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9

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF MONTEREY
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13 MONTEREY COASTKEEPER, a project of THE
14 OTTER PROJECT, a non-profit organization,

15 Petitioner-Plaintiff,

16 v.

17 MONTEREY COUNTY WATER RESOURCES
18 AGENCY, a public agency,

19 Respondent-Defendant.
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Case No. M108858

**COASTKEEPER'S FURTHER
CASE MANAGEMENT
CONFERENCE STATEMENT AND
STATUS UPDATE REPORT**

Date: Feb. 17, 2015
Time: 10:30 a.m.
Dept: 14

Action Filed: Oct. 21, 2010

1 Monterey Coastkeeper submits this statement in anticipation of the upcoming review hearing on
2 February 17, 2015. Since the last status conference on December 2, 2014, the parties submitted the
3 questions certified by this Court to the Regional Board. Sivas Decl., Exh. A (Certified Questions). In
4 response, the Regional Board stated that it “has determined that MCWRA is a waste discharger and
5 must file a report of waste discharge pursuant to California Water Code section 13260 or 13264 for its
6 activities in and around the Reclamation Ditch and Blanco Drain watersheds. We will provide
7 additional information directly to MCWRA regarding timing and content of a report of waste
8 discharge.” Sivas Decl., Exh. B (Regional Board letter, January 7, 2015). The Water Agency
9 responded to the Regional Board, explaining its disagreement with the discharger determination. Sivas
10 Decl., Exh. C (Water Agency letter, January 13, 2015). The letter went on to describe the lengthy
11 investigation conducted by the Regional Board and the Water Agency's confusion about the Regional
12 Board's resulting conclusion. Id. The Water Agency then requested a meeting to discuss the matter.
13 Id. In a later email exchange, the two agencies agreed to meet privately during February. Sivas Decl.,
14 Exh. D (Regional Board email, January 23, 2015).

15 While the Regional Board’s submission to this Court sheds more light on the Regional Board's
16 view of the Water Agency’s duty to report its waste discharges, the submission alone does not move the
17 parties closer to the remedy sought – the Water Agency filing a report of waste discharge. At this
18 critical point in the case, we return to this Court to address the writ petition still pending before it. This
19 Court now has three options with regard to the statutory claim. The options include: issuing the writ,
20 denying the writ, or further staying the case while the Water Agency moves into discussions with the
21 Regional Board. The recent developments also do not aid this Court in its determination of the Water
22 Agency’s public trust duty. Below is a short analysis of the common law public trust duty and then a
23 discussion of each the three options before this Court to dispose of the statutory claim.

24 As for the separate common law public trust claim, this Court should simply issue the writ. The
25 most recent submission by the Regional Board does not have any bearing on the separate public trust
26 question still pending before this Court – Does the Water Agency, as a trustee of the public trust
27 resources that it manages, have a public trust duty to protect the waters that it touches in the Salinas
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1 Valley? Coastkeeper has already fully briefed the Water Agency's public trust duty to protect the
2 waters that it manages. However, at the writ hearing, the Agency raised several theories to avoid its
3 public trust duty: (1) the public trust duty arises only from an explicit statutory provision; (2) the
4 public trust duty arises only to protect water supply and not water quality; (3) the public trust duty
5 arises only where a decision triggers the duty; (4) the public trust duty does not extend to the Water
6 Agency because the Regional Board is the only trustee of the public trust waterways at issue; and (5)
7 the Water Agency cannot satisfy any public trust duties because its hands are tied by its enabling act
8 that limits its authority to flood control activities. The seminal opinion in National Audubon Society
9 provides an apt blueprint for this Court to dispose of all of the Water Agency's theories to avoid its
10 public trust duty. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419 (1983).

11 There, the Supreme Court began by explaining that the public trust doctrine arises from its
12 origins in Roman law and evolved from the English common law to bestow on the state a trusteeship
13 over the navigable waterways for the benefit of the people. Id. at 434. Likewise here, the Water
14 Agency's public trust duty arises from the common law, and it need not be located in a statute's express
15 grant of trusteeship. Moreover, the Water Agency's management of the entire watershed affects the
16 water quality of public trust resources, and the Agency is therefore a trustee of trust resources subject to
17 the public trust's fiduciary obligations. Among the most important public trust uses "is the preservation
18 of those lands in their natural state, so that they may serve as ecological units for scientific study, as
19 open space, and as environments which provide food and habitat for birds and marine life." Nat'l
20 Audubon, 33 Cal. 3d at 434.

21 More tellingly, National Audubon found that a public trust duty requires reconsideration of
22 ongoing activities even if they have been occurring for decades, identifying this most salient fact: "no
23 responsible body has ever determined the impact of diverting the entire flow of the Mono Lake
24 tributaries into the Los Angeles Aqueduct." Id. The public trust obligation is a continuous,
25 affirmative duty to protect public trust resources, and it does not require a decisional trigger like a
26 discrete permit decision. Id. at 446. Moreover, multiple agencies may be trustees over the waters of
27 the Salinas Valley. A more recent case, Center. for Biological Diversity v. FPL Group, Inc., 166 Cal.
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1 App. 4th 1349 (2008), squarely addressed the obligations of multiple trustee agencies to protect public
2 trust resources. Ctr. for Biological Diversity, 166 Cal. App. 4th at 1366-67. While finding no
3 enforceable claim against the private windmill operator, the court indicated that the claim could be
4 enforceable against two public agencies, either the County of Alameda with authority over the windmill
5 uses or the California Department of Fish and Game with the responsibility for protecting the affected
6 natural resources. Id. 1367. As a subdivision of the state, the Water Agency is a trustee with public
7 trust obligations over the public trust resources that it affects. Ctr. for Biological Diversity, 166 Cal.
8 App. 4th 1349, 1370; see also Environmental Law Foundation v. State Water Resources Control Board,
9 Case No. 34-2010-8000583 (July 15, 2014) (“As a subdivision of the State, the County ‘shares
10 responsibility’ for administering the public trust [in connection with groundwater management plan].
11 The State cannot abdicate its duties under the public trust doctrine. Neither can the County.”),
12 previously attached to Request for Judicial Notice.

13 Finally, the Water Agency, like the water board in National Audubon, believes that it lacks the
14 power and duty to protect water quality. The helpless plea was rejected by the Court in that case
15 because the state has the continuing power and duty to revisit water allocations. Nat’l Audubon, 33
16 Cal. 3d at 446-47. Here too, the Water Agency engages in ongoing management of the water system
17 but has never considered the impacts of its vast water conveyance system on public trust resources, or
18 ways to reduce the pollution loads (e.g., constructed wetlands), before pumping the pollution into the
19 receiving waters. Nat’l Audubon, 33 Cal. 3d at 452 (compelling water board to consider public trust
20 uses for the first time). Because this Court is the proper forum to determine the Water Agency’s
21 obligations under the public trust doctrine, a writ declaring the Agency’s public trust duty should issue.

22 With respect to Petitioner’s Porter-Cologne Act claim, the Court has essentially three options,
23 each of which are addressed below. For the reasons explained, justice and judicial efficiency both
24 warrant that the Court act on the writ petition and issue a writ finding that the Water Agency is a
25 discharger under the statute and ordering it to file a report of waste discharge.

26 **I. Option One: This Court Issues the Writ**

27 This Court now has the Regional Board's legal interpretation of the Porter-Cologne Act, an
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1 interpretation from the agency that implements the Act, along with a fully developed record developed
2 through lengthy discovery, showing that the Water Agency is a discharger under the Act. The Regional
3 Board's recent submission to this Court simply restates its prior legal interpretation of the Porter-
4 Cologne Act: The Water Agency's activities trigger a mandatory duty to file a report of waste
5 discharge. This latest statement is one of many from the Regional Board since April 2012 that reiterate
6 this view of the Water Agency's activities. PET 000065 (requiring a report of waste discharge because
7 the Water Agency "periodically pumps surface water from flood channels, such as the Blanco Drain
8 and the Reclamation Ditch, directly into other water bodies (e.g. the Salinas River:); PET 000074
9 (stating that "[the Regional Board's] authority and responsibility include regulation of any activities
10 and factors that may affect water quality"); PET 000080, 180-81 (reiterating same). In short, the
11 Regional Board, since at least April 2012, has consistently read the statute's waste discharge provisions
12 as extending to the activities of the Water Agency that affect water quality. And the Water Agency has
13 put forward no applicable authority contradicting that agency interpretation. Accordingly, the Court
14 now has before all of the available legal authority to grant the writ consistent with the expert agency's
15 statutory interpretation. See Communities for a Better Environment v. State Water Res. Control Bd.,
16 109 Cal. App. 4th 1089, 1103-04 (2003) (endorsing courts' deference to an administrative agency's
17 interpretation of a statute involving its area of expertise).

18 Following years of litigation, including voluminous and protracted discovery, this Court also
19 now has before it more than sufficient evidence to decide the writ. This evidence – evidence obtained
20 in discovery directly from the Water Agency, much of which was not provided by the Water Agency to
21 the Regional Board in response to various requests for information – demonstrates that the Water
22 Agency's activities could affect (and, in fact, do affect) the quality of state waters. But for the Water
23 Agency's operation and maintenance of its extensive water conveyance system, the pollution moving
24 through this drainage system could not continue. PET 000818; 000820; 000242-52; 001030; 001941;
25 001973; 001981-88; 001993-94. Its drainage system actively carries contaminated wastewater from
26 agricultural fields to the very waters that suffer from water quality impairments. PET 003051. The
27 Water Agency's culverts, pumps, and gates send agricultural pollution through the lower Salinas
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1 watersheds that suffer from the worst water quality by far in the Central Coast region. PET 000818-20;
2 002115-16.

3 With these facts before it, the Court has more than enough evidence to issue the writ. The
4 Porter-Cologne Act requires that a discharger, like the Water Agency, “shall file with the appropriate
5 regional board a report of the discharge.” Cal. Water Code § 13260(a). The Water Agency’s duty to
6 report its waste discharges is a mandatory one. A writ of mandate may be issued “to compel the
7 performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or
8 station” in all cases “where there is not a plain, speedy, and adequate remedy, in the ordinary course of
9 law.” See Cal. Civ. Proc. Code §§ 1085, 1086.

10 No procedural obstacles stand in the Court’s way. Nonetheless, the Water Agency suggests that
11 it cannot be subject to a writ because an adequate remedy is available to Coastkeeper through an
12 administrative petition to the Regional and State Boards. But no administrative process would have
13 remedied Coastkeeper’s claim against the Water Agency. The strategy suggested by opposing counsel
14 at the December writ hearing focuses not on the Water Agency’s actions, but on the Regional Board
15 and its failure to act, and that strategy cannot resolve Coastkeeper’s claim. The Regional Board has no
16 mandatory duty to act, so at the end of any petition process, Coastkeeper would have administratively
17 exhausted a “claim” – to compel the Regional Board to take a discretionary enforcement action – that is
18 not the proper subject of a writ.

19 The Porter-Cologne Act makes clear that in the absence of a report of waste discharge, the
20 Regional Board “may prescribe requirements.” Cal. Water Code § 13263(d). Thus, while Coastkeeper
21 could ask the Regional Board, informally or through a formal petition, to enforce this provision if the
22 Water Agency refuses to submit a report of waste discharge, the statute’s discretionary “may” provision
23 precludes a writ claim at the end of any petition brought by Coastkeeper before the water boards. See,
24 e.g., Nasir v. Sacramento County Office of the Dist. Attorney, 11 Cal. App. 4th 976, 990 (1992)
25 (explaining that prosecutorial discretion “cannot be controlled through a writ of mandate”); Hutchinson
26 v. City of Sacramento, 17 Cal. App. 4th 791, 796 (1993) (explaining that “a writ will not lie to control
27 discretion conferred upon a public officer or agency” and finding that mandate will not issue to compel
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1 a city to exercise its discretion to amend speed limits); Schwartz v. Poizner, 187 Cal.App.4th 592, 597-
2 98 (2010) (dismissing policy holder writ of mandate suit seeking to compel Insurance Commissioner to
3 pursue enforcement remedies against third party insurance company) (citing Heckler v. Chaney, 470
4 U.S. 821, 831 (1985) (“[A]n agency's decision not to prosecute or enforce, whether through civil or
5 criminal process, is a decision generally committed to an agency’s absolute discretion. This recognition
6 of the existence of discretion is attributable in no small part to the general unsuitability for judicial
7 review of agency decisions to refuse enforcement.”). There can be no exhaustion requirement for a
8 claim that does not exist.

9 **II. Option Two: This Court Denies the Writ**

10 Particularly in light of the Regional Board’s statement and the absence of any other authority to
11 the contrary, denial of the writ would be unsupported by the trial record and the legal authority before
12 the Court.

13 **III. Option Three: This Court Stays the Writ Pending Talks Between the Two Agencies**

14 The Water Agency may now argue that the Court should stay this judicial proceeding in order to
15 let the administrative process proceed. But the most recent correspondence between the Regional
16 Board and the Water Agency shows that without a writ, the Water Agency will continue to resist, as it
17 has done for many years, coming under the Regional Board’s permitting jurisdiction by refusing to file
18 a report of waste discharge. During the interagency correspondence between 2012 and 2013, the
19 Regional Board repeatedly asserted that the Water Agency is a discharger required to report its
20 discharges, and the Water Agency repeatedly refuted the Regional Board's interpretation of the Porter-
21 Cologne Act and declined to file a report of waste discharge. In fact, the Water Agency went so far as
22 to petition the State Board for review of the Regional Board’s letter requesting that the Water Agency
23 file a report of waste discharge.¹

24 Again during the exchange in early 2015, the Regional Board has restated its legal interpretation
25 of the Porter-Cologne Act as covering the Water Agency’s activities. The Water Agency has again
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27 ¹ The Water Agency has since requested that the petition to the State Board be held in abeyance
28 multiple times; as a result, the Water Agency's petition to the State Board is currently being held in
abeyance through mid-2016. PET 000191.

1 resisted that interpretation, and the two agencies have agreed to meet to discuss the matter. Then as
2 now, the Regional Board has consistently characterized the Water Agency as a discharger under the
3 Porter-Cologne Act. PET 000065; 000073-74; 000181; Exh. B (Regional Board letter). Yet to the best
4 of Coastkeeper's knowledge, no report has been submitted by the Water Agency. This matter is now
5 back in the same posture as April 2012 when the Regional Board first notified the Water Agency that it
6 was required to file a report of waste discharge. PET 000065. What is different now is that the
7 Regional Board has, as the Water Agency put it, "engaged in an extensive evaluation of MCWRA's
8 maintenance activities, which included the provision of a substantial amount of information by
9 MCWRA, both in documentary form and during site visits." Sivas Decl., Exh. C (Water Agency
10 letter).

11 Even with the benefit of the investigation and the discharger determination submitted to this
12 Court, the Water Agency shows no signs of finally filing a report of waste discharge. The Regional
13 Board promised to "provide additional information directly to MCWRA regarding timing and content
14 of a report of waste discharge." Sivas Decl., Exh. B (Regional Board letter). At present, the agencies
15 have agreed to meet, but promises to meet do not bring the Water Agency any closer to satisfying its
16 obligations under the Porter-Cologne Act. Nor do they ensure a public permit process whereby
17 concerned members of the community, like Coastkeeper, can participate. Indeed, we could well see a
18 reoccurrence of the last round, where the Water Agency pressures Regional Board staff to rescind its
19 statements and Coastkeeper's claims are once again in a state of limbo.

20 Closed-door discussions between the agencies do not come close to an administrative process
21 with a remedy for Coastkeeper's claim. Nor does the "process" suggested by the Water Agency. That
22 process would begin with Coastkeeper's request to the Regional Board to pursue enforcement against
23 the Water Agency for its failure to submit a report of waste discharge or simply to prescribe waste
24 discharge requirements. Cal. Water Code § 13320(a). If the Regional Board refused to take action or
25 failed to respond to Coastkeeper's request within 60 days, then Coastkeeper would file a petition for
26 review with the State Board. Id. The State Board then has a number of options. Id. § 13320(c). It
27 "may" decide not to review the Regional Board's failure to act at all. Id.; 23 Cal. Code Regs.
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1 § 2052(a)(1); People ex rel. Cal. Regional Water Quality Control Bd. v. Barry, 194 Cal. App. 3d 158
2 (1987). Its discretionary decision to decline review of a petition is unreviewable. Id. In that event,
3 following 270 days of silence from the State Board, the petition to the State Board is deemed denied,
4 and the Regional Board’s failure to act becomes the final agency decision available for judicial review.
5 Cal. Water Code § 13330(b). However, as explained above, the Regional Board’s discretionary
6 decision not to act on Coastkeeper’s request to enforce the Water Agency’s non-compliance with the
7 permit provisions of the Porter-Cologne Act would still be judicially unreviewable by a writ petition
8 because mandamus does not lie to control discretionary action.

9 Alternatively, if the State Board elected to review the Regional Board’s refusal or failure to act
10 and then affirmed the Regional Board, the State Board’s decision finding that the Regional Board’s
11 conduct (enforcement inaction) was proper would be a final agency decision arguably subject to review
12 by writ petition. Cal. Water Code § 13330(a). But the subject of such a writ petition – the Regional
13 Board’s failure to act – would still be judicially unreviewable, for the reasons described above. Thus,
14 the water boards’ administrative “process” does not exhaust a justiciable claim. And, thus, the
15 “remedy” would not provide the relief sought.

16 The outcome is no more constructive if the Water Agency is ultimately unsuccessful in
17 convincing the Regional Board to refrain from imposing waste discharge requirements. At that point,
18 the Water Agency may petition the State Board to review that determination. Assuming for the sake of
19 argument that Coastkeeper is allowed to intervene and participate in that process, the State Board may
20 deny the Water Agency’s petition and uphold the Regional Board’s determination (or allow the petition
21 to be deemed denied by inaction), in which case the Water Agency may then seek judicial review. If
22 that were outcome, Coastkeeper may (or may not) be allowed to intervene in the court case to support
23 the water boards’ determination, but the trial record developed over the course of the last four years in
24 the case would not be before the new court. Coastkeeper may (or may not) be able to get that
25 hypothetical future case consolidated with this present case being held in abeyance. But either way, the
26 very same issues currently before this Court would need to be resolved as a matter of law. No judicial
27 efficiency is promoted by that outcome, and Coastkeeper, having already had its claims pending in this
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1 writ proceeding for over four years, would be further delayed by at least another year, if not
2 significantly longer. In the meantime, the discharging activities would continue without any permitting
3 agency oversight.

4 If, alternatively, the Water Agency petitions the Regional Board's determination and the State
5 Board grants that petition by reversing the Regional Board, Coastkeeper may (or may not) have
6 standing to pursue judicial review. If so, the parties would then be contesting the same issue currently
7 before this Court in a new case or seeking to have the new matter consolidated with this case and
8 presented again to this Court, but without the discovery and trial record that has been laboriously
9 developed here. Again, there is no judicial economy promoted by that outcome. And if Coastkeeper
10 was not allowed to intervene in the State Board proceedings or otherwise is held to lack standing to
11 seek judicial relief regarding the Water Agency's administrative appeal, it would then need (under the
12 Water Agency's theory) to return once again to the Regional Board and start the entire "petition"
13 process over.

14 As these scenarios suggest, if the Court stays this case to allow some type of water board
15 process to play out, all possible pathways lead to either (1) non-justiciable failure to act claims (if
16 Coastkeeper is unsuccessful at the administrative level in persuading the Regional Board to enforce the
17 law) or (2) a subsequent writ of mandate proceeding that presents the very same question currently
18 before this Court (if the Water Agency is unsuccessful at the administrative level in persuading the
19 Regional Board not to enforce the law).

20 Accordingly, the administrative review process suggested by the Water Agency does not
21 provide a remedy at all, let alone a speedy one.² As the California Supreme Court established long ago,
22 "it is settled that where the plaintiff shows compliance with the requirements for issuance of the writ,
23 including the lack of any plain, speedy and adequate remedy in the usual course of law, he may be
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25 ² The State Board's regulations allow it to grant an indefinite abeyance for review of administrative
26 petitions. 23 Cal. Code Regs. § 2050.5(d). Even where there is no stay on the petition, the State Board
27 has 90 days to deem the petition complete and another 270 days to decide the petition, unless a hearing
28 is held, then the Board has 330 days from the date the petition is deemed complete, or 120 days after
the hearing, whichever is later, to make a final decision. 23 Cal. Code Regs. § 2050.5(a),(b),(e). Thus,
the State Board has up to 480 days – or roughly 16 months – to decide a petition from the Regional
Board.

1 entitled to mandate as a matter of right.” Flora Crane Serv., Inc. v. Ross, 61 Cal. 2d 199, 203-209
2 (1964) (holding that city controller’s mandatory duty to certify funds was “compellable by mandate”).
3 Coastkeeper is entitled to a writ to compel the Water Agency to file a report of waste discharge, and the
4 issuance of a writ is the only way to ensure that the Porter-Cologne Act's regulatory system begins to
5 work. See Cal. Water Code § 13263(a) (directing that, once a waste discharge report is filed, the
6 Regional Board ”shall prescribe requirements as to the nature of any proposed discharge, existing
7 discharge or material change in an existing discharge”). A writ is proper to compel the Water Agency
8 to file its report of waste discharge – the first step to bringing the Water Agency into the permitting
9 process before the Regional Board. Otherwise, that process may never even begin.


10 **Conclusion**

11 Meanwhile, the Water Agency’s activities have long been degrading the waters in the Salinas
12 Valley, and continue to do so, without a permit. The Salinas Valley does not have the luxury of time to
13 wait for the Water Agency to voluntarily comply with its obligations. The Salinas Valley suffers from
14 repeated, pervasive violations of drinking water standards for nitrate in the region’s surface and
15 groundwater; the worst surface and groundwater sites exhibit nine-fold exceedances of allowable
16 nitrate levels. PET 002118. And the ecologically important waters that receive the outflow from the
17 Reclamation Ditch and the Blanco Drain – the Tembladero Slough, Old Salinas River, Old Salinas
18 Estuary, Moss Landing Harbor, Elkhorn Slough, Lower Salinas River, and Salinas River Lagoon – all
19 suffer from a cocktail of agricultural water quality impairments. PET 002969-71; 003023-39. See
20 King v. Martin, 21 Cal. App. 3d 791, 795-96 (1971) (holding that “[m]andate is appropriate when it
21 appears from the conduct or declarations of the officer against whom relief is sought that he does not
22 intend to comply with his lawful obligation”). Based on the recent developments in this matter, the full
23 record now before this Court, and the urgency of the pollution problem in Salinas Valley, Coastkeeper
24 respectfully requests that this Court grant a peremptory writ of mandate under California Code of Civil
25 Procedure section 1085 directing Respondent to comply with its statutory and common law obligations.
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1 Dated: February 10, 2015

Respectfully submitted,

2 ENVIRONMENTAL LAW CLINIC
3 Mills Legal Clinic at Stanford Law School

4 By: 
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6 Deborah A. Sivas, Supervising Attorney

7 Attorneys for MONTEREY COASTKEEPER

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1 **PROOF OF SERVICE**

2 LYNDA F. JOHNSTON declares:

3 I am over the age of eighteen years and not a party to this action. My business address is 559
4 Nathan Abbott Way, Stanford, California 94305-8610.

5 On February 10, 2015, I served the foregoing **COASTKEEPER’S FURTHER CASE**
6 **MANAGEMENT CONFERENCE STATEMENT AND STATUS UPDATE REPORT** on all
7 persons named below by placing a true and correct copy thereof in a sealed envelope, with postage
8 thereon fully prepaid, in the United States Mail at Stanford, California, addressed to each recipient
9 respectively as follows:

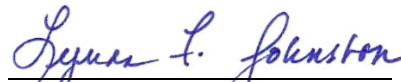
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11 Charles J. McKee, County Counsel
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21 Sacramento, California 95814-4731

22 and also by placing a courtesy copy in the course of electronic transmission to each at the following
23 email addresses:

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25 ssaxton@downeybrand.com
26 ngranquist@downeybrand.com
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28 I declare under penalty of perjury that the foregoing is true and correct, and that this declaration
was executed February 10, 2015 at Stanford, California.

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LYNDA F. JOHNSTON