Deborah A. Sivas, CA Bar No. 135446
Alicia E. Thesing, CA Bar No. 211751
Matthew J. Sanders, CA Bar No. 222757
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426
dsivas@stanford.edu
athesing@stanford.edu
msanders@law.stanford.edu

Attorneys for Petitioner-Plaintiff
MONTEREY COASTKEEPER

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

MONTEREY COASTKEEPER, a project of THE OTTER PROJECT, a non-profit organization,

Petitioner-Plaintiff,

v.

MONTEREY COUNTY WATER RESOURCES AGENCY, a public agency,

Respondent-Defendant.

Case No. M108858

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE PURSUANT TO CODE OF CIVIL PROCEDURE §1085

Hearing Date:	September 22, 2014
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INTRODUCTION

Monterey County Water Resources Agency ("Water Agency" or "Agency") cannot credibly dispute that it manages a vast conveyance system which moves water and wastewater across the northern Salinas Valley. The Water Agency controls and carefully times the release of accumulated rainwater from two coastal mountain reservoirs to optimize freshwater recharge of the heavily-pumped groundwater aquifer beneath the Salinas Valley, providing a continuous supply of vital irrigation water to local growers. Then, to protect the Valley's low-lying historic marshland from inundation by spent irrigation return flow, it operates an extensive drainage network that collects and commingles surface runoff and subsurface tile drain water from individual farms and transports it seaward through a series of agency-controlled culverts, pumps, and gates. Salinas Valley growers collectively fund these water supply and wastewater disposal services through parcel assessments levied pursuant to the Monterey County Water Resources Agency Act ("Agency Act"). Thus, the Water Agency is not the passive "mere conduit" it portrays in its papers. But for its active operation and maintenance of this elaborate mechanical water cycle, the pollution moving into and out of the drainage system could not continue.

Monterey Coastkeeper's writ petition is based on these incontrovertible facts. The Water Agency's day-to-day activities are pivotal to the continued functioning of a collective wastewater drainage and disposal system which is adversely affecting the quality of state waters. Under the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), as interpreted by the expert regulatory agencies and the courts, and the public trust doctrine, the Water Agency's expansive management activities trigger attendant legal obligations. Not surprisingly, Coastkeeper agrees that individual growers also have responsibility for the contamination coming from their agricultural activities. It is precisely for this reason that Coastkeeper has expended considerable time and effort participating in the lengthy "Conditional Waiver" process, which has finally begun to impose some limited source control requirements on the surface practices of agricultural operators along the central coast. Coastkeeper likewise agrees that the Central Coast Regional Water Quality Control Board ("Regional Board") also plays an important role in setting and enforcing permit standards for activities that affect waters of the state. But the fact that other actors may also have legal responsibilities does not exempt or excuse the Water Agency from the statutory and common law obligations associated with its own activities.

Given its expansive activities and broad statutory authority, the Water Agency cannot plausibly hide behind the semantic conceit of a helpless "localized flood control" agency caught between the growers and the Regional Board. To be sure, during winter storm events, the Water Agency's drainage system helps move rainwater downstream toward the ocean. But during much of each year, the only water flowing through the arid northern Salinas Valley is contaminated irrigation return flow – or tailwater – moving over the surface and through subsurface tile drains to the drainage system, and from there into other state waters.[1] The sole purpose of the century-old drainage network, collectively funded by the growers who benefit from its operation, has always been to maintain the Valley's artificially-created cropland and prevent reversion to its natural marshland state, whether during high water storm events or as a result of extensive dry-season irrigation on top of an exceedingly shallow water table. POB at 5-7. While the drainage system unquestionably assists in managing traditional "flood" concerns during occasional winter storm events, its primary function for most of the year is to drain irrigation return flow and prevent inundation of valuable farmland. E.g., PET 001030 (Blanco Drain pump conveys to the Salinas River "agricultural drainage water during the growing season"); PET 000820 (Prior to Agency's acquisition of the Reclamation Ditch in 1968, "maintenance of the Ditch and improvements made to it were infrequent and very spotty, since the founding company was generally in financial difficulty. When first constructed, much of the length of the ditch was in agricultural land and the collected drainage water consequently originated in large part from that source. Today, almost 4.8 miles of the Ditch is located within the growing urban area of Salinas. The increase in impervious surface area that comes with urban development has consequently increased the surface runoff reaching the Ditch. However, the urban area is not a significant percentage of the total drainage area in Zone 9 and consequently the overall impact of urbanization on flows in the Reclamation Ditch is not considered to be significant."). Although the Agency Act authorizes Respondent to operate and maintain this vast system, it does not give the Water Agency (or its

[1] E.g., PET 000274 ("Whereas the upland [stream] gauge is dry two thirds of the time, the Reclamation Ditch is perennial downstream of agricultural and urban development (Fig. 4.3). According to USGS estimates, flow only ceased on three days between 1971 and 1985, and on those days, standing water was probably still present throughout most of the Reclamation Ditch. The presence of standing water is reflective of historic conditions, since the area was a system of lakes. However, the presence of dry-season flow is a consequence of dry-season urban discharges and agricultural tailwater.").

agricultural customers who benefit from the system) a free pass to degrade the quality of state waters.

Notwithstanding opposing counsel's overheated rhetoric to the contrary,[2] the Water Agency actually is performing the same wastewater collection, transport, and disposal services as a typical urban sewer treatment system (also generally funded, as here, by system users), but then disclaims any responsibility for the "treatment" part of the equation. Like other public agencies operating waste collection systems, the Water Agency must comply with state statutory and common law obligations to protect water quality. And as is true for any other public agency, Respondent's failure to satisfy these legal obligations is judicially reviewable through a writ of mandate action.

In the end, the Water Agency pins its substantive defense on two erroneous assertions: (1) all of the contaminated wastewater transported through the drainage system is already regulated by the 2012 Conditional Waiver; and (2) the Regional Board has determined, through a rigorous, completed factual investigation, that the Water Agency is not subject to waste discharge requirements under the Porter-Cologne Act. Respondent's Opposition Brief ("ROB") at 9-15, 31-32. These assertions are simply not true as a factual matter. First, as Coastkeeper explained in its opening brief, while the Conditional Waiver requires farmers to undertake some management practices to control surface runoff, much of the waste transported into and eventually out of the drainage system is subsurface tile drain water, which is expressly excluded from the Conditional Waiver, and the regulatory agencies do not expect to achieve compliance with water standards through the waiver. Petitioner's Opening Brief ("POB") at 29-30. Second, as the Regional Board has repeatedly explained in correspondence with the Water Agency, Respondent's operation and management activities are very likely subject to waste discharge requirements. POB at 26-28. The Regional Board has never completed its outstanding factual investigation because the Water Agency has failed to fully respond to repeated inquiries. Through discovery in this case, however, Coastkeeper has adduced and presented to the Court the factual information necessary to definitively demonstrate that the Porter-Cologne Act, as interpreted by the courts and the regulatory agencies, imposes a legal duty on the Water Agency to file a report of waste discharge and obtain waste discharge requirements. These same facts establish the Agency's public

[2] See ROB at 6 (accusing Petitioner of drawing the sewer system analogy in an "unsubstantiated attempt to mislead the Court"). Counsel's relentless barrage of blustery broadsides on Coastkeeper's motives is not helpful to adjudication of the important legal issues in this case.

trust responsibilities and support Coastkeeper's contention that Respondent is not fulfilling its fiduciary obligations under the common law. Coastkeeper therefore seeks a writ of mandate directing the Water Agency to comply with its legal duties under the Porter-Cologne Act and the public trust doctrine.[3]

ARGUMENT

I. This Court Has Already Twice Rejected the Water Agency's Procedural Arguments and Should Do So Again Now.

Before addressing the merits, we briefly respond to the Water Agency's various procedural arguments that this Court is not the proper venue for redress of Coastkeeper's grievances. ROB at 6-22. The Agency made these very same arguments in its demurrer, which was overruled. Respondent's Memorandum of Points and Authorities in Support of Demurrer (Dec. 17, 2010); Order Overruling Demurrer (Mar. 15, 2011). It made them again in its motion for summary judgment, which was denied. Respondent's Memorandum of Points and Authorities in Support of Motion for Summary Judgment Motion (July 27, 2012); Bench Ruling on Cross Motions for Summary Judgment (Sept. 14, 2012). Respondent has offered nothing new here to support its theories. Accordingly, the Court should affirm its prior correct rulings and reach the merits.

A. Coastkeeper Has Alleged and Demonstrated a Mandatory Duty.

First, the Water Agency argues that mandamus is not available here because "Coastkeeper identifies nothing in the Porter-Cologne Act establishing a mandatory duty with which MCWRA must comply." ROB at 17. This statement is simply wrong. As we repeatedly identified in the opening trial brief, in the complaint, and in opposition to both demurrer and summary judgment, Petitioner's Porter-Cologne Act claims are based on Water Code sections 13260 and 13264. Section 13260 is unquestionably mandatory: "Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board: (1) A person discharging waste, or proposing to discharge waste, within any region that could affect the

[3] The Water Agency chides Coastkeeper's proposed relief as a "moving target." ROB at 1, fn.1. In fact, grounded in sound lawyering practice, Coastkeeper's complaint seeks the legally appropriate relief – cessation of unlawful discharges and abatement of the public nuisance. But consistent with prior settlement efforts, Coastkeeper reasonably attempted to fashion a less draconian remedy at trial briefing. There is nothing nefarious about that approach. At this point, the most prudent course may be for the Court to issue a liability decision, direct the Agency to file a report of waste discharge within 30 days, and then seek additional input from the parties on the nature and timing of relief on the public trust claim.

quality of the waters of the state . . ." Cal. Water Code § 13260(a)(1) (emphasis added).[4] The same is true for section 13264: "No person shall initiate any new discharge of waste or make any material changes in any discharge . . . prior to the filing of the report required by Section 13260 and no person shall take any of these actions after filing the report but before whichever of the following occurs first: (1) The issuance of waste discharge requirements pursuant to Section 13263. (2) The expiration of 140 days after compliance with Section 13260 if the waste to be discharged does not create or threaten to create a condition of pollution or nuisance and . . . [t]he project is not subject to the California Environmental Quality Act . . ." Cal. Water Code § 13264(a). Similarly, the public trust doctrine imposes an affirmative fiduciary duty on all public agencies "to protect the people's common heritage of streams, lakes, marshlands and tidelands." National Audubon Soc'y v. Superior Court, 33 Cal.3d 419, 441 (1983). These statutory and common law duties are in no way "discretionary."

Respondent seems confused. The central question before the Court is whether these mandatory Porter-Cologne Act and public trust duties apply to the Water Agency. The fact that Respondent disputes their applicability does not make the duties any less mandatory or prevent Coastkeeper from pursuing them in a mandamus action. Equally perplexing is the Agency's discussion of its broad discretionary authority under the Agency Act. ROB at 17-18. Coastkeeper does not seek to enforce the Agency Act or assert any claims based upon it. That statute is relevant only to the extent that it confirms Respondent's ample discretion to comply with legal obligations imposed by the Porter-Cologne Act and public trust doctrine; it does not shield the Agency from those applicable laws.

B. Coastkeeper Has No Other Plain, Speedy, and Adequate Remedy at Law.

Next, the Water Agency reprises its twice-rejected argument that Coastkeeper may not pursue mandamus under Code of Civil Procedure ("CCP") section 1085 because it has another "plain, speedy and adequate remedy, in the ordinary course of law." ROB at 18 (citing CCP § 1086). As it did before, Respondent argues again here that if Coastkeeper is dissatisfied with the Water Agency's failure to comply with the Porter-Cologne Act and the public trust doctrine, it should petition the Regional Board to act. Id. In support of this argument, the Water Agency cites a single inapposite case, Eight

[4] The Water Agency does not dispute that it is a "person" within the meaning of the Porter-Cologne Act. POB at 18 (citing Cal. Water Code § 13050(c)).

Unnamed Physicians v. Med. Exec. Comm. of the Med. Staff of Wash. Township Hosp., 150 Cal. App. 4th 503 (2007). There, the court denied a writ petition challenging an organization's termination of membership benefits on the grounds that petitioners had failed to exhaust their contractual remedies, where the organization's "bylaws stipulate that members must exhaust the foregoing remedies 'before resorting to legal action.'" Id. at 508, 510-11 ("It is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance.")

Here, there are no contractual, administrative, or statutory processes that must be exhausted. Respondent suggests that rather than seeking to compel the Agency's compliance with its legal duties in a mandamus action, Coastkeeper must instead (1) ask the Regional Board to bring an enforcement action against the Water Agency, (2) if the Regional Board fails to act, pursue an administrative appeal to the State Board under Water Code section 13320, and (3) if that appeal is denied, seek mandamus against the Regional or State Board under Water Code section 13330. ROB at 18-19. This argument is nonsensical. For one thing, the fact the Coastkeeper – or any other member of the public – may politely ask the Regional Board to take an enforcement action does not mean the Coastkeeper is required to do so as a matter of administrative law or remedy exhaustion. See Common Cause of Cal. v. Bd. of Supervisors of Los Angeles County, 49 Cal. 3d 432, 441 (1989) ("the mere possession by some official body of a continuing supervisory or investigatory power does not itself suffice to afford an 'administrative remedy' unless the statute or regulation under which that power is exercised establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties"); City of Coachella v. Riverside County Airport Land Use Comm., 210 Cal. App. 3d 1277, 1287 (1989) ("An administrative remedy is provided only in those instances where the administrative body is required to actually accept, evaluate and resolve disputes or complaints."); Glendale City Employees' Ass'n, Inc. v. City of Glendale, 15 Cal. 3d 328, 342 (1975) (finding "[a] procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact" to be "manifestly inadequate"); Jacobs v. State Bd. of Optometry, 81 Cal. App. 3d 1022, 1029 (1978) (ability to petition administrative agency without "clearly defined machinery for the submission, evaluation and resolution

of complaints by aggrieved parties" is not an adequate to mandamus action).

Moreover, Respondent's proffered path does not provide a "plain, speedy, and adequate remedy." As Respondent's lawyers are well aware, an agency's decision to pursue or forego an enforcement action is an unreviewable exercise of prosecutorial discretion. See, e.g., Nasir v. Sacramento County Office of the Dist. Attorney, 11 Cal. App. 4th 976, 990 (1992) ("Prosecutorial discretion is not subject to appellate review and cannot be controlled through a writ of mandate); Johnson v. State Water Resources Control Bd., 123 Cal. App. 4th 1107, 1114 (2004) (holding that State Board's discretionary decision not to review a regional board decision is not subject to judicial review). Thus, even if Coastkeeper spent the next few years seeking enforcement of the Water Agency's legal obligations before the Regional and State Boards, it could not maintain a judicial challenge in the event that its request is denied. Thus, there is no plain, speedy,[5] and adequate remedy for the Water Agency's ongoing violations that Coastkeeper must futilely pursue and "exhaust."[6]

C. Coastkeeper Need Not Establish that the Water Agency Has a "Special Duty" to Comply with the Porter-Cologne Act or the Public Trust Doctrine.

Respondent also rehashes its prior argument that Coastkeeper must show the Water Agency has "a special and specific duty to comply with" the Porter-Cologne Act and the public trust doctrine, apparently separate from the legal and fiduciary duties applicable to other agencies or entities. This argument, too, should be rejected for a third time because there is still no legal authority to support it.

As it did in its demurrer and summary judgment motion, Respondent bases its odd legal theory on two, dated contract cases, both of which turned on the question of whether petitioner had another

[5] Indeed, there is no guarantee when such a challenge would even become ripe for judicial challenge, as the State Board's 270-day deadline for deciding administrative appeals does not begin to run until the Board deems the petition complete. See http://www.swrcb.ca. gov/laws_ regulations/docs/initial_sr2014feb.pdf (Initial Statement of Reasons for Feb. 2014 proposed amendments to address this issue). Given the State Board's overwhelming workload in recent years dealing with drought-related issues, hundreds of administrative petitions now languish in bureaucratic purgatory. See http://www.swrcb.ca.gov/public_notices/ comments/water_quality/ cmnt043014/ michael_lasalle.pdf (comment on proposed regulations explaining the current backlog of administrative appeals due to this practice). Moreover, the State Board's regulations allow it to grant an indefinite abeyance for administrative appeals. 23 Cal. Code Regs. § 2050.5. And even if the State Board eventually acted on such an administrative appeal, there can be little doubt that the Water Agency, as the real party in interest, would intervene in any proceeding to argue that Coastkeeper cannot challenge the agencies' enforcement discretion.

[6] And, of course, Respondent's exhaustion argument does not apply to Coastkeeper's separate common law public trust claim.

"adequate remedy at law" of which it can avail itself. In Black v. Santa Monica, 13 Cal. App. 2d 4 (1936), the petitioner sued in mandamus to enforce the terms of its contract with the city. The court sustained the city's demurrer on the grounds that the petitioner had a plain, speedy, and adequate remedy at law through a breach of contract suit. In Wenzler v. Municipal Court, 235 Cal. App. 128 (1965), the petitioner sought a writ of mandate compelling the return of exhibits and a sum of money previously paid as a fine in connection with an earlier criminal trial. The court found that there was no duty under the Penal Code to return either money or exhibits and that recovery, if any, "would require a showing that petitioner paid money under circumstances which gave rise to a quasi-contractual duty on the part of the county to repay it." Because petitioner had not "suggested any reason why a civil action is not adequate for this purpose," the appellate court upheld the trial court's refusal to issue a writ. Id. at 133. These holdings have no bearing on the case at bar.

As to Respondent's legal theory, the Supreme Court is clear: There is "no authority for the proposition that, once the Legislature has created a duty in a public agency, a court may limit, on public policy grounds, the availability of a writ of mandate to enforce that duty." Santa Clara County Attorneys Ass'n v. Woodside, 7 Cal. 4th 525, 540 (1994). In particular, "[i]t appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through the normal judicial means. What public policy reasons there are against enforcement of a statutory duty are reasons against the creation of the duty ab initio, and should be addressed to the Legislature." Id. (finding general Government Code obligations enforceable against city under CCP section 1085). California courts routinely grant mandamus against public agencies for all kinds of general mandatory duties that apply broadly to other agencies or entities. See, e.g., Marken v. Santa Monica-Malibu Unified School Dist., 202 Cal. App. 4th 1250 (2012) (allowing writ petition against school district to enjoin release of information under the state Public Records Act); Mission Hosp. Regional Med. Center v. Shewry, 168 Cal. App. 4th 460 (2009) (allowing writ petition against state agency to compel compliance with federal Medicaid Act and its regulations); California Association for Health Services at Home v, Dep't of Health Services, 148 Cal. App. 4th 696 (2007) (same); Rancho Murieta Airport, Inc. v. County of Sacramento, 142 Cal. App. 4th 323, 325-27 (2006) (rejecting argument that petitioner could not compel compliance with general requirements of California Public Utilities Code against

county through a section 1085 writ of mandate action); Morris v. Harper, 94 Cal. App. 4th 52 (2001) (allowing writ petition to compel youth correction facilities to obtain state licenses required by law); Sunset Drive Corp. v. City of Redlands, 73 Cal. App. 4th 215 (1999) (allowing writ petition against city to compel completion of environmental review in accordance with state law deadlines); Venice Town Council, Inc. v. City of Los Angeles, 47 Cal. App. 4th 1547 (1996) (allowing writ petition against city to compel compliance with state law coastal zone housing requirements).

In short, the Water Agency offers no relevant support for its novel theory that Coastkeeper cannot invoke the writ of mandamus process to compel an agency's compliance with general state law. And, indeed, all of the legal authority is to the contrary. See also Center for Biological Diversity, Inc. v. FLP Group, Inc., 166 Cal.App.4th 1349, 1370 (2008) (common law public trust doctrine also enforceable against local agency through a CCP section 1085 writ of mandate).

D. Coastkeeper Does Not Need a Private Right of Action to Pursue Mandamus Against a Public Agency.

Respondent gains no better traction with its final procedural argument – that Coastkeeper cannot use mandamus to compel a public agency's compliance with the Porter-Cologne Act because the Water Code does not include a "private right of action." ROB at 21-22. While it is true that there is no separate right of action in the Porter-Cologne Act, that fact is of no relevance to this case.

Here again, the Supreme Court has already considered and rejected the Agency's argument. In Common Cause of Cal., the county argued that because the Elections Code contains no private right of action, members of the public could not enforce the law through a writ. The Court disagreed:

> [T]he plain language of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our longstanding approval of citizen actions to require governmental officials to follow the law, expressed in our expansive requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings.

49 Cal.3d at 440. Thus, "even a party who is not authorized to pursue a civil action to force compliance with a particular legislative requirement may nevertheless be able to do so through a writ of mandate." Doe v. Albany Unified School Dist., 190 Cal. App. 4th 668, 682 (2010). See also California Ass'n for Health Services at Home, 148 Cal. App. 4th at 705 (the fact that a particular statute creates no explicit private right of action "does not mean it cannot be the basis for the issuance of a writ of

mandate to compel [an agency] to act pursuant to law"); Mission Hosp. Regional Med. Center, 168 Cal. App. 4th at 479 ("In California, a party who may not have standing to enforce [particular legislation] may still be entitled to enforce [it] by means of a writ of mandate under Code of Civil Procedure section 1085 if he is a beneficially interested party under Code of Civil Procedure section 1086."). Based on applicable precedent, this Court has twice before rejected Respondent's argument, and the argument has gotten no better with age.[7] Accordingly, the Court should affirm its prior rulings and reach the merits of Coastkeeper's substantive claims.

II. Respondent Does Not Refute the Overwhelming Evidence that the Water Agency's Activities "Could Affect the Quality" of State Waters, and this Uncontroverted Evidence Triggers the Porter-Cologne Act's Permit Requirements.

The Water Agency's substantive arguments are no more meritorious than its procedural defenses. With respect to the Porter-Cologne Act, the Agency makes three misguided claims: (1) Coastkeeper is required but has failed to establish the location, date, and time of specific waste discharges "into" waters of the state; (2) all waste transported through the drainage ditch system is "already" fully regulated, from farm to ocean; and (3) the Regional Board has completed a "rigorous investigation" and "determined" that the Water Agency is not subject to the Porter-Cologne Act permitting requirements. Each of these assertions is simply wrong. We address them in turn.

A. The Water Agency's Porter-Cologne Act Argument Is Not Supported by the Statutory Language, the Implementing Agencies' Interpretation, or the Applicable Case Law.

The heart of Respondent's substantive defense is that "Coastkeeper must prove that MCWRA is discharging 'waste' 'into' waters of the State" and has failed to do so. ROB at 27. That is not actually what the statute says, however. Section 13260 requires the submission of a report of waste discharge by any person "discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state." Cal. Water Code § 13260(a). Section 13264 prohibits any new discharge prior to the filing of a report of waste discharge and receipt of waste discharge requirements (or 140 days after submission if the board does not act, as long as the discharge does not threaten to

[7] This time around, the Water Agency cites two unpublished federal district court decisions dismissing claims to enforce Porter-Cologne Act orders against private entities based on the undisputed fact that the statute does not provide a private right of action. ROB at 21. These cases obviously are inapposite.

create a condition of pollution or nuisance or require CEQA compliance). Id. § 13264(a).[8]

As the opening brief explains, the State and Regional Boards have consistently interpreted these statutory requirements to apply to any waste-related "activity" that "could affect the quality of waters of the state," whatever the original source of that waste. POB at 17 (quoting State Board's public position that a permit application is required for any activities or proposed activities that could affect California's surface, coastal, or ground waters) and 27-28 (quoting Regional Board's consistent statements over time that the Porter-Cologne Act permit requirements apply to any activities that may affect water quality).[9] "Generally, [courts] extend considerable deference to an administrative agency's interpretation of its own regulations or the regulatory scheme which the agency implements or enforces. The agency interpretation is entitled to great weight unless unauthorized or clearly erroneous." Communities for a Better Environment v. State Water Res. Control Bd., 109 Cal. App. 4th 1089, 1107 (2003). Although the Water Agency's disagrees with the State's reading of the law, Respondent does not explain why, or on what authority, this Court should reject the expert agencies' long-standing, consistent, public interpretation of the statute they are charged with implementing.

Moreover, the most relevant judicial precedent, Lake Madrone Water Dist. v. State Water Resources Control Bd., 209 Cal.App.3d 163 (1989), supports the State and Regional Boards' reading of sections 13260 and 13264. Respondent attempts to both distinguish and rely on Lake Madrone in arguing that the Water Agency's collection, commingling, pumping, and transport of agricultural

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[8] In a footnote, the opposition brief oddly cites Water Code sections 13263(g), 13304, and 13350 rather than the provisions at issue here, focusing on the word "into," ROB at 27, fn. 2 (underlining, bolding, and italicizing "into"), even though that word does not appear in the operative language of sections 13260(a) and 13264. In any event, Respondent's fixation on this non-existent preposition has no significance to the facts of this case, where the Water Agency's own operations manager and internal documents concede that the Agency daily pumps contaminated wastewater from lateral tributaries into the Reclamation Ditch and from the Blanco drain into the Salinas River.

[9] The case law supports this interpretation of the statute. In TWC Storage v. State Water Resources Control Bd., 185 Cal.App.4th 291 (2010), for instance, a regional board brought an enforcement action against a property owner under Water Code sections 13264 (discharge of waste without a permit) and 13350 (permitting or causing hazardous substance to be discharged to state waters) in connection with a contractor's handling of a transformer that leaked PCE, which then leached through the soil and infiltrated underlying groundwater. Among other things, the property owner argued that the regional board lacked jurisdiction under the Porter-Cologne Act "because the discharge was 'not to the waters of the state.'" The court rejected this argument, as well as the landowner's argument that it "cannot be held liable for a discharge unless it took an 'active role' in the creation of the discharge." Id. at 298.

wastewater – and the daily maintenance activities necessary to sustain this vast drainage system – are not subject to permit requirements. ROB at 29-31. But the reasoning and import of that decision are clear: Activities that may affect the quality of state waters are subject to Porter-Cologne Act permit requirements, no matter the source of the waste. In Lake Madrone, the water district operating the dam did not create the sediment that was naturally eroding from the surrounding land or affirmatively manipulate or control it in any way. Nevertheless, its activities in releasing water from the dam for purposes of water supply or flood control made it both a producer and discharger under the Porter-Cologne Act because the sediment in the released water could affect downstream water quality.

Here, the Water Agency's activities affect downstream water quality much more directly and actively than did the district's opening of the dam gates in Lake Madrone. Virtually every day, the Water Agency actively manages "the system" for moving water off farmland and downstream. PET 001978, 002033. It has a crew of eleven full time employees dedicated to the operation and maintenance of that system. PET 001506. This crew uses heavy equipment to remove debris and built-up sediment from the drainage ditches, to stabilize eroding ditch banks, and for other ongoing preventive maintenance – all for the purpose of maintaining a downward gradient so that wastewater in the drains moves toward the ocean. PET 001430-38, 001506, 001384, 001439-41, 002014-16, 001440, 000620; RESP 00732. The Water Agency purchases and applies large volumes of herbicides for the purpose of removing vegetation growing within the drainage ditches that might otherwise impede water movement, and its staff engages in physical vegetation removal as well. PET 001966-67, 001437, 001384, 001437-38; RESP 00731-32. These maintenance activities not only keep wastewater moving rapidly from farmland to downstream water bodies, they also reduce the efficacy of natural pollution filtering and breakdown processes (e.g., by removing the vegetation that can naturally filter and degrade pollutants and by increasing the speed and reducing settling time of wastewater traveling downstream), thereby making the pollution loading worse than it might otherwise be. PET 003051, 002985-86, 002993. Without these ongoing debris, sediment, and vegetation maintenance activities, the natural wetlands would quickly reestablish. PET 001443.

Even more important, the Water Agency controls eight pump stations that move water around the Salinas Valley. PET 001506. Along the 16-mile portion of the Reclamation Ditch between Salinas

and Castroville, the Water Agency operates five separate stations that pump agricultural wastewater from lateral ditches into the main channel, including (1) the Hebron Heights Pump Station (consisting of two pumps) that transports water from Sanborn Creek through "a discharge pipe to the nearby Reclamation Ditch" just upstream of Carr Lake; (2) the Chinn or Santa Rita Pump Station (consisting of three pumps) that moves water from 4.2 miles of lateral drainage ditches through Santa Rita Creek and downstream to the Reclamation Ditch; (3) the Espinosa Pump Station (consisting of two pumps) which pumps water from Espinosa Lake to a drainage ditch that discharges into the Reclamation Ditch; and (4) the Upper and Lower Merritt Pump Stations, which move water from a lateral ditch in the Merritt Lake area to the Reclamation Ditch. PET 000821-22, 000271-22; RESP 00728. The Agency operates, maintains, and, as necessary, repairs these facilities. PET 000822-28. Their purpose is to "raise water from a lower elevation to a higher elevation to enable water to flow downstream, and avoid water from accumulating and flooding upstream or adjacent property." RESP 00728. Without these lift activities, contaminated wastewater would saturate adjacent land rather than moving downstream, PET 001030, 001981-88; 001941-42, 001994, 001973, making it difficult or impossible to farm.

Likewise, the Water Agency maintains and operates "a pump station and outfall ditch in the downstream most 2,000 feet of the Blanco Drain system," which "discharges to the Salinas River, conveying storm water in the winter season and agricultural drainage water during the growing season." PET 001030. Even during the driest time of year, the Blanco pump station operates virtually every day, transporting between six and sixteen acre-feet of agricultural wastewater per day from the Drain into the parallel Salinas River channel. RESP 00736, 00739. As is true of the other pumps, ongoing operation of the Blanco Drain station is critical to moving water from adjacent farmland into the Salinas River. PET 001981-82. Respondent attempts to diminish its role by stating that "the only ownership interest MCWRA happens to possess is a small section (fewer than 2,000 feet long) located at the mouth of the Drain as it flows into the Salinas River." ROB at 7. But it is this critical 2000-foot stretch of the system, of course, that joins the otherwise unconnected Blanco Drain and Salinas Rivers and houses the pump station that actively transport wastewater from the drain into river.

These are the key facts that trigger the Water Agency's legal obligation to file a report of waste discharge and obtain waste discharge requirements under the Porter-Cologne Act. No amount of artful

drafting by Respondent's lawyers – who, for instance, attempt to downplay the Agency's pumping activities with modifers like "periodic," "intermittent," and "automatic" (ROB at 7, 24) – can change them. Within the Reclamation Ditch district alone, the Water Agency has nearly $60,000,000 in assets (in 2000 dollars) which are used to maintain 20 miles of the main channel and more than five and a half miles of pumped lateral tributaries between Salinas and Castroville. PET 000820. It holds in-fee ownership or maintenance easements along most of these channels, PET 000307, and owns the pump stations as well. PET 000832 (noting that "[t]he Reclamation Ditch and Santa Rita Espinosa Pump Stations were originally designed to convey agricultural and some minor amounts of urban runoffs from the drainage basin" and were deeded by farmers to the Agency as part of the Zone 9 assets). As the voluminous stack of documents before the Court reveal, the Agency expends considerable energy and resources on consultants, reports, and plans to keep the wastewater flowing between and through these channels. Moreover, Coastkeeper's opening brief unequivocally documents that water moving from the lateral ditches into the Reclamation Ditch and from the Reclamation Ditch downstream into Tembladero Slough and the Old Salinas River is highly contaminated and impairing designated beneficial uses; the same is true of water discharged from the Blanco Drain into the Salinas River and Salinas River Lagoon. POB at 21-26. Respondent's contention that Coastkeeper has not submitted "any" supporting evidence – or, in its words, that Coastkeeper "ask[s] this Court to conclude on faith that MCWRA is liable" (ROB at 24) – is therefore preposterous.[10]

[10] Respondent is simply wrong that "Coastkeeper has an evidentiary burden to establish the location, date, time, specific activity, and specific standard violated with respect to any alleged 'discharge' by MCWRA that could give rise to liability." ROB at 24 (citing inapplicable cases). While a Clean Water Act citizen suit alleging a "point source" discharge in violation of a federal permit standard may require more exacting specificity, a mandamus action seeking to compel Porter-Cologne Act compliance need only show that Respondent's waste-related activities "could affect" state water quality. Coastkeeper submitted uncontroverted evidence that the Water's Actions action are affecting water quality in the form of 48 trial exhibits. As explained in our July 22, 2014 response to Respondent's ex parte application, all but one of these exhibits was filed with the Court more than two years ago and merely renumbered and resubmitted them with the writ brief for the Court's convenience; he one new document, which did not exist two years ago, is properly subject to judicial notice because it is an agency revision of the Conditional Waiver on which Respondent's defense relies. Because there is no administrative record of agency proceedings here, Coastkeeper properly put this evidence, consisting almost entirely of Water Agency documents and testimony, before the Court to support its claims. See Petitioner's July 22, 2014 Response at 5-7 (and cases cited therein).

B. The Conditional Waiver Does Not Regulate All Agricultural Pollution or Satisfy the Water Agency's Legal Obligations.

The Water Agency advices the Court not to worry because "the entities covered by the Conditional Waiver must now ensure, among many other things, that all of their agricultural discharges meet all applicable water quality standards (including the parameters of the Basin Plan), *and continue to meet those standards from their first point of discharge all the way to the ocean*." ROB at 11 (emphasis in original). This statement is misleading – or just plain wrong – in several respects.

As a threshold matter, the 2012 Conditional Waiver to which MCWRA cites has been superseded by the State Water Board's 2013 changes and clarifications, which reduce both the requirements on individual dischargers and the protections for environmental resources. See POB at 30 (citing PET 002881-82). But even the original Regional Board order does not support Respondent's statements. The Conditional Waiver categorizes growers into one of three risk "tiers," depending on the size, location, and nature of their operations, and sets forth management practice requirements based on perceived risk. The vast majority of growers fall into the lowest risk tier.[11] The designated management practices are intended to provide some limited source control according to a grower's risk category; they include "the installation of backflow prevention devices, maintenance of containment structures, maintenance of riparian vegetation cover and riparian areas, and preparation of a farm plan for dischargers in all three tiers, initiation of certain irrigation and nutrient management practices to control nitrates for Tier 2 and Tier 3 dischargers, and maintenance of water quality buffers for Tier 3 dischargers." PET 002858-59. The Waiver does not, however, contain any enforceable discharge standards, and the regulatory agencies explicitly intend that implementation of management practices will be an "iterative" process over many years. See POB at 29 (citing PET 002879-81). Thus, the Conditional Waiver does not "ensure" that growers' surface discharges will "meet all applicable water quality standards" at the point the wastewater empties into the drainage system, at the point of pumping from one ditch to another, or at any other point "on the way to the ocean."

Even more significant, the required management practices, which do not apply to the Water Agency's operation of the drainage ditch system, are only designed to begin addressing source activity

[11] See Regional Board Staff Report at 14-15 (Feb. 22, 2012), available at http://www.waterboards.ca.gov/centralcoast/board_info/agendas/2012/march/Item_4/4_stfrpt.pdf.

that results in overland flow and surface runoff of agricultural pollutants, not "all of their agricultural discharges." By law, the Waiver extends for only five years. Whether another waiver will be adopted after that point, and what conditions it might contain, is entirely speculative.[12] During the effective period of the existing Conditional Waiver, however, tile drain wastes – the contaminated subsurface agricultural return water that discharges directly to drainage ditches through plastic piping (e.g., photographs at PET 003000, 003012) – are not regulated or controlled in any way, period. RESP 00211, 00262 (Regional Board "anticipates evaluating longer timeframes necessary to address tile-drain discharges, for inclusion in a subsequent Agricultural Order").[13]

Cutting through Respondent's colorful rhetoric, here is the reality: Through the conditional waiver process, the Regional Board is very slowly attempting to phase in some source control requirements on a highly resistant (and politically connected) agricultural industry that has never before been regulated. While better on-farm management practices may lessen the pollution loading problem, they will not solve it – or come close to solving it. Farmers must still use fertilizer and pesticides to grow crops, especially at the high-intensity production levels present in the Salinas Valley. And some of those chemical inputs inevitably will wind up in the surface and subsurface wastewater that is drained away to keep the land arable. If we are ever to begin restoring water quality and beneficial uses in Monterey County, therefore, on-farm source control must be coupled with appropriate wastewater treatment. Individual growers generally do not enjoy the economies of scale to efficiently address wastewater problems on a parcel-by-parcel, which is precisely why they created (through special state legislation) and now fund the Water Agency. The wastewater disposal problem is a collective one that demands a collective solution. Through the Porter-Cologne Act permitting process, the Water Agency, funded by its agricultural customers, legally must and practically can begin to address wastewater disposal issue in a responsible way, just as public urban sewage systems must treat their constituents' collective waste streams to satisfy permit standards before releasing them to a downstream water body.

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[12] The Conditional Waiver, whose provisions are just now beginning to be implemented, replaced a prior waiver that expired in 2009. As this timetable attests, the process for developing waivers has proven to be long and highly contentious. See http://www.swrcb.ca.gov/centralcoast/water_issues/programs/ag_waivers/indexshtml.

[13] Respondent contends that this statement is "patently false" (ROB at 12), but it is borne out by the evidence before the Court. Although a small number of landowners (those in Tier 3) must begin to monitor tile drain water under the current Waiver, tile drain waste itself is not subject to any present regulation or controls.

C. The Regional Board Agrees that the Water Agency's Activities May Affect Water Quality and Require Waste Discharge Requirements, but Has Not Yet Made Any "Determination."

Finally, Respondent claims that the Regional Board, in correspondence with the Water Agency, has accepted the Agency's interpretation of the Porter-Cologne Act and, therefore, the Court "must defer to this determination." ROB at 32. The Regional Board, however, has not agreed with Respondent's legal interpretation and has never made a "determination" that the Agency is not a subject to permit requirements. To the contrary, the correspondence cited by Respondent makes it abundantly clear that the Regional Board's interpretation of the law is identical to Coastkeeper's.

The Agency's argument hinges on the Regional Board's August 3, 2012 letter "rescinding" its earlier request that Respondent submit a report of waste discharge. ROB at 14. As that correspondence shows, the Regional Board did not undertake "a rigorous investigation" (ROB at 13) or determine "after the facts were fully scrutinized" (ROB at 32) that no permit is required. Rather, the August 3 "rescission" letter was part of an arrangement whereby the Water Agency would provide a technical report of its activities pursuant to California Water Code section 13267 in lieu of submitting a more formal report of waste discharge because Respondent was concerned about the "inference" of filing a report of waste discharge. See ROB at 14. In the August 3 letter, the Regional Board correctly agreed with the Agency (and Coastkeeper) that farms are discharging wastes. But in the very next sentence, the Regional Board concluded: "In addition, your agency actively manages the drainages in question, and this management, which includes pumping water and vegetation removal, is an activity that may contribute to degradation of water quality." PET 000073 (emphasis added). Under the State's interpretation of the statute, such activity would require a permit. PET 000073-74. Remarkably, Respondent omits this key sentence when it quotes from the letter to support its contention that the Regional Board has determined that the Agency is not a discharger. Responding to the Agency's same misuse of this quote during summary judgment briefing, the Regional Board subsequently clarified that it "has not made such [a] determination." PET 000080 (reiterating that Regional Board regulates "activities" and "factors" that may affect water quality).

In lieu of a report of waste discharge, the Water Agency provided a six-page letter that declined to answer several of the Regional Board's questions about receiving waters, ownership issues, and

pollutant monitoring. See PET 000082, 000084. The Board sought clarification concerning the location of the water pumped out of the Agency's flood control system, water quality monitoring data, and channel maintenance activities. PET 000180-81 (again affirming that "the Water Board regulates both discharges of waste and activities that may affect water quality"). In response, the Water Agency conceded that "the Reclamation Ditch flows into Tembladero Slough . . . which then flows into the Old Salinas River . . . which then flows into the Harbor," but otherwise directed the Regional Board back to its prior submission. PET 000184. It is hardly surprising, therefore, that the Regional Board has not completed its investigation or made a "determination" on discharger status.[14]

What this correspondence does unequivocally confirm, however, is that:

(1) The Water Agency pumps and releases polluted water from flood channels directly into other water bodies that may affect water quality downstream, PET 000065 (the Water Agency "periodically pumps surface water from flood channels, such as the Blanco Drain and the Reclamation Ditch, directly into other water bodies (e.g., the Salinas River)";

(2) Management activities that may affect water quality are subject to the permitting requirements of the Porter-Cologne Act, PET 000074 ("the [Regional] Board's authority and responsibility are not limited to regulating direct discharges of waste. Our authority and responsibility include the regulation of any activities or factors that may affect water quality. This is well established in the Water Board's many regulatory programs, ranging from prohibitions on certain activities to a wide variety of requirements regarding management practices and actions"); and

(3) The Water Agency must play an integral role in water pollution treatment in the lower Salinas Valley water system, PET 000075 ("We want to explore how the drainages you manage could be an integral part of a larger effort to address the water pollution problem while

[14] Respondent also suggests, erroneously, that the Regional Board has "long agreed" that the Water Agency's "assisting periodically with the movement of conveyance downstream cannot in any way constitute contribution 'into' 'waters of the State,'" citing a 1975 Regional Board letter explaining that the proposed installation of new pipes at the end of the Blanco Drain system (at the mouth of the Salinas River where some water may flow northward into the Old Salinas River) did not require a new discharge permit. ROB at 30. As Coastkeeper explained in its opening brief, until 1979 the Water Agency held a joint federal NPDES permit/California waste discharge requirements for the Blanco Drain. POB at 26-27. After the federal Clean Water Act was amended in 1977 to exempt agricultural return flows, the Blanco Drain permit expired without renewal. Thus, when the Regional Board penned the 1975 correspondence about the construction of new pipes, the agricultural wastewater being discharged from the Blanco Drain into the Salinas River was already covered by a federal permit and state waste discharge requirements and the installation of new pipes would not affect those permits or alter water quality. PET 000025. In fact, the 1975 letter actually undermines Respondent's legal theory around the word "into": Before the federal agricultural exemption became effective, a federal permit was required because Blanco Drain was considered a "point source" discharging "into" the Salinas River. Thus, the pumping activity at Blanco Drain not only triggered waste discharge requirements under the broad Porter-Cologne Act language, but also triggered the much narrower Clean Water Act standard requiring that a pollutant be added into a navigable water. But for the agricultural exemption, federal permit requirements would still apply.

> maintaining flood control. The larger effort would include a variety of projects on multiple scales, such as nitrate treatment systems (e.g., simple denitrification using woodchips), wetland treatment systems, vegetated waterways, and pollutant source control. The Water Boards have allocated millions of dollars in grants to demonstrate the viability of various treatment options and management practices. The next step is for agencies like ours to consider the lower Salinas Valley as a system, and design an effective overall approach to achieve our goals.").

III. The Water Agency Is Subject to, but Acting Inconsistent with, the Public Trust Doctrine.

Respondent asserts a single defense to the public trust claim: The Water Agency has no public trust obligations here because its authorizing law (the Agency Act) does not impose a statutory duty to protect trust resources. ROB at 37-38. As the Agency's capable lawyers surely know, that is not the law in California. In this state, every public agency whose activities may affect public trust resources has an affirmative fiduciary duty to protect those resources in perpetuity for the people of California. National Audubon Soc'y, 33 Cal.3d at 33-34, 441, 446-48. Indeed, the courts have flatly rejected the Water Agency's argument:

> At oral argument plaintiffs' counsel seemed to suggest that the absence of legislation explicitly delegating to the counties the responsibility for enforcing the public trust over birdlife means that the Alameda County Board of Supervisors cannot be held accountable for authorizing conduct unjustifiably detrimental to these natural resources. However, the county, as a subdivision of the state, shares responsibility for protecting our natural resources and may not approve of destructive activities without giving due regard to the preservation of those resources.

Center for Biological Diversity, 166 Cal.App.4th at 1370, fn.19.[15] As another superior court recently explained in rejecting the County of Siskiyou's argument that it need not consider the public trust when exercising its statutory discretion to manage groundwater:

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[15] Respondent mischaracterizes this case law. It quotes a snippet from Center for Biological Diversity to argue that "the public 'are not entitled to bring an action against those whom they allege are harming trust property.'" ROB at 37. As Coastkeeper explained in its opening brief, that court properly held that trust duties cannot be enforced against a private permit holder; any suit must be against the public agency that authorized the activity. Obviously, trust duties can be enforced against a trustee agency when its own actions harm the trust. Respondent also twice claims that the Water Agency here is akin to the "state board of 1913" discussed in National Audubon. ROB at 37, 38. Not true. The Supreme Court there explained that the role of the original water board was "a very limited one" – "restricted to determining if unappropriated water was available; if it was, and no competing appropriator submitted a claim, the grant of an appropriation was a ministerial act." 33 Cal.3d at 442. But the board's function "has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. This change necessarily affects the board's responsibility with respect to the public trust. The board of limited powers of 1913 had neither the power nor duty to consider interests protected by the public trust; the present board, in undertaking planning and allocation of water resources, is required by statute to take those interests into account." Id. at 444.

> [W]hile the County has discretion whether to adopt a groundwater management plan, it does not have discretion to ignore its duties under the public trust doctrine. Although administration of the public trust rests primarily with the State as sovereign, the County is a subdivision of the State. As a subdivision of the State, the County "shares responsibility" for administering the public trust. The State cannot abdicate its duties under the public trust doctrine. Neither can the County.

Environmental Law Found. v. State Water Resources Control Bd., Case No. 34-2010-80000583 (July 15, 2014), attached to Petitioner's Request for Judicial Notice filed concurrently herewith. Similarly here, the Water Agency's discretion in implementing the Agency Act does not immunize its actions from compliance with the common law pubic trust doctrine applicable to all state-created agencies.

In short, the fact that Respondent's authorizing legislation does not impose an explicit duty on the Water Agency is irrelevant to Coastkeeper's common law public trust claim. The Agency Act does not prevent the Water Agency from fulfilling its common law fiduciary duties, nor could it. Indeed, the Agency Act provides Respondent with broad discretion to address pollution issues and protect resources. ROB at 38-39; Cal. Water Code App. § 52-9(o). Thus, the only question before the Court on this claim – a question the Water Agency does not directly address in its opposition papers – is whether the Agency's comprehensive operation and management of the vast upper Salinas Valley water supply and wastewater disposal system implicates affirmative fiduciary duties under California's robust common law public trust doctrine. The answer to that question, based on the abundant evidence before the Court and the relevant case law, is plainly "yes."

CONCLUSION

The issue raised by this case is whether the Water Agency's comprehensive operation, maintenance, and management of the agricultural water supply and wastewater disposal system in the northern Salinas Valley triggers the permitting requirements of the Porter-Cologne Act and the fiduciary duties of California's public trust doctrine. Coastkeeper has more than satisfied its evidentiary burden – based almost entirely on Respondent's own documents and testimony – to demonstrate that these legal obligations apply and that the Water Agency is not fulfilling them. Accordingly, Coastkeeper requests that the Court grant a peremptory writ of mandate under California Code of Civil Procedure section 1085 directing Respondent to comply with is statutory and common law obligations.

Dated: Sept. 4, 2014

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 

Deborah A. Sivas
Alicia E. Thesing