

**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 AND SOLANO COUNTY TAXPAYERS ASSOCIATION v. STATE WATER RESOURCES CONTROL BOARD**

**CASE NUMBER**  
34-2015-80001850

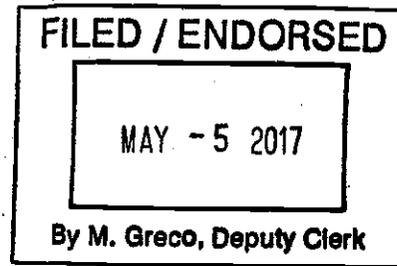
I certify that I am not a party to this cause. I certify that a true copy of the attached, clerk's certificate of service by mail and **ORDER AFTER HEARING GRANTING PETITION FOR WRIT OF MANDATE**, 5/05/2017, was mailed following standard court practices in a sealed envelope with postage fully prepared, addressed as indicated below. The mailing and the certification occurred at Sacramento, California, on 5/05/2017

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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 AFTER HEARING GRANTING  
PETITION FOR WRIT OF MANDATE

On August 26, 2016, hearing was held on the court's tentative ruling on the petitions for writ of mandate. Petitioners were represented by Andrew L. Collier and Clifton McFarland. Respondents were represented by Deputy Attorney General Russell B. Hildreth and Nicholas Stern. On November 15, 2016, the court issued an order noting that it intended to adopt most of the substance of its tentative ruling, and also identifying several issues regarding the appropriate remedy on which it requested additional briefing. Have now considered all of the parties' papers and arguments, the court now issues the following final ruling.

**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.<sup>1</sup> The Department adopted the MCL pursuant to the Safe Drinking

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<sup>1</sup> 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

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 adopt a new MCL at a level that is economically feasible. For the reasons stated below, the petition is granted, in part, and this case is remanded to the Department to consider the MCL’s economic feasibility in light of this order.

## 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).)<sup>2</sup> 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

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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 this case will actually be remanded to the Board.

<sup>2</sup> Further undesignated statutory references are to the Health and Safety Code.

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 never been challenged. Thus, as a practical matter, the MCL for hexavalent chromium cannot be higher than 50 parts per billion, and Petitioners do not seriously 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 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. Although it is clear from the allegations in the original petition that Petitioners believe the public health goal is too low,<sup>3</sup> they do not challenge it. (See Pet., ¶¶ 12-24.) 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.*)

The combined effect of the criteria just discussed is that the MCL for hexavalent chromium must be set (1) at or between 0.02 and 50 parts per billion, and also (2) as close as technologically and economically feasible to 0.02 parts per billion. As summarized by one court,

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<sup>3</sup> Indeed, they appear to believe the public health goal for hexavalent chromium should be set at a level that is *above* the EPA's MCL for total chromium (i.e., above 100 ppb), which is certainly an interesting position to take. (Pet. ¶¶ 22, 24.)

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.4<sup>th</sup> 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 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. (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”).<sup>4</sup> (AR 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 (such as it was) for selecting 10 ppb was set forth in its initial statement of reasons, and 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 and/or that the Department had underestimated the cost of compliance.<sup>5</sup> 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

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<sup>4</sup> 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 10 parts per billion. Like the parties in their briefs, the court refers to parts per billion rather than milligrams per liter.

<sup>5</sup> Although a number of commenters asserted the proposed MCL was too high, and that it thus failed to adequately protect public health. It appears safe to say that, no matter what MCL the Department adopted, some would believe it was too high, and some would believe it was too low.

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 assess 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.

### 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.4<sup>th</sup> 209, 221; *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4<sup>th</sup> 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.4<sup>th</sup> 999, 1006-07.) As our Supreme Court has explained:

[Q]uasi-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.4<sup>th</sup> 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.4<sup>th</sup> 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.4<sup>th</sup> 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 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].) The corresponding public health goal in this case is 0.02 ppb, and recall that the public health goal itself must be set at a level that avoids “any significant risk to health.” (§ 116365, subd. (c)(1)(B).) Thus, the court interprets the Safe Drinking Water Act as requiring the Department to set the MCL at a level that is as close as economically feasible to 0.02 ppb.<sup>6</sup> When considering economic feasibility, the Act requires the Department to “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.” (§ 116365, subd. (b).)

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

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<sup>6</sup> 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.

economically feasible, although, as will become apparent below, it has 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 determine 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, somewhat reluctantly, 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 each of the seven MCLs that it 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).<sup>7</sup> (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); (3) 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). 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:

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<sup>7</sup> 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.

**Estimated Annual Cost per System by System Size**

MCL (ppb)	No. of Affected Systems				Annual Cost Per System (\$)			
	<200	200- <1,000	1,000- <10,000	≥10,000	<200	200- <1,000	1,000- <10,000	≥10,000
1	340	72	160	122	278,000	507,000	1,883,000	10,271,000
5	130	31	60	64	258,000	409,000	1,564,000	4,949,000
10	55	10	29	34	251,000	278,000	1,276,000	2,983,000
15	28	4	18	20	257,000	362,000	1,095,000	2,143,000
20	13	1	13	12	225,000	241,000	706,000	1,850,000
25	3	0	6	10	198,000	--	686,000	1,461,000
30	2	0	3	7	197,000	--	885,000	1,292,000

(AR 286.) Here is another example:

**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 any of these cost estimates were economically feasible. Instead, the Department simply 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 either consider or determine whether it was economically feasible to set the MCL at 10 ppb. 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 opposition. Although several of its points are well taken, it ultimately fails to convince that it adequately considered whether the MCL it set is economically feasible.

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. Presumably the Department's point is that \$5 a month is economically feasible on its face. This may or may not be true,<sup>8</sup> but merely noting this fact in its opposition brief does not demonstrate that the Department considered economic feasibility when it adopted the MCL. Indeed, the Department points to nothing in the administrative record that demonstrates it actually considered this fact when it set the MCL. (See, e.g., *Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4<sup>th</sup> 1086, 1111 [court may disregard post hoc rationalizations for agency action].) Moreover, the fact that customers of large water systems will see their bills increase by \$64 per year is cold comfort to customers of small water systems, whose bills are estimated to go up by \$5,630 per year, or \$469.17 per month. Note that this number is the Department's own estimate. This number is big – so big that it appears, on its face, to be economically *un*feasible for many people. At the very least, the court is concerned that some people will not be able to afford a \$5,630 increase in their water bills, and that the Department failed to consider this when it set the MCL.

At the hearing, the Department attempted to respond to this concern by arguing that small water system customers would not *necessarily* see their water bills increase by \$5,600 per year. For example, if “compelling factors” are present, a water system may seek an exemption from any MCL. (§ 116425.) “Compelling factors” include (1) economic factors and (2) serving a disadvantaged community. (*Id.*, subd. (a)(2).) As might be guessed, however, complete exemptions are difficult to obtain and are only available for a limited period of time while the system works towards compliance. (*Id.*, subd. (b) through (h).) As another example, small water systems might be able to comply with the MCL by using “point-of-entry” or “point-of-use” treatment devices rather than more costly centralized treatment if they can demonstrate that centralized treatment is not immediately economically feasible.<sup>9</sup> (See § 116380; 22 Cal. Code Regs §§ 64417 – 64420.7.) In order to use these devices, small water systems are required to

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<sup>8</sup> Although the court tends to agree that it is.

<sup>9</sup> A point-of-use treatment device is a treatment device applied to a single tap or faucet for the purpose of reducing contaminants in drinking water at that tap, and a point-of-entry treatment device is a treatment device applied to the drinking water entering a house or building for the purpose of reducing contaminants in the drinking water distributed throughout the house or building. (22 Cal. Code Regs §§ 64417 and 64419.)

“have submitted applications for funding to correct the violations for which the point-of-entry and point-of-use treatment is provided,” and the devices may only be used for three years, or until funding for centralized treatment is available, whichever occurs first. (§ 116380 and § 116552.) The Department also argued that some water systems might be able to meet the MCL at lower cost by blending water rather than treating it,<sup>10</sup> or by replacing contaminated sources with uncontaminated sources.<sup>11</sup> Finally, the Department argued that some water systems might be able to obtain grants to help pay for the cost of complying with the MCL.

It does appear that some of the alternatives discussed by the Department (i.e., blending, grants) could reduce the cost of compliance to a more feasible level, although others would only delay the cost of compliance. The problem, however, is that it does not appear that the Department actually considered the alternatives discussed above when it set the MCL. (See *Southern Cal. Edison Co., supra*, 85 Cal.App.4<sup>th</sup> at 1111 [court may disregard post hoc rationalizations for agency action].) Perhaps more importantly, it does not appear that the Department considered either (1) how the various alternatives would affect the economic feasibility of the MCL, particularly for small water systems, or (2) whether these alternatives would actually make the MCL economically feasible. In the initial statement of reasons, the Department’s discussion of alternatives consisted entirely of the following *single* sentence: “Some of these water systems may be able to meet the MCL by blending their drinking water supplies as already occurs during drinking water distribution, at minimal cost.” (AR 282.) To this single sentence, the Department added the following three sentences about alternatives to the final statement of reasons: “[Small water systems] can seek a variance (under H&S Code section 116430) from the hexavalent chromium MCL, allowing extended permitted use of POUs [i.e., point-of-use treatment devices]. Use of POEs [i.e., point-of-entry treatment devices] is not limited to three years. Also, the proposed regulatory action does not preclude a [public water system] from applying for an exemption pursuant to H&S Code section 116425.” (AR 4643.) That is all. The court finds this is insufficient to demonstrate that the Department appropriately considered either how the available alternatives would affect the economic feasibility of the MCL, or whether the MCL is economically feasible.

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<sup>10</sup> Presumably this means that water that does not meet the MCL would be blended with water that does until the water as a whole meets the MCL.

<sup>11</sup> An option that would only appear to be available to a water system that had sufficient access to uncontaminated sources.

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

The Department also notes it estimates the annual statewide total cost of compliance is \$155.4 million.<sup>12</sup> 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,<sup>13</sup> 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.4<sup>th</sup> 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." Even if only a small number 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

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<sup>12</sup> 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.)

<sup>13</sup> The fact that the Department cites the Census Bureau's website rather than the administrative record to establish this point only underscores the fact that the Department failed to consider this data when it set the MCL.

that for small water systems compliance with the proposed MCL . . . may not be affordable.”<sup>14</sup> (AR 114.) The Department makes a similar concession in its opposition brief when it notes that there are over 38 million people in California,<sup>15</sup> 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 the Department itself recognizes 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 “economically feasible,” and it argues the term is not synonymous with “affordable.” Perhaps. But economically feasible has to mean something, and it is difficult to conceive of a definition that does not at least *consider* affordability.<sup>16</sup> In determining economic feasibility, the Department is directed to consider one thing: how much compliance will cost. (§ 116365, subd. (b)(3).) 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”].) Moreover, the term “feasible,” as Petitioners note, generally means “[c]apable of being done, affected or accomplished. Reasonable assurance of success.” (Black’s Law Dict. (6<sup>th</sup> ed. 1990) p. 609; see also *People v. Cornett* (2012) 53 Cal.4th 1261, 1265 [when interpreting statutory language, courts “begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning . . . because the language employed in the legislature’s enactment generally is the most reliable indicator of legislative intent.”]; *Wasatch Property Management v. Degrate* (2005) 35 Cal.4<sup>th</sup> 1111, 1121-22

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<sup>14</sup> 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.

<sup>15</sup> 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.4<sup>th</sup> at 574.)

<sup>16</sup> And the court notes that the Department does not proffer a different definition of the term.

[“When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition.”].) 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.) Whether one uses the term “economically feasible” or the term “affordable,” the court is concerned that some families will not have the income or resources to pay a water bill that increases by \$5,600 per year. More 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.<sup>17</sup> 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.

As the above discussion shows, the court remains concerned that the Department’s own analysis acknowledges that the MCL it adopted will not be economically feasible for some households. More importantly, the court is not convinced that the Department considered this fact when it adopted the MCL, or, more generally, that it determined the MCL was economically feasible. Instead, it simply estimated the cost of complying with seven possible MCLs, and then stated it was adopting one of them. It was required to do more. The court thus agrees Petitioners are entitled to a writ of mandate remanding this case to the Department with instructions to comply with the Legislature’s direction to consider the economic feasibility of complying with 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. This is because the Legislature has entrusted that determination to the Department, not to this court. On remand, once it has

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<sup>17</sup> 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.

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 0.02 ppb. 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. They argue: (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.

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) [emphasis added].) 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 database 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, manufactured, 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.<sup>18</sup> (AR 273, 278.) It is thus quite obvious that the database does 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.<sup>19</sup> 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

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<sup>18</sup> 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.

<sup>19</sup> It does not appear that Petitioners challenge the Department's estimates regarding treatment costs.

cost per service connection).

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' suggested 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 ("the 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 (\$518 million). (AR 6263.) Unfortunately, the District does not explain in its letter whether the Department's purported \$71.2 million estimate comes from, 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.<sup>20</sup>

There is a more fundamental problem with this type of "system specific" argument.<sup>21</sup> 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**

As noted above, the MCL was adopted as a regulation, and was thus subject to the procedural requirements of the APA. "The APA is intended to advance meaningful public participation in the adoption of administrative regulations by state agencies and create an administrative record assuring effective judicial review. [Citation.] In order to carry out these

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<sup>20</sup> 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. At the very least, the evidence shows how difficult it can be to estimate costs.

<sup>21</sup> I.e., the argument that the Department's cost estimates are inaccurate for specific systems, and that they thus must be inaccurate overall.

dual objectives, the APA (1) establishes basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations [citation] which give interested parties an opportunity to present statements and arguments at the time and place specified in the notice and calls upon the agency to consider all relevant matter presented to it, and (2) provides that any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court.” (*Voss v. Superior Court* (1996) 46 Cal.App.4<sup>th</sup> 900, 908-09 [internal quotes omitted].)

Petitioners contend the Department failed to comply with two provisions of the APA: (1) a provision requiring it to assess the regulation’s “potential for adverse economic impact on California business enterprises;” and (2) a provision requiring it to respond to public comments. (Gov. Code §§ 11346.3, 11356.0.) “Failure to comply with every procedural facet of the APA . . . does not automatically invalidate a regulation.” (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4<sup>th</sup> 1315, 1328.) Instead, in order to prevail on their APA claim, Petitioners must show there was “a *substantial failure* to comply.” (Gov. Code § 11350, subd. (a) [emphasis added].) Moreover, even if Petitioners make such a showing, invalidation is not automatic. Instead, the APA provides the court “may” declare the regulation invalid. (*Id.*) The word “may” “connotes discretionary action,” and a court is thus not required to declare a regulation invalid even if it fails to comply with the APA in some respects. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4<sup>th</sup> 286, 306 [“CAMPS”].)

#### **A. The Economic Impacts Analysis**

The APA requires agencies to assess the economic impacts of their proposed regulations. In particular, the APA provides that an agency proposing a regulation “shall assess the potential for adverse economic impact on California business enterprises,” and 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.” (§ 11346.3, subd. (a).) As interpreted by the courts, this provision does not require agencies to determine whether a proposed regulation will have *any* adverse economic impact on businesses, but only whether it “will have a *significant* adverse economic impact on businesses.” (*Western States Petroleum Assn., supra*, 57 Cal.4<sup>th</sup> at 429; see also *CAMPS, supra*, 199 Cal.App.4<sup>th</sup> at 307 [agency “need not assess . . . *all* adverse economic impact anticipated,” just “significant” impact] [italics in

original]; Gov. Code § 11346.5, subd. (a)(8) [if agency “makes an initial determination that the action will not have a significant, statewide economic impact directly affecting business . . . it shall make a declaration to that effect in the notice of proposed action.”].) Although the required assessment does not impose a “heavy burden,” it does require “an evaluation based on facts” rather than “mere speculative belief.” (*Western States Petroleum Assn.*, *supra*, 57 Cal.4<sup>th</sup> at 431; *CAMPS*, *supra*, 199 Cal.App.4<sup>th</sup> at 305-06.) Petitioners contend the Department failed to comply with this requirement.

The Department concluded the regulation would have *no* economic impact on businesses within the meaning of the APA. It explained this conclusion in its initial statement of reasons as follows:

The Department has determined that the proposed regulatory action would have no significant *direct* adverse economic impact on California business enterprises . . . , including the ability of California businesses to compete with businesses in other states. The proposed regulations apply only to public water systems,<sup>22</sup> as defined pursuant to Health and Safety Code section 116275, which are not businesses . . . . 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.

(AR 295 [emphasis added].) This is at least partially true. Government Code section 11342.610, subdivision (b)(8), which is part of the APA, expressly excludes “a water company” from the definition of the term “small business.” However the APA does not define the term “water company,” and the court finds that it is not necessarily synonymous with the term “public water system,” which is defined by the Safe Drinking Water Act as “a system for the provision of water for human consumption . . . that has 15 or more service connections or regularly serves at least 25 individuals daily for at least 60 days out of the year.” (§ 116275, subd. (h).) There thus may be entities that meet the Safe Drinking Water Act’s definition of a public water system, but that are not water companies within the meaning of the APA. As discussed below, such entities may include at least some “nontransient noncommunity water systems.”

In its final statement of reasons, in response to comments about the accuracy of its conclusion that the regulation would have no significant adverse economic impact on California businesses, the Department further explained its reasoning, as follows:

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<sup>22</sup> This is true. The MCL only applies to “public water systems.” (22 Cal. Code Regs § 64431 [“Public water systems shall comply with the primary MCLs”].)

Although the Government Code provides no definition of “business,” Government Code section 11342.610(b)(8) explicitly excludes a “utility” or “water company” from the definition of a small business. Further, public water systems generally operate as monopolies within their respective defined service areas and, therefore, do not compete, in the ordinary sense of the word. In common usage, “business” generally implies some money-making objective, which is consistent with section 23101 of the Revenue and Taxation Code, which states: “ ‘Doing business’ means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.”<sup>23</sup> The purpose of a public water system is to provide drinking water for human consumption . . . . This is also true of a mutual water company in that the purpose of the mutual water company is to provide water for human consumption for the mutual benefit of its members and/or shareholders, and although the mutual water company may be formed by a private corporation, if properly formed it is a nonprofit mutual benefit company (as opposed to a for-profit business) . . . .

Additionally, section 11342.535 of the Government Code refers to “cost impacts” as the amount of reasonable range of direct costs. Thus, for purpose of meeting the applicable statutory requirements under the Government Code, *indirect costs to customers associated with potential water rate increases need not be considered.*

(AR 4657-58 [emphasis added].) In other words, the Department concluded that because the APA expressly excludes water companies from the definition of small businesses, and because the term “business” in general implies a profit motive that most water companies (whether large or small) lack, it did not need to assess the economic impact of the MCL on water companies themselves, because they are not businesses within the meaning of the APA. It also concluded it

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<sup>23</sup> The court notes that Black’s Law Dictionary similarly defines the term “business enterprise” as “[i]nvestment of capital, labor and management in an undertaking for profit.” (Black’s Law Dictionary, 6<sup>th</sup> Ed., p. 198.) The court also notes the general rule that, when interpreting a statute, courts “begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning . . . because the language employed in the Legislature’s enactment generally is the most reliable indicator of legislative intent.” (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) “When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4<sup>th</sup> 1111, 1121-22; see also *Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4<sup>th</sup> 237, 244.) The court thus agrees with the Department that, as used in the APA, the term “business” or “business enterprise” refers to a profit-making enterprise.

only needed to assess the direct economic impact of the MCL on water systems themselves, and not the indirect impact on customers.

Petitioners do not challenge the Department's determination that *most* water systems are not businesses within the meaning of the APA. They argue, however, that the APA nonetheless required the Department to assess two things: (1) the regulation's potential economic impact on businesses that *use* water, because the regulation could cause their water rates to go up; and (2) the regulation's potential economic impact on those water systems that *are* businesses.

*i. Direct versus indirect impacts*

The Department determined that the APA only required it to assess the *direct* economic impact of the proposed regulation on public water systems (i.e., to assess the impact on the regulated entities themselves), and not the *indirect* impact on customers, including businesses, who purchase water. Petitioners disagree.

In its tentative ruling, the court agreed with Petitioners and concluded the Department was required to consider both the direct and the indirect economic impact of the MCL. This conclusion was based on section 2000 of title 1 of the California Code of Regulations, which defines "economic impact" as "*all costs . . . (direct, indirect or induced) of the proposed major regulation on business enterprises . . .*" (1 Cal. Code Regs § 2000, subd. (e) [emphasis added].) Upon further reflection, the court should not have based its conclusion on section 2000, because that section does not apply to the MCL.

The MCL was proposed in August 2013. The APA provides that regulations proposed "*on or after November 1, 2013,*" must include a "standardized regulatory impact analysis" in the manner prescribed by regulations adopted by the Department of Finance ("DOF"). (See § 11346.3, subd (c) [emphasis added]; see also subs. (a)(3) and (f), and § 11346.36.) DOF was required to adopt such regulations prior to November 1, 2013. (§ 11346.36, subd. (a).) It did so. Section 2000, title 1, is one of the regulations DOF adopted to prescribe how to conduct a standardized regulatory impact analysis. Section 2000 was filed on October 29, 2013, and became operative on November 1, 2013. Thus, had the MCL been proposed on or after November 1, 2013, the Department would have been required by DOF's new definition to consider the *indirect or induced* costs of the regulation on businesses. The court, however,

agrees with the Department's argument that because the regulation at issue in this case (i.e., the MCL) was proposed on August 1, 2013, this new definition does not apply.

Putting aside the new definition, the question is whether the APA itself required the Department to consider the proposed regulation's indirect economic impact on businesses that purchase water from regulated entities, and not just its direct economic impact on the regulated entities themselves. Petitioners argue that the APA requires agencies to assess a proposed regulation's "economic impact" – period – and that it does not contain the qualifier "direct." (Gov. Code § 11346.3, subd. (a).) This is true but not dispositive.

As the Department notes, at least one other provision of the APA supports its interpretation. That provision states that if an agency determines a proposed regulation "will not have a significant, statewide adverse economic impact *directly* affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action." (Gov. Code § 11346.5, subd. (a)(8) [emphasis added]; see also subd. (a)(7) [imposing similar requirement if agency determines proposal "may have a significant, statewide adverse economic impact directly affecting business".]) This provision provides some support for the Department's argument that it was only required to consider the MCL's direct impact on businesses as regulated entities. Indeed, section 11346.3 itself provides some support for the Department's position. It provides: "A state agency proposing to adopt. . . any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, *avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.*" (Gov. Code section § 11346.3, subd. (a) [emphasis added].) Reporting, recordkeeping, and compliance requirements are imposed only on the regulated entities themselves – and not on customers of the regulated entities. This suggests that the focus of the economic impact analysis is on the regulated entities rather than their customers. Finally, case law also provides some support for the Department's argument. In *CAMPS, supra*, for example, the court held, "an agency adopting a regulation must 'assess' and 'consider' the potential for adverse economic impact *directly* on California business." (*CAMPS, supra*, 199 Cal.App.4<sup>th</sup> at 304 [emphasis added].) The court is thus not convinced the Department was required to consider the indirect economic impact of the MCL on businesses that purchase water.

Even if the court were to conclude that the Department *was* required to consider the

proposed regulation's indirect economic impact on businesses that purchase water, however, the court is not convinced the Department failed to do so. According to the Department's cost estimates, the regulation will cause water rates to increase from a low of \$64 to a high of \$5,630 annually. (AR 287 [Table 8].) Although these cost estimates do not appear under the heading "APA-Required Adverse Economic Impact Analysis," they do nonetheless contain an assessment of the MCL's economic impact on water purchasers, including businesses that purchase water. Moreover, and as noted above, the APA does not require agencies to assess whether a proposed regulation will have *any* adverse economic impact on businesses, but only whether it "will have a *significant* adverse economic impact on businesses." (*Western States Petroleum Assn.*, *supra*, 57 Cal.4<sup>th</sup> at 429.) The court cannot say that a \$5,600 annual increase would have a significant adverse impact on a business (as opposed to an individual).

*ii. Public water systems that are also for-profit businesses*

Petitioners also argue that some entities that meet the definition of public water systems are also for-profit businesses, and that the APA thus required the Department to consider the regulation's economic impact on them. In particular, they point to so-called "nontransient noncommunity water systems" (or NTNCWSs), which are defined by the Safe Drinking Water Act as public water systems that are not community water systems<sup>24</sup> and that regularly serve at least 25 of the same persons over six months per year. (§ 116275, subd. (k).) According to Petitioners, NTNCWSs "are businesses, located largely in rural areas, that cannot connect to public water systems and that therefore provide water, generally from a private well, to their employees, customers and visitors. Typical NTNCWS include food processors, commercial nurseries, wineries and other agricultural operations." (Reply at 16.) Although the evidence on this is extremely slim,<sup>25</sup> the court will assume that at least *some* NTNCWSs are for-profit

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<sup>24</sup> Community water systems are public water systems that serve at least 15 service connections used by year-long residents or that regularly serve at least 25 year-long residents. (§ 116275, subd. (i).)

<sup>25</sup> Petitioners cite just two letters, both written by Petitioner California Manufacturers and Technology Association, and both saying essentially the same thing. (AR 6429-34, 6709-10.) Both letters note that NTNCWSs include wineries, commercial nurseries, agricultural operations and food processors. Both letters also cite a U.S. Environmental Protection Agency publication that states NTNCWSs include "schools, factories, office buildings, and hospitals which have their own water systems." According to this publication, "about half of . . . NTNCWSs are rural

businesses (and the Department does not suggest otherwise). Because NTNCWSs are public water systems within the meaning of the Safe Drinking Water Act, they must comply with the MCL.

It is unclear how many NTNCWSs will be affected by the MCL. Petitioners assert there are “dozens.” As evidence, they cite the Department’s cost estimating methodology, which states that 65 privately owned water systems will be affected by the MCL. (AR 367.) Petitioners appear to assume that all 65 of these privately owned water systems are NTNCWSs – although it is not clear that this is true (some could be mutual water companies, which are not for-profit businesses). In any event, the court will assume that at least *some* of these 65 privately owned water systems are both NTNCWSs and for-profit businesses, and that, pursuant to the APA, the Department was required to assess the MCL’s “potential for adverse economic impact” on these businesses, and to “consider” the “industries affected including the ability of California businesses to compete with businesses in other states.” (§ 11346.3, subd. (a).) The court is not convinced, however, that the Department *completely* ignored these requirements. For example, although it did not do so under the heading “economic impact analysis,” the Department’s cost estimating methodology *did* estimate the economic impact of the proposed regulation on these 65 privately owned water systems: \$28.7 million per year. (AR 367.) It is true that the Department did not expressly consider the “industries affected” by the MCL (i.e., what industries are represented by the 65 or fewer NTNCWSs that will be affected by the regulation) or the ability of those 65 (or fewer) businesses to compete in other states. If this were the only flaw in the MCL, the court would likely exercise its discretion and decline to declare the regulation invalid on this ground alone. (*CAMPS, supra*, 199 Cal.App.4<sup>th</sup> at 306.) Because the court is already remanding this case for the reasons discussed above, however, it reminds the Department that, on remand, it must consider the MCL’s economic impact on those businesses that must comply with it.

## **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

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schools while the remainder includes hospitals, restaurants, and factories.” The court notes that entities like schools and hospitals might not be considered for-profit businesses.

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 response 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.<sup>26</sup> (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

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<sup>26</sup> Although not entirely clear, it appears that the difference between the Department’s estimate and the City of Dixon’s estimate may stem 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.)

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.<sup>27</sup> 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 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.

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<sup>27</sup> For example, one of the commenters states it represents a system serving 2,500 connections, and it estimates its capital compliance costs will be \$10 to \$35 million, and its operating costs will be \$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.

### 3. The Effect, If Any, Of Senate Bill 385

In its tentative ruling, the court noted that, 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.) Every analysis of the bill noted that the Department had recently set the MCL at 10 ppb, and several described the MCL as part of “existing law.” (See Senate Rules Committee Bill Analysis dated 8/21/15; Assembly Committee on Appropriations Bill Analysis dated 7/13/15; Assembly Committee on Judiciary Bill Analysis dated 7/5/15; Assembly Committee on Environmental Safety and Toxic Materials Bill Analysis dated 6/26/15; Senate Rules Committee Bill Analysis dated 5/27/15; Senate Judiciary Committee Bill Analysis dated 5/11/2015; Senate Judiciary Committee Bill Analysis dated 5/4/15; and Senate Committee on Environmental Quality Bill Analysis dated 4/13/15.)

The bill was sponsored by the Association of California Water Agencies (or “ACWA”). In a bill analysis prepared by the Senate Committee on Environmental Quality shortly after the bill was introduced, ACWA’s argument in support was described as follows:

Public water systems are committed to meeting the standard, which is the first of its kind in the nation, but the timeline provided for compliance does not recognize the complex steps water systems must take to achieve the standard. The steps involved - from designing appropriate treatment systems to securing financing to building and testing new treatment facilities - can take up to five years or more and cost millions of dollars.

To address this challenge, ACWA is sponsoring SB 385 by Sen. Ben Hueso (D-San Diego). The bill would authorize the State Water Resources Control Board (SWRCB) to grant a time-limited compliance period to public water systems that meet strict conditions and demonstrate they are taking needed steps to comply with the standard by the earliest feasible date.

(Senate Committee on Environmental Quality Bill Analysis dated 4/13/15, pp. 7-8.) According to a lengthy analysis of the bill prepared by the Assembly Committee on the Judiciary:

Almost every public water system in the state affected by this new . . . MCL . . . has expressed a series of concerns about their ability to meet the new . . . MCL . . . . The public water systems that are included in the new monitoring requirements argue that they need an extension of time to design treatment systems, obtain financing, and construct the treatment system, all of which could take up to five years and cost millions of dollars.

(Assembly Committee on Judiciary Bill Analysis dated 7/5/15, pp. 2-3.) This same analysis

noted that “the costs of the infrastructure required to achieve compliance and the time it will take to get the infrastructure in place are substantial. According to the letters received by the Committee . . . , the costs to achieve compliance will be difficult for many of the local water agencies that are impacted by the . . . MCL . . . to bear.” (*Id.* at p. 12.)

SB 385 added section 116431 to the Health and Safety Code. As noted above, it allows public water systems additional time to comply with the MCL if certain requirements are met. Unless extended by statute, the section expires on January 1, 2020. (§ 116431, subd. (i).) It provides that, in order to be granted additional time to comply with the new MCL, public water systems must prepare a compliance plan that includes: (1) “[a] compelling reason why it is not feasible for the system to presently comply” with the MCL; (2) “[a] summary of the public water system’s review of available funding sources, the best available technology or technologies for treatment, and other options to achieve and maintain compliance with the [MCL] by the earliest feasible date;” and (3) “the public water system’s best estimate of the funding required to achieve compliance and the actions that the public water system will take to secure the funding.” (§ 116431, subd. (b)(1).) “This section is intended to address the specific circumstances that, for some public water systems, compliance with the state’s hexavalent chromium drinking water standard requires the design, financing, and construction of capital improvements. These major compliance actions necessitate a period of time for compliance.” (§ 116431, subd. (h).)

Both the legislative history of SB 385 and the text of section 116431 itself shows that the Legislature knew about the MCL, and also knew that the cost of compliance could be difficult for at least some public water systems. (See *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4<sup>th</sup> 999, 1018 [Legislature presumed to be aware of administrative construction of statute or administrative practice if construction or practice is made known to the Legislature].) The question is what, if anything, we can read into this knowledge. In its tentative ruling, the court asked the parties whether it was evidence the Legislature either effectively ratified the MCL, or at least 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.4<sup>th</sup> 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.4<sup>th</sup> 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.”.) 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 the other whether the Department had appropriately determined the MCL was economically feasible. The court thus concludes that SB 385 is simply too weak a reed upon which to base a finding of ratification.<sup>28</sup>

#### 4. The Appropriate Remedy

At the court’s request, the parties submitted additional briefing on the appropriate remedy in this case, and, in particular, whether the court should allow the current MCL to remain in place and operative during the remand process. The Department urged the court to leave the current MCL in place during the remand process. Petitioners, in contrast, argued the court lacks the authority to do so. The court is not necessarily convinced it lacks the authority to fashion a remedy of the type that the Department suggests. (See, e.g., *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4<sup>th</sup> 499, 525-30 [discussing trial court’s broad authority to utilize “all the means necessary to carry [its jurisdiction] into effect,” and noting that such authority is broad enough to authorize interlocutory remand orders in proper circumstances].) The Department, however, fails to convince that the court should exercise its authority and leave the MCL in place during the remand process. In no small part, this is because the court is concerned that leaving the MCL in place will create an inexorable amount of momentum for the Department to simply readopt 10 ppb without adequately considering its economic feasibility. (See *Id.* at 528 [noting agency on remand “may not simply . . . rubberstamp its prior unsupported decision.”].) For similar reasons, the court declines the Department’s suggestion that it only invalidate the MCL for small water systems (i.e., those with less than 200 service connection) and that it leave the MCL in place for all other water systems.

The court also declines to impose a strict time limit on completing the remand process, largely for the reasons stated by Petitioners in their supplemental memorandum. The court notes,

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<sup>28</sup> In their supplemental brief, Petitioners note that, on remand, the Department may want to consider providing water systems with a compliance period similar to the one contained in SB 385. The court expresses no opinion on that suggestion and leaves it instead to the Department’s discretion.

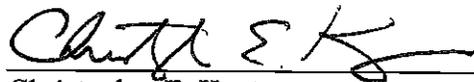
however, that when the Legislature instructed the Department to establish an MCL for hexavalent chromium, it established a two-year deadline to do so. (§ 116365.5, subd. (c).)

### CONCLUSION

For the reasons stated above, the petition is granted and this case is remanded to the Department with orders to withdraw the current MCL and establish a new MCL. When establishing a new MCL, the Department must comply with the Legislature's directive to consider the economic feasibility of compliance, paying particular attention to small water systems and their users, and to set the MCL as close as economically feasible to the public health goal of 0.02 ppb.

Counsel for Petitioners is directed to prepare a formal judgment and writ, incorporating this order 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.

Dated: May 5, 2017, 2017



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