

1 CHARLES J. McKEE (Bar No. 152458)
County Counsel
2 IRVEN L. GRANT (Bar No. 068950)
Deputy County Counsel
3 County of Monterey
168 W. Alisal Street, Third Floor
4 Salinas, California 93901-2653
Telephone: (831) 755-5045
5 Facsimile: (831) 755-5283
6 granti@co.monterey.ca.us

7 DOWNEY BRAND LLP
STEVEN P. SAXTON (Bar No. 116943)
8 NICOLE E. GRANQUIST (SBN 199017)
621 Capitol Mall, 18th Floor
9 Sacramento, CA 95814-4686
10 Telephone: (916) 444-1000
Facsimile: (916) 444-2100

11 Attorneys for Petitioner
12 MONTEREY COUNTY WATER RESOURCES AGENCY



14 BEFORE THE
15 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

17 In the Matter of the Monterey County Water
18 Resources Agency's Petition for Review of
19 Action and Failure to Act by the California
20 Regional Water Quality Control Board, Central
Coast Region, In Issuing Request for
21 Information

PETITION FOR REVIEW;
PRELIMINARY POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION (WATER CODE
SECTION 13320)

22 INTRODUCTION

23 Petitioner Monterey County Water Resources Agency ("Agency"), in accordance with
24 section 13320 of the Water Code, hereby petitions the State Water Resources Control Board ("State
25 Water Board") to review the April 18, 2012 "Request for Information – Report of Waste Discharge"
26 ("Request") issued by the Regional Water Quality Control Board, Central Coast Region's
27 ("Regional Water Board") Executive Officer, attached hereto as Exhibit A. The issues and a
28 summary of the bases for the Petition follow. At such time as the full administrative record is

1 available and any other material has been submitted, the Agency reserves the right to file a more
2 detailed memorandum in support of the Petition and/or in reply to the Regional Board's response.¹

3 **1. NAME, ADDRESS, TELEPHONE, AND EMAIL FOR PETITIONER:**

4 David E. Chardavoyne
5 Interim General Manager
6 Monterey County Water Resources Agency
7 P.O. Box 930
8 Salinas, California 93902
9 Telephone: (831) 755-8906
10 Facsimile: (831) 424-1098 Email: chardavoyne@co.monterey.ca.us

11 In addition, all materials in connection with this Petition for Review should also be provided
12 to the Agency's counsel at the following addresses:

13 Irven L. Grant
14 Deputy County Counsel
15 County of Monterey
16 168 W. Alisal Street, Third Floor
17 Salinas, California 93901-2653
18 Telephone: (831) 755-5045
19 Facsimile: (831) 755-5283 Email: granti@co.monterey.ca.us

20 Nicole E. Granquist
21 Downey Brand LLP
22 621 Capitol Mall, 18th Floor
23 Sacramento, California 95814
24 Telephone: (916) 444-1000
25 Facsimile: (916) 444-2100 Email: ngranquist@downeybrand.com

26 **2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE
27 BOARD IS REQUESTED TO REVIEW:**

28 The Agency seeks review of the April 18, 2012 Request issued by the Regional Water
Board's Executive Officer.

¹ The State Board's regulations require submission of a statement of points and authorities in support of a petition (23 C.C.R. §2050(a)(7)), and this document is intended to serve as a preliminary memorandum. However, it is impossible to prepare a thorough statement or a memorandum that is entirely useful to the reviewer in the absence of the complete administrative record, which is not yet available.

1 **3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:**

2 The Regional Water Board's Executive Officer sent the Request to the Agency on April 18,
3 2012.

4 **4. A STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR**
5 **IMPROPER:**

6 In the Request, the Executive Officer asks for general information regarding periodic
7 pumping that may be conducted by the Agency for flood control purposes. The Executive Officer
8 then demands that the information responsive to the Request be submitted in the form of a Report of
9 Waste Discharge ("ROWD") and U.S. Environmental Protection Agency ("USEPA") Forms 1 and
10 2-A (e.g., applications for Waste Discharge Requirements ("WDRs")/federal Clean Water Act
11 National Pollutant Discharge Elimination System ("NPDES") permit), though the Executive Officer
12 concurrently asserts throughout the Request that no conclusion has yet been made whether any
13 permit is actually necessary for the Agency's activities. Water Code sections 13260 and 13376 are
14 cited as the authorization for the Request, and civil liability under Water Code sections 13261 and
15 13385 are recited as applicable if the Agency does not respond to the Request by May 31, 2012.
16 The Executive Officer's actions have placed the Agency in the untenable circumstance of being
17 ordered to file an application for a permit (with attendant fees?) before any determination has
18 actually been made as to whether a permit is required for any Agency-related water conveyance
19 activities. Further, the Agency faces potentially harsh civil penalties if the Agency does not submit
20 the demanded applications. The Agency does not believe any of its water conveyance activities
21 require WDRs or an NPDES permit.

22 The Executive Officer's Request is not reasonable as required by Water Code section 13000,
23 is contrary to Water Code sections 13260 and 13376, and is otherwise unsupported by findings or
24 evidence in the administrative record, all of which constitute an abuse of discretion. For the reasons
25 stated herein and in Section 7 below, the Agency requests the State Water Resources Control Board
26 ("State Water Board") to deem the Executive Officer's April 18, 2012 Request inappropriate and
27 improper in accordance with Water Code section 13320(c) and to set aside the Request in
28 accordance with 23 C.C.R. §2052(a)(2)(B).

1 **5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:**

2 The Executive Officer's Request requires the Agency to submit applications for state and
3 federal discharge permits (WDR and NPDES permit) no later than May 31, 2012 for activities for
4 which no determination has yet been made as to whether such permits are required. More
5 egregiously, permit applications are required as the mechanism by which the Agency must furnish
6 simple factual information responsive to the Request. Not only is the Request procedurally
7 improper (information regarding factual activities of the Agency must be submitted to the Regional
8 Water Board in the form of permit applications), the Request is substantively deficient (requiring
9 permit applications before any determination is made that such permits are necessary). Further, it is
10 unclear whether the Executive Officer expects the Agency to pay the fee associated with submission
11 of a ROWD and Forms 1-2A required by Water Code §13260(d) – (f), collected to fund permit
12 preparation activities, but misdirected at a response to a request for information.

13 If the Agency does not comply, the Request recites that civil liability under Water Code
14 sections 13261 and 13385 may be imposed in excess of \$10,000 per day. The Agency does not
15 believe its activities require WDRs or an NPDES permit, and the Agency should be provided the
16 opportunity to discuss the matter with Regional Water Board staff without being under the threat of
17 enforcement should the Agency choose not to submit the demanded permit applications.

18 **6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**
19 **PETITIONER REQUESTS:**

20 The Agency seeks an Order by the State Water Board that determines the Executive
21 Officer's April 18, 2012 Request was inappropriate and improper in accordance with Water Code
22 section 13320(c) and that sets aside the Request in accordance with 23 C.C.R. §2052(a)(2)(B).

23 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
24 **ISSUES RAISED IN THE PETITION:**

25 The Agency incorporates by reference the information presented elsewhere in this Petition.
26 The Agency also reserves the right to supplement this statement of points and authorities upon
27 receipt and review of the administrative record.
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A. Monterey County Water Resources Agency

The Agency is a special act flood control and water agency formed by the legislature in 1990 to replace the Monterey County Flood Control and Water Conservation District. (Water Code App. § 52-8; Stats. 1990, c. 1159 (S.B. 2580), § 4.) The Agency maintains flood control channels that accept and convey water, including agricultural run-off already regulated by the Regional Water Board pursuant to Order No. R3-2012-0011, Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, as well as previous conditional waivers adopted by the Regional Water Board (“Ag Waiver”). The Agency simply maintains the Blanco Drain and the Reclamation Ditch for drainage and flood control purposes.

B. Pending Lawsuit Against the Agency by Monterey Coastkeeper

On October 21, 2010, Monterey Coastkeeper, a project of The Otter Project, filed a Petition for Writ of Mandate and Complaint for Declaratory Judgment (“Coastkeeper Complaint”) against the Agency in Monterey County Superior Court alleging, among other things, that the Agency is required to secure WDRs for its maintenance of the Blanco Drain and Reclamation Ditch, due primarily to the presence of already regulated agricultural return flows in those channels that Monterey Coastkeeper believes is of insufficient quality. Coastkeeper essentially argues that MCWRA must obtain a permit from the Regional Water Board to “re-regulate” these agricultural discharges after they reach the flood control channels, solely on the theory that the mere continuation of flow amongst and between Blanco Drain and/or the Reclamation Ditch and all downstream waters (e.g., the Salinas River) is a separate and distinct discharge of waste subject to repeated regulation. Not surprisingly, the Agency disagrees. A copy of Monterey Coastkeeper’s Petition for Writ of Mandate and Complaint is attached hereto as Exhibit B. Coastkeeper and the Agency are actively engaged in litigation on this topic, with trial scheduled for October 22, 2012.

During deposition testimony by Steve Shimek, the Executive Director of the Otter Project, on May 11, 2012, Mr. Shimek testified that recently, and almost two years after filing the Coastkeeper Complaint, he telephonically contacted the Executive Officer of the

1 Regional Water Board to inquire as to whether the Agency possessed permits for its
2 activities, including periodic pumping within the Blanco Drain and Reclamation Ditch. Mr.
3 Shimek testified that Mr. Briggs told him that he “would look into it, and get back to him.”
4 Shortly thereafter, the Agency received the Request at issue in this Petition.

5 **C. The Regional Water Board’s Request**

6 On April 18, 2012, the Executive Officer of the Regional Water Board sent the Agency the
7 Request. Of relevance, the Request states as follows:

8 **“Central Coast Regional Water Quality Control Board (Central Coast Water**
9 **Board) staff understands that the Monterey County Water Resources**
10 **Agency (MCWRA) periodically pumps surface water from flood control**
11 **channels, such as the Blanco Drain and the Reclamation Ditch, directly into**
12 **other waterbodies (e.g., the Salinas River). Both the Federal Water Pollution**
13 **Control Act Section 402 and California Water Code section 13376 require any**
14 **person or entity that discharges pollutants or proposes to discharge pollutants to**
15 **navigable waters of the United States to obtain a National Pollutant Discharge**
16 **Elimination System (NPDES) permit. In addition, Section 13260(a) of the Porter**
17 **Cologne Water Quality Control Act states: *Each of the following persons shall file***
18 ***with the appropriate regional board a report of waste discharge, containing the***
19 ***information that may be required by the regional board: (1) A person discharging***
20 ***waste, or proposing to discharge waste, within any region that could affect the***
21 ***quality of the waters of the state, other than into a community sewer system. The***
22 **Central Coast Water Board is responsible for issuing waste discharge**
23 **requirements, including NPDES permits, in Monterey County.”**

24 (See Request at page 1 (italics in original, bold emphasis added).) The Request further states:

25 **“In order to evaluate if these types of discharges contain pollutant and if waste**
26 **discharge requirements or NPDES permits are required, the Central Coast Water Board**
27 **requires you to submit the following information by May 31, 2012:**

- 28 1. How many pumping locations exist and where are they? Please provide a map showing the locations.
2. Why is the water discharged?
3. When is the water discharged?
4. How much water is discharged?
5. Does your agency monitor the volume and chemistry of the discharges, or the effects of the discharges on receiving waters?
6. What is the quality of the discharged water with respect to potential pollutants?
7. What is the quality of the receiving waters with respect to potential pollutants?
8. Which branch of MCWRA oversees these activities?

1 The information should be transmitted on the Report of Waste Discharge forms that can be found
2 at...[ROWD Form 200, USEPA Forms 1 and 2-A].” (*Id.* at pages 1-2) (emphasis added).

3 Finally, the Request concludes,

4 “Based on the information you provide, **Central Coast Water Board staff will**
5 **evaluate if pollutants are being discharged into waters of the United States or**
6 **of the state and if you will be required to obtain a NPDES permit or other**
7 **another type of permit from our agency. If we determine that a permit is**
8 **needed, Water Board staff will contact you to discuss our permitting**
9 **process.”**

10 (*Id.* at page 2) (emphasis added).) The plain language of the Request makes clear that no
11 determination has been, or could be, made yet as to whether any conveyance activities of the
12 Agency require WDRs or an NPDES Permit; nonetheless, the Executive Officer characterizes the
13 water flowing within waters with the aid of a pump as being “discharged” in the 8 listed categories
14 of information requested, and requires the Agency to submit permit applications as the mechanism
15 to furnish the requested information, rather than simply asking the Agency to submit the requested
16 information in a more informal manner for further evaluation, analysis, and conclusion.

17 **D. The Executive Officer’s Issuance of the Request is Not Reasonable as Required**
18 **by Water Code section 13000**

19 The California Legislature has found and declared that activities affecting water quality
20 “shall be regulated to attain the highest water quality which is *reasonable*, considering all demands
21 being made and to be made on those waters and the total values involved, beneficial and
22 detrimental, economic and social, tangible and intangible.” *See* Water Code §13000 (emphasis
23 added). This section sets state policy and imposes an overriding requirement on the Regional
24 Boards that all orders be reasonable considering all circumstances.

25 The Regional Water Board Executive Officer’s issuance of the Request is not reasonable,
26 considering all of the related circumstances. The Executive Officer attempts to obtain information
27 that might be relevant to determining whether the Agency is “discharging” waste or pollutants to
28 waters of the State or United States that may implicate WDR or NPDES permit requirements.
However, before the information is submitted or any evaluation is performed to make that

1 determination (admitted as necessary by the Executive Officer twice in the Request), the Executive
2 Officer nonetheless requires the Agency to submit permit applications for both WDRs and an
3 NPDES permit. Even worse, to comply with the Request, the *only* way the requested factual
4 information can be submitted is via permit applications that have not yet been properly determined
5 as being necessary. Requiring information to be furnished in this manner, as opposed to other
6 means, (e.g., via a report as contemplated by Water Code section 13267, or otherwise) is
7 procedurally irregular, prejudicial to the Agency, and puts the “cart before the horse.” Further, the
8 ROWD Form 200 and USEPA Forms 1 and 2A provide no clear method by which to submit the
9 requested information, since their purpose is not for the routine submission of information, but
10 rather, for submission of information relevant to preparation and issuance of a WDR or NPDES
11 Permit. The Executive Officer’s action in issuing the Request is clearly unreasonable and does not
12 comport with mandated duties under Water Code section 13000.

13
14 **E. The Executive Officer’s Issuance of the Request is Contrary to Water Code**
15 **sections 13260 and 13376.**

16 As recited in the Request, Water Code section 13260 requires a person to submit a ROWD
17 and secure WDRs when that person is “discharging waste, or proposing to discharge waste, within
18 any region that could affect the quality of the waters of the state.” (Cal. Water Code §13260(a).)
19 Water Code section 13376 requires a person to submit a ROWD and secure an NPDES permit when
20 that person “discharges pollutants or proposes to discharge pollutants to the navigable waters of the
21 United States within the jurisdiction of this state ...” (Cal. Water Code §13376) In this case, and as
22 twice admitted by the Request, no factual determination has yet been made as to whether any
23 pumping activities conducted by the Agency satisfy the elements of either Water Code section
24 13260 or 13376. Thus, the Executive Officer’s demand that the Agency submit a ROWD and
25 USEPA Forms 1 and 2-A so as to secure WDRs and/or an NPDES permit is unsupported and
26 contrary to the express terms of Water Code sections 13260 and 13376. No such demand can be
27 made by the Executive Officer at this point.
28

1 For these reasons, the Agency requests the State Water Board to deem the Executive
2 Officer's April 18, 2012 Request inappropriate and improper in accordance with Water Code
3 section 13320(c) and to set aside the Request in accordance with 23 C.C.R. §2052(a)(2)(B).

4 **F. The Executive Officer's Issuance of the Request is Not Supported by Findings**
5 **and Evidence in the Administrative Record.**

6 Orders issued by the Regional Water Board not supported by the findings, or findings not
7 supported by the evidence, constitute an abuse of discretion. *Topanga Association for a Scenic*
8 *Community v. County of Los Angeles*, 11 Cal.3d 506, 515; *California Edison v. SWRCB*, 116 Cal.
9 App.3d 751, 761 (4th Dt. 1981); *see also In the Matter of the Petition of City and County of San*
10 *Francisco, et al.*, State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995). The Regional Water
11 Board Executive Officer's issuance of the Request is not supported by adequate findings, and
12 findings made are not supported by evidence in the administrative record.

13 The Request suffers from inadequate findings and a lack of evidence to justify the demands
14 of the Request. By the very fact that the Executive Officer is requesting information regarding the
15 Agency's activities, not otherwise available in the administrative record of the Regional Water
16 Board, necessary to evaluate whether the Agency is "discharging" waste or pollutants that may
17 implicate WDR or NPDES permit requirements, indicates that no findings can yet be made by the
18 Executive Officer with respect to that issue. Certainly, no findings made could be supported by
19 evidence in the administrative record. Thus, the Executive Officer's use of the word "discharge" or
20 "discharged" in the 8 categories of requested information to characterize Agency activities is not
21 supported by evidence in the administrative record.

22 Further, the plain language of the Request indicates that the Executive Officer and other
23 Regional Water Board staff require the information requested before they can even "evaluate if
24 pollutants are being discharged into waters of the United States or of the state and if [the Agency]
25 will be required to obtain a NPDES permit or other [sic] type of permit" from the Regional Water
26 Board. (See Request at page 2) Therefore, the Executive Officer's demand that the Agency submit
27 permit applications now, that will be used to determine whether a permit application is, in fact,
28

1 necessary in the future, is certainly not supported by findings or evidence in the administrative
2 record. In fact, the administrative record is utterly void of any evidence that would support the
3 Executive Officer's demand. Finally, no findings were made, and no evidence currently exists in
4 the administrative record to support a finding (as recognized by the Request itself), that the Agency
5 is either discharging waste that could affect the quality of the waters of the state or discharging
6 pollutants to navigable waters of the United States, a prerequisite under Water Code sections 13260
7 and 13376 that must be satisfied before a permit must be obtained; therefore, the Executive
8 Officer's demand for permit applications is wholly unsubstantiated.

9 For these reasons, the State Water Board should find that the Regional Water Board's
10 Executive Officer abused his discretion when issuing the April 18, 2012 Request as the Request was
11 not supported by adequate findings, and the findings made were not supported by evidence in the
12 administrative record.

13
14 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL
WATER BOARD AND TO THE DISCHARGER:**

15 A true and correct copy of this Petition was mailed by First Class mail on May 18, 2012, to
16 the Regional Water Board at the following address:

17 Roger W. Briggs
18 California Regional Water Quality Control Board
19 Central Coast Region
20 895 Aerovista Place
Suite 101
San Luis Obispo, California 93401

21 **9. A STATEMENT THAT THE SUBSTANTIVE ISSUES AND OBJECTIONS RAISED
22 IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN
23 EXPLANATION WHY NOT:**

24 The April 18, 2012 Request was issued by the Executive Officer of the Regional Water
25 Board without public notice and/or a comment period. For this reason, the Agency had no
26 opportunity to formally raise the substantive issues or objections contained in this Petition to the
27 Regional Water Board prior to issuance of the Request.

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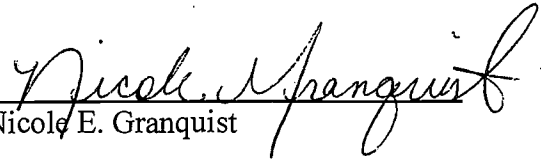
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10. PETITIONER'S REQUEST FOR ABEYANCE:

The Agency wishes to place its Petition for Review in abeyance pursuant to 23 C.C.R. §2050.5(d) to allow time for the Agency to attempt to resolve its concerns with the Regional Water Board.

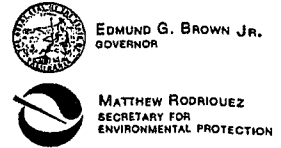
DATED: May 18, 2012

Respectfully submitted,



Nicole E. Granquist

EXHIBIT A



Central Coast Regional Water Quality Control Board

April 18, 2012

Mr. David E. Chardavoine
Interim General Manager
chamblissws@co.monterey.ca.us
Monterey County Water Resources Agency
P.O. Box 930
Salinas, CA 93902

Sent via US and Electronic Mail

Dear Mr. Chardavoine:

REQUEST FOR INFORMATION - REPORT OF WASTE DISCHARGE

Central Coast Regional Water Quality Control Board (Central Coast Water Board) staff understands that the Monterey County Water Resources Agency (MCWRA) periodically pumps surface water from flood channels, such as the Blanco Drain and the Reclamation Ditch, directly into other waterbodies (e.g., the Salinas River). Both the Federal Water Pollution Control Act Section 402 and California Water Code Section 13376 require any person or entity that discharges pollutants, or proposes to discharge pollutants, to navigable waters of the United States to obtain a National Pollutant Discharge Elimination System (NPDES) permit. In addition, Section 13260(a) of the Porter Cologne Water Quality Control Act states: *Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board: (1) A person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.* The Central Coast Water Board is responsible for issuing waste discharge requirements, including NPDES permits, in Monterey County.

In order to evaluate if these types of discharges contain pollutants and if waste discharge requirements or NPDES permits are required, the Central Coast Water Board requires you to submit the following information **by May 31, 2012**:

1. How many pumping locations exist and where are they? Please provide a map showing the locations.
2. Why is the water discharged?
3. When is the water discharged?
4. How much water is discharged?
5. Does your agency monitor the volume and chemistry of the discharges, or the effects of the discharges on receiving waters?
6. What is the quality of the discharged water with respect to potential pollutants?
7. What is the quality of the receiving waters with respect to potential pollutants?
8. Which branch of MCWRA oversees these activities?

JEFFREY S. YOUNG, CHAIR | ROGER W. BRIGGS, EXECUTIVE OFFICER

895 Aerovista Place, Suite 101, San Luis Obispo, CA 93401 | www.waterboards.ca.gov/centralcoast

The information should be transmitted on the Report of Waste Discharge forms that can be found at:

1. *Application/Report of Waste Discharge General Information Form for Waste Discharge Requirements or NPDES Permit (Form 200)*. This form may be acquired from the State Water Resource Control Board's website at <http://www.waterboards.ca.gov/centralcoast/Applications/Form200/Form200.pdf>
2. *United States Environmental Protection Agency (USEPA) General Information Form (Form 1)*. This form may be acquired from the USEPA's website at www.epa.gov/npdes/pubs/form_1.pdf
3. *USEPA Application Overview Form (Form 2-A)*. This form may be acquired from USEPA's website at www.epa.gov/npdes/pubs/final2a.pdf

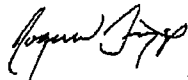
Based on the information you provide, Central Coast Water Board staff will evaluate if pollutants are being discharged into waters of the United States or of the state and if you will be required to obtain a NPDES permit or other another type of permit from our agency. If we determine that a permit is needed, Water Board staff will contact you to discuss our permitting process.

This requirement that MCWRA submit a report of waste discharge is made pursuant to sections 13260 and 13376 of the California Water Code. Section 13261 of the Water Code states that a violation of a request made pursuant to Water Code Section 13260 may subject the Discharger to administrative civil liability of up to \$1,000 per day. Pursuant to Section 13385 of the Water Code, a violation of a Water Code Section 13376 requirement may subject you to civil liability of up to \$10,000 per day for each day in which the violation occurs.

Any person aggrieved by this action of the Central Coast Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of the order, except that if the thirtieth day following the date of the order falls on a Saturday, Sunday, or state holiday, the petition must be received by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the internet at http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

If you have questions regarding the requirements in this letter, please call **Sheila Soderberg (805) 549-3592** or ssoderberg@waterboards.ca.gov or Mike Higgins at (805) 542-4649 or mhiggins@waterboards.ca.gov

Sincerely,



Digitally signed by Roger W. Briggs
DN: c=US, o=Waterboards, ou=Waterboards, email=rogerbriggs@waterboards.ca.gov, c=US
Date: 2012.04.17 17:13:10 -0700

Roger W. Briggs
Executive Officer

S:\Shared\NPDES\NPDES Facilities\Monterey Co\Blanco Drain\ROWD-requestf1.docx

cc's on next page:

cc:

Mr. Brent Buche, Assistant General Manager, MCWRA bucheb@co.monterey.ca.us

Ms. Jennifer Epp, Water Board jepp@waterboards.ca.gov

centralcoast@waterboards.ca.gov

Ms. Deirdre Whalen, Monterey Bay National Marine Sanctuary, deirdre.whalen@noaa.gov

Mr. Jamie Marincola, US EPA Region IX, Marincola.JamesPaul@epa.gov

Mr. Steve Shimek, Monterey Coastkeeper, exec@otterproject.org

EXHIBIT B

FILED

OCT 21 2010

CONNIE MIZZE
CLERK OF THE SUPERIOR COURT
~~M. OLIVEREZ~~ DEPUTY

1 Deborah A. Sivas (Ca. Bar No.135446)
Alicia Thesing (Cal. Bar No. 211751)
2 Robb W. Kapla (Cal. Bar. No.238896)
ENVIRONMENTAL LAW CLINIC
3 Mills Legal Clinic at Stanford Law School
Crown Quadrangle
4 559 Nathan Abbott Way
Stanford, California 94305-8610
5 Tel: (650) 725-8571
Fax: (650) 723-4426

CASE MANAGEMENT CONFERENCE
DATE: 3-11-2011
TIME: 9:00 AM
PLACE: Courtroom 15, 2nd Floor
1200 Agualito Rd. Monterey CA 93940

6 Attorneys for Petitioner-Plaintiff
7 MONTEREY COASTKEEPER

8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9
10 IN AND FOR THE COUNTY OF MONTEREY

11 MONTEREY COASTKEEPER, a project
12 of The Otter Project, a nonprofit
13 organization,

14 Petitioner-Plaintiff,

15 v.

16 MONTEREY COUNTY WATER
RESOURCES AGENCY, a public agency,

17 Respondent-Defendant.

Case No.: **N10 88 58**

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**VERIFIED PETITION FOR WRIT
OF MANDATE AND COMPLAINT
FOR DECLARATORY JUDGMENT**

[Cal. Civ. Proc. Code § 1085 for violations
of Cal. Water Code §§ 13246, 13260, and
13264; Public Trust Doctrine; Abatement of
Public Nuisance]

19 Petitioner-Plaintiff Monterey Coastkeeper hereby seeks a writ of mandate and judgment
20 declaring that Respondent-Defendant Monterey County Water Resources Agency has violated
21 and continues to violate the Porter-Cologne Water Quality Control Act, as well as its public trust
22 fiduciary duties, by discharging pesticides, nutrients, sediments, pathogens, and other harmful
23 agricultural pollutants into surface and subsurface waters in the Salinas River watershed at levels
24 that exceed water quality standards and injure public health, fish and wildlife, and other
25 beneficial uses of such waters. Petitioner-Plaintiff also hereby seeks a court order directing
26 Respondent-Defendant to cease its unlawful discharges and to abate the public nuisance caused
27 by these discharges. In support of this petition and complaint, Petitioner-Plaintiff alleges as
28 follows:

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY JUDGMENT

1 educational, conservational, and economic benefits from the waters affected by Respondent-
2 Defendant's discharges. These benefits and the recreational, aesthetic, scientific, educational,
3 conservational, and economic interests of Monterey Coastkeeper and its staff and members have
4 been and, in the absence of relief from the court, will continue to be adversely affected by
5 Respondent-Defendant's discharge practices in violation of its mandatory duties under state law.

6 4. Respondent-Defendant Monterey County Water Resources Agency ("MCWRA")
7 is the primary water management agency for Monterey County. MCWRA is the successor-in-
8 interest to the Monterey County Flood Control and Water Conservation District, which was
9 created in 1947 by Chapter 699 of the Statutes. In 1990, the California Legislature created
10 MCWRA by special state legislation, codified as Chapter 52 of the Appendix to the California
11 Water Code, and conferred upon it broad powers to manage water supply and water quality in
12 Monterey County, including in the northern Salinas Valley. MCWRA is responsible for
13 managing, protecting, and enhancing water supply and water quality in the lower Salinas River
14 watershed, as well as providing flood protection in the County of Monterey.

15 5. Among other things, MCWRA is authorized by state law to, and does, operate the
16 Nacimiento and San Antonio Reservoirs for flood management and water supply purposes,
17 including through periodic groundwater recharge. MCWRA provides water to agricultural
18 growers and landowners within the Salinas River watershed and collects agricultural wastewater
19 from growers and landowners for discharge into state waters. In particular, MCWRA operates
20 the "Reclamation Ditch" and the "Blanco Drain," both of which channelize and convey
21 contaminated agricultural wastewater from the point of generation on individual farmland in the
22 lower Salinas River Valley to downstream receiving waters, including the Salinas River and
23 Tembladero Slough.

24 **JURISDICTION AND VENUE**

25 6. This court has jurisdiction over this action under California Code of Civil
26 Procedure section 1085, California Code of Civil Procedure section 731, and California Civil
27 Code section 3493.

28

1 support aquatic life.” Concerns about health impacts from exposure to contaminated water
2 reduce boating and fishing opportunities for the public and significantly impair recreational and
3 aesthetic interests in these public resources.

4 12. Agricultural contamination of surface water also threatens the ecological health of
5 the region. The Salinas River and Elkhorn Slough provide important habitat for fish and
6 wildlife, and both water bodies support world-renowned national wildlife refuges. These waters,
7 in turn, flow into the Monterey Bay National Marine Sanctuary, a critical feature of the unique
8 California Current marine ecosystem. Data show that habitat conditions for sea otters, steelhead
9 trout, benthic macroinvertebrates, and other native species occupying these waters are being
10 degraded and adversely impacted by the discharge of pesticides, nutrients, sediments, pathogens,
11 and other agricultural pollutants.

12 13. Agricultural pollution also adversely impacts groundwater throughout the lower
13 Salinas River watershed. Within the northern Salinas Valley, the Regional Board has found that
14 25 percent of 352 wells sampled – or 88 wells – contain nitrate concentrations above the
15 drinking water standard for that contaminant. In portions of the Salinas Valley, up to
16 approximately 50 percent of the wells surveyed contain nitrate concentrations above the drinking
17 water standard. The average nitrate concentration in these wells is nearly double the drinking
18 water standard, and the highest detected nitrate concentration is approximately nine times the
19 drinking water standard. This contamination is caused primarily by the percolation of
20 agricultural chemicals and pollutants through soil and subsurface waters.

21 14. Based on monitoring data, the Regional Board has concluded that “thousands of
22 people [in the Central Coast region] are drinking water contaminated with unsafe levels of nitrate
23 or are drinking replacement water to avoid drinking contaminated water” and that “[t]he cost to
24 society for treating [this] polluted drinking water is estimated to be in the hundreds of millions of
25 dollars.” The United States Environmental Protection Agency warns that “[i]nfants who drink
26 water containing nitrates in excess of the [drinking water standard] could become seriously ill
27 and, if untreated, may die. Symptoms include shortness of breath and blue-baby syndrome.”

28

1 15. Through its day-to-day management activities, MCWRA actively facilitates and
2 contributes to the discharge of agricultural pollution to surface and subsurface water in the
3 Salinas River watershed. MCWRA has erected and operates an extensive infrastructure to
4 transport water into the Salinas Valley from the distant Nacimiento and San Antonio Reservoirs.
5 MCWRA regularly recharges the groundwater aquifer in the lower Salinas River region with
6 water transported from these reservoirs. Growers and landowners then pay MCWRA to
7 withdraw and use this recharged groundwater for irrigating cropland. But for MCWRA's active
8 management and regular recharge of the subsurface aquifer, growers and landowners in the
9 northern Salinas Valley would be unable to sustain irrigation of their lands at existing levels over
10 the long term.

11 16. Due to the poor drainage attributes of the soils in this area, many or most farm
12 operators who irrigate their cropland affirmatively channel return flows from their fields into
13 drainage canals operated by MCWRA. In particular, the so-called "Reclamation Ditch" operated
14 by MCWRA collects contaminated agricultural wastewater from adjacent farmland and
15 discharges it into Tembladero Slough, which in turn empties into the Salinas River, Elkhorn
16 Slough, and ultimately the Pacific Ocean. Similarly, the so-called "Blanco Drain" operated by
17 MCWRA collects contaminated irrigation return flow from adjacent low-lying farmland and
18 actively pumps that collected water into the Salinas River. But for the operation of these
19 wastewater conveyance facilities by MCWRA, contaminated agricultural return flows from
20 much of the cropland in the lower Salinas River region would not reach or pollute the Salinas
21 River, Tembladero Slough, or Elkhorn Slough.

22 17. The pollutants contained in discharges from the Reclamation Ditch and the
23 Blanco Drain exceed state water quality standards set forth in the Water Quality Control Plan for
24 the Central Coast Region ("Basin Plan") for the designated beneficial uses of the Salinas River,
25 Tembladero Slough, and Elkhorn Slough and have contributed to impairment of these designated
26 beneficial uses. Monterey Coastkeeper is informed and believes, and on that basis alleges, that
27 in managing the Reclamation Ditch and the Blanco Drain, MCWRA has not undertaken action or
28 instituted protective measures to minimize or mitigate the contamination in surface water.

1
2 18. The application of irrigation water to Salinas Valley cropland treated with
3 pesticides or fertilizer has resulted in the percolation of pollutants, including but not limited to
4 nitrates, into underlying groundwater. The subsequent movement of these agricultural pollutants
5 through the groundwater aquifer has contaminated drinking water resources at levels that exceed
6 applicable legal standards and threaten public health. Monterey Coastkeeper is informed and
7 believes, and on that basis alleges, that in managing withdrawals from and recharge of
8 groundwater in the lower Salinas Valley, MCWRA has not undertaken action or instituted
9 protective measures to minimize or mitigate nitrate or other contamination in subsurface water.

10 19. As a public agency, MCWRA has a legal obligation under state law to protect the
11 public trust uses of navigable waters and their non-navigable tributaries. These public trust uses
12 include, but are not limited to, protection of fisheries and other wildlife in the Salinas River,
13 Tembladero Slough, and Elkhorn Slough, as well as preservation of the ecological, aesthetic, and
14 recreational uses of these waters. MCWRA's public trust obligations extend to hydrologically
15 connected groundwater, as well as non-navigable tributaries of these water bodies.

16 20. By allowing and contributing to the contamination of water resources in the
17 Salinas Valley watershed to the detriment of their ecological, aesthetic, and recreational public
18 trust values and uses, MCWRA is breaching its fiduciary obligations under the Public Trust
19 Doctrine to the people of California and future generations.

20 21. Like all dischargers, MCWRA also has a legal duty to conform its actions and
21 operations to the requirements of the Porter-Cologne Water Quality Control Act. Among other
22 things, the Porter-Cologne Act mandates that a potential discharger submit a report of waste
23 discharge to the Regional Board and comply with all state water quality standards set forth in the
24 Basin Plan.

25 22. Monterey Coastkeeper is informed and believes, and on that basis alleges, that
26 MCWRA has never submitted a report of waste discharge to the Regional Board for its
27 discharges from the Reclamation Ditch and the Blanco Drain. Monterey Coastkeeper is further
28 informed and believes, and on that basis alleges, that the Regional Board has never issued a

1 waste discharge requirement, a conditional waiver applicable to MCWRA, or any other
2 authorization to MCWRA for discharges from these conveyance channels into state waters.
3 MCWRA's failure to submit a report of waste discharge and to obtain Regional Board
4 authorization for its agricultural discharges constitute ongoing breaches of its mandatory duties
5 under the Porter-Cologne Act.

6 23. Monterey Coastkeeper is informed and believes, and on that basis alleges, that the
7 amounts and types of pesticides and fertilizers applied to cropland that drains into the
8 Reclamation Ditch and the Blanco Drain have materially changed over the years since the
9 Porter-Cologne Act was adopted in 1969, resulting in new or different discharges to state waters.

10 24. The conversion of functioning wetlands into farmland and the removal of
11 vegetative buffer that helps filter contamination and reduce sedimentation also has materially
12 changed over the last several years, resulting in new or different discharges to state waters.

13 CLAIMS FOR RELIEF

14 First Cause of Action (Violation of Section 13260 of the Porter-Cologne Act)

15 25. Monterey Coastkeeper realleges and incorporates by reference each and every
16 allegation contained in paragraphs 1 through 24 above as though fully set forth herein.

17 26. Any person, including a water agency or district, discharging or proposing to
18 discharge waste that could affect the quality of waters of the state must file a report of waste
19 discharge with the Regional Board. Cal. Water Code § 13260.

20 27. MCWRA continues to discharge pesticides, nutrients, sediments, pathogens, and
21 other pollutants into waters of the state, including the Salinas River and Tembladero Slough
22 from the Blanco Drain and Reclamation Ditch, but has not filed a report of waste discharge with
23 the Regional Board for these discharges.

24 28. MCWRA is not exempt from the requirement to file a report of waste discharge
25 by the "Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated
26 Lands" issued by the Regional Board because MCWRA is not an "owner and/or operator of
27 irrigated cropland on or from which there are discharges of waste that could affect the quality of
28 any surface water or groundwater."

1 29. MCWRA's failure to file a report of water discharge constitutes an ongoing
2 violation of its legal duty under the Porter-Cologne Water Quality Control Act for which
3 Monterey Coastkeeper has no adequate remedy at law. This violation is actionable under
4 California Civil Code section 1085.

5 **Second Cause of Action**
6 **(Violation of Section 13264 of the Porter-Cologne Act)**

7 30. Monterey Coastkeeper realleges and incorporates by reference each and every
8 allegation contained in paragraphs 1 through 24 above as though fully set forth herein.

9 31. No person, including a water agency or district, shall make any new discharge or
10 a material change in an existing discharge until the Regional Board issues a waste discharge
11 requirement for such new or materially changed discharge implementing the standards adopted
12 in the Basin Plan. Cal. Water Code § 13264. The waste discharge requirement must take into
13 consideration the beneficial uses to be protected, the water quality objectives reasonably required
14 for that purpose, other waste discharges, and the need to prevent nuisance. Cal. Water Code §
15 13263.

16 32. Since passage of the Porter-Cologne Water Quality Control Act in 1969, changes
17 in crop rotation, pesticide and fertilizer use, vegetative buffers, and the operation of the Blanco
18 Drain and Reclamation Ditch system have caused new or materially changed discharges by
19 MCWRA into the Salinas River and Tembladero Slough, but MCWRA has not sought or
20 received a waste discharge requirement from the Regional Board.

21 33. MCWRA is not exempt from the requirement to obtain a waste discharge
22 requirement for new or materially changed existing discharges by the "Conditional Waiver of
23 Waste Discharge Requirements for Discharges from Irrigated Lands" issued by the Regional
24 Board because MCWRA is not an "owner and/or operator of irrigated cropland on or from which
25 there are discharges of waste that could affect the quality of any surface water or groundwater."

26 34. MCWRA's ongoing discharge of agricultural pollutants into state waters without
27 a waste discharge requirement constitutes a violation of its legal duty under the Porter-Cologne
28 Water Quality Control Act for which Monterey Coastkeeper has no adequate remedy at law.
This violation is actionable under Cal. Civ. Proc. Code section 1085.

1 enjoyment of the waters, fish, and wildlife of the Salinas River, Tembladero Slough, and Elkhorn
2 Slough that is being impaired and lessened by agricultural pollution.

3 **RELIEF REQUESTED**

4 WHEREFORE, Petitioner-Plaintiff Monterey Coastkeeper prays for entry of judgment as
5 follows:

6 1. For a declaratory judgment that Respondent-Defendant MCWRA has violated and
7 continues to violate its mandatory duties under state law by:

8 a. Failing to file a report of water discharge for its ongoing discharge of
9 pesticides, nutrients, sediment, pathogens, or other agricultural pollutants into the Salinas River
10 and Tembladero Slough from the Blanco Drain and the Reclamation Ditch, in violation of
11 California Water Code section 13260;

12 b. Causing a new or materially changed discharge of pesticides, nutrients,
13 sediment, pathogens, or other agricultural pollutants into the Salinas River and Tembladero
14 Slough from the Blanco Drain and the Reclamation Ditch without obtaining a waste discharge
15 requirement for such new or changed discharges, in violation of California Water Code section
16 13264;

17 c. Discharging pesticides, nutrients, sediment, pathogens, or other
18 agricultural pollutants into the Salinas River and Tembladero Slough from the Blanco Drain and
19 the Reclamation Ditch at levels that do not comply with the approved and adopted Basin Plan, in
20 violation of California Water Code section 13247.

21 2. For a declaratory judgment that Respondent-Defendant MCWRA's ongoing
22 discharge of pesticides, nutrients, sediment, pathogens, or other agricultural pollutants into the
23 Salinas River and Tembladero Slough from the Blanco Drain and Reclamation Ditch and into
24 hydrologically connected groundwater violates MCWRA's fiduciary trust obligations to
25 Monterey Coastkeeper and the people of the State of California under the Public Trust Doctrine.

26 3. For a declaratory judgment that Respondent-Defendant MCWRA's ongoing
27 discharge of pesticides, nutrients, sediment, pathogens, or other agricultural pollutants into the
28

1 Salinas River and Tembladero Slough from the Blanco Drain and the Reclamation Ditch
2 constitutes a public nuisance and/or a nuisance per se.

3 4. For a peremptory writ of mandate ordering Respondent-Defendant MCWRA to
4 abate the public nuisance and cease all discharges from the Reclamation Ditch and Blanco Drain
5 until those discharges are brought into full compliance with the requirements of law.

6 5. For an award to Petitioner-Plaintiff of its attorneys' fees and costs of suit
7 (including reasonable attorney, witness, and consultant fees) as authorized by Cal. Civ. Proc.
8 Code § 1021.5.

9 6. For any such other equitable or legal relief as the Court deems appropriate.

10 Date: October 21, 2010

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

11
12
13 By: 

Deborah A. Sivas

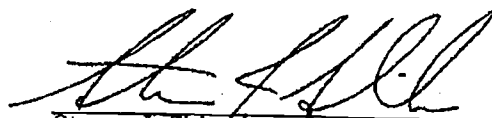
14 Attorneys for Petitioner-Plaintiff MONTEREY
15 COASTKEEPER
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VERIFICATION

I am a representative of Petitioner-Plaintiff Monterey Coastkeeper and am authorized to execute this verification on its behalf. I have read the foregoing Petition for Writ of Mandate and Complaint for Declaratory Relief and am familiar with its contents. I am informed and believe and on that ground allege that the matters stated in this Petition and Complaint are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: October 21, 2010


Steven J. Shirek