are the two most common forms of chromium. The EPA's MCL for total chromium is 100 parts per billion. The MCL for hexavalent chromium thus cannot be higher than 100 parts per billion. There is an important caveat. California's MCL for total chromium is 50 ppb, and that MCL, which was adopted in 1977, has not been challenged. Thus, as a practical matter, the MCL for hexavalent chromium cannot be higher than 50 parts per billion, and Petitioners do not suggest otherwise.

- The standard "shall be set at a level that is *as close as feasible* to the corresponding public health goal placing primary emphasis on the protection of public health." (§ 116365, subd. (a) [emphasis added].) The public health goal is set by the Office of Environmental Health

[2] Further undesignated statutory references are to the Health and Safety Code.

Hazard Assessment ("OEHHA"), not by the Department. (§ 116365, subd. (c).) The public health goal is "an estimate of the level of the contaminant in drinking water that is not anticipated to cause or contribute to adverse health effects, or that does not pose any significant risk to health." (*Id.*) It must be based "exclusively on public health considerations," and "shall be set at the level at which no known or anticipated adverse effects on health shall occur." (*Id.*) As the name implies, it is only a *goal*, not an enforceable standard. Here, OEHHA has set the public health goal for hexavalent chromium at 0.02 parts per billion. The standard for hexavalent chromium thus must be set as close as feasible to 0.02 parts per billion, placing primary emphasis on the protection of public health.

- "[T]o the extent technologically and economically feasible," the standard shall "avoid[] any significant risk to public health." (§ 116365, subd. (b)(3).) In determining economic feasibility, the Legislature has directed the Department to "consider the costs of compliance to public water systems, customers, and other affected parties with the proposed primary drinking water standard, including the cost per customer and aggregate cost of compliance, using best available technology." (*Id.*)

As summarized by one court, setting an MCL thus "involves a balancing of public health concerns with questions of technological feasibility and cost." (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 679.)

MCLs are set via regulation, and, with certain exceptions that are not relevant here, those regulations are subject to the Administrative Procedures Act ("APA"). (§ 116365.01.) The APA imposes certain procedural requirements on adopting regulations beyond the substantive requirements imposed by the Safe Drinking Water Act. As relevant to this case, the APA requires an agency to assess a proposed regulation's "potential for adverse economic impact on businesses and individuals," and to substantively respond to all public comments on a proposed regulation. (Gov. Code §§ 11346.3 and 11346.9, subd. (a)(3).)

The Challenged Regulation

In August 2013, the Department commenced a rulemaking proceeding pursuant to the APA that proposed an MCL for hexavalent chromium of 10 parts per billion (or "ppb").[3] (AR

[3] Levels can also be expressed in milligrams per liter (or "mg/L"), and during the regulatory process, the Department expressed the level as 0.010 mg/L, which is approximately equivalent to

250-63.) According to the initial statement of reasons (occasionally referred to as the "ISOR"), the Department considered seven possible standards – 1, 5, 10, 15, 20, 25, and 30 ppb. The Department's rationale for selecting 10 ppb was set forth in its initial statement of reasons, which is discussed in more detail below. (AR 264-99.)

More than 18,000 comments were submitted on the proposed MCL, with many asserting it was too low to be economically feasible[4] and/or that the Department underestimated the cost of compliance. The Department ultimately issued a final statement of reasons that responded to comments and adopted 10 ppb as the MCL. (AR 94-139.) The regulation was approved by the Office of Administrative Law, and became effective July 1, 2014. (See 22 Cal. Code Regs § 64431.)

This case is largely about economic feasibility. Petitioners believe the MCL is too low, and that compliance will be prohibitively expensive. Their primary claim is that the Department violated the Safe Drinking Water Act by failing to adopt an MCL that is economically feasible, and by failing to properly and appropriately consider the cost of compliance to public water systems, customers, and other affected parties. They also argue the Department violated the APA by failing to properly asses the MCL's economic impact on California businesses, and by failing to respond to all public comments. They seek a writ of mandate ordering the Department to withdraw the current MCL and to promulgate a new MCL that is economically feasible.

Although not necessarily dispositive, the court notes three facts that may have some relevance to the outcome of this case, and it invites the parties to discuss these facts at the hearing.

First, in 2015, the Legislature enacted Senate Bill 385, giving public water systems additional time to comply with the MCL for hexavalent chromium, provided that certain conditions were met. (§ 116431.) Several analyses of the bill noted that the Department had recently set an MCL for hexavalent chromium at 10 ppb, but did not otherwise comment on the MCL. (See, e.g., Senate Rules Committee Bill Analysis 8/21/15; Assembly Committee on Appropriations Analysis dated 7/13/15; Senate Judiciary Committee Bill Analysis, dated 5/11/2015.) This is at least some evidence that the Legislature knew of, and approved, the MCL,

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10 parts per billion. Like the parties in their briefs, the court refers to parts per billion rather than milligrams per liter.

[4] Although a number of commenters asserted the proposed MCL was too high, and that it thus failed to adequately protect public health.

or, at the very least, that it thought the Department acted within its authority when it adopted the MCL. (See, e.g., *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207 ["Because the Legislature is presumed to be aware of a long-standing administrative practice, the failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent."]; *California Assn. of Medical Products Suppliers v. Maxwell* (2011) 199 Cal.App.4th 286, 315 [when Legislature adopts law that incorporates previously promulgated regulation, "this indicates the Legislature thought the Department acted within its authority to adopt the regulation."]; *Elk County Water Dist. v. Dep't of Forestry & Fire Prot.* (1997) 53 Cal.App.4th 1, 11 ["The Legislature is presumed to be aware of long-standing administrative practice, and its failure to modify the Act . . . here indicates acquiescence in that practice as consistent with legislative intent."].) Has the Legislature effectively ratified the MCL, and responded to complaints about its economic feasibility expense by providing additional time to comply?

Second, the court recognizes that the Department was under some time pressure to adopt the MCL. The Legislature directed the Department to adopt the MCL by January 1, 2004. (Health & Saf. Code § 116365.5, subd. (c).) The Department missed that deadline by over a decade.[5] In 2012, two environmental groups filed a petition against the Department in the Alameda County Superior Court, seeking a writ of mandate directing the Department to adopt a standard. The petition was granted, and, on December 17, 2013, the court issued a thorough and thoughtful decision directing the Department to finalize the MCL by June 15, 2014, at the absolute latest. (See Ps RJN, Ex. E.) The Department met this deadline only to find itself, once again, the Respondent in a lawsuit, this time challenging the adequacy of the regulatory process. Would this court be interfering with the judgment of the Alameda County Superior Court if it directed the Department to re-open the regulatory process over two years after that Court's deadline?

Third, and finally, the MCL went into effect over two years ago, on July 1, 2014. Although Petitioners challenged it immediately,[6] it took approximately one year to finalize the pleadings, and another year to schedule the hearing on the merits, although some of that delay

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[5] Although, in its defense, the Department could not adopt the MCL until OEHHA established a public health goal, and OEHHA did not establish a public health goal until 2011.

[6] Indeed, the petition was filed on May 29, 2014, which was after the Department issued its final statement of reasons, and before the regulation went into effect.

was caused by the court's schedule. In any event, the court presumes that, since the MCL went into effect, public water systems have begun implementing it, and that at least some of these systems have incurred substantial costs in doing so. What will these water systems do if the court remands this case to the Department and the Department adopts a different MCL?

STANDARD OF REVIEW

The parties disagree on the standard of review. Petitioners argue most of the Department's actions in this case were ministerial, and thus entitled to little judicial deference. The Department disagrees, and argues its actions must be reviewed deferentially, and upheld unless arbitrary, capricious, or lacking in evidentiary support. Both sides are partially correct.

This petition is brought under Code of Civil Procedure section 1085, which allows the court to issue a writ of mandate for two reasons: (1) to compel the Respondent to perform a ministerial act required by law; or (2) to correct an abuse of discretion. (Code Civ. Proc. § 1085; *Young v. Gannon* (2002) 97 Cal.App.4th 209, 221; *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 105.) The standard of review depends largely on why the writ is sought.

The MCL is a quasi-legislative rule. (See, e.g., *Western States Petroleum Assn. v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1006-07.) As our Supreme Court has explained:

> quasi-legislative rules … represent[] an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. [Citations.] Because agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

(*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-16.) To the extent Petitioners challenge the Department's "determination and weighing of the facts and policy considerations" relevant to setting the MCL, the MCL comes before the court "with a strong presumption of validity," and Petitioners have "the burden of demonstrating its invalidity." (*Western States Petroleum Assn., supra*, 99 Cal.App.4th at 1007.) In order to meet their burden, Petitioners must demonstrate "that the regulation is arbitrary and capricious," that it is "without rational basis," or that it is not supported by "substantial evidence." (*Id.*; *Western States Petroleum Assn.*, *supra*, 57 Cal.4th at 415.)

To the extent Petitioners' claim is that the Department failed to comply with a statutory requirement when it adopted the MCL, the issue is one of statutory construction, which "is a question of law on which the court exercises its independent judgment." (*Id.*)

ANALYSIS

1. The Alleged Safe Drinking Water Act Violations

A. Economic Feasibility

Petitioners' primary concern is with the economic feasibility, or cost, of the MCL. As noted above, the Safe Drinking Water Act requires the Department to set the MCL "at a level that is *as close as feasible* to the corresponding public health goal [here, 0.02 ppb] placing primary emphasis on the protection of public health, and that, to the extent technologically and *economically feasible*, . . . avoids any significant risk to public health." (§ 116365, subd. (a) [emphasis added].) Because the term "feasible" is defined solely by reference to technological and economic feasibility, the court interprets this provision as requiring the Department to set the MCL at a level that is as close as *economically feasible* to the public health goal.[7] This also, necessarily, means that the Department must set the MCL at a level that is economically feasible.[8] The Act also requires the Department to "*consider*" the "economic feasibility of compliance" with the MCL, and provides that, "[f]or purposes of determining economic feasibility," the Department "shall consider the costs of compliance to public water systems, customers, and other affected parties with the [MCL], including the cost per customer and aggregate cost of compliance, using best available technology." (*Id.*, subd. (b) [emphasis added].)

Petitioners argue both (1) that the Department failed to consider the economic feasibility of complying with the MCL and (2) that the MCL it adopted is not economically feasible. The

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[7] It also requires the MCL to be as close as technologically feasible to the public health goal. This case, however, is about economic feasibility, not technological feasibility.
[8] And the Department does not seriously suggest that it can set the MCL at a level that is not economically feasible.

court agrees with the first argument, and thus remands this case to the Department in order to consider economic feasibility. Because the court remands this case to the Department for further consideration of economic feasibility, it need not decide whether the MCL *is* economically feasible, although, as will become apparent below, it has some concerns about the MCL's economic feasibility for small water systems and their users.

Petitioners' first, and most persuasive, argument is that the Department failed to determine whether the MCL was economically feasible – it simply estimated the cost of complying with each of the seven MCLs it considered, and then picked 10 ppb as the standard, but failed to consider whether the standard it picked was economically feasible. In their reply, Petitioners confirm that their argument is not that the Department conducted a flawed economic feasibility analysis, but that it failed to conduct any feasibility analysis at all. The court agrees.

The Department essentially equates its economic feasibility analysis with its cost-benefit analysis. Whatever that analysis is called, the bulk of it consisted of estimating the cost of complying with the seven MCLs that were considered. (AR 275-87.) At the end of this process, which is discussed in more detail in the next paragraph, the Department had seven sets of cost estimates (i.e., one for each of the MCLs under consideration). The Department then, very briefly and not entirely clearly, estimated the benefits of complying with the proposed MCL (which it determined was 12 cancer cases avoided per year).[9] (AR 287-88.) Finally, the Department set the MCL at 10 ppb without discussing or analyzing the economic feasibility of that standard.

The Department's cost estimates themselves are quite thorough. They are broken down by water system size: (1) less than 200 service connections (small); (2) between 200 and 1,000 service connections (medium); (23) between 1,000 and 10,000 service connections (large); (4) and over 10,000 service connections (very large). For each of the four water system sizes and each of the seven MCLs under consideration, the Department estimated monitoring costs; capital costs (total and annualized); operation and maintenance costs; annual cost per system; annual cost per water source; and annual cost per service connection (i.e., per customer or household).

[9] It does not appear that the Department estimated either the number or the cost of cancer cases avoided for all of the MCLs under consideration, just for the proposed MCL of 10 ppb.

The estimates are presented in seven tables. Here is one example (which the court has modified slightly), with the actual MCL set by the Department highlighted:[10]

Estimated Annual Cost per Service Connection by System Size

MCL (ppb)	No. of Service Connections				Annual Cost Per Service Connection ($)			
	<200	200-<1,000	1,000-<10,000	≥10,000	<200	200-<1,000	1,000-<10,000	≥10,000
1	13,225	29,979	623,016	4,181,888	7,160	1,220	483	300
5	5,023	11,683	235,700	2,696,321	6,680	1,090	398	117
10	2,453	4,418	113,550	1,595,790	5,630	857	326	64
15	1,227	1,101	70,351	1,148,896	5,870	1,310	280	37
20	535	232	48,165	904,159	5,470	1,040	190	25
25	140	0	22,354	862,913	4,240	--	14	17
30	95	0	13,269	796,447	4,140	--	200	11

(AR 287.)

Petitioners argue that the Department simply calculated its cost estimates, but then failed to take the required next step and consider whether its cost estimates were economically feasible. Instead, after calculating its estimates, the Department simply noted that cost per service connection was greater for smaller water systems, and then concluded: "Pursuant to section 116365 of the Health and Safety Code and its mandate to place primary emphasis on the protection of public health, the Department is proposing an MCL of [10 ppb] to be adopted for hexavalent chromium." (AR 288.) Petitioners argue the Department thus failed to even *consider* economic feasibility, as it was required to do. The court agrees. Simply coming up with cost estimates for seven MCLs and then selecting one of those MCLs is not equivalent to considering the economic feasibility of complying with the MCL.

The Department makes numerous points in its opposition. None persuade.

For example, the Department stresses that, for customers of very large water systems (i.e., over 10,000 service connections), water bills are estimated to increase by only $5.33 per month (or $64 per year). This is true, and presumably the Department's point is that $5 a month is economically feasible for anybody. But merely noting this fact does not demonstrate the Department actually considered economic feasibility when it set the MCL. Moreover, this is cold comfort to the customers of small water systems, whose bills are estimated to go up by ***$5,630 per year***, or $469.17 per month. This number is the Department's own estimate. This

[10] The court uses this table as an example because, as discussed in more detail below, it contains the one cost estimate that, on its face, appears economically ***un***feasible.

number is big -- so big that appears, at least on its face, to be economically ***un***feasible for some families. At the very least, the court is concerned that some customers will not be able to afford a $5,630 increase in their water bills. The Department should come to the hearing prepared to address this concern, because the administrative record in this case does not do so.

The Department also notes it did not select the more restrictive MCLs that it considered (i.e., 1 or 5 ppbs). Again, this is true, but it does not establish that the Department considered whether the MCL actually chosen -- 10 ppb -- was economically feasible.

The Department also notes it estimates the annualized statewide aggregate total cost of compliance is $155.4 million.[11] It then cites the U.S. Census Bureau's website to prove there are 12.5 million households in California. Finally, it notes that $155.4 million works out to just $12.46 per household. Two points. First, it does not appear that the Department actually considered the number of households in California when it adopted the MCL or analyzed its economic feasibility,[12] and it cites no authority for its implicit argument that an agency may justify a regulation after the fact by relying on evidence that it did not consider during the regulatory process. Indeed, the law appears to be otherwise. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 574 ["It is well settled that extra-record evidence is generally not admissible in . . . traditional mandamus actions challenging quasi-legislative administrative decisions."].) Second, the Department acknowledges that not all households will be affected by the regulation. Indeed, its own data showed that only one-third of monitored water sources contained detectable levels of hexavalent chromium, and even fewer would contain levels above 10 ppb. (AR 273.) When considering the MCL's economic feasibility, the court is not convinced that it is reasonable to spread the cost of compliance among *every* household in California when it is clear that the cost will be borne by a much smaller subset.

The Department also argues that although the estimated annual cost per service connection for small systems "is high for an average family, the projected number of users affected by this number is small," although the Department fails to point to anything in the record that quantifies how many users will be impacted. Moreover, even if only a small number

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[11] Or $13.5 million for small systems, $3.8 million for medium systems, $36.9 million for large systems, and $101.2 million for very large systems. (AR 282-83.)

[12] The fact that the Department cites to the Census Bureau's website rather than the administrative record to establish this point only underscores the fact that the Department failed to consider number of households in selecting a MCL.

of users will be affected by a $5,600 increase, it does not follow that an increase of this magnitude is economically feasible. Indeed, in its final statement of reasons, the Department comes close to acknowledging the MCL is *not* economically feasible for customers of small water systems: "The Department recognizes that for small water systems compliance with the proposed MCL . . . may not be affordable."[13] (AR 114.) The Department makes a similar concession in its opposition brief when it notes that there are over 38 million people in California,[14] that the majority live in cities served by large water systems, and that, as a result, "the majority . . . will be economically impacted at a feasible level that can be fairly shared among water users." (Opp. at 9:13-14.) The nearly unmistakable conclusion is that at least some Californians will be economically impacted at a level that is ***not*** feasible.

The Department notes the Safe Drinking Water Act does not define the term "economic feasibility," and it argues "economically feasible" is not synonymous with "affordable." Perhaps. But economic feasibility has to mean something, and it is difficult to conceive of a definition that does not at least consider affordability. The term "feasible," as Petitioners note, generally means "[c]apable of being done, affected or accomplished. Reasonable assurance of success." (Black's Law Dict. (6th ed. 1990) p. 609.) And the term "economic" means "pertaining to the production, distribution, and use of income," or "pertaining to one's personal resources of money." (See dictionary.com.) Moreover, at least one other court has found that the term "feasible" means both "technically possible and affordable." (*City of Portland v. Environmental Protection Agency* (D.C. Cir. 2007) 507 F.3d 706, 712.) Although *City of Portland* arose under the federal Safe Drinking Water Act while this case arises under California's Safe Drinking Water Act, both the federal and state Acts require that drinking water standards be set as close as feasible to the corresponding public health goal. (Compare. 42 U.S.C. § 300g-1, subd. (b)(4)(B) [MCL shall be "as close . . . as is feasible" to the goal], with § 116365, subd. (a) [MCL "shall be set at a level that is as close as feasible to the corresponding public health goal"].) Whether one uses the term "economically feasible" or the term

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[13] The Department also notes these systems might be able to lower costs if they use something other than the best available technology, but it fails to explain how such systems could actually utilize these "second-best" and less costly technologies.

[14] A fact which does not appear to be mentioned in the administrative record, and which is thus cannot be used to justify the regulation here. (See *Western States Petroleum Assn., supra*, 9 Cal.4th at 574.)

"affordable," the court is concerned that some families will not have the income or personal resources to pay a water bill that increases by $5,600 per year. Equally important, the court is not convinced that the Department properly considered this fact when it adopted the MCL.

The court agrees with the Department's assertion that Californians who get their water from small systems need to have their health protected as much as everyone else. The court also agrees with the Department's contention that Petitioners are essentially making a "micro argument" that focuses on one small segment of the population. It does not follow, however, that the Department can simply ignore the economic feasibility of the regulation on that small segment of the population that will bear disproportionately higher costs.

The Department states it has no discretion to adopt a different, more affordable, MCL for small water systems. (See AR 106.) This may or may not be true.[15] Whether it adopts one standard for the entire state, or different standards for different sized water systems, however, the Department must nonetheless consider economic feasibility and must adopt a standard that is economically feasible.

As the above discussion shows, the court has concerns that the Department's own analysis acknowledges that the MCL it adopted will not be economically feasible for some families. Perhaps more importantly, the court is not convinced that the Department considered this fact when it adopted the MCL, or, more generally, that it considered economic feasibility at all. Instead, it simply estimated the cost of complying with the MCL, and then stated it was adopting the MCL. It is required to do more. The court thus tentatively agrees Petitioners are entitled to a writ of mandate remanding this case to the Department with instructions to comply with the Legislature's mandate to consider the economic feasibility of complying with the MCL when setting the MCL. In remanding this case to the Department, however, the court is *not* definitively holding that an MCL of 10 ppb is not economically feasible (although the court's concerns about this level should be clear by now). This is because the Legislature has entrusted that determination to the Department, not to this court. On remand, once it has properly considered economic feasibility, it will be up to the Department to set the MCL at a level that is as close as economically feasible to the public health goal, placing primary emphasis on the

[15] The Department cites no legal authority for this position. The court notes the Legislature directed the Department to adopt a primary drinking water *standard* for hexavalent chromium, not to adopt primary drinking water *standards*. (§ 116465.5.) However, the court need not decide here whether the MCL must be a single number for all water systems across the state.

protection of human health. It may well be that, after properly considering economic feasibility, the Department will, once again, set the MCL at 10 ppb.

B. The Alleged Flaws in the Department's Data and Cost Estimates

Petitioners' next argument concerns the Department's data and its cost estimates. It argues: (1) the Department used an incomplete, and fatally flawed, database to come up with its cost estimates; and (2) system specific data shows the Department's cost estimates are inaccurate. These arguments fail to persuade this court. .

As noted above, the Department was required to consider "the costs of compliance to public water systems, customers, and other affected parties . . . , including the *cost per customer* and *aggregate cost of compliance*. . . ." (§ 116365, subd. (b)(3).) In order to estimate these costs, the Department relied on a database that contained monitoring data supplied by public water systems. Petitioners complain the database is incomplete. It *is* incomplete – a fact which the Department fully acknowledges. It is also, however, the information that the Department had to work with, and the Department's reliance on this database does not render the challenged MCL arbitrary and capricious. Petitioners fail to show that the database was so fatally incomplete that it was unreasonable for the Department to base its cost estimates thereon.

The Department began populating the database in 2001, after it promulgated a regulation (since repealed) requiring public water systems to monitor for hexavalent chromium and to submit the results to the Department. (AR 273; 22 Cal. Code Regs § 64450 [since repealed].) Systems were required to conduct one round of monitoring by December 31, 2002. (22 Cal. Code Regs § 64450, subd. (b).) Most of the data in the database comes from this initial round of monitoring, although some water sources continued to monitor for hexavalent chromium after December 31, 2002, and to submit their findings to the Department. (AR 276.)

Not all systems submitted monitoring results. Systems could apply for a waiver from the monitoring requirement if they could demonstrate either (1) that hexavalent chromium "has not been previously used, manufacturer, transported, stored, or disposed of within the watershed or zone of influence and, therefore, that the source can be designated nonvulnerable," or (2) that the source was relatively unsusceptible to hexavalent chromium contamination based on, among other things, previous monitoring results. (*Id.*, subd. (c); 22 Cal. Code Regs § 64445, subd. (d).) In addition, systems that served fewer than 150 services connections were eligible for an exemption from the monitoring requirements. (22 Cal. Code Regs § 64450, subd. (d).) The Department also acknowledges that it did not enter data from some small water systems (with fewer than 200 service connections) until June 2001, when electronic data transmission became required. (AR 276-77.)

According to the initial statement of reasons, the Department received monitoring data from over 7,000 out of 11,827 total sources (or approximately 60 percent), and this data showed that about one-third of those sources had detectable levels of hexavalent chromium.[16] (AR 273, 278.) It is thus quite obvious that the database did not contain data on *all* of the state's water sources. The Department fully acknowledges in its statement of reasons that "the dataset cannot be assumed to be complete at the time of download (October 1, 2010)." (AR 276.) The Department also acknowledges that the "data gap" is more pronounced for small water systems with less than 200 service connections. For those small systems, the Department lacked monitoring data for approximately 60 percent of the sources (which is another way of saying that it had data for only approximately 40 percent of the sources). (AR 284.)

The Department used the database to estimate the cost of complying with the proposed standards. Briefly, the Department came up with its cost estimates by first determining the number of water sources that would require treatment in order to meet each MCL being considered. This number would vary based on the MCL. For example, a source with a current hexavalent chromium level of 18 ppb would require treatment if the MCL was set at 1, 5, 10, or 15 ppb, but not if the MCL was set at 20, 25, or 30 ppb. In general, the lower the MCL, the greater the number of sources that would need treatment in order to comply. Next, the Department estimated the cost of treatment.[17] The Department then multiplied the number of water sources that would require treatment by the estimated cost of treatment to come up with the aggregate cost of compliance for each MCL being considered. This aggregate cost was then divided by the number of service connections in order to come up with the cost per customer (or cost per service connection).

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[16] More precisely, about one-third had levels above the 1 ppb reporting limit. A reporting limit is the lowest concentration at which a chemical can be detected in a sample and its concentration reported with a reasonable degree of accuracy and precision. Note that if one-third of the sources had levels above the reporting limit, this means that two-thirds had levels *below* the reporting limit and thus would thus *not* require treatment.

[17] It does not appear that Petitioners challenge the Department's estimates regarding treatment costs.

Most of Petitioners' complaints about the accuracy of the Department's data have to do with its *aggregate* cost estimates. Because aggregate cost is a function of the number of water sources requiring treatment, and because the Department only had data on about 60 percent of the state's total water sources (and about 40 percent of the water sources used by small water systems), Petitioners believe the Department's aggregate cost estimates are significantly understated. Even if this is true, the court agrees with the Department's assertion that cost per service connection is more pertinent than aggregate costs when determining economic feasibility.

For example, Petitioners note numerous times that, according to the Department's own estimate, the aggregate cost of complying with the MCL would be $870 million. Although Petitioners believe this number is understated, they also assert that even $870 million is a massive expenditure, and that a number this big is, in essence, unfeasible on its face. The court disagrees. Although the Department was required to consider aggregate compliance costs, the feasibility of aggregate costs depends, in large part, on how widely those costs are spread. It makes a big difference whether a $1 million capital improvement project is spread out among 100 users or 100,000 users. In the first instance, each user pays $10,000; in the second, each user pays $10. The feasibility of aggregate costs also depends on the period of time over which those costs will be paid. Petitioners fail to acknowledge that a large portion of the aggregate costs are up front capital costs, which will be repaid over an estimated 20 years. Most people would find it economically unfeasible to purchase a house if not for the ability to take out a mortgage and pay for the house over 15 or 30 years; the same is true here for the large up front capital costs. Thus, even if the court assumes the Department's aggregate estimates are understated, it is not convinced this understatement is fatal.

In any event, Petitioners believe the Department should have accounted for, or corrected, its "data gap" by (1) extrapolation or scaling up (i.e., assuming the same incidence of hexavalent chromium in those water sources that did not submit data as was found in those that did submit data); (2) using data that it had for total chromium; or (3) using more recent data. Although the Department certainly could have chosen to use one of Petitioners' correction methods, Petitioners fails to convince that it was *required* to do so. Moreover, the Department has explained why it did not correct its data, and the court finds the Department's explanation is both rational and supported by substantial evidence.

For example, the Department concluded that extrapolation would have posed its own set of problems, because many of the water sources that did not submit monitoring data were sources that could demonstrate they were not vulnerable to hexavalent chromium. (AR 276.) It is thus not reasonable to assume, as Petitioners suggest, that the Department's data could simply be scaled up.

The Department also explained that it did not use data on total chromium as a surrogate for hexavalent chromium because its own study suggested there was not always a direct relationship between the two. Instead, the Department's study showed the percentage of hexavalent chromium to total chromium ranged from 8 percent to 100 percent. Although the Department acknowledged a different study that suggested a "strong relationship" between hexavalent chromium and total chromium, it noted that study indicated "some scatter in the data" or "a fair number of sources where the relationship does not hold and where . . . hexavalent chromium is only a small amount of the total chromium present." The Department thus explained "we do not believe that it is appropriate to assume that all total chromium in groundwater sources is solely the contribution of hexavalent chromium." (AR 108.) This explanation is reasonable.

Finally, the Department explained that it did not use more recent data because "the development of 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 108.) The court agrees, and Petitioners fail to convince that the point of time chosen by the Department is arbitrary or capricious.

In addition to criticizing the Department's data, Petitioners also complain that "system specific" data demonstrates that the Department's cost estimates are inaccurate. They fail to convince. Here is one example cited by Petitioners. The Coachella Valley Water District services approximately 220,000 people, and is thus presumably a "very large" water system as defined by the Department. According to a comment letter submitted by the District during the regulatory process, the Department estimated that its capital costs for complying with the MCL would be $71.2 million, while the District's own estimates were substantially higher. (AR 6263.) Unfortunately, the District does not explain in its comment letter the basis of its $71.2 million estimate, Petitioners merely cite the District's comment letter without explaining where this number comes from, and the court cannot find this number in the Department's cost estimates. Because the court cannot tell where the $71.2 million figure comes from, it cannot even begin to analyze Petitioners' claim that the Department vastly underestimated the District's capital costs.[18]

There is a more fundamental problem with this type of "system specific" argument.[19] As the court understands it, the Department's costs estimates are averages. That means, almost by definition, that some system's costs will be higher than the Department's estimates, and some will be lower. Indeed, the Department recognized that actual costs for any particular system "will vary depending on many site-specific parameters, such as the level of hexavalent chromium in the source, physical qualities of the water and any other regulated chemicals present, type and method of residual disposal, availability of land, and cost of construction later and water treatment plan operating staff," and on economies of scale. (AR 287, 282.) Assume, for example, three comparably-sized water systems with compliance costs of $1,000, $10,000, and $100,000. The average cost of compliance for these three systems is $37,000. In effect, Petitioners point to the one system with $100,000 in compliance costs to demonstrate that the $37,000 estimate is significantly understated. That, however, is the nature of an average. Thus, the fact that "system specific" costs are higher or lower than the Department's estimates does not render those estimates fatally flawed.

In sum, Petitioners fail to convince that either the Department's data or its cost estimates are fatally flawed.

2. The Alleged APA Violations

Petitioners also contend the Department violated two provisions of the APA. In order to prevail on this claim, Petitioners must show there was "a substantial failure to comply" with the APA. (Gov. Code § 11350, subd. (a).) Noncompliance is insubstantial only if it does not

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[18] Petitioners do inform the court that the District initially informed the Department its actual capital costs would be $518 million, but that it later told the Legislature its capital costs would be around $200 million. Based on the evidence cited by Petitioners, it appears that it is the District, not the Department, whose numbers are inaccurate.

[19] I.e., the argument that the Department's cost estimates are inaccurate for specific systems, and that they thus must be inaccurate overall.

compromise the objectives of the APA. (*Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1073.)

A. The Economic Impacts Analysis

The APA "was born out of the Legislature's perception there existed too many regulations imposing greater than necessary burdens on the state and particularly upon *small businesses*." (*Western States Petroleum Assn., supra,* 57 Cal.4th at 425 [emphasis added].) The APA thus requires state agencies to assess the economic impacts of their proposed regulations. (*Id.* at 425-27.) In particular, an agency proposing a regulation must assess the regulation's "potential for adverse economic impact on California business enterprises and individuals . . . ." (Gov. Code § 11346.3, subd. (a).) In performing this assessment, the agency must "consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states." (*Id.*) Among other things, the agency must consider whether the proposed regulation will affect the creation or elimination of jobs, and the creation of new businesses or the elimination of existing businesses. (*Id.*)

The Department concluded the regulation would have no economic impact on businesses or individuals. It explained this conclusion in the initial statement of reasons:

> The Department has determined that the proposed regulatory action would have no significant ***direct*** adverse economic impact on California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states. The proposed regulations apply only to public water systems, as defined pursuant to Health and Safety Code section 116275, which are not businesses or individuals. Public water systems are water companies providing drinking water to the public and, pursuant to Government Code section 11342.610, are exempt from the definition of a small business.[20]

(AR 295 [emphasis added]; see also AR 297 ["the proposed regulation would not affect small business because Government Code . . . section 11342.610 excludes drinking water utilities from the definition of small business."].) In other words, the Department only considered the economic impact of the regulation on water systems themselves, and concluded there would be no economic impact (adverse or otherwise), because water systems are not businesses. The

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[20] This is true. Government Code section 11342.610 provides the term "small business" "does not include. . . a water company." (Gov. Code § 11342.610, subd. (b)(8).)

Department makes this clearer in its cost estimating methodology: "[Public water systems] are water companies providing drinking water to the public and, pursuant to Government Code section 11342.610, are exempt from the definition of a small business. As such, *there will be no economic impact to businesses or individuals*." (AR 359 [emphasis added].)

Petitioners do not dispute that water systems themselves are not businesses within the meaning of the APA, but they contend the Department should have considered how the regulation would impact businesses (and individuals) that *use* water, because the regulation will cause their water rates to go up. The court agrees.

The Department argues it was only required to consider the *direct* impact of the regulation on the regulated entity. As Petitioners note, however, the term "economic impact" means "*all costs . . .* (*direct, indirect or induced*) of the proposed major regulation on business enterprises and individuals . . . ." (1 Cal. Code Regs § 2000, subd. (e) [emphasis added].) According to the Department's own cost estimates, the regulation will cause water rates to increase by up to $5,630 annually, and will thus have an indirect (or induced) economic impact on businesses (and individuals) that buy water. (AR 287.) Although the impact for a business is likely to be relatively small, the Department was nonetheless required to assess it. The Department notes (accurately) that the definition of "economic impact" quoted above was not added to the Code of Regulations until November 1, 2013. The Department's point is that it began the regulatory process in August 2013, and thus could not have considered a definition that was not in effect at that time. True, but the Department did not respond to public comments and prepare its final statement of reasons until April of 2014, but which time the new definition had been in effect for over six months. The Department offers no explanation for why it could ignore a definition that became effective during the pendency of the regulatory process.

Petitioners also contend the Department should have considered how the regulation would impact non-transient, non-community water systems, which include private businesses like wineries, commercial nurseries, agricultural operations, and food processors. According to the Department's own "cost estimating methodology," 65 private non-transient, non-community water systems will be affected by the regulation, and Petitioners contend the Department was required to consider the regulation's impact on these businesses. (AR 367.) The Department never responds to this argument. The court notes that although these non-transient, non-community water systems serve small numbers of people, they will be disproportionately impacted by the MCL. The Department estimates a total of 128 water systems will be affected by the MCL, of which, as noted, 65, or over 50 percent, are non-transient, non-community water systems. (*Id.*) On remand, the Department must consider the economic impact of the regulation on these systems.

The Department contends this case is "very similar" to *Western States*, supra, 99 Cal.App.4th 999, and it argues that, as in that case, the court should uphold the Department's economic analysis. *Western States*, however, did not involve compliance with the APA in general or the APA's economic impact assessment in particular. Indeed, it never mentions the APA. *Western States* thus provides no authority for the Department's argument that its economic impact analysis is adequate under the APA.

B. Response to Public Comments

Under the APA, the public is allowed to comment on an agency's proposed regulation. The agency's final statement of reasons for adopting the regulation must contain a "summary" of each comment, and an "explanation of how the proposed action has been changed to accommodate each [comment], or the reasons for making no change." (Gov. Code § 11346.9, subd. (a)(3).) Petitioners contend the Department failed to respond to numerous public comments.

The Department received approximately 18,000 comments. (AR 94.) The APA does not require an individual respond to each comment, but allows an agency to "aggregate and summarize repetitive . . . comments as a group" and to "respond to repetitive comments . . . as a group." (Gov. Code § 11346.9, subd. (a)(3.) In its final statement of reasons the Department prepared a 44-page response to the comments it received. (AR 94-137.) As it was permitted to do, the Department aggregated and summarized repetitive comments, and responded to them as a group. Petitioners claim the Department nonetheless failed to respond to comments about (1) economic feasibility and/or affordability, and (2) the number of impacted sources (i.e., the data gap).

For the reasons discussed above, the court agrees that the Department failed to respond to comments about the MCL's economic feasibility and/or affordability, at least as to small water systems and their customers. It must do so on remand. The Department did, however, adequately respond to the other comments about which Petitioners complain.

It is not easy to determine precisely what comments Petitioners contend the Department failed to respond to, but most appear to be comments about "specific cost of compliance information." Presumably, Petitioners refer to comments from water systems stating they had done their own compliance estimates and that the Department had underestimated their compliance costs. For example, according to the Department's estimates, the annual cost of compliance per service connection for water systems with between 1,000 and 10,000 connections would be $326. (AR 287.) The City of Dixon, which serves approximately 2,600 connections, estimated its cost of compliance would actually be $552 per service connection, and it noted this in a comment letter.[21] (AR 6395-96.) Presumably Petitioners' point is that the Department failed to respond to this comment by explaining why its estimate is $200 less than the City of Dixon's estimate. The court has already discussed this type of "system specific" argument above. Again, the problem with this argument is that Petitioners (and those whose comments they cite) fail to explain how they came up with their own system specific estimates, and how they compared their estimates to the Department's estimates.[22] In any event, and as also discussed above, the Department's estimates are based on averages. Thus, as the Department noted in its response to comments, "some water systems may incur costs exceeding those provided, while others may incur significantly less costs utilizing other means of compliance or treatment." (AR 107-08.) This response is both true and sufficient.

As also discussed above, Petitioners believe the Department underestimated the number of sources that would be impacted by the proposed MCL because it relied on an incomplete database. A number of commenters expressed similar views. (See AR 106-07.) In particular (and as summarized by the Department), commenters noted the Department "did not consider [the] most recent occurrence data available," and that it should have used data on total chromium as a surrogate for hexavalent chromium. (AR 106-07.) Petitioners argue the Department failed

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[21] Although not entirely clear, it appears that the difference between the Department's estimate and the City of Dixon's estimate may stems from the fact that the City of Dixon did "preliminary sampling" in 2013 that showed all five of its wells had hexavalent chromium concentrations above the MCL. (AR 6395.)

[22] For example, one of the commenters states it represents a system serving 2,500 connections which estimates its projected capital compliance costs at $10 to $35 million, and its operating costs at $67,000 to $2.1 million. Presumably, this commenter believes the Department's estimates are lower, but it is not clear which of the Department's estimates are the proper comparison.

to respond to these comments about the data gap. The Department did respond. It noted it used monitoring data submitted up to December 31, 2009, which was accessed on October 1, 2010, and it adequately explained why it did not use more recently submitted data: "[I]t 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 108.) As the court has already stated, it agrees. Any other rule would create a regulatory process that never ends. As also discussed above, the Department adequately explained in the final statement of reasons why it did not use total chromium as a surrogate for hexavalent chromium. Again, the court has already found this response is adequate.

CONCLUSION

For the reasons stated above, the petition is granted, in part, and this case shall be remanded to the Department with instructions to consider the economic feasibility of complying with the MCL. The Department is also instructed to assess the regulation's economic impact on California businesses and individuals. Finally, the Department is instructed to more adequately respond to comments regarding the MCL's economic feasibility, particularly for small water systems and their users.

The tentative ruling shall become the court's final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear. In the event this tentative ruling becomes the final ruling of the court, counsel for the prevailing party is directed to prepare a formal judgment and writ, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

The court prefers that any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court day before the hearing. (See Cal. Rule Court, Rule 3.670; Sac. County Superior Court Local Rule 2.04.)

In the event that a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.