

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

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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
18 organization,

19 Petitioner and Plaintiff,

20 v.

21 MONTEREY COUNTY WATER
RESOURCES AGENCY, a public agency,

22 Respondent and Defendant.
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CASE NO. M 108858

**MONTEREY COUNTY WATER
RESOURCES AGENCY'S STATEMENT
TO COURT IN ADVANCE OF MARCH
19, 2015 STATUS CONFERENCE/REVIEW
HEARING**

Date: March 19, 2015
Time: 9:00 a.m.
Department: 14

Action Filed: October 21, 2010

1 Various events have occurred since the last Status Conference relevant to the issues that
2 Respondent/Defendant Monterey County Water Resources Agency (“MCWRA”) believes must
3 be addressed on March 19. On February 24, 2015, Steven Shimek, the Program Director of
4 Plaintiff/Petitioner Monterey Coastkeeper (Coastkeeper”), sent correspondence to the Central
5 Coast Regional Water Quality Control Board (“Regional Board”) concerning the then-scheduled
6 March 3, 2015 meeting between the Regional Board and MCWRA.¹ On February 25, 2015,
7 Tamarin E. Austin, counsel for the Regional Board, responded via e-mail to Mr. Shimek’s
8 February 24, 2015, e-mail correspondence, asking Mr. Shimek to provide her with a copy of
9 orders confirming certain assertions Mr. Shimek made in his February 24 correspondence. In Mr.
10 Shimek’s response to Ms. Austin, he informed Ms. Austin that the transcript of the February 17
11 hearing was not yet available, and reiterated the representations in his prior correspondence.

12 On February 27, 2015, the Regional Board presented the parties with correspondence
13 addressed to this Court regarding the March 3, 2015, meeting. That correspondence was later
14 filed by MCWRA on behalf of the Regional Board, at the Regional Board’s request and with
15 Coastkeeper’s knowledge. The Regional Board’s correspondence addresses, among other things,
16 its belief that it would be beneficial for the originally-scheduled meeting with MCWRA to go
17 forward without Coastkeeper present. This correspondence also detailed the Regional Board’s
18 preferred process for responding to a complaint that any party should be required to file a report
19 of waste discharge (as Coastkeeper asserts in this action):

20 The Central Coast Water Board staff’s preference is to follow
21 customary procedure and meet first with [MCWRA] and then
develop options for future public consideration.

22 However, the correspondence also went on to offer *two* alternatives in the event that the Court
23 would not allow the Regional Board to follow its preferred process:

24 If the Court does not allow [MCWRA] to participate in such a
25 meeting, another option would be to have the Central Coast Water
26 Board and [MCWRA] meet first, followed by a second session that
includes Coastkeeper and communicates the main points of the first

27 ¹ All of the correspondence referenced here was filed with the Court on March 10, 2015, with MCWRA’s *Ex Parte*
28 Application and served on Coastkeeper that same day. A copy of that Application, including the supporting
declaration and exhibits, is attached as Exhibit A to the contemporaneously-filed Declaration of Nicole E. Granquist.

1 meeting. Another possibility is arranging a confidential mediation
2 session between the parties, which the Central Coast Water Board
staff would agree to attend in order to assist the court.

3 The Regional Board also explained its legitimate reason for offering these alternatives:

4 These suggestions are intended to minimize legal posturing and
5 rhetoric and allow the parties to have frank discussions about
6 solutions without being concerned their statements will be treated
as admissions.

7 Finally, the Regional Board's correspondence requested that this Court provide clarification, and
8 communicate its preference regarding the options in the event that the Regional Board's preferred
9 process was not acceptable.

10 On March 2, 2015, Mr. Shimek responded to the Regional Board's correspondence to the
11 Court. In his correspondence, Mr. Shimek, in apparent response to the Regional Board's
12 indication that requiring MCWRA to file a report of waste discharge was not the only regulatory
13 option² it was considering, dismissed both alternatives the Regional Board offered to its preferred
14 process; made various inflammatory and inaccurate statements about MCWRA; and eventually
15 asked the Regional Board to clarify whether Coastkeeper could attend the March 3 meeting.

16 In response to Mr. Shimek's letter, Ken Harris, the Regional Board's Executive Director,
17 explained that the Regional Board staff were still awaiting direction from the Court as to how to
18 proceed, and indicated that if such direction was not received by 3:00 p.m. that day (March 2,
19 2015), staff would not participate in the March 3 meeting. Shortly after 3:00 p.m., Mr. Harris
20 wrote the parties again to confirm that no direction had been received from the Court and the
21 meeting would therefore not take place. The Court did contact counsel for MCWRA that
22 afternoon to set up a call between the parties on this issue, but the call did not ultimately convene.
23 As such, the March 3, 2015, meeting never occurred.

24 On March 10, in an effort to resolve this uncertainty (and thereby keep the regulatory
25 process moving forward), and mindful of the fact that this Court had indicated a desire to

26 ² On the first page of its February 27 correspondence, the Regional Board referenced some of its available regulatory
27 tools for addressing water quality issues. ("The Central Coast Water Board has a variety of regulatory tools to
28 address water quality issues, including the use of waste discharge requirements; cleanup and abatement orders; and
oversight of a voluntary process.") Should the Regional Board pursue an option other than waste discharge
requirements, a report of waste discharge may not be required.

1 potentially make determinations at the March 19 Status Conference, MCWRA filed an *ex parte*
2 application (“Application”) for an order confirming that MCWRA could participate as requested
3 by the Regional Board in any of the regulatory processes/alternatives outlined by the Regional
4 Board in its February 27, 2015 correspondence. Coastkeeper opposed the Application, and argued
5 once again that the Court should simply proceed to rule on the writ.

6 On March 11, the parties appeared in Department 16 for the hearing on MCWRA’s
7 Application. The Court, acknowledging significant history in this case of which it was not aware,
8 denied the Application, explaining that MCWRA’s request for clarification should be addressed
9 at the March 19 Status Conference in Department 14. Accordingly, MCWRA raises this issue
10 now for the Court’s consideration at the upcoming Conference/Hearing.

11 MCWRA has also made reasonable efforts to keep the regulatory process moving in the
12 interim. On March 12, 2015, MCWRA contacted Regional Board staff to request a date on which
13 the Regional Board could be available to meet regarding this matter. (Declaration of Nicole E.
14 Granquist re March 19, 2015, Status Conference/Review Hearing, Ex. B.) As indicated in
15 MCWRA’s correspondence, MCWRA’s intention was to secure a date with the Regional Board
16 as soon as possible, so that this Court could then simply decide whether the meeting should
17 proceed and what format that meeting should take (including who should attend) at the March 19,
18 2015, Conference/Hearing, and the intervening time period would not delay the regulatory
19 process any further. Regional Board staff responded that same afternoon, indicating that they
20 would obtain available dates and respond on or about Monday, March 16³. (*Id.*)

21 Now all that is required is the requested clarification from this Court. The Court’s
22 clarification is essential in order for the Regional Board to proceed with its review of
23 Coastkeeper’s allegations – the very administrative review that Coastkeeper has claimed for years
24 does not exist in order to justify its filing and maintenance of a writ petition. As the Regional
25 Board’s correspondence confirms, the Regional Board does not know whether it can proceed with
26 its preferred administrative process, or if this Court wishes to order or indicate that another

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28 ³ Since the Regional Board has indicated it will respond after this Statement is filed, MCWRA anticipates being able to provide the Court with updated information about the meeting date at the Conference/Hearing.

1 process be followed instead, so its progress is effectively stalled. Based on Coastkeeper's
2 response to the Regional Board's request for clarification from this Court, there is no way to
3 resolve this without the Court's involvement.

4 It is also clear that a significant risk of prejudice to MCWRA exists if this Court does not
5 clarify how the regulatory process may proceed. This Court has indicated its desire to resolve this
6 dispute in the near future. However, if the requested clarification is not provided, there is an
7 obvious risk of a different – and wrong – result in this action. The lack of clarification may
8 prevent or impede completion of the Regional Board's investigation. The fact that the Regional
9 Board has not been able to adequately complete its investigation might then be used by
10 Coastkeeper as support for the argument that a writ is – or has ever been – needed.

11 In sharp contrast, no harm would come to Coastkeeper if the Court provides the requested
12 clarification and allows the Regional Board's process to proceed. Coastkeeper has claimed that it
13 wants the Regional Board to make a determination with respect to whether or not MCWRA must
14 file a report of waste discharge: it is clear that this will not happen until the clarification is
15 provided. So not only is there no prejudice, but the relief being requested by MCWRA
16 necessarily benefits Coastkeeper too.

17 With respect to the substance of the clarification, MCWRA does believe that the Regional
18 Board should be allowed to proceed with its preferred administrative process. For the reasons
19 already explored in the Regional Board's own correspondence, the preferred process is fair and
20 efficient, and has been developed and honed over time to deal with this very kind of issue. There
21 is also independent value in not requiring the Regional Board to act in a way it would not
22 normally act – particularly given Coastkeeper's claim that no process ever existed. Of course, to
23 the extent that the Court believes proceeding with one of the alternatives suggested by the
24 Regional Board is preferable, MCWRA certainly has no objection to proceeding in that manner
25 either. MCWRA merely wants the Court to provide necessary clarification to the Regional
26 Board, so that its process can continue to move forward and confirm once and for all that
27 Coastkeeper's procedural and substantive arguments in this proceeding are wholly unfounded.

28 MCWRA anticipates that – once again – Coastkeeper's position will be that the Court

1 should not give the Regional Board's process the ability to properly run its course, and instead
2 should simply make a final determination with respect to Coastkeeper's claims in Coastkeeper's
3 favor. Coastkeeper's position is both unreasonable and legally invalid.

4 Initially, the mere fact of the Regional Board's conduct in responding to Coastkeeper's
5 allegations conclusively illustrates that MCWRA's procedural arguments with respect to
6 Coastkeeper's Porter-Cologne Act claims – as well as MCWRA's arguments with respect to
7 Coastkeeper's Public Trust claims – are all well taken, and that Coastkeeper's writ petition must
8 therefore be denied in its entirety. *Critically, and regardless of whether or not MCWRA is*
9 *ultimately required to file a report of waste discharge, Coastkeeper's Porter-Cologne Act claims*
10 *fail on a threshold procedural basis because the Regional Board's responding to its concerns*
11 *without any existing report of waste discharge in place proves that there is – and always has been*
12 *– an adequate remedy at law with respect to the matters about which Coastkeeper complains. Of*
13 *course, the Regional Board's clear decision-making authority (and corresponding trustee*
14 *responsibility) in this arena also confirms that Coastkeeper's Public Trust claims are just as*
15 *meritless and should also be denied.*

16 However, and even if the Court does not believe that such rulings are appropriate at this
17 time, the only reasonable option is to let the Regional Board's process run its course. Even in the
18 event that the Court is inclined to act in some interim manner with respect to the issues identified
19 in Coastkeeper's writ petition, determinations by the Regional Board will necessarily inform what
20 relief might be appropriate, and are therefore worth waiting for. As perhaps the most obvious
21 example, should the Regional Board determine that no report of waste discharge is required, any
22 determination by this Court to the contrary would be both counter to the Regional Board's
23 process and substantively incorrect.

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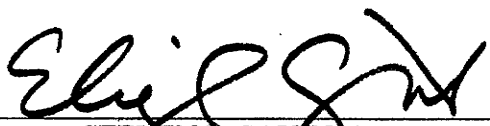
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DATED: March 13, 2015

DOWNEY BRAND LLP

By: 

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

DOWNEY BRAND LLP