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*Exempt from filing fees pursuant
to Government Code section 6103*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SACRAMENTO

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,

v.

19 **CALIFORNIA STATE WATER RESOURCES**
20 **CONTROL BOARD, a public agency,**

Respondent.

Case No. 34-2012-80001324

**STATE WATER RESOURCES
CONTROL BOARD'S REPLY 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

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1 INTRODUCTION

2 Petitioners assert that the State Water Resources Control Board’s (State Board) demurrer to
3 Petitioners’ fifth cause of action, alleging violation of the California Environmental Quality Act
4 (CEQA), should be denied for three reasons, but none of these reasons are valid, in light of the
5 law and the allegations contained in the amended petition for writ of mandate.

6 First, Petitioners assert that exhaustion is not required because the State Board has an
7 ongoing duty to comply with CEQA. It is correct that the State Board has an ongoing duty to
8 comply with CEQA, but as a matter of law, CEQA claims are waived by failure to exhaust
9 administrative remedies. Petitioners’ failure to raise any issues regarding CEQA to the State
10 Board during the administrative review process is fatal to Petitioners’ fifth cause of action.¹

11 Second, Petitioners assert that even if exhaustion is required, “public comments sufficiently
12 apprised the State Board of the need to evaluate the effects of changing the waiver.” Facts of
13 which this Court may take judicial notice reflect that none of the public comments raised anything
14 about additional adverse environmental impacts of the 2012 Conditional Waiver, that, in the
15 context of the State Board’s administrative review, could trigger a need for the State Board to
16 engage in CEQA review beyond that previously performed by the Regional Board. Rather, the
17 comments raised issues about Petitioners’ preferences regarding reporting and monitoring
18 requirements, compliance with the State’s Antidegradation Policy, and the U.C. Davis Report.
19 Petitioners’ new litigation claim, not raised administratively, is that these issues triggered a need
20 for further environmental analysis under CEQA. But all of these issues, as articulated by
21 Petitioners (or any other public participants) tied into the terms and conditions of the 2012
22 Conditional Waiver, as modified and clarified by the State Board; the comments did not identify
23 any purported need for further environmental review of the issues.

24
25 ¹ Even if this were not so, Petitioners’ CEQA claim would fail for the reasons stated in the
26 State Board’s merits brief in opposition to the petition for writ of mandate. Once an initial EIR
27 has been certified, there is a statutory presumption against additional environmental review,
28 which is triggered only upon satisfaction of specific criteria not met here. (Pub. Resources Code,
§ 21166, Cal. Code Regs., tit. 14, § 15164(a); *San Diego Navy Broadway Complex Coalition v.*
City of San Diego (2010) 185 Cal.App. 4th 924, 934.)

1 Third, Petitioners assert that they can seek declaratory and injunctive relief to order the
2 State Board to engage in CEQA review. As a matter of law, in light of their failure to raise
3 CEQA compliance as an issue, Petitioners' remedies are limited to those available under Water
4 Code section 13330. Accordingly, Petitioners can seek a writ of mandate ordering the State
5 Board to reconsider the terms and conditions of the Modified Waiver, as adopted by the State
6 Board upon the conclusion of its administrative review of the 2012 Conditional Waiver, but they
7 cannot seek a declaration ordering it to initiate supplemental CEQA review of the Modified
8 Waiver.

9 In addition to the three assertions summarized, Petitioners devote much of their opposition
10 arguing the merits of their petition for writ of mandate. These merits arguments and Petitioners'
11 corresponding references to the administrative record to support them, are not reflected in
12 Petitioners' fifth cause of action alleging violation of CEQA, and Petitioners identify no basis
13 upon which they would be judicially noticeable in the context of the State Board's demurrer.
14 Petitioners' merits arguments are therefore irrelevant to the legal issue presented to this Court by
15 the State Board's demurrer: Because Petitioners failed to exhaust their administrative remedies as
16 to their CEQA claim, and that failure creates a procedural defect that cannot be cured, Petitioners'
17 fifth cause of action should be dismissed without leave to amend.

18 ARGUMENT

19 **I. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A PREREQUISITE TO SEEKING** 20 **JUDICIAL REVIEW OF AGENCY ACTIONS FOR ALLEGED VIOLATIONS OF CEQA,** 21 **INDEPENDENT OF THE STATE BOARD'S ROLE IN ITS ADMINISTRATIVE REVIEW OF** **THE 2012 WAIVER**

22 **A. Petitioners Were Not Excused From Their Duty to Exhaust** 23 **Administrative Remedies During the State Board's Administrative** 24 **Review of the 2012 Waiver Simply Because the State Board Must** 25 **Comply With Any Applicable CEQA Requirements.**

26 Petitioners assert that "[b]ecause it is the agency's duty to determine when supplemental
27 review is necessary, no exhaustion is required." (Pets.' Opp. to Demurrer at 5:9-10.) Petitioners'
28 broad-brush and unsupported assertion, if accepted, would vitiate the doctrine of exhaustion of
administrative remedies not only in the context of CEQA, but in all administrative proceedings,
because agencies always bear ultimate responsibility to follow the law. Petitioners cite to cases

1 discussing the undisputed proposition that agencies are responsible for gathering sufficient
2 information to render informed decisions on whether to engage in CEQA review.² The role of an
3 agency in the context of a CEQA proceeding does not, however, negate the applicability of the
4 exhaustion doctrine in the context of CEQA. (*Coalition for Student Action v. City of Fullerton*
5 (1984) 153 Cal.App.3rd 1194, 1198; see generally *Abelleira v. District Court of Appeal, Third*
6 *Dist.* (1941) 17 Cal.2d 280, 293 [discussing original and jurisdictional nature of the exhaustion
7 doctrine].) According to Petitioners, in their fifth cause of action, they “are challenging the State
8 Board’s failure to conduct *any* supplemental environmental review of the Board’s changes to the
9 2012 Waiver, after the Regional Board certified the [Addendum to the Final Supplemental] EIR.”
10 (Petr.’ Opp. to Dem. at 5:13-15, italics original.) Petitioners then conclude, “Because this is a
11 purely legal issue – one that presents the purely legal question of whether the State Board had a
12 legal duty and satisfied it – Petitioners did not have to exhaust.” (*Id.* at 5:15-17.) Petitioners are
13 correct that the State Board’s demurrer is based on a legal issue and undisputed facts, but they are
14 wrong that the legal issue raised by their CEQA cause of action negates their legal duty to exhaust
15 administrative remedies.

16 Regarding the State Board’s role in determining whether or not to engage in further
17 environmental review -- above and beyond the Subsequent EIR performed by the Regional
18

19 ² *Concerned Citizens of Costa Mesa, Inc. v 32nd Dist. Agric. Ass’n.* (1986) 42 Cal.3d 929,
20 cited by Petitioners regarding an agency’s duties to gather information under CEQA does not
21 stand for the proposition that a CEQA claim may proceed absent exhaustion of administrative
22 remedies. Rather, this case addressed the application of the CEQA statute of limitations in the
23 context of a lack of public notice regarding substantial changes made to a pending outdoor
24 amphitheater project. The project was the subject of an EIR, but after the EIR was filed,
25 substantial changes were made to the project without giving any notice and without filing a
26 Supplemental EIR. (42 Cal.3d at p. 938.) The court rejected a demurrer based on failure to file
27 the CEQA lawsuit within 180 days after commencement of construction because the phrase
28 “commencement of the project” in the CEQA statute of limitations referred to the project
described in the EIR, not the substantially different project constructed, and found the complaint
was timely filed because of the change in the project. (*Id.*) The holding of the case is
inapplicable to the facts here, where Petitioners failed to raise the purported need for additional
CEQA review to the State Board even though the revisions to the 2012 Conditional Waiver were
formally noticed and subject to three public review and comment periods.

1 Board -- Petitioners acknowledged the statutory presumption against further CEQA review in the
2 context of the State Board's review of the 2012 Waiver. (RJN, ex. 1, at p. 37, AR SB 005457,
3 citing Pub. Resources Code § 21166 (allowing agencies to issue a subsequent EIR *only* when
4 certain conditions are met); Cal. Code Regs. tit. 14, § 15164(a).) Petitioners failed to raise any of
5 these three factors of Public Resources Code section 21166 to the State Board during its
6 administrative review process. (See State Bd.'s Mem. of P's & A's at 6:11-8:11.)³

7 **B. The Need For Subsequent Environmental Review Could Not Have Been**
8 **“Plain” Since Petitioners Never Raised It As An Issue, and Their**
9 **Subsequent Arguments On the Merits Acknowledge That the Modified**
10 **Waiver Cannot Cause Adverse Impacts On the Degraded**
11 **Environmental Baseline**

12 Petitioners attempt to dodge their failure to raise any issues regarding any purported need
13 for additional CEQA review by asserting that, “The administrative record in this case makes clear
14 that additional environmental review, beyond the Regional Board’s EIR, was necessary for the
15 Modified Waiver.” (Petr.’ Opp. to Dem. at 6:4-5.) The only portion of the administrative record
16 that is relevant to the issue of Petitioners’ failure to exhaust administrative remedies are
17 Petitioners’ public comments during the State Board’s administrative review of the 2012 Waiver.
18 All of these comments regarding the several iterative drafts considered by the State Board are
19 included in the State Board’s Request for Judicial Notice in Support of Demurrer. Not a word
20 about the purported need for subsequent environmental review is included among the numerous
21 and detailed comments about various aspects of the proposed revisions and modifications to the

21 ³ Petitioners cite *Eller Media Co. v. Community Redevelopment Agency* (2003) 108
22 Cal.App.4th 25, for the proposition that agencies must monitor new sources of information and
23 assess the impacts of changes to a proposed project. In *Eller Media*, the court considered whether
24 supplemental environmental review was indicated in the context of a “Program EIR” for a
25 redevelopment project, designed to analyze environmental impacts of a series of related actions
26 that were characterized as one large project. At issue was a proposal to construct a billboard,
27 which was submitted 13 years after the final EIR was certified and the redevelopment plan was
28 adopted. Under the circumstances, the proposed construction was “new information” that was not
known at the time the EIR was certified 13 years previously. Accordingly, a supplemental EIR
was necessary. (108 Cal.App.4th 24, at pp. 43-44.) In contrast, the State Board reviewed the
2012 Waiver, and issued the Modified Waiver in the context of its administrative review under
the Water Code. There was no significant passage of time, and the Modified Waiver did not
substantively change the 2012 Waiver.

1 2012 Waiver. (See RJN, exh. 2-7.) Significantly, the detailed comments refer to the legal issues
2 raised by Petitioners' first through fourth causes of action. (State Bd.'s Mem. of P's & A's at
3 8:20-9:25.) This reflects that Petitioners, veteran environmental activists represented by counsel,
4 understood how to articulate issues they concluded were worthy of documenting during the
5 administrative review process.

6 Petitioners make four assertions about why the State Board should have *sua sponte*
7 engaged in supplemental CEQA analysis, notwithstanding Petitioners' failure to raise the issue.
8 First, Petitioners cite to the already degraded water quality in the region. Second, Petitioners
9 assert that the State Board made "major changes" to the 2012 Waiver. Third, Petitioners assert
10 that the State Board's referral of long-range planning issues to the Expert Panel is a "tacit
11 admission of the need for further environmental review." Fourth, Petitioners refer to the U.C.
12 Davis Report, which the State Board did not consider, but which Petitioners contend contains
13 "critical new information." None of these assertions are valid.

14 **1. The water quality baseline was degraded by longstanding**
15 **agricultural practices, and the Modified Waiver could not cause**
16 **further adverse environmental impacts**

17 Petitioners' first argument is that the State Board had a "mountain of evidence showing the
18 significant water quality impacts of agricultural pollution in the Central Coast Region." (Petr.'
19 Opp. to Dem. at 6:5-7.) This argument fails to explain why they did not raise CEQA at the
20 administrative level; it similarly fails to provide a reason why this Court should entertain their
21 request for further CEQA review. (Petr.' Opp. to Demurrer at 6:5-7.) Petitioners cannot and do
22 not allege that the Modified Waiver, adopted in 2013, adversely impacts the environmental
23 baseline. Rather, Petitioners vigorously decry what they contend is a lack of sufficient progress in
24 improving water quality consistent with the Water Code and the Basin Plan. But Petitioners'
25 dissatisfaction with the pace at which the Modified Waiver addresses the already degraded
26 watersheds in the Central Coast region is distinct from the issue of whether the State Board's
27 modification and clarification of the 2012 Waiver constituted significant adverse environmental
28 impacts on the existing environmental baseline that triggered a need for further CEQA review.

1 **2. Petitioners acknowledge that the Modified Waiver could not cause**
2 **further adverse environmental impacts on the already degraded**
3 **environmental baseline.**

4 Petitioners' second argument that "the State Board made major changes to the 2012
5 Waiver" also fails to excuse Petitioners' failure to exhaust or provide a reason for further CEQA
6 review. (Petr.' Opp. to Dem. at 6:7.) Indeed, Petitioners' arguments on the merits acknowledge
7 that the Modified Waiver did not have a significant adverse environmental impact by conceding
8 the Modified Waiver is stronger than the 2004 Waiver: "Ultimately, the Modified Waiver is Only
9 Marginally Stronger Than the 2004 Waiver, and Not Strong Enough to Comply with the Basin
10 Plan." (Petr.' Opening Brief in Support of Pet. for Writ of Mandate at 28:16-17 [argument
11 heading I.A.5].) Petitioners' dissatisfaction with the provisions of the Modified Waiver is based
12 on its purported failure to comply with Water Code provisions and the Basin Plan. But any
13 purported deficiencies with the provisions of the Modified Waiver or the speed with which it
14 achieves water quality objectives are distinct from the legal issue of whether additional CEQA
15 analysis was indicated to study adverse environmental impacts *caused* by the Modified Waiver.⁴
16 Petitioners' recognition that the Modified Waiver is "marginally stronger" than the 2004 Waiver,
17 coupled with their failure to identify any perceived need for additional CEQA review in the
18 administrative process, tacitly concedes there were no such impacts and no need for further
19 CEQA review.

20 **3. The Expert Panel was empanelled to consider long-term**
21 **recommendations on a statewide basis; it was not empanelled to focus**
22 **on the Modified Waiver**

23 Petitioners assert that the State Board "punted" a number of specific issues to the Expert
24 Panel, and further assert, without citation or authority, that the reason for the Expert Panel's very
25 existence was to defer additional CEQA review of the State Board's modifications and
26 clarifications to the 2012 Waiver. On the contrary, the State Board had previously committed in a

27

28 ⁴ Taking Petitioners' argument on the merits of the Modified Waiver at face value, the
Modified Waiver's purported deficiencies could not *cause* any significant adverse environmental
impact to the undisputedly degraded baseline, as it existed when the Regional Board issued an
Addendum to the Final Supplemental EIR in August 2011. (RJN, exh. 3, AR Bates SB 5830.)

1 report to the Legislature to convene a panel of experts “to assess *existing* agricultural nitrate
2 control practices and propose *new* practices to protect groundwater as appropriate.” (SB 7165,
3 italics added.) Far from being limited to addressing specific issues relevant to the Modified
4 Waiver, the Expert Panel was “to conduct more thorough analysis and to provide *long-term*
5 recommendations that may be applied *statewide*.” (*Ibid.*, italics added.) The State Board
6 expressly recognized that the Modified Waiver is “only an interim determination as to how to
7 move forward” [five-year term for waiver; Wat. Code, § 13269, subd. (a)(2)], and noted that it
8 would consider additional revisions, if any are indicated by the Expert Panel’s findings. (SB
9 7165-7166.) In sum, the Expert Panel’s contemplated role is studying and proposing appropriate
10 practices and monitoring for long-term continued progress toward achieving water quality
11 requirements, not evaluating any specific effects to the physical environment that might result
12 from changes made by the State Board to the 2012 Conditional Waiver.

13 **4. The U.C. Davis Report does not contain new information because the**
14 **State Board’s administrative record already contained a draft of the**
15 **Report**

16 Petitioners assert that the U.C. Davis Report constituted new information such that the State
17 Board should have included it in the administrative record, and *sua sponte* conducted further
18 CEQA environmental review in light of this “new” information. In fact, the information was not
19 “new,” the Regional Board had already received a 53-page PowerPoint presentation of a draft of
20 the U.C. Davis Report (RB 7166-7218), and the administrative record before the Regional Board
21 was replete with studies and technical reports that address the same issues.⁵ In light of the
22 undisputed fact that the underlying information, as well as a draft summary of the report, was
23 already included in the administrative record, the U.C. Davis Report was not “new information”
24 sufficient to trigger supplemental CEQA review.

25
26
27 ⁵ See discussion in State Board’s Brief in Opp. to Pet. for Writ of Mandate at 46:14-
28 48:18.)

1 **II. PETITIONERS FAILED TO APPRISE THE STATE BOARD OF ANY PURPORTED NEED TO**
2 **CONDUCT ADDITIONAL CEQA REVIEW**

3 Petitioners acknowledge that “the purpose of exhaustion is to ensure that an agency is
4 apprised of all the relevant facts and issues, so that it can consider and fix any legal errors during
5 the administrative process.” (Petr. ’ Opp. to Dem. at 5:16-18, citing *Center. for Biological*
6 *Diversity v. County of San Bernardino* (2010) 185 Cal.App. 4th 866, 890.) Petitioners maintain,
7 however, that they did exhaust because a party need not cite to a controlling statute to provide an
8 agency an adequate opportunity to address an issue, rather, a party has fully exhausted as long as
9 the agency is “apprised of all the relevant facts and issues.” (Petr. ’ Opp. to Dem. at 9:17-19.)
10 Petitioners’ recitation of this general legal principle is unavailing, however, because there is
11 nothing in the record that this Court could reasonably construe to support a conclusion that any of
12 Petitioners’ comments apprised the State Board of the purported need to conduct additional
13 CEQA review.

14 Petitioners’ reliance on *Center for Biological Diversity v. County of San Bernardino* (2010)
15 185 Cal.App. 4th 866 (*Cntr. Bio. Diversity*), is similarly misplaced because the facts in that case
16 are distinguishable from the undisputed, judicially noticeable facts presented here. In *Cntr. Bio.*
17 *Diversity*, petitioners challenged a proposed open-air human waste composting facility in the
18 Mojave Desert, and raised the issue of whether the project had an adequate water supply
19 (established at 1,000 gallons per day for dust control). (*Cntr. Bio. Diversity*, 185 Cal.App. 4th
20 866, 878.) The petitioners’ comments expressly referred to the issue of whether the EIR
21 sufficiently addressed water supply for the proposed project, but did not specifically refer to a
22 Water Supply Assessment, which is the process established in Water Code section 10910 to
23 analyze whether there are sufficient water supplies for a proposed project. The court rejected an
24 argument that the petitioners’ failure to cite to a Water Supply Assessment and/or Water Code
25 section 10910 meant the petitioners did not properly exhaust their remedies on the issue of
26 whether a sufficient water supply existed for the proposed project. In finding the petitioners had
27 exhausted adequately and, thus, could raise a water supply issue in the CEQA claim, the court
28 noted that this exact issue, just not the precise statute, was raised. (*Id.* at p. 890.)

1 Here, in contrast to *Cntr. Bio. Diversity*, the content of the public comments during the
2 State Board’s administrative review of the 2012 Waiver show that, in this case, Petitioners failed
3 to raise any issue regarding any purported need for supplemental CEQA review of any potential
4 adverse environmental impacts caused by the State Board’s modification to the 2012 Waiver. In
5 short, Petitioners’ “the magic words argument is unconvincing, where no words that could fairly
6 be construed to raise the CEQA issue they now want to litigate were ever uttered. (See *Petr.*
7 *Opp. to Dem.* at 9:21-22.)

8 Failing to raise an issue at all is different from raising it only obliquely. While it is “not
9 necessary to identify the precise statute at issue, so long as the agency is apprised of the relevant
10 facts and issues,” there is no tenable argument to be made here that Petitioners preserved a CEQA
11 claim where there are no comments that fairly can be read to signal a need for additional CEQA
12 review. (*Cntr. Bio. Diversity, supra*, 185 Cal.App. 4th at p. 890, quoting *McPherson v. City of*
13 *Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264 [exact issue raised, though without
14 reference to specific legal provisions, was preserved for litigation].) As the court noted in *Cntr.*
15 *Bio. Diversity*, “the *exact issue* raised in the lawsuit must have been presented to the
16 administrative agency so that it will have had an opportunity to act and render the litigation
17 unnecessary.” (*Id.*) Petitioners would have this Court find that their comments alleging that the
18 State Board’s revisions and clarifications to the 2012 Conditional Waiver were less protective of
19 water quality than the provisions that were modified were sufficient to alert the State Board that
20 additional CEQA review was required to fill in purported gaps in the Regional Board’s CEQA
21 analysis. But Petitioners never asked for additional environmental review in evaluating the
22 changes made by the Modified Waiver to the 2012 Conditional Waiver. Petitioners simply
23 opposed the proposed changes. The content of Petitioners’ comments supports granting the State
24 Board’s demurrer because Petitioners’ comments did not apprise the State Board of the relevant
25 facts and issues regarding Petitioners’ newfound litigation claim that additional CEQA review is
26 necessary.⁶

27 ⁶ In sharp contrast, Petitioners’ comments presented all the issues raised by their first
28 through fourth causes of action. (See State Board’s Br. ISO Dem. At pp. 8:12-10-8.)

1 **III. PETITIONERS ARE NOT ENTITLED TO REQUEST RELIEF UNDER CEQA**

2 In light of Petitioners' failure to exhaust, they have waived their right to seek judicial relief
3 under CEQA. Accordingly, this Court should strike the reference to CEQA at 1(c) in the prayer
4 for relief, wherein Petitioners improperly seek a declaration regarding CEQA in connection with
5 their fifth cause of action. Petitioners may seek relief for a peremptory writ of mandate pursuant
6 to Water Code section 13330, but only regarding such issues as are properly within the scope of
7 review.

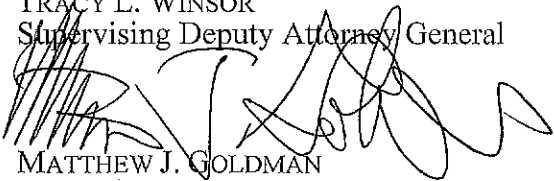
8 **CONCLUSION**

9 For the reasons discussed above, the State Board asks this Court to grant its demurrer to
10 Petitioners' fifth cause of action, without leave to amend, because failure to exhaust is a defect
11 that cannot be cured. Granting the demurrer will narrow and focus the litigation on legal issues
12 that Petitioners actually raised in their comments during the State Board's administrative review
13 process.

14 Dated: April 3, 2015

Respectfully Submitted,

15 KAMALA D. HARRIS
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24 *Board*

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: Monterey Coastkeeper, et al. v. State Water Resources Control Board

No.: 34-2012-80001324

I declare:

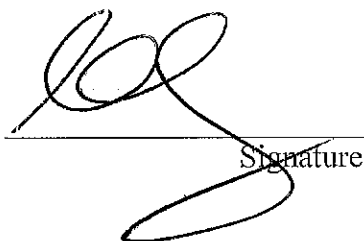
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento,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

On April 3, 2015, I served the attached **STATE WATER RESOURCES CONTROL BOARD'S REPLY IN SUPPORT OF DEMURRER TO PETITIONERS' 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 April 3, 2015, at Sacramento, California.

Michelle Fowler
Declarant



Signature

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