

1 KAMALA D. HARRIS
Attorney General of California
2 TRACY L. WINSOR
Supervising Deputy Attorney General

3 MATTHEW J. GOLDMAN
Deputy Attorney General
4 State Bar No. 113330
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 324-4223
7 Fax: (916) 327-2319
E-mail: Matthew.Goldman@doj.ca.gov

Attorneys for Respondent
8 *California State Water Resources Control Board*

**EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE § 6103**

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11
12 **MONTEREY COASTKEEPER, a program of**
13 **THE OTTER PROJECT, a non-profit**
14 **organization; SAN LUIS OBISPO**
15 **COASTKEEPER, a non-profit organization;**
16 **CALIFORNIA SPORTFISHING PROTECTION**
17 **ALLIANCE, a non-profit organization; and**
18 **SANTA BARBARA CHANNELKEEPER, a non-**
19 **profit organization,**

Petitioners,

20 v.

21 **CALIFORNIA STATE WATER RESOURCES**
22 **CONTROL BOARD, a public agency.,**

23 Respondent.

Case No. 34-2012-80001324

**STATE WATER RESOURCES
CONTROL BOARD'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO PETITIONERS'
AMENDED VERIFIED PETITION
FOR WRIT OF MANDATE**

Date: May 15, 2015
Time: 10:00 a.m.
Dept: 29
Judge: Hon. Timothy M. Frawley

Trial Date: May 15, 2015
Action Filed: November 29, 2012

TABLE OF CONTENTS

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

	<u>Page</u>
Introduction	1
Background	1
I. The Regional Board’s 2004 CEQA review and Conditional Waiver	1
II. The Regional Board’s 2012 CEQA review and Conditional Waiver	2
III. Administrative petitions regarding the 2012 Conditional Waiver are submitted to the State Board	2
IV. The State Board issues a draft order, takes public comments, and issues an order in 2013 modifying the 2012 Conditional Waiver	3
V. Petitioners commence this action, alleging CEQA violations not vetted with the State Board during the public comment periods	3
Standard of Review on Demurrer	4
Argument	4
I. Petitioners’ CEQA claim was never presented to the State Board, so this court should not entertain that claim as a matter of first impression	4
A. Petitioners did not raise the need for additional CEQA review with the State Board during the administrative review process	5
B. Petitioners raised issues regarding all of their other causes of action to the State Board, but did not include any references to the purported need for additional CEQA review	8
II. Additional procedural defects favor granting the State Board’s demurrer to Petitioners’ CEQA claim.....	10
A. Petitioners misstate the legal standard for supplemental CEQA review	10
B. Petitioners did not raise the correct legal standard or apply it to the adoption of the State Board order in their public comments to the State Board during the administrative review process.....	11
C. Declaratory relief is improper under CEQA where, as here, a statutory remedy is available pursuant to the Water Code.....	12
Conclusion	13

TABLE OF AUTHORITIES

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

Page

CASES

Abelleira v. District Court of Appeal, Third Dist.
(1941) 17 Cal.2d 280, 293 8

Baughman v. State of California
(1995) 38 Cal.App.4th 182 4

Benton v. Board of Supervisors of Napa County
(1991) 226 Cal.App.3d 1467..... 2

Coalition for Student Action v. City of Fullerton
(1984) 153 Cal.App.3d 1194,1198..... 8

County of Los Angeles v. California State Water Resources Control Board
(2006) 143 Cal.App. 4th 985, 1002 12

Cryolife, Inc. v. Superior Court
(2003) 110 Cal.App. 4th 1145 4

Gentry v. City of Murrieta
(1995) 36 Cal.App. 4th 1359, 140 11

Laurel Heights Improvement Assn. v. Regents of University of California
(1993) 6 Cal. 4th 1112, 1135 11

Latinos Unidos De Napa v. City of Napa
(2013) 221 Cal.App. 4th 192, 200 11

Long Beach Equities, Inc. v. County of Ventura
(1991) 231 Cal.App.3d 1016..... 4

Mani Brothers Real Estate Group v. City of Los Angeles
(2007) 154 Cal.App. 1385, 1398..... 11

Matteson v. Board of Ed. of City of Los Angeles
(1930) 104 Cal.App. 647, 650.) 4

Moss v. County of Humboldt
(2008) 162 Cal.App. 4th 1041, 1049-1050 11

San Diego Navy Broadway Complex Coalition v. City of San Diego
(2010) 185 Cal.App. 4th 924, 934 11

Sierra Club v. County of Sonoma
(1992) 6 Cal.App. 4th 1307, 1316-1317 11

TABLE OF AUTHORITIES
(continued)

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

Page

Western States Petroleum Assn. v. Superior Court
 (1995) 9 Cal. 4th 559, 567 13

STATUTES

Code of Civil Procedure
 § 430.10, subd. (e)..... 4
 § 430.30, subd. (a)..... 4
 § 430.50, subd. (a)..... 4
 § 430.70..... 4

Evidence Code,
 § 451..... 4
 § 452..... 4
 § 453..... 4

Public Resources Code
 § 21166..... 10, 12

Water Code
 §13330..... 12

REGULATIONS

California Code Regulations Title 14
 § 15164(a) 10
 § 15162..... 12

OTHER AUTHORITIES

2A Cal.Jur3d (2007) Administrative Law, § 674..... 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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18
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INTRODUCTION

The State Water Resources Control Board (State Board) demurs to Petitioners' fifth cause of action, which alleges violation of the California Environmental Quality Act (CEQA), California Public Resources Code section 21000 *et seq*, because Petitioners failed to exhaust their administrative remedies by failing to raise any issue regarding CEQA with the State Board during the course of the State Board's review of the Central Coast Regional Water Quality Control Board's (Regional Board) order.

BACKGROUND

Petitioners seek judicial review of the State Board's order that reviewed and amended the order of the Regional Board that waives the requirement to obtain waste discharge requirements for discharges from irrigated lands that comply with conditions imposed in the order. Over the years, the regional boards issued waivers for over 40 categories of discharges, including discharges from irrigated agriculture. To control and assess the effects of discharges from irrigated agricultural lands, various regional boards have adopted comprehensive conditional waivers such as the one at issue here. The conditions are designed to require that discharges not cause violations of water quality objectives.

I. THE REGIONAL BOARD'S 2004 CEQA REVIEW AND CONDITIONAL WAIVER

The Regional Board adopted its first Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands in 2004 (2004 Conditional Waiver). (Amended Petition ("Petn") at ¶ 31.) In adopting the 2004 Conditional Waiver, the Regional Board found that it "includes conditions that are intended to reduce and prevent pollution and nuisance and protect the beneficial uses of the waters of the state" and "contains more specific and more stringent conditions for protection of water quality compared to existing regulatory programs." (Petn. at ¶ 32.) When the 2004 Conditional Waiver was adopted, Regional Board staff performed an initial study pursuant to CEQA and issued a Negative Declaration. (Petn. at ¶ 34.)

1 **II. THE REGIONAL BOARD’S 2012 CEQA REVIEW AND CONDITIONAL WAIVER**

2 Pursuant to the Water Code, the waiver may not exceed five years in duration, but may be
3 renewed. (Petn. at ¶ 22.) In anticipation of revising and renewing the 2004 Conditional Waiver,
4 the Regional Board began a thorough public administrative renewal process that commenced in
5 December 2008, and continued for four years, soliciting comments and participation from all
6 stakeholders. (Petn. at ¶ 35.) On February 1, 2010, the Regional Board released for comment a
7 draft of the proposed new waiver. (Petn. at ¶ 37.) On March 15, 2012, the Regional Board
8 adopted Order No. R3-2012-011, a Conditional Waiver of Waste Discharge Requirements for
9 Discharges from Irrigated Lands (2012 Conditional Waiver). (Petn. at ¶ 39.) “In connection with
10 its adoption of the [2012] Conditional Waiver, the Regional Board completed environmental
11 review pursuant to CEQA and issued a Subsequent Environmental Impact Report, a set of CEQA
12 Findings, and a Statement of Overriding Considerations.” (Petn. at ¶ 80.)

13 **III. ADMINISTRATIVE PETITIONS REGARDING THE 2012 CONDITIONAL WAIVER ARE**
14 **SUBMITTED TO THE STATE BOARD**

15 Following the Regional Board’s adoption of the 2012 Conditional Waiver, both agricultural
16 interests and environmental interests, including Petitioners, petitioned the State Board to review
17 the decision pursuant to Water Code section 13320, subdivision (a). Agricultural interests also
18 asked the State Board to stay certain provisions of the 2012 Conditional Waiver, pending the
19 State Board’s review of the full merits. (Petn. at ¶ 40.) Opposing the agricultural interests’
20 petition for review and request for stay of the 2012 Conditional Waiver by the State Board,
21 Petitioners devoted a section of their written response as, “C. The Regional Board complied with
22 CEQA,” wherein they elaborated:

23 In contradiction of [agricultural] petitioners’ claim, the Regional Board did not need
24 to restart the CEQA process by issuing a wholly new EIR. Rather, the Regional
25 Board properly exercised its discretion to incorporate the 2004 Negative Declaration,
26 because the 2012 Waiver is an incremental change to the 2004 Waiver, which had
27 already received CEQA analysis. Where there is just a change in the project, a new
28 EIR is not required. [Discussing *Benton v. Board of Supervisors of Napa County*
(1991) 226 Cal.App.3d 1467.] Here, the Regional Board properly limited its review
to the differences between the 2004 Waiver and the 2012 Waiver.

1 (State Board's Request for Judicial Notice (RJN), ex. 1, at pp. 34-35, Administrative Record (AR)
2 Bates SB 005454—005455.¹)

3 **IV. THE STATE BOARD ISSUES A DRAFT ORDER, TAKES PUBLIC COMMENTS, AND**
4 **ISSUES AN ORDER IN 2013 MODIFYING THE 2012 CONDITIONAL WAIVER**

5 The State Board's order, adopted in 2013, upheld most of the Regional Board's 2012
6 Conditional Waiver. The State Board adopted a stay of several provisions of the 2012
7 Conditional Waiver, and on June 6, 2013, issued a proposed order resolving the outstanding
8 issues raised by the agricultural and environmental petitioners and modifying the 2012
9 Conditional Waiver. (Petn. at ¶¶ 43, 44.) Following a written public comment period and a
10 workshop, the State Board issued a revised draft order on August 20, 2013. (Petn. at ¶¶ 46, 47.)
11 The State Board issued another draft order on September 9, 2013, the day before a scheduled
12 meeting, but to accommodate public comments, continued the hearing on the matter until
13 September 24, 2013. (Petn. at ¶¶ 48, 49.) On September 24, 2013, the State Board adopted a
14 final Order No. WQ 2013-0101 (State Board Order). (Petn. at ¶ 50.) Petitioners submitted
15 comments during all three comment periods, but did not raise any CEQA-related objections to the
16 draft order in any of their three sets of written comments. (RJN at exh. 2-7.)

17 **V. PETITIONERS COMMENCE THIS ACTION, ALLEGING CEQA VIOLATIONS NOT**
18 **VETTED WITH THE STATE BOARD DURING THE PUBLIC COMMENT PERIODS**

19 Petitioners commenced this action seeking judicial review of the State Board Order through
20 a petition for writ of mandate pursuant to Water Code section 13330, subdivision (a). (Petn. at ¶
21 51.) Petitioners raised CEQA as an issue for the first time in their Petition. (Petn. at ¶¶ 79-84.)
22 In stark contrast with their failure to exhaust administrative remedies regarding their fifth cause of
23 action alleging that the State Board should have undertaken CEQA review beyond that performed

24 ¹ The State Board is lodging the administrative record with the Court along with its Notice
25 of Demurrer and Demurrer. Petitioners are to file their opening brief on the merits of their
26 Petition. (See November 12, 2014 Order on Joint Stipulation re Briefing Scheduling and New
27 Hearing Date.) The State Board's demurrer shall be briefed concurrently with the merits of
28 Petitioners' writ petition, pursuant to the Court's November 12, 2014 Order. For the Court's
convenience, copies of the documents referenced in the State Board's demurrer, all of which are
contained within the administrative record, are presented in hardcopy in the State Board's
accompanying Request for Judicial Notice.

1 by the Regional Board regarding the 2012 Conditional Waiver, Petitioners exhausted their
2 administrative remedies regarding all of their other four causes of action by explicitly raising their
3 contentions about the alleged deficiencies of the State Board Order in their public comments prior
4 to its adoption on September 24, 2013.

5 STANDARD OF REVIEW ON DEMURRER

6 A demurrer is proper when a complaint or petition for writ of mandate fails to “state facts
7 sufficient to constitute a cause of action.” (Code Civ. Proc., § 430.10, subd. (e); *Matteson v.*
8 *Board of Ed. of City of Los Angeles* (1930) 104 Cal.App. 647, 650.) A demurrer “may be taken to
9 the whole complaint . . . or to any of the causes of action stated therein.” (Code Civ. Proc., §
10 430.50, subd. (a).) In ruling on a demurrer, the court accepts as true all facts properly pleaded in
11 the complaint, and disregards contentions, opinions, speculation, conclusions of fact or law, and
12 allegations that are contrary to law or to judicially noticed facts. (*Baughman v. State of*
13 *California* (1995) 38 Cal.App.4th 182, 187; *Long Beach Equities, Inc. v. County of Ventura* (1991)
14 231 Cal.App.3d 1016, 1024.) The court may also consider any judicially noticeable matter.
15 (Code Civ. Proc., §§ 430.30, subd. (a), 430.70; Evid. Code, §§ 451-453; *Cryolife, Inc. v. Superior*
16 *Court* (2003) 110 Cal.App.4th 1145, 1152.) A general demurrer is proper where the complaint,
17 and any judicially noticeable evidence, clearly disclose some defense or bar to recovery.
18 (*Cryolife, Inc. v. Superior Court, supra*, 110 Cal.App.4th at p. 1152.)

19 ARGUMENT

20 I. PETITIONERS’ CEQA CLAIM WAS NEVER PRESENTED TO THE STATE BOARD, SO 21 THIS COURT SHOULD NOT ENTERTAIN THAT CLAIM AS A MATTER OF FIRST 22 IMPRESSION

23 This Court should grant the State Board’s demurrer to Petitioners’ fifth cause of action
24 alleging violation of CEQA because that claim contravenes the “important societal and
25 governmental interests” furthered by a proper exhaustion of administrative remedies. (2A
26 Cal.Jur3d (2007) Administrative Law, § 674, p. 10.) Petitioners, who are represented by
27 sophisticated environmental advocates, did not fully exhaust their administrative remedies. They
28 therefore afforded no opportunity for the State Board to administratively respond to Petitioners’
CEQA claim, which could have potentially eliminated the issue altogether, or, at minimum,

1 streamlined the legal issues for this Court's review. For the reasons below, this Court should
2 decline Petitioners' invitation to hear their CEQA claim as a matter of first impression, grant the
3 State Board's demurrer, and focus the action on the core issues, namely, Petitioners' water quality
4 claims.

5 **A. Petitioners Did Not Raise the Need for Additional CEQA Review with**
6 **the State Board During the Administrative Review Process.**

7 Petitioners' CEQA cause of action fails as a matter of law in light of the facts alleged in the
8 Petition, when reviewed in conjunction with Petitioners' public comments to the State Board
9 regarding the draft order that was subsequently adopted as the State Board Order. These
10 comments are contained in the administrative record, are subject to judicial notice, and are
11 submitted in hardcopy format for the Court's convenience in the State Board's Request for
12 Judicial Notice. As referenced below, Petitioners' comments to the State Board about the alleged
13 deficiencies of the draft order that was subsequently adopted, with some clarifying revisions, as
14 the State Board Order reflect that Petitioners explicitly raised the issues framed by their first,
15 second, third, and fourth causes of action, but ignored any reference to CEQA, which is the
16 subject of their fifth cause of action and this demurrer. This should not be viewed as an error on
17 the part of Petitioners' experienced counsel and environmental activist representatives, whose
18 written response to the agricultural petitioners' request for a State Board stay of the 2012
19 Conditional Waiver lauded the scope of the Regional Board's CEQA analysis.

20 In light of the allegations of the Petition, and the timing and content of their comments to
21 the State Board, as a matter of law, Petitioners cannot now assert that the State Board should have
22 performed additional CEQA review. Petitioners acknowledge that "the Regional Board
23 completed environmental review pursuant to CEQA and issued a Subsequent Environmental
24 Impact Report, a set of CEQA Findings, and a Statement of Overriding Considerations." (Petn. at
25 ¶ 80.) Petitioners then allege that the State Board "issued a new, modified final Order that
26 significantly reduced monitoring and other requirements contained in the Regional Board's
27 waiver order and added new provisions that authorized continued discharge even when water
28 quality standards are being exceeded or water quality is being degraded." (Petn. at ¶ 81.)

1 Petitioners' allegations regarding the sequence of the State Board's draft orders that led to
2 the modified final order, when viewed in conjunction with the timing and content of Petitioners'
3 public comments, reflect that, during the administrative review process, Petitioners did not view
4 the draft order that was subsequently adopted as the State Board Order as triggering the need for
5 additional CEQA analysis. The record therefore reflects that Petitioners never raised the CEQA
6 issue they now allege in their fifth cause of action, namely, that the State Board should have
7 conducted additional CEQA review, beyond that performed by the Regional Board, at any time
8 during the administrative process. Petitioners' failure to raise or exhaust this issue deprived the
9 State Board of the ability to consider it; Petitioners' failure also deprived this Court of an
10 administrative record to review the issue of the State Board's reaction to a CEQA-related issue .

11 Petitioners allege, in summary, the sequence of the State Board's draft orders that led to the
12 State Board Order, about which they failed to raise CEQA objections in their public comments,
13 but about which they now base their CEQA cause of action:

- 14 • August 20, 2013, the State Board issued a revised draft order;
- 15 • August 20—September 3, 2013, the State Board took public comments on the revised
16 draft order;
- 17 • September 9, 2013, the State Board issued a "dramatically revised" draft order that
18 "significantly weakened the environmental protections contained in the [2012]
19 Conditional Waiver and in the State Board's prior proposed orders";
- 20 • September 10, 2013, the State Board met to consider adoption of the revised draft order,
21 but continued the matter to September 24, 2013, in response to public concern about "the
22 significant changes in the proposed order";
- 23 • September 24, 2013, the State Board met and adopted the September 9, 2013 draft, with
24 some clarifying revisions, as the final State Board Order.

25 (See Petn. at ¶¶ 47-50.)

26 Petitioners submitted public comments on September 16 and 17, 2013, regarding the
27 purportedly "dramatically revised draft order" of September 9, 2013. Chronologically, these
28 comments came after the revised draft order was issued on September 9, and before the continued

1 State Board meeting on September 24, at which the draft, with some clarifying revisions, was
2 adopted as the State Board Order. Despite coming after the purportedly “dramatically revised”
3 draft order, Petitioners’ public comments do not reflect their new CEQA litigation allegations
4 that, in light of the “dramatically revised draft order,” the State Board should have conducted
5 additional CEQA review to supplement that performed by the Regional Board.²

6 Omitting any mention of CEQA, Petitioners’ September 17, 2013 comments expressed
7 dissatisfaction with the State Board’s modification of its prior August 20, 2013 draft order, and
8 expressed Petitioners’ desire that the State Board adopt provisions from the Regional Board’s
9 February 1, 2010 draft order that was not even included in the 2012 Conditional Waiver. (RJN,
10 exh. 7, AR Bates SB 006734, 006737—006739, 006743.) Petitioners’ September 16, 2013
11 comment letter does not mention any need to reopen the Regional Board’s CEQA analysis, but
12 states, “we were taken aback by the State Board’s decision to strike the August 20th [2013]
13 Revised Order language.” (RJN, exh. 6, AR Bates SB 006714.) While both comment letters
14 expressed Petitioners’ preference for the State Board’s earlier August 20, 2013 draft order in lieu
15 of the revised September 9, 2013 draft, both the draft orders *postdate* the Regional Board’s
16 CEQA analysis, yet Petitioners did not request any supplemental CEQA analysis to consider any
17 potential differences between the Regional Board’s 2012 Conditional Waiver Order and the State
18 Board’s September 9, 2013 draft order. (RJN, exhs. 4-7 [no references to CEQA in the September
19 3, 16, and 17, 2013 comment letters, all of which postdate the August 20, 2013 draft order.]
20 Instead, their public comments asked the State Board to adopt provisions of the Regional Board’s
21 February 1, 2010 draft, and portions of the State Board’s prior August 20, 2013 draft, without
22 identifying their current litigation position that adopting the September 9, 2013 draft would
23 require additional CEQA review.

24
25
26 ² Petitioners Monterey Coastkeeper, a program of The Otter Project, and Santa Barbara
27 Channelkeeper submitted a 14-page comment letter on September 17, 2013. (RJN, exh. 7, AR
28 Bates SB 006730—006743.) Petitioner Environmental Justice Coalition for Water, among other
non-parties, submitted an eight-page comment letter on September 16, 2013. (RJN, exh. 6, AR
Bates SB 006712—006719.)

1 The factual sequence of the draft orders, as alleged in the Petition, when viewed in
2 conjunction with Petitioners' failure to raise CEQA in any way, at any point, during the State
3 Board's administrative review process in response to any version of a draft order reflects that
4 Petitioners failed to exhaust their administrative remedies, and therefore are barred from asserting
5 their fifth cause of action alleging violation of CEQA.³ "The essence of the exhaustion doctrine
6 is the public agency's opportunity to receive and respond to articulated factual issues and legal
7 theories *before* its actions are subjected to judicial review." (*Coalition for Student Action v. City*
8 *of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 [italics original]; see generally *Abelleira v.*
9 *District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 293 [discussing origin and
10 jurisdictional nature of the exhaustion of administrative remedies doctrine].) Petitioners' failure
11 to exhaust administrative remedies violates the essence of the doctrine.

12 **B. Petitioners Raised Issues Regarding All of Their Other Causes of Action**
13 **to the State Board, but Did Not Include Any References to the Purported**
14 **Need for Additional CEQA Review**

15 Petitioners' public comment letters to the State Board reflect the other allegations of their
16 Petition, underscoring that they understood how to articulate technical, factual, and legal theories
17 in its public comment letters. The sole reference to CEQA in *any* of Petitioners' comment letters
18 is included in one letter that *predates* the State Board's release of its purported CEQA-violating
19 September 9, 2013 revised draft order; that single reference, contained in a July 13, 2013
20 comment letter regarding a prior draft order is a single paragraph that simply summarizes the
21 Regional Board's CEQA process. (RJN, exh. 3, AR Bates SB005830.) In contrast to Petitioners'
22 silence on any need for additional CEQA analysis purportedly triggered by the State Board's
23 September 9, 2013 draft, Petitioners' comment letters refer to the alleged bases underlying the
24 first through fourth causes of action alleged in the Petition, while failing to include any reference
25 to any purported need for the State Board to supplement the Regional Board's CEQA analysis, as
26 alleged in Petitioners' fifth cause of action. Petitioners' comments on the issues raised by their

27 ³ Petitioners participated at the State Board meetings at which the draft orders were
28 considered, including the September 24, 2013 meeting at which the September 9, 2014 draft, with
some clarifying revisions, was adopted as the final State Board Order. Petitioners failed to raise
any CEQA-related issue at any of the three meetings.

1 first through fourth causes of action are summarized below to demonstrate that they understood
2 how to raise issues to the State Board during the administrative review process and thereby
3 exhaust their administrative remedies (while failing to do so regarding CEQA):

4 First cause of action (Violation of Water Code section 13269(a)(1)): Petitioners' comment
5 letters refer to the water quality objectives, the public interest, and critique the management
6 practices referenced in the State Board's draft orders, including the 2013 State Board Order.
7 (RJN, exh. 6, AR Bates SB 006716—006718; ex. 7, AR Bates SB 006733-006734.)

8 Second cause of action (Violation of Water Code section 13269(a)(2)): Petitioners'
9 comment letters refer to surface water or groundwater monitoring requirements to verify the
10 adequacy and effectiveness of the waiver's conditions. (RJN, exh. 6, AR Bates SB 006714--
11 006715, exh. 7, AR Bates SB 006735--006737.)

12 Third cause of action (Violation of California's Antidegradation Policy): Petitioners'
13 comment letters refer to antidegradation requirements as laid out in the State Board resolution,
14 and as interpreted by a recent appellate court decision. (RJN, exh. 7, AR Bates SB 006742-
15 006743.)

16 Fourth cause of action (Improper Exclusion of Relevant Scientific Evidence): Petitioners'
17 comment letters refer to the exclusion of the "Harter Report"⁴ from the State Board's
18 administrative record. (RJN, exh. 7, AR Bates SB 006736.)

19 Petitioners' failure to raise CEQA as an issue to the State Board during its administrative
20 review of the Regional Board's 2012 Conditional Waiver is fatal to Petitioners' fifth cause of
21 action alleging violation of CEQA. "Mere objections to the *project*, as opposed to the procedure,
22 are not sufficient to alert an agency to an objection based on CEQA. Petitioners, having failed to
23 raise their CEQA claims at the administrative level, cannot air them for the first time in the
24 courts." (*Coalition for Student Action v. City of Fullerton, supra*, 153 Cal.App.3d at p. 1198
25 [italics original].)

26 ⁴ Petitioners' reference to the "Harder Report" in their fourth cause of action (Petn. at ¶
27 73) is a typo; the report, titled "Report to the Legislature – Addressing Nitrate in California's
28 Drinking water" (March 2012) was authored by Harter, T., et al. (RJN, exh. 7, AR Bates SB
006736.)

1 Nor can Petitioners credibly claim their failure to raise CEQA was excusable inadvertence
2 born out of a lack of savvy. By their own self-descriptions, Petitioners are sophisticated
3 participants in the ongoing process regarding the agricultural conditional waiver in the Central
4 Coast Region.⁵ Moreover, Petitioners not only knew that the agricultural petitioners had raised
5 CEQA as an issue, but Petitioners' response to the agricultural petitioners' request for
6 administrative review of the Regional Board's 2012 Conditional Waiver urged the State Board to
7 reject any assertion that the Regional Board's CEQA analysis was deficient. (RJN, exh. 1, at pp.
8 34-36, AR Bates SB 005454-005456.)

9 **II. ADDITIONAL PROCEDURAL DEFECTS FAVOR GRANTING THE STATE BOARD'S**
10 **DEMURRER TO PETITIONERS' CEQA CLAIM**

11 **A. Petitioners Misstate the Legal Standard for Supplemental CEQA**
12 **Review**

13 At the start of the administrative review process, in their rebuttal of the agricultural
14 petitioners' position regarding State Board review of the 2012 Conditional Waiver, Petitioners
15 accurately described the legal standard for determining whether additional CEQA analysis is
16 required following the Regional Board's preparation of a subsequent EIR. There, they
17 acknowledged that "Section 21166 of CEQA compels agencies to carefully consider whether
18 issuing a subsequent EIR is necessary. Pub. Resources Code § 21166 (allowing agencies to issue
19 a subsequent EIR *only* when certain conditions are met); Cal. Code Regs. tit. 14 § 15164(a)."
20 (RJN, ex. 1, at p. 37, AR SB 005457, italics original.)

21 Despite Petitioners' recitation of the correct legal standard in their administrative comment,
22 in their Petition, they incorrectly allege:

23 There is a *fair argument* that the State Board's modifications of and additions to the
24 final Order *may result in significant adverse effects* on the environment that were not

25 ⁵ "The [Coast]Keepers have many years of experience dealing with the water quality
26 challenges facing the Central Coast including agricultural discharges and have been continuously
27 involved in the Irrigated Agriculture Regulatory Program since at least 2008." (RJN, exh. 7, AR
28 Bates SB 006730); "As representatives of environmental justice communities, our organizations
work extensively at the local, regional, and state level to ensure that all communities have
equitable access to safe, affordable, and accessible drinking water. . . . As such, several of us have
been engaged in the development of this Central Coast Agricultural Order since before the
[Regional Board's] original Draft Order in February of 2010." (RJN, exh. 6, AR Bates SB
006712-6713.)

1 adequately considered or disclosed in the CEQA documents and findings prepared by
2 the Regional Board in connection with the [2012] Conditional Waiver. Accordingly,
3 the State Board was required to undertake additional CEQA review and disclosure
4 before adopting its final [2013] Order.

5 (Petn. at ¶ 82, italics added.)

6 Adding to the procedural defects favoring a ruling granting the demurrer their CEQA claim,
7 in the summary above, Petitioners misstate the legal standard applicable to supplemental CEQA
8 review. “[T]he ‘fair argument’ test has been applied *only* to the decision whether to prepare an
9 original EIR or a negative declaration.” (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359,
10 1400, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6
11 Cal.4th 1112, 1135, italics original.) The “fair argument” standard creates a “low threshold” for
12 requiring an EIR, reflecting a legislative preference for resolving doubts in favor of
13 environmental review. (*Latinos Unidos De Napa v. City of Napa* (2013) 221 Cal.App. 4th 192,
14 200 [citing *Sierra Club v. County of Sonoma* (1992) 6 Cal.App. 4th 1307, 1316-1317.] In
15 contrast, “the ‘fair argument’ test does not apply to the decision on whether to prepare [a
16 Subsequent EIR]. (*Gentry v. City of Murrieta, supra*, 36 Cal.App. 4th at p. 1401.) “After an
17 initial EIR is certified, there is a statutory presumption against additional environmental review.”
18 (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App. 4th
19 924, 934, citing *Moss v. County of Humboldt* (2008) 162 Cal.App. 4th 1041, 1049-1050 [“the
20 statutory presumption flips in favor of the [agency] and against further review.”]).⁶

21 **B. Petitioners Did Not Raise the Correct Legal Standard or Apply It to the**
22 **Adoption of the State Board Order in Their Public Comments to the**
23 **State Board During the Administrative Review Process**

24 Because the Regional Board issued a Subsequent EIR (Petn. at ¶ 80), and then issued an
25 Addendum to the Final Subsequent EIR in August 2011 (RJN, exh. 3, AR Bates SB 005830),

26 ⁶ “In reviewing an agency’s decision not to require additional environmental review
27 ‘pursuant to section 21166, courts ‘are not reviewing the record to determine whether it
28 demonstrates a possibility of environmental impact, but are viewing it in a light most favorable to
the [agency’s] decision in order to determine whether substantial evidence supports the decision
not to require additional review.’ [Citation.]” (*Latinos Unidos De Napa v. City of Napa, supra*,
21 Cal.App.4th at pp. 204-205 [quoting *Mani Brothers Real Estate Group v. City of Los Angeles*
(2007) 154 Cal.App. 1385, 1398].)

1 Public Resources Code section 21166 (and also CEQA Guidelines, Cal. Code Regs., tit., 14, §
2 15162) mandates that no further Subsequent EIR is required unless:

3 (1) Substantial changes were proposed in the draft State Board Order that would require
4 major revisions of the Regional Board's Subsequent EIR; or

5 (2) Substantial changes occurred with respect to the circumstances under which the
6 conditional waiver of waste discharge requirements for discharges from irrigated lands that
7 would require major revisions in the Subsequent EIR; or

8 (3) New information, which was not known and could not have been known when the
9 Subsequent EIR was certified (August 2011), became available.

10 (Pub. Resources Code, § 21166; Cal. Code Regs., tit. 14, § 15162.)

11 As discussed above, Petitioners' September 16 and 17, 2013, comments about the State
12 Board's September 9, 2013 draft that, with some clarifying revisions, was subsequently adopted
13 as the final State Board Order reflect that Petitioners failed to raise any of these three factors of
14 Public Resources Code section 21166 to the State Board during its administrative review process.
15 In the context of this demurrer to Petitioners' fifth cause of action for violation of CEQA, the
16 Court should review the allegations of the Petition in the context of Petitioners' comments, and
17 rule that because Petitioners failed to raise any need for additional CEQA analysis as an issue to
18 the State Board at any time during the administrative review process, Petitioners failed to exhaust
19 administrative remedies, and that this failure bars their CEQA claim as a matter of law.

20 **C. Declaratory Relief is Improper Under CEQA Where, as Here, a**
21 **Statutory Remedy is Available Pursuant to the Water Code**

22 Petitioners ask this Court to enter judgment declaring that the State Board violated CEQA
23 in connection with the fifth cause of action. (Petn. at p. 18:22-25.) But declaratory relief is
24 improper here because Water Code section 13330 provides a statutory remedy for administrative
25 review. "When a remedy has been designated by the Legislature to review an administrative
26 action, declaratory relief is unavailable." (*County of Los Angeles v. California State Water*
27 *Resources Control Board* (2006) 143 Cal.App. 4th 985, 1002, citations omitted.) In *County of*
28 *Los Angeles*, cited above, a demurrer was correctly sustained to declaratory relief claims where

1 Water Code section 13330 provided a statutory remedy for administrative review. (*Ibid.*) That
2 provision governs review here, and declaratory relief is similarly unavailable.⁷ In addition, in the
3 CEQA contest, the California Supreme Court has held that where the adoption of air quality
4 regulations is challenged under CEQA, the means for review is traditional mandamus. (*Western*
5 *States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 567.) Applying the reasoning of
6 either of these cases to the Petition before this Court yields the conclusion that Petitioners'
7 request for declaratory relief regarding their CEQA claim is a procedurally improper as their
8 failure to exhaust administrative remedies regarding this claim.

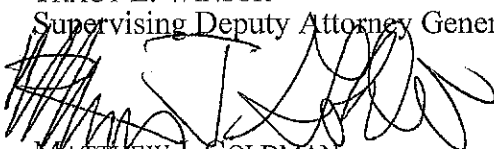
9 **CONCLUSION**

10 Petitioners failed to exhaust administrative remedies by failing to raise CEQA compliance
11 before the State Board, and their fifth cause of action suffers from other procedural defects. The
12 State Board therefore asks this Court to sustain its demurrer to Petitioners' fifth cause of action,
13 narrowing and focusing the litigation on the water quality issues that Petitioners actually raised in
14 their comments during the State Board's administrative review process. The State Board also asks
15 this Court to strike the reference to CEQA at 1(c) in the prayer for relief, wherein Petitioners
16 improperly seek declaratory relief in connection with their fifth cause of action.

17 Dated: December 19, 2014

Respectfully Submitted,

18
19 KAMALA D. HARRIS
Attorney General of California
20 TRACY L. WINSOR
Supervising Deputy Attorney General

21 
22 MATTHEW J. GOLDMAN
Deputy Attorney General
23 Attorneys for Respondent
24 California State Water Resources Control
Board

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26 11639364.doc

27 ⁷ The State Board asks that Petitioners' request for declaratory relief regarding their fifth
28 cause of action alleging violation of CEQA be stricken.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: Monterey Coastkeeper v. State Water Board (Stay Order)

No.: 34-2012-80001324

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

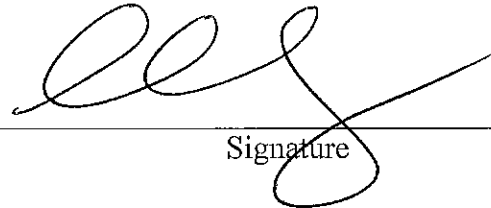
On December 19, 2014, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT STATE WATER RESOURCES CONTROL BOARD'S DEMURRER TO AMENDED VERIFIED PETITION FOR WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope with the GOLDEN STATE OVERNIGHT DELIVERY, addressed as follows:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 19, 2014, at Sacramento, California.

Michelle Fowler

Declarant



Signature

ATTACHMENT TO PROOF OF SERVICE

William J. Thomas
Wendy Y. Wang
Stephanie R. Straka
BEST BEST & KRIEGER LLP
500 Capitol Mall, Suite 1700
Sacramento, CA 95814-4756

Jason E. Resnick
General Counsel
Western Growers Association
17620 Fitch Street
Irvine, CA 92614-6022

Nancy N. McDonough
Kari E. Fisher
Jack L. Rice
CALIFORNIA FARM BUREAU
FEDERATION
2300 River Plaza Drive
Sacramento, CA 95833-4236

Theresa A. Dunham
Nicholas A. Jacobs
Richard S. Deitchman
SOMACH SIMMONS & DUNN
500 Capitol Mall, Suite 1000
Sacramento, CA 95814-4742

Deborah A. Sivas
Alicia E. Thesing
Matthew J. Sanders
Environmental Law Clinic
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610

Michael I. Marsh
Kenia Acevedo
Yuchih Pearl Kan
California Rural Legal Assistance, Inc.
3 Williams Road
Salinas, CA 93905

Helen H. Kang
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2921