

DOWNEY BRAND LLP

1 CHARLES J. MCKEE (Bar No. 152458)
County Counsel
2 IRVEN L. GRANT (Bar No. 068950)
Deputy County Counsel
3 County of Monterey
168 W. Alisal Street, Third Floor
4 Salinas, California 93901-2653
Telephone: (831) 755-5045
5 Facsimile: (831) 755-5283
granti@co.monterey.ca.us
6

7 DOWNEY BRAND LLP
STEVEN P. SAXTON (Bar No. 116943)
NICOLE E. GRANQUIST (Bar No. 199017)
8 ELIZABETH B. STALLARD (Bar No. 221445)
621 Capitol Mall, 18th Floor
9 Sacramento, CA 95814-4731
Telephone: (916) 444-1000
10 Facsimile: (916) 444-2100
ssaxton@downeybrand.com
11 ngranquist@downeybrand.com
estallard@downeybrand.com
12

13 Attorneys for Respondent and Defendant
Monterey County Water Resources Agency

14 SUPERIOR COURT OF CALIFORNIA

15 COUNTY OF MONTEREY

16 MONTEREY COASTKEEPER, a project
17 of the Otter Project, a nonprofit
organization,

18 Petitioner and Plaintiff,

19 v.

20 MONTEREY COUNTY WATER
21 RESOURCES AGENCY, a public agency,

22 Respondent and Defendant.

CASE NO. M 108858

**MONTEREY COUNTY WATER
RESOURCES AGENCY'S STATEMENT
IN ADVANCE OF FEBRUARY 17, 2015
HEARING REGARDING CENTRAL
COAST REGIONAL WATER QUALITY
CONTROL BOARD'S RESPONSE TO
CERTIFIED QUESTIONS**

Date: February 17, 2015
Time: 10:30 a.m.
Department: 14

Action Filed: October 21, 2010

26 Pursuant to this Court's Order, dated December 8, 2014, Respondent/Defendant Monterey
27 County Water Resources Agency ("MCWRA") submits its Statement regarding the response of
28 the Central Coast Regional Water Quality Control Board ("Regional Water Board") to certified

**EXEMPT FROM
FILING FEES
GOV'T CODE §6103**

FILED

FEB 11 2015

TERESA A. RISI
CLERK OF THE SUPERIOR COURT
DEPUTY
CARMEN B. OROZCO

FILED BY FACSIMILE

1 questions submitted on or about December 9, 2014.

2 **I.**
3 **INTRODUCTION**

4 On January 7, 2015, Regional Water Board staff responded to the certified questions,
5 indicating in relevant part as follows:

6 Central Coast Water Board staff has determined that MCWRA is a
7 waste discharger and must file a report of waste discharge pursuant
8 to California Water Code section 13260 or 13264 for its activities in
and around the Reclamation Ditch and Blanco Drain watersheds.

9 (1/7/15 correspondence to The Honorable Thomas W. Wills from Kenneth A. Harris, Jr.,
10 Regional Water Board Executive Officer.) While MCWRA disagrees with the conclusion
11 announced by the Regional Water Board in its January 7, 2015, correspondence¹, the Board's
12 response certainly confirms what MCWRA has been telling this Court all along: the Regional
13 Water Board – *and not MCWRA* – has the responsibility and authority to address the issues about
14 which Plaintiff/Petitioner Monterey Coastkeeper (“Coastkeeper”) complains here.

15 Coastkeeper can no longer avoid or obfuscate the undeniable – and now plainly
16 demonstrated – fact that the Regional Water Board is the party that must address (and is already
17 addressing) the very issues Coastkeeper has been improperly asking this Court to decide. Of
18 course, the Regional Water Board's January 7 response is not the only thing that proves this
19 point. The Regional Water Board has also taken other important actions since providing its
20 response, including issuing January 22, 2015, correspondence indicating that it actually does not
21 want MCWRA to submit a report of waste discharge at this time, and scheduling a meeting with
22 MCWRA (set for March 3, 2015) during which the Regional Water Board will further explore the

23 _____
24 ¹ MCWRA has filed a Petition for Review with respect to the Regional Water Board's January 7, 2015, letter in an
25 abundance of caution. MCWRA's Petition – which MCWRA has also requested be held in abeyance – does not
26 challenge the Regional Water Board's authority to decide who is required to file a report of waste discharge. Instead,
27 the Petition for Review simply (and not surprisingly) challenges the conclusion that MCWRA should be required to
28 file one. This Petition for Review – like the one MCWRA filed back in 2012 – is merely the procedural mechanism
by which MCWRA reserves its right to challenge the Regional Water Board staff's action in the future should
MCWRA find it necessary to do so. Accordingly, Coastkeeper's effort to use this typical and unremarkable
procedural action to support its position is at best an overstatement, and at worst merely another example of
Coastkeeper's active disinterest in acknowledging the well-established administrative process that it inexplicably,
and improperly, refuses to follow.

1 issues raised in the certified questions. All of these actions undeniably confirm that
 2 Coastkeeper's interests – not to mention the remedies Coastkeeper purports to seek in this action
 3 – are already entirely and adequately addressed by the longstanding administrative process of the
 4 Regional Water Board. Of course, if Coastkeeper does not like the outcome of this robust
 5 administrative process, it also has a clear remedy, explicitly provided in the Water Code. Quite
 6 simply, there is nothing this Court could order that is not already occurring as a consequence of
 7 the Regional Water Board's administrative process, and no reason for this Court to intervene
 8 when the Regional Water Board has always had the means and authority to handle this dispute.

9 Notably, this administrative process, which is wholly directed at the Regional (and
 10 ultimately State) Water Board, also confirms that Coastkeeper's public trust cause of action is
 11 misguided, as Coastkeeper has not pursued its claim against the entity that actually has the
 12 decision making authority – and corresponding public trust responsibility – with respect to the
 13 issues at the heart of this dispute.

14 For all these reasons, and as explained herein, the Regional Water Board's January 7,
 15 2015, response therefore unequivocally confirms why Coastkeeper's Petition for Writ of Mandate
 16 must be denied, and further requires that any remaining causes of action be dismissed with
 17 prejudice as well.²

18 II. 19 ARGUMENT³

20 A. Coastkeeper's Porter-Cologne Causes of Action Are Moot.

21 A case is moot when the decision of the reviewing court “can have no practical impact or
 22 provide the parties effectual relief.” (*MHC Operating Limited Partnership v. City of San Jose*
 23 (2003) 130 Cal.Rptr.2d 564, 571 (citing *Woodward Park Homeowners Assn. v. Garreks, Inc.*

24 _____
 25 ² Coastkeeper confirmed that it was abandoning its Third and Fifth Causes of Action in its Memorandum of Points
 26 and Authorities in Support of its Writ Petition. (7/13/2014 Memorandum of Points and Authorities in Support of
 27 Petition for Writ of Mandate at 13, n. 5.) As a result, the only causes of action still at issue are Coastkeeper's First
 28 and Second Causes of Action related to the Porter-Cologne Act, and Coastkeeper's Fourth Cause of Action based on
 the Public Trust Doctrine. Accordingly, those are the only causes of action discussed in this Statement.

³ MCWRA received Coastkeeper's statement less than 24 hours before the time to finalize and file its own Statement.
 While MCWRA did make an effort to address certain points raised by Coastkeeper here, MCWRA respectfully
 requests the opportunity to provide additional briefing/information if it would be useful to the Court's determination.

1 (2000) 77 Cal.App.4th 880, 888, 92 Cal.Rptr.2d 268.) Moot cases must be dismissed, for the
2 “duty of this court, as of every other judicial tribunal, is to decide actual controversies by a
3 judgment which can be carried into effect, and not to give opinions upon moot questions or
4 abstract propositions, or to declare principles or rules of law which cannot affect the matter in
5 issue in the case before it.” (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind*
6 (1967) 67 Cal.2d 536, 541.)

7 In the instant case, the relief Coastkeeper seeks with respect to its remaining Porter-
8 Cologne Act claims (Causes of Action 1 and 2) is an order directing MCWRA to file a report of
9 waste discharge with the Regional Water Board. (*See, e.g.,* Coastkeeper’s September 4, 2014,
10 Reply Brief in Support of Writ of Mandate at 4, n. 3.) However, and as is plain from the
11 Regional Water Board’s response to this Court’s certified questions, there would be no “practical
12 impact” even were this Court to award such relief.

13 The Regional Water Board’s January 7, 2015, response confirms that it will decide who
14 should (and should not) file a report of waste discharge, and that it will certainly decide whether
15 MCWRA has any obligation to do so. So at its most basic, even if this Court ordered MCWRA to
16 file a report of waste discharge, the Regional Water Board will nonetheless decide whether such a
17 report is actually required and whether MCWRA should file one, because such matters fall
18 squarely within the Regional Water Board’s authority.

19 In light of these factual circumstances, it is undeniable that this Court cannot provide the
20 parties “effectual relief” by granting Coastkeeper’s Writ Petition. Instead, any declaration by this
21 Court with respect to whether MCWRA should file a report would only be the very kind of
22 abstract declaration this Court should not – and must not – make, as it would not affect or
23 influence the determination of the regulatory body actually tasked with the substantive
24 determination at issue. (*Eye Dog Foundation*, 67 Cal.2d at 541.) Coastkeeper’s Porter-Cologne
25 Act claims are therefore wholly moot, and must be denied on this basis.

26 **B. Regardless of Whether Coastkeeper’s Porter-Cologne Act Claims Are Moot, the**
27 **Regional Water Board’s Response to the Certified Questions Confirms These Claims**
28 **Must Nonetheless Be Dismissed on Procedural Grounds.**

Even if this Court is not inclined to dismiss Coastkeeper’s remaining Porter-Cologne Act

1 claims on mootness grounds, there is another independent reason to deny them. As MCWRA has
2 maintained from the inception of this case – and as Coastkeeper has repeatedly challenged –
3 Coastkeeper’s Petition must be denied because there was no legal basis for Coastkeeper to pursue
4 its Porter-Cologne Act claims in this forum in the first place. The Regional Water Board’s
5 January 7, 2015, correspondence, and its related activities since, reaffirm that MCWRA was right
6 all along.

7 As explained most recently in MCWRA’s Opposition to Coastkeeper’s Brief in support of
8 its Writ Petition, in order to establish its entitlement to a writ of mandate, Coastkeeper must
9 demonstrate that: (1) it seeks to compel MCWRA to perform “an act which the law specially
10 enjoins, as a duty resulting from an office, trust, or station,” and that MCWRA refuses to
11 perform; (2) that it has a beneficial interest in the outcome of the proceedings; and (3) that it has
12 no other plain, speedy, or adequate remedy at law. (*Pich v. Lightbourne* (2013) 221 Cal.App.4th
13 480, 490-91.) MCWRA continues to maintain that Coastkeeper cannot establish all of the
14 required elements. With respect to the first element, Coastkeeper has never been able to identify a
15 mandatory duty with which MCWRA must comply. (*Coachella Valley Unified School Dist. v.*
16 *State* (2009) 176 Cal.App.4th 93, 113 (Mandamus is only available to enforce an act that a public
17 officer or entity *is required to perform in a prescribed manner*, without regard to individual
18 judgment or opinion concerning the act’s propriety.)) Nor has Coastkeeper ever been able to
19 identify a special duty imposed on MCWRA by law. (*Black v. City of Santa Monica* (1936) 13
20 Cal.App.2d 4, 6 (where “the law imposes upon municipal corporations no special duty,”
21 traditional mandamus is inappropriate.); *see also Wenzler v. Municipal Court of the Pasadena*
22 *Judicial District* (1965) 235 Cal.App.2d 128, 132.)

23 Finally of course, and of particular relevance given the Regional Water Board’s
24 response, is the third required element, whether Coastkeeper has no other plain, speedy, or
25 adequate remedy in the ordinary course of law. (Cal. Code Civ. Proc. §1086; *Eight Unnamed*
26 *Physicians v. Medical Executive Committee of the Medical Staff of Washington Township*
27 *Hospital* (2007) 150 Cal.App.4th 503, 511.) There can be no doubt that the Regional Water
28 Board’s response to the certified questions proves Coastkeeper’s inability to satisfy this element

1 once and for all.

2 While Coastkeeper attempts to make much of the Regional Water Board's April 2012
3 correspondence – which again, requested that MCWRA provide certain information regarding its
4 activities to the Regional Water Board in the form of a Report of Waste Discharge – this is
5 merely another of Coastkeeper's seemingly relentless efforts to reinvent the true facts of this case.
6 The Regional Water Board did not make any "interpretation" that MCWRA was a discharger
7 required to file a report of waste discharge in April 2012. In fact, in August 2012 the Regional
8 Water Board rescinded its April 2012 letter requesting MCWRA file such a report.
9 (RESP00718.) Of course, the Regional Water Board also did not require MCWRA to file a report
10 of waste discharge at any subsequent time, something it undeniably had the ability and authority
11 to require had it simply desired that outcome.

12 It is also notable that Coastkeeper's position as to whether the Regional Water Board is
13 actually doing anything varies from argument to argument, if not from paragraph to paragraph.
14 When Coastkeeper is trying to convince this Court to do something that only the Regional Water
15 Board has the authority to do (and that would therefore run wholly afoul of what the law actually
16 says), Coastkeeper attempts to mitigate this insurmountable problem by claiming that the
17 Regional Water Board actually concluded MCWRA was a discharger years ago, and therefore
18 this Court should defer to the Regional Water Board by making a ruling now in keeping with that
19 alleged prior conclusion.⁴ Yet when Coastkeeper needs to explain why this Court should act
20 instead of deferring to the Regional Water Board – because deference would require this Court to
21 conclude that Coastkeeper's claims must be denied – Coastkeeper asserts that nothing has
22 changed, nothing will be done, and Coastkeeper will have no recourse to address the Regional

23 _____
24 ⁴ Importantly, Coastkeeper has continued to urge this Court to determine that MCWRA is a discharger based on
25 theories like, "[b]ut for [MCWRA's] operation and maintenance of its extensive water conveyance system, the
26 pollution moving through this drainage system could not continue." (Coastkeeper's Further Case Management
27 Conference Statement at 4:22-24.) Taken to its logical conclusion, imposing "discharger" liability on such a basis
28 would mean that every public water supplier would be legally responsible for anything that another party with access
to the water system decides to discard. For example, one could imagine East Bay Municipal Utility District being
sued because Chevron decides to discharge pollutants in violation of its permits, and those pollutants end up in the
water supply. As is clear from even this example, imposing liability in such an instance would completely upend
basic principles of legal liability, not to mention ignore the existing mechanisms by which water quality is regulated
in this state. There can be no doubt that what Coastkeeper is asking this Court to do would create a dangerous and
far-reaching precedent indeed.

1 Water Board's lack of action unless this Court acts now. The only thing consistent about
2 Coastkeeper's arguments is their factual and legal inaccuracy: neither argument provides a basis
3 for Coastkeeper's claims to continue to be maintained in this Court.

4 Now, as in 2012, the Regional Water Board acted quickly in response to Coastkeeper's
5 request to determine whether a report of waste discharge and/or waste discharge requirements for
6 MCWRA may be appropriate. And now, as in 2012, if either party disagrees with any finding
7 made by the Regional Water Board with respect to this determination, that party can avail itself of
8 the processes detailed in the Water Code for precisely such a situation – as MCWRA has already
9 done, and as Coastkeeper ultimately had to concede it could do at the December 1, 2014, Status
10 Conference.

11 Specifically, and once again, if Coastkeeper does ultimately end up dissatisfied with the
12 Regional Board's determination as to whether MCWRA is required to submit a report of waste
13 discharge or obtain waste discharge requirements, the Porter-Cologne Act provides a process by
14 which Coastkeeper can request the Regional Water Board to act. (Cal. Water Code §13320(a).)
15 If the Regional Water Board does not act in response to that request within sixty (60) days,
16 Coastkeeper then can, within thirty (30) days, file a Petition for Review (administrative appeal)
17 with the Regional Water Board's parent agency, the State Water Board, to obtain further review.
18 (*Id.*; *see also* 23 C.C.R. §§2050-2068.) Should review at the State Water Board be denied, or not
19 substantively satisfy Coastkeeper, Coastkeeper can then seek judicial review of the dispute by
20 filing a Petition for Writ of Mandate in Superior Court. (Cal. Water Code §13330.) Thus, the
21 Porter-Cologne Act sets forth a comprehensive scheme for administrative and judicial review for
22 precisely the circumstance faced here. Notably, the respondents in these statutorily-authorized
23 administrative and judicial appeals are the Regional Water Board and/or the State Water Board,
24 *not* the entity who is the subject of the complaint (*e.g.*, MCWRA).

25 MCWRA has also explained to this Court why there can be no doubt that Coastkeeper is
26 well aware of these procedures, as it has availed itself of this very process already⁵, including in

27 _____
28 ⁵Coastkeeper also faithfully followed this procedure when recently pursuing almost identical claims against the
Regional Board with respect to the Board's regulation (via the 2012 Conditional Waiver) of the same alleged

1 2012 when Coastkeeper complained to the Regional Water Board that MCWRA was engaged in
2 activities that require a report of waste discharge under Water Code section 13260 and waste
3 discharge requirements under Water Code section 13263. In response to Coastkeeper's 2012
4 complaint, the Regional Water Board promptly responded, engaging in approximately one year of
5 investigation and discussion, which culminated in MCWRA not being required to submit a report
6 of waste discharge pursuant to Water Code section 13260. Yet again, if after that process
7 Coastkeeper still somehow believed that MCWRA was required to submit a report of waste
8 discharge, the appropriate vehicle for administrative and eventual judicial review would have
9 been for Coastkeeper to file a Petition for Review of the Regional Board's April 18, 2012, letter
10 rescinding the Regional Board's request for MCWRA to submit a report of waste discharge, as
11 provided by Water Code section 13320. Yet Coastkeeper, an experienced environmental
12 organization with experienced environmental counsel, chose not to.

13 Despite all of these undeniable facts, including Coastkeeper's own undisputed prior
14 actions and knowledge of the explicit remedy provided in the Porter-Cologne Act, Coastkeeper
15 remarkably told this Court at the November 14, 2014, writ hearing that no such remedy at law
16 existed. Despite having months to consider the propriety of making such an unfounded argument,
17 Coastkeeper asserts this claim yet again in its Statement. The Regional Water Board's response
18 to the certified questions merely underscores just how false Coastkeeper's position is, as it
19 confirms the existence of the very process Coastkeeper wants to pretend does not exist.

20 The arguments Coastkeeper makes with respect to this issue are completely illegitimate.
21 First, Coastkeeper claims that it cannot avail itself of this established administrative procedure
22 because the Regional and/or State Water Boards have no "mandatory duty" to act, and therefore
23 writ review is unavailable. However, the writ review provided under Water Code section 13330
24 *is not a Code of Civil Procedure section 1085 writ*. Instead, Coastkeeper's remedy is a writ
25 pursuant to *Code of Civil Procedure section 1094.5* – a writ available to challenge agency orders

26
27 agricultural pollution as alleged here. (RESP00003-23 (Petition for Review); RESP00065-83 (Writ).) Contrary to its
28 claims in this action, Coastkeeper has itself repeatedly acknowledged in those actions that the "agency directly
responsible for water quality is the Regional Water Quality Control Board." (RESP00265.)

1 or decisions even if those acts result from an agency's exercise of discretion. (*See, e.g., Bixby v.*
 2 *Pierno* (1971) 4 Cal. 3d 130, 137-38). Of course, that is the very kind of order or decision that
 3 would necessarily be at issue once Coastkeeper got to this point in the administrative process.

4 Nonetheless, and in an effort to claim that discretionary acts cannot be reviewed via a
 5 1094.5 writ, Coastkeeper offers the wholly inapposite example of the State Water Board's ability
 6 to exercise discretion in the context of an enforcement action. Once again, discretionary
 7 enforcement is an entirely different exercise of authority, is handled via Water Code sections
 8 13323, 13350, and 13361 (dictating civil and criminal penalties for non-compliance), and is
 9 therefore irrelevant to the case at hand. At its most basic, issuing a permit (or a request related
 10 thereto) is not an enforcement activity under the Water Code. Coastkeeper understands this basic
 11 regulatory difference, yet misrepresents it to the Court now in an effort to bolster its untenable
 12 legal position.

13 The other notable inaccuracy in Coastkeeper's argument is its assertion that because the
 14 State Water Board has the discretion not to hear a petition (per Water Code section 13320 and as
 15 explained above), that means Coastkeeper would be left without any remedy if the State Water
 16 Board chose not to hear its theoretical petition. While it is true that the State Water Board would
 17 have the discretion not to hear Coastkeeper's petition, the Water Code unequivocally confirms
 18 that such a decision would simply move Coastkeeper on to the next step of its available remedy:
 19 filing a writ pursuant to Code of Civil Procedure section 1094.5.⁶ As confirmed in 23 C.C.R.
 20 section 2052, the State Water Board can grant full or partial review, or dismiss without review,
 21 and the decision as to which approach to take is entirely within its discretion. Yet under all of
 22 these scenarios, the petitioner (in this case, Coastkeeper) retains the ability to file a writ for
 23 continued review pursuant to Water Code section 13330. (23 C.C.R. § 2052.) Accordingly,
 24 Coastkeeper's contention that "it could not maintain a judicial challenge in the event that its
 25 request is denied" (as stated on page 7 of its Statement) is patently false.

26 _____
 27 ⁶ It is also worth noting that, contrary to what Coastkeeper appears to suggest, the State Water Board would have no
 28 ability to put such a Petition in abeyance. That right rests solely with the Petitioner, who, as explained above with
 respect to MCWRA's own such petitions, may have good reason to let a Petition sit while it works on resolving the
 matter, but does not want to waive its statutory right to pursue relief in the event resolution is not achieved.

1 In sum, the procedural framework of the Porter-Cologne Act, Coastkeeper’s own efforts
 2 before the Regional Board with respect to MCWRA’s activities, and the Regional Board’s
 3 responses, including the response provided on January 7, 2015, all confirm that the Regional
 4 Board, and then, authorized administrative and judicial tribunals, are the appropriate agency and
 5 forum to resolve Coastkeeper’s claims for relief – and that Coastkeeper therefore undeniably has
 6 an adequate remedy at law. Lacking any way to satisfy this threshold requirement for writ relief,
 7 Coastkeeper’s claims for relief based on the Porter-Cologne Act necessarily fail, and must be
 8 denied on this independent basis as well.

9 **C. The Regional Water Board’s Response to the Certified Questions Also Confirms**
 10 **Why Coastkeeper’s Public Trust Cause of Action Must Be Denied.**

11 As MCWRA most recently explained in its Opposition to Coastkeeper’s Brief in support
 12 of its Writ Petition, members of the public, as beneficiaries of the public trust, may file suit to
 13 compel a trustee agency to perform its public trust duties. (*Center for Biological Diversity, Inc. v.*
 14 *FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1367-1368 (“CBD”).) However, members of the
 15 public “are not entitled to bring an action against those whom they allege are harming trust
 16 property.” (*Id.* at 1367.) Instead, the trustee alone has the right to bring such an action. (*Ibid.*)
 17 Thus, when members of the public seek to compel enforcement of the public trust, they must
 18 bring the action against the appropriate entity: the representative of the State with trustee
 19 responsibilities over the affected trust resources. (*Id.* at 1367-1368, 1372 (challenge to adequacy
 20 of measures being taken to protect public trust resources in connection with activities that could
 21 affect such resources “must be addressed in an appropriate manner to the agencies that are
 22 responsible for regulating those activities.”).) Conversely, when challenges are addressed to the
 23 wrong party (i.e., not the trustee), courts should not hesitate to dismiss them. In the instant case,
 24 and as MCWRA has continued to maintain throughout this proceeding, Coastkeeper failed to
 25 bring its claim against the actual trustee, so denial/dismissal of its public trust cause of action is
 26 required. The Regional Board’s January 7, 2015, response to the certified questions once again
 27 proves that MCWRA is right.

28 In the *CBD* case, the Center for Biological Diversity (“Center”) sued windmill operators

1 whose actions, they alleged, were destroying trust resources. (*Id.* at 1367.) Even though the
2 appellate court vindicated the Center's theory that the public trust doctrine applied to wildlife, it
3 determined that the Center nonetheless lost *because it failed to sue the proper parties*.
4 Specifically, the court determined that the Center should have brought suit against the permitting
5 agencies, such as Alameda County, and not against the operators/permittees. (*Id.* at 1372.)

6 This principle, that the responsible agency in the context of a public trust analysis is the
7 *permittor*, and not the permittee, is a long-established and recurring premise in public trust law,
8 and critical to this Court's determination now. In *National Audubon Society v. Superior Court*
9 (1983) 33 Cal. 3d 419, the court confirmed that the local agency permittee was not at fault for
10 failing to consider public trust. Instead, that responsibility rested with the Water Board, a state
11 agency and the permittor. (*Id.*, 33 Cal.3d at 452.) Moreover, just last year, in *Environmental Law*
12 *Foundation v. State Water Resources Control Board*, Case No. 34-2010-80000583, currently
13 pending in Sacramento Superior Court, the court once again explained that it is the permit or
14 license *granting* agency (in this case, an agency issuing permits to appropriate groundwater) that
15 possesses the trustee obligations for purposes of a public trust analysis. (July 15, 2014, Order on
16 Motions for Judgment on the Pleadings at p. 13.)

17 Having failed to identify the requisite discretionary authority in MCWRA to trigger public
18 trust obligations, and proven wrong by the very authority upon which it purports to rely,
19 Coastkeeper resorts to the wholly unsupported assertion that all public agencies are trustees of the
20 public trust. This argument makes no logical sense. The nature and extent of discretionary
21 authority granted to the hundreds of public agencies in California varies wildly. And in cases
22 like this one, where the agency lacks the discretionary authority to protect trust resources, there
23 necessarily is no ability to act meaningfully as a trustee. Moreover, no court has ever recognized
24 Coastkeeper's argument or based a public trust decision upon it. As MCWRA has previously
25 pointed out, Coastkeeper is asking this Court to make brand new law, and has failed to justify –
26 legally or factually – why this Court should embark on such an extraordinary change in legal
27 direction.

28 Here, MCWRA is undeniably the permittee, not the permittor, and the authority to permit

1 (or in this case, to require a report of waste discharge and/or issue waste discharge requirements)
 2 rests with the Regional Water Board. Accordingly, and as the Regional Water Board's January 7,
 3 2015, response confirms, there is no basis to assert any claim based on the public trust doctrine
 4 against MCWRA. Instead, and as MCWRA has argued from the beginning, if Coastkeeper wants
 5 to challenge the regulation of the agricultural discharges referenced in its Petition/Complaint, the
 6 entity to which it must direct that challenge is the Regional Water Board, precisely because the
 7 Regional Water Board has the public trust responsibility in this arena.

8 Of course, Coastkeeper already knows this to be true, as it has already made that very
 9 challenge, in an action currently pending in Sacramento Superior Court, captioned *Monterey*
 10 *Coastkeeper, et al. v. California State Water Resources Control Board*, Case No. 34-2012-
 11 80001324. There is accordingly no concern that Coastkeeper's ability to pursue a public trust
 12 claim will be eliminated if this Court denies Coastkeeper's petition: Coastkeeper must merely
 13 abide by the standard litigation prerequisite of pursuing its claims only against a proper party.

14 As explained herein, there can be no doubt that the Regional Water Board is the entity
 15 charged with regulating the activities at issue in Coastkeeper's Petition/Complaint, and that the
 16 public trust challenge presented against MCWRA in this action is therefore legally improper. In
 17 keeping with established court precedent, and common sense, Coastkeeper's public trust cause of
 18 action must also be dismissed. (*CBD*, 166 Cal.App.4th at 1367-1368, 1372.)

19 **D. What The Regional Water Board Ultimately Decides Is Irrelevant.**

20 As referenced above, in subsequent correspondence, dated January 22, 2015, Staff
 21 Counsel for the Regional Water Board clarified that pending additional investigation and
 22 discussions regarding logistical issues (such as who must actually submit a report of waste
 23 discharge, whether other regulatory tools can and should be used, etc.), MCWRA did not yet have
 24 to physically file a report of waste discharge ("ROWD"):

25 Please be advised that Regional Water Board's Executive Officer
 26 does not construe the letter to the court as a request for MCWRA to
 27 file an ROWD. The letter is not a board order, and the Executive
 28 Officer did not intend it to be a request for a ROWD under section
 13261, subdivision (a). We anticipate using the proposed meeting
 with MCWRA as an opportunity to discuss various potential
 regulatory tools, timing issues and identify appropriate and/or

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

potential dischargers who may be party to any potential orders to address the Reclamation Ditch and Blanco Drain.

(January 22, 2015, e-mail correspondence from Tamarin Austin to Nicole Granquist, Irven Grant, and Ken Harris). The meeting referenced in this correspondence, where Regional Water Board staff and MCWRA will discuss these issues, will take place on March 3, 2015. Importantly, and even if the Regional Water Board were to ultimately determine that no ROWD is required for MCWRA, the applicable analysis, and consequently the conclusion required here, remains the same.

The critical fact is not what outcome the Regional Water Board requires, but simply that the Regional Water Board is entrusted to – and obligated to – make the decision. In fact, additional evidence of the Regional Water Board’s evaluation process only confirms why MCWRA’s arguments are valid. After all, what better evidence could there be of the fact that the Regional Water Board fully and actively occupies this regulatory space than evidence of it actively doing exactly what it is statutorily empowered and required to do in that very capacity.

III. CONCLUSION

Coastkeeper is right that nothing has changed, but wrong about what that “nothing” is. The Regional Water Board staff’s response to the certified questions only served to unambiguously confirm what MCWRA has been saying all along – Coastkeeper’s claims do not belong in this Court, and cannot be maintained as a matter of law. Regardless of what decision is ultimately reached by the Regional Water Board, it is still the agency to decide, it is still the agency with the trustee obligation to consider, and Coastkeeper still has an adequate remedy at law to challenge any decision reached. Thus, for the reasons explained herein – and as the Regional Water Board’s January 7, 2015, correspondence plainly supports – MCWRA

///
///
///
///

1 respectfully requests that this Court deny Coastkeeper's Petition for Writ of Mandate, and dismiss
2 its Petition/Complaint with prejudice.

3
4 DATED: February 11, 2015

MONTEREY COUNTY COUNSEL

5
6 By: 

IRVEN L. GRANT
Deputy County Counsel
Attorney for Respondent
MONTEREY COUNTY WATER RESOURCES
AGENCY

7
8
9
10 DATED: February 11, 2015

DOWNEY BRAND LLP

11
12 By: 

STEVEN P. SAXTON
NICOLE E. GRANQUIST
ELIZABETH B. STALLARD
Attorneys for Respondent
MONTEREY COUNTY WATER RESOURCES
AGENCY

DOWNEY BRAND LLP

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28