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7 MONTEREY COASTKEEPER

8
9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF MONTEREY

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

14 Petitioner-Plaintiff,

15 v.

16 MONTEREY COUNTY WATER RESOURCES
AGENCY, a public agency,

17 Respondent-Defendant.

Case No. M108858

**PETITIONER'S OPPOSITION TO
RESPONDENT'S *EX PARTE*
APPLICATION**

Date: Mar. 11, 2015
Time: 1:30 pm
Dept: 14

Action Filed: Oct. 21, 2010
Trial: Nov. 14, 2014

1 Petitioner Monterey Coastkeeper (“Coastkeeper”) opposes Respondent Monterey County Water
2 Resources Agency’s (“Water Agency”) *ex parte* application. As a threshold matter, the Water
3 Agency’s use of the *ex parte* process is entirely inappropriate here. The Water Agency has not shown
4 and cannot show “irreparable harm, immediate danger, or any other statutory basis for granting” *ex*
5 *parte* relief. Cal. Rules of Court, Rule 3.1202 (c). There simply is no reason to take the Court’s time
6 and Coastkeeper’s resources for an emergency hearing when a case management conference is
7 currently scheduled for next week, March 19, 2014.

8 In any event, the *ex parte* request is without merit. Once again, the Water Agency seeks to
9 delay resolution of this case in order, it now argues, to allow the Regional Water Quality Control Board
10 (“Regional Board”) to “properly conclude its investigation of Coastkeeper’s allegations.” Ex Parte
11 Application at 1. But there is no ongoing Regional Board “investigation” of any “allegations,” and the
12 Court’s resolution of the writ in Coastkeeper’s favor will not interfere with the Regional Board’s ability
13 to move forward with determining the contents of waste discharge requirements under the Porter-
14 Cologne Act. Indeed, until the Court resolves this case, the Water Agency and the Regional Board are
15 likely to remain at a permanent standstill – to the prejudice of Coastkeeper, which has been trying to
16 get its legal claims resolved for more than four and a half years, and more importantly to the detriment
17 of the public’s interest in clean water and pollution reduction. There is no “prejudice” to the Water
18 Agency from a final judgment and its claim of administrative “limbo” is entirely of its own making.

19 1. This case was filed in October 2010. After extensive discovery, summary judgment
20 motions, and nearly two years of mediation, this matter finally came on for writ trial in November
21 2014. At that time, the Water Agency argued vehemently, for more than four hours, that the Regional
22 Board (1) had *already undertaken and completed* a thorough investigation of whether the Water
23 Agency is a discharger subject to the Porter-Cologne Act and (2) had definitively concluded that it was
24 not.

25 2. The Court subsequently solicited the Regional Board’s opinion on the question of whether
26 the Water Agency is a discharger under the Porter-Cologne Act. On January 7, 2015, Regional Board
27 Executive Officer Ken Harris submitted an unequivocal answer to the Court, stating that the Water
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1 Agency “is a waste discharger and must file a report of waste discharge” (hereinafter “Harris Letter”).

2 3. At the February 17, 2015 hearing to review the Harris Letter, the Water Agency tried to
3 undermine the Harris Letter by producing excerpts from a January 22, 2015 email from Regional Board
4 attorney Tamarin Austin (hereinafter “Austin Email”), which it claimed as evidence that the Regional
5 Board was retreating, only two weeks later, from the Harris Letter. The Austin Email, however, merely
6 stated the unremarkable proposition that the Harris Letter was not itself a Board “order” and was not
7 intended to be a “request” for a report of waste discharge. Declaration of Nicole E. Granquist, Exh. A,
8 filed February 24, 2015. But nothing in the Austin Email even hinted that the Regional Board had
9 retracted the legal conclusions of the Harris Letter *with respect to the Water Agency’s status and*
10 *responsibility as a discharger.*

11 4. In an attempt to delay entry of judgment, the Water Agency stated that it would be meeting
12 with the Regional Board on March 3, 2015 to discuss this matter and the Court should refrain from
13 acting. Coastkeeper’s counsel indicated that Petitioner had no information about the March 3 meeting,
14 that Petitioner was not invited to participate in that meeting, and that no formal public process would
15 even begin until the Water Agency filed a report of waste discharge, which is the statutory trigger for
16 the Regional Board’s mandatory duty to act. The Water Agency’s counsel emphatically indicated that
17 the meeting was open to the public and agreed to provide meeting details so that Coastkeeper could
18 arrange to attend.

19 5. Coastkeeper and its counsel are well-aware that meetings between dischargers and Regional
20 Board staff to discuss the potential content of permits – meetings that generally occur once a report of
21 waste discharge has been filed, thereby initiating the permitting process – are not normally open to the
22 public. But because the Water Agency’s counsel insisted otherwise, and having heard nothing more
23 about the rapidly-approaching March 3 meeting, Coastkeeper Executive Director Steve Shimek sent a
24 letter on February 24, 2015 to the Regional Board Executive Officer, copied to the Water Agency and
25 its counsel as directed by the Court, asking for further information about the March 3 meeting.
26 Declaration of Nicole E. Granquist, Exh. A, filed March 10, 2015. On February 27, 2015, Mr. Shimek
27 received a copy of a letter to the Court from Regional Board legal counsel Tamarin Austin, apparently
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1 in response to Mr. Shimek’s February 24, 2015 correspondence (“Austin Letter”). Declaration of
2 Nicole E. Granquist, Exh. D, filed March 10, 2015. As Coastkeeper suspected, the Austin Letter made
3 it clear that the March 3 meeting was *not*, in fact, open to the public, as Water Agency counsel had
4 suggested, and Coastkeeper was *not* welcome to attend.

5 6. In a never-ending attempt to dodge liability, the Water Agency now radically switches gears
6 again, taking a diametrically opposed position to the one it argued at trial. Having insisted that the
7 Regional Board previously completed an exhaustive investigation and concluded that the Water
8 Agency was not a discharger, the Water Agency now argues that the Regional Board’s “investigation”
9 is actually ongoing and being impeded by the Court. These arguments are a continued exercise in
10 misdirection. There is no “investigation.” The Water Agency’s goal is to delay any ruling by the Court
11 while simultaneously pressing the Regional Board to retract its legal conclusion. Its ever-shifting
12 arguments have managed to grind this matter to a halt before both the Court and the Regional Board.

13 The way forward is simple: The Court should issue a writ of mandate finding that the Water
14 Agency is a discharger under the Porter-Cologne Act and must, therefore, file a report of waste
15 discharge. This is precisely what the Regional Board said in its clear response to the Court on January
16 7, and nothing has changed since that time. The Regional Board has merely indicated that it will work
17 with the Water Agency, as it does with all dischargers, to negotiate the terms and conditions of a draft
18 permit. This process normally does not commence – and the Regional Board’s mandatory duties are
19 not triggered – until the discharger applies for a permit by filing a report of waste discharge.

20 The filing of a report of waste discharge, moreover, will not interfere with the Regional Board’s
21 considerations or prejudice the Water Agency. On the contrary, once the report of waste discharge is
22 filed, the Regional Board will be free to pursue its “normal” process of working with the discharger on
23 the contents of the permit. The Regional Board also will be free to involve growers or other
24 “stakeholders” if it chooses to do so.

25 But Regional Board meetings with the Water Agency or with a broader group of stakeholders to
26 discuss the tools for abating pollution will not resolve the purely *legal questions* that are now fully
27 briefed and at issue before the Court, whether a report of waste discharge and permit are required in the
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1 first instance.

2 In the end, Coastkeeper has no way to timely advance the Water Agency’s private discussions
3 with the Regional Board, no way to participate in a lengthy stakeholder process, and no way to ensure
4 that its interests are represented in any discharger discussions *unless and until* the Water Agency
5 actually initiates the permitting process and files a report of waste discharge under Water Code section
6 13260. The simple filing of a report of waste discharge is the mechanism which ensures that those
7 informal meetings will eventually lead to an actual administrative process – one that can, if necessary,
8 be judicially challenged.

9 Finally, the Regional Board has no authority over Coastkeeper’s second claim concerning the
10 Water Agency’s common law fiduciary duty under California’s public trust doctrine. Whether or not a
11 Porter-Cologne Act permitting process is ever initiated, the Water Agency has its own separate and
12 distinct public trust obligation, independent of the Regional Board’s public trust obligation that can
13 only be determined in the first instance through the issuance of a judicial writ by the Court. *See*
14 *Environmental Law Foundation v. State Water Resources Control Board*, Case No. 34-2010-8000583
15 (July 15, 2014) (“As a subdivision of the State, the County ‘shares responsibility’ for administering the
16 public trust [in connection with groundwater management plan]. The State cannot abdicate its duties
17 under the public trust doctrine. Neither can the County.”). Although the Regional Board also has
18 public trust obligations, it has no statutory or other authority to make a determination about *the Water*
19 *Agency’s* common law public trust obligation. It is the Court’s role to adjudicate that duty. While
20 filing a report of waste discharge does not in itself result in water quality improvements, it only triggers
21 a mandatory process, it is the ruling that the agency has public trust responsibilities and must
22 affirmatively protect the public’s water resources, that ultimately changes the behavior of the Water
23 Resources Agency.

24 Coastkeeper respectfully submits that the Court can and should deny the Water Agency’s *ex*
25 *parte* application and, instead, decide the two legal questions briefed on the writ petition: (1) Whether
26 the Water Agency’s operation, maintenance, and management activities in the Reclamation Ditch and
27 Blanco Drain constitute activities that “could affect” water quality and, therefore, require the Water
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1 Agency to file a report of waste discharge under Water Code section 13260; and (2) Whether the Water
2 Board has a fiduciary duty under California's robust public trust doctrine to consider public trust
3 resources in managing and operating the Reclamation Ditch and Blanco Drain, an obligation it has not
4 yet satisfied or even acknowledged. All of the factual evidence and legal authority to grant the writ
5 petition on both of these legal questions is now before the Court. Once a writ issues, the Water Agency
6 will be able to work with the Regional Board and other stakeholders (e.g., growers) to comply with its
7 statutory and common law obligations, and Coastkeeper will have assurance that a permitting process is
8 under way. But unless and until the writ issues, it is clear the Water Agency will do everything in its
9 power to delay any resolution of its responsibilities by either the Regional Board or the Court.

10 Accordingly, Coastkeeper respectfully requests that the Court rule on the pending writ petition
11 and issue a writ of mandate directing the Water Agency to comply with its legal obligations under the
12 Porter-Cologne Act and the public trust doctrine.

13 Dated: March 11, 2015

Respectfully submitted,

14 ENVIRONMENTAL LAW CLINIC
15 Mills Legal Clinic at Stanford Law School

16 By:  _____
17 Deborah A. Sivas

18 Attorneys for Petitioner MONTEREY COASTKEEPER

1 DEBORAH A. SIVAS declares:

2 I am over the age of eighteen years and not a party to this action.

3 On March 11, 2015, I served the following documents:

4 **PETITIONER'S OPPOSITION TO RESPONDENT'S *EX PARTE* APPLICATION**

5 on all persons named below by placing a true and correct copy in the course of electronic transmission
6 to each at the email address below their respective names and addresses:

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13 I declare under penalty of perjury that the foregoing is true and correct, and that this declaration
14 was executed March 11, 2015 at Stanford, California.

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16 DEBORAH A. SIVAS