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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

MONTEREY COASTKEEPER, a program of THE OTTER PROJECT, a non-profit organization; ANTONIA MANZO, an individual; ENVIRONMENTAL JUSTICE COALITION FOR WATER, a non-profit organization; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, a non-profit organization; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, a non-profit trade association; and SANTA BARBARA CHANNELKEEPER, a non-profit organization,

Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, a public agency,

Respondent,

OCEAN MIST FARMS, et al.,

Respondent-Intervenors.

Case No. 34-2012-80001324

PETITIONERS' OPPOSITION TO DEMURRER OF RESPONDENT STATE WATER RESOURCES CONTROL BOARD TO AMENDED VERIFIED PETITION FOR WRIT OF MANDATE

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

Action Filed: Nov. 29, 2012

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INTRODUCTION

California's water boards have a legal duty to meaningfully address water contamination from irrigated agriculture in the Central Coast Region. Seeking to enforce this duty, Petitioners have filed this action to compel the State Water Resources Control Board ("State Board") to impose legally sufficient regulations on agricultural polluters. The State Board demurs to Petitioners' fifth cause of action, which claims that the Board violated the California Environmental Quality Act ("CEQA") when it gutted the conditional waiver adopted by the Central Coast Regional Water Quality Control Board ("Regional Board") without considering the resulting environmental impacts. The State Board argues that Petitioners failed to administratively exhaust this claim.

The State Board's demurrer should be denied for three reasons. First, exhaustion was not required in this case because the State Board has an independent legal duty to determine whether it must conduct further environmental review under CEQA, and the record here made clear that such review was required. Second, even if exhaustion was required, public comments sufficiently apprised the State Board of the need to evaluate the effects of changing the waiver. And finally, Petitioners properly request relief in the form of a petition for writ of mandate compelling agency action in compliance with applicable law.

If the Court dismisses Petitioners' CEQA claim, there will be no evaluation of the environmental effects of the State Board's modifications. Dismissing this claim would allow the State Board to make uninformed decisions that rest on incomplete and misleading information. Dismissal would also keep the public from ever knowing the true impacts of a wide-reaching discharge permit that will remain in place for many years.

BACKGROUND

The Central Coast Region, home to some of the world's most profitable farmland, is facing the consequences of decades of intense agricultural pollution. *See* Petitioner's Opening Brief in Support of Petition for Writ of Mandate ("Pet. Op. Brief") at 5-11 (describing severe pollution). To fix this ongoing problem, in March 2012, the Regional Board issued a conditional waiver to regulate discharges from irrigated agriculture ("2012 Waiver"). *See* Final Administrative Record—Regional

Board ("RB") 8465-8558. To accompany the 2012 Waiver, the Regional Board prepared a Subsequent Environmental Impact Report under CEQA. RB 8976-77.

Although the final 2012 Waiver was an improvement over the prior waiver, it was substantially weaker than the measures the Regional Board originally had proposed. Intervenors, Petitioners, and other parties to the administrative process filed petitions to the State Board challenging the 2012 Waiver. *See* Final Administrative Record—State Board ("SB") 1-1646. The State Board responded by issuing a stay of the 2012 Waiver and then a series of draft waivers revising its provisions. SB 5302-26 (stay), 5645-5700, 6181-6255, 6390-6461, 6751-6825. Over a period of less than four months, the State Board released four different draft orders before issuing the final order on September 24, 2013 ("Modified Waiver"). *Id.*; SB 7162-7234. The draft-and-comment process was a frantic one—for instance, parties had less than 24 hours to prepare for a September 10 board meeting by producing remarks on a September 9 draft containing "[v]ery significant revisions." SB 6390-6461, 6462-65.

Despite the rushed nature of the administrative process, commenters, including Petitioners, managed to submit comments on the State Board's draft modifications to the Regional Board's 2012 Waiver. For example, Petitioners criticized the State Board's decision to allow monitoring in downstream receiving waters rather than at individual discharge sites because this change would make it impossible to evaluate individual dischargers' compliance with the Modified Waiver's conditions. SB 5735. Others explained that the State Board's revisions would not halt groundwater contamination, SB 5814, and that the Regional Board's ability to implement the Modified Waiver would be substantially limited, SB 5815; *see also* SB 5838. The public also noted that the State Board removed a valuable source of information about the Modified Waiver's effectiveness by weakening nitrogen reporting requirements. SB 6554. Additionally, the State Board established an Expert Panel to review agricultural impacts to water quality, SB 7165, but commenters observed that these reviews would occur *after* the Board issued the Modified Waiver, allowing the Waiver's adverse effects to continue unabated. *See* SB 5824. Finally, the Regional Board implored the State Board to consider new information in a report prepared by experts at U.C. Davis ("U.C. Davis Report"). SB 7163 n.2. The U.C. Davis Report was released immediately before the Regional Board finalized the 2012 Waiver, and

it provided the latest and most comprehensive information on nitrate contamination and possible remedies in the Central Coast Region. *See generally* SB 3157-4802; Pet. Op. Brief at 14, 43-46.

Over the public's concerns, the State Board issued a Modified Waiver that made major changes to the 2012 Waiver. SB 7162-7234. Among other things, the Modified Waiver significantly weakened monitoring requirements, SB 6694; diluted enforcement mechanisms, SB 6204-05, 6414-15, 7186; and provided polluters with an escape valve from the Waiver's general requirements, SB 7187.

Petitioners filed a petition for writ of mandate to compel the State Board to revise the legally insufficient Modified Waiver. Among other claims (which are discussed fully in Petitioners' merits briefs), Petitioners claim that the State Board violated CEQA by failing to conduct supplemental review of the Modified Waiver despite the substantial changes proposed in the project and the availability of the U.C. Davis Report. The State Board demurs to this cause of action, alleging that Petitioners failed to administratively exhaust their CEQA challenge and misstated the legal standard for supplemental CEQA review in their writ petition.[1]

LEGAL STANDARD

A demurrer tests the legal sufficiency of a complaint. *Young v. Gannon*, 97 Cal. App. 4th 209, 220 (2002). In assessing a demurrer, a court must accept as true all material facts properly pled, as well as facts that may be implied or inferred from those alleged. *Montclair Parkowner's Ass'n v. City of Montclair*, 76 Cal. App. 4th 784, 790 (1999). A demurrer may be sustained only if the complaint, liberally construed, "fails to state a cause of action on any theory." *Kramer v. Intuit*, 121 Cal. App. 4th 574, 578 (2004). Moreover, if there is a reasonable possibility a defect can be cured, a plaintiff should be granted leave to amend. *Young*, 97 Cal. App. 4th at 220.

ARGUMENT

Exhaustion was not required in this case because the State Board has an independent, ongoing duty under CEQA to monitor the need for further environmental review, and it was apparent that further review of the Modified Waiver was needed. Even if exhaustion was required, the Petitioners did not have to use "magic words" by saying that "the [environmental impact report] is inadequate,"

[1] Petitioners have set forth the correct standard of review in their opening merits brief. *See* Pet. Op. Brief at 15 n.11.

and public comments sufficiently apprised the State Board of Petitioners' CEQA concerns. *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 795 (2006). Finally, Petitioners request the appropriate relief—a petition for writ of mandate compelling agency action—under California Water Code section 13330.

I. Exhaustion Was Not Required Because the State Board Has an Independent, Ongoing Duty to Comply with CEQA.

A. The State Board Has an Ongoing Duty to Determine If There Is a Need for Supplemental Environmental Review.

CEQA's provision for environmental review is "the heart of CEQA" because it ensures that "the agency has, in fact, analyzed and considered the ecological implications of its actions." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988) (internal quotation and citation omitted). Accordingly, a public agency must ensure that proposed projects undergo adequate environmental review. *See id.* at 390-92. Ensuring adequate environmental review means not only preparing legally compliant initial documents, but also continually evaluating whether further environmental review is needed under section 21166.[2] To comply with this mandate, an agency must monitor sources of new information and assess the impacts of changes to a proposed project. *See Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Ass'n*, 42 Cal. 3d 929, 939 (1986); *Eller Media Co. v. Cmty. Redevelopment Agency*, 108 Cal. App. 4th 25, 43 (2003).

For CEQA to function effectively, it is the agency—not the public—that carries the ongoing duty to determine when supplemental review is necessary. As the California Supreme Court explained in *Concerned Citizens*, when the "actual project . . . differ[s] substantially from the [one] described in the EIR," "the primary duty to comply with CEQA's requirements must be placed on the public agency." 42 Cal. 3d at 938-39; *see also id.* at 939 ("It is up to the agency, not the public, to ensure compliance with CEQA in the first instance.") (quotation marks omitted); *Eller Media*, 108 Cal. App. 4th at 44 (explaining that the *agency* "correctly determined that" there was "'new information' that was

[2] Three events require an agency to prepare a subsequent or supplemental environmental impact report ("EIR"): "(a) Substantial changes . . . in the project which will require major revisions of the [EIR]; (b) Substantial changes . . . with respect to the circumstances under which the project is being undertaken which will require major revisions in the [EIR]; [or] (c) New information, . . . not known . . . at the time the [EIR] was certified as complete, becomes available." Cal. Pub. Res. Code § 21166; *see also* 14 Cal. Code Regs. § 15162(a)(1); *Laurel Heights*, 47 Cal. 3d at 396.

not known and could not have been known at the time the final EIR was certified as complete"); *cf. Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) ("It is the agency, not an environmental plaintiff, that has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions" under the closely related federal National Environmental Policy Act.) (internal quotation marks omitted). To make "faithful execution of [the duty to determine when supplemental review is necessary] contingent upon the vigilance and diligence of . . . environmental plaintiffs would encourage . . . agencies to evade their important responsibilities." *Concerned Citizens*, 42 Cal. 3d at 939 (internal quotation marks omitted).

Because it is the agency's duty to determine when supplemental review is necessary, no exhaustion is required. If this were a case in which the State Board prepared an EIR and Petitioners challenged that EIR's adequacy, the State Board would have discharged its legal duty and Petitioners would have had to exhaust their claims by raising their objections to the State Board. In this case, however, Petitioners are challenging the State Board's failure to conduct *any* supplemental environmental review of the Board's changes to the 2012 Waiver, after the Regional Board certified the EIR. Because that is a purely legal issue—one that presents the purely legal question of whether the State Board had a legal duty and satisfied it—Petitioners did not have to exhaust. Indeed, the purpose of exhaustion is to ensure that an agency is apprised of all the relevant facts and issues, so that it can consider and fix any legal errors during the administrative process. *Ctr. for Biological Diversity v. Cnty. of San Bernadino*, 185 Cal. App. 4th 866, 890 (2010). That purpose is satisfied where, as here, an agency must *itself* evaluate the record to determine whether further environmental review is needed. *Cf. Sierra Club v. Cnty. of Sonoma*, 6 Cal. App. 4th 1307, 1313 (1992) (holding that when courts must determine whether supplemental environmental review is needed, courts look to the administrative record and consider new facts and issues that could cause environmental impacts not considered in the existing EIR).

In short, apart from any involvement by members of the public, it was incumbent on the State Board to independently assess whether more environmental review was needed when it elected, over Petitioners' strenuous objections, to substantially alter the project under consideration. Neither

Petitioners nor the public more generally has an obligation to point out the State Board's duty to comply with its legal mandates.

B. It Was Plain that Subsequent Environmental Review Was Necessary in This Case.

The administrative record in this case makes clear that additional environmental review, beyond the Regional Board's EIR, was necessary for the Modified Waiver. First, the State Board had at its disposal a mountain of evidence showing the significant water quality impacts of agricultural pollution in the Central Coast Region. Second, the State Board made major changes to the 2012 Waiver, and members of the public were vocal about the significance of these changes throughout the administrative process. Third, the State Board's reliance on the Expert Panel was a tacit admission of the need for further environmental review. Finally, the State Board was presented with, but refused to consider, critical new information in the form of the U.C. Davis Report.

The State Board was apprised that the impacts of agricultural pollution are substantial. As the Regional Board noted, the surface water and groundwater quality impairments associated with agricultural discharges are "well documented, severe, and widespread." RB 4849. In the Central Coast Region, groundwater accounts for about 83 percent of the water used for agricultural, industrial and urban purposes, and nearly 100 percent for rural domestic purposes (like drinking water). RB 5466. Low-income families, many of whom rely on this groundwater, are "forced to purchase bottled water in addition to paying for potable water service that is unsafe to drink." RB 5502. Many of these people work daily on the Region's farms, RB 5502, the same farms that contribute 83.6 percent of the nitrate pollution in the Central Coast Region due to the excessive application of fertilizers. RB 4891-92. Even if nitrate loading is reduced, these problems will likely continue to worsen for decades. SB 3241. In addition to serious nitrate pollution, the Regional Board concluded that the "levels of toxicity found in ambient waters of the Central Coast far exceed anything allowed in permitted point source[ ] discharges." RB 5452.

It was these serious impacts that led the Regional Board to adopt the 2012 Waiver. Although it lacked essential measures for curbing agricultural pollution, the 2012 Waiver was an improvement over the prior waiver issued in 2004. Among other things, the 2012 Waiver required dischargers to report nitrogen balance requirements, which the Regional Board viewed as the only requirement that would

allow it to reduce nitrogen loading. SB 6694 (further noting this reporting requirement "is not only basic and fundamental; it is also reasonable"); *see also* Pet. Op. Brief at 13-15, 18-27 (discussing how the 2012 Waiver, despite being weakened through successive drafts, was still better than the 2004 Waiver).

In 2013, however, the State Board gutted the 2012 Waiver without performing additional environmental review, even though the 2012 Waiver had serious deficiencies and pollution in the Central Coast Region was surpassing critical levels. For instance, the State Board inserted Provision 87.5, which essentially provides the worst dischargers with an escape valve from the Waiver's general requirements. SB 7187. This provision downgrades the requirement from "effectively control[ling]" discharges to merely "implement[ing] management practices." SB 7817. It stood to reason that this stripped-down standard would result in new or different impacts from those considered in the original EIR. In addition, even while admitting the "necessity of providing targets to encourage and measure progress in reducing pollutant discharges[,]" the State Board deleted the requirement to report nitrogen balance ratios. SB 7215-16. The State Board itself identified "eliminat[ing] calculation and reporting of nitrogen balance ratios" as the "most significant revision[ ]" to the 2012 Waiver. SB 7230.

These were not the State Board's only changes. The State Board vitiated the 2012 Waiver's Provision 11 by eliminating the requirement that dischargers demonstrate "a reasonable chance of *eliminating* toxicity" within the permit period of five years. SB 7342-43 (emphasis added). In place of this provision, the State Board required only that discharges demonstrate "a reasonable chance of *improving* water quality and/or *reducing* pollutant loading." SB 7342-43 (emphasis added). Additionally, the State Board replaced Provision 44(g) of the 2012 Waiver, which required that each farm have a plan containing a "[d]escription *and results* of methods used to verify practice effectiveness and compliance with this Order," with a provision that requires only a description of the *methods* for assessing the effectiveness of such practices. SB 7190 (emphasis added). Because these substantial modifications to the 2012 Waiver will result in significant new environmental impacts not considered in the Regional Board's EIR, further environmental review was required.

The need for further review was not only self-evident, it was made clear by members of the public. One comment letter to the State Board worried that "this regulation borders on a very large

social experiment that has extremely high stakes for both the environment and the Central Coast communities." SB 6370-71. Another coalition was "incredibly concerned because, as revised, the [Modified Waiver] is insufficient to effectively halt the widespread groundwater contamination attributable to irrigated agriculture in the . . . Region." SB 5814. That coalition's representative echoed those concerns in a public hearing: Restricting nitrogen reporting requirements "severely limits the amount of information that [the State Board will] have moving forward to determine the efficacy of the program," and the information the State Board "ha[s] now is not sufficient . . . to determine the impact of [the] order." SB 6554.

Moreover, the State Board refused to consider new information in the form of the U.C. Davis Report. SB 7163 n.2. As Petitioners have explained, this report provided the latest and most comprehensive information on nitrate contamination and possible remedies in the Central Coast Region. The State Board admitted the "high significance of the information and analysis" in the U.C. Davis Report, but concluded that "the administrative record already before us contains sufficient evidence of the impact of agricultural practices on drinking water in the Central Coast region as well as practices that may ameliorate the problem." SB 7163 n.2. The State Board's conclusion was incorrect, *see* Pet. Op. Brief at 43-46, and the Board fell short of its duty to conduct further review when presented with this significant new information.

The State Board knew that the effects of its changes to the 2012 Waiver could be significant, and it knew that they were largely unknown—indeed, that was the reason the State Board created an "Expert Panel." Broadly, the State Board tasked the Expert Panel with evaluating "the groundwater issues contested in the petitions" and "certain issues related to the impact of agricultural discharges on surface water." SB 7165. The State Board punted a number of specific issues to the Expert Panel, ranging from "evaluat[ing] the [State Board's] selection of appropriate indicators of risk to water quality," SB 7181, to "considering appropriate structures and methodologies for monitoring that may support long-term nitrate control efforts, SB 7191, and "consider[ing] . . . approaches to identification of problem discharges." SB 7199. Parties lamented that the Expert Panel "allows for further delay in implementing orders to protect water quality." SB 5824.

In short, the State Board made substantial changes to the 2012 Waiver, and new and important information came to light after the Regional Board certified the EIR. Both the changes and the new information could cause or reveal significant environmental impacts not considered in the Regional Board's EIR. Yet the State Board not only failed to conduct supplemental review of the potential effects of significantly changing the 2012 Waiver, there is no evidence the Board even thought about whether such review was required. Given that the State Board had an ongoing duty to consider whether supplemental environmental review was needed, Petitioners were not required to exhaust their CEQA claim, especially because the need for such review was clear in the record.

II. Even If Exhaustion Was Required, Petitioners Met That Requirement.

A. To Exhaust, Parties Must Apprise the Agency of the Relevant Facts and Issues; Parties Need Not Recite "Magic Words."

The exhaustion doctrine provides public agencies an opportunity to respond to parties' concerns before the parties turn to litigation. *See State Water Res. Control Bd. Cases*, 136 Cal. App. 4th at 794. Thus, if exhaustion is required, the question for a reviewing court is whether the public fairly raised an issue during administrative proceedings so that the agency had "an adequate opportunity to address" that issue.[3] *Id.* at 795.

To meet this standard, Petitioners do not need to cite the controlling statute; a party exhausts as long as the agency is "apprised of the relevant facts and issues." *Ctr. for Biological Diversity*, 185 Cal. App. 4th at 890. Nor are Petitioners required to "identify[ ] the precise legal inadequacy" at issue. *Save Our Residential Env't v. City of W. Hollywood*, 9 Cal. App. 4th 1745, 1750 (1992). Indeed, Petitioners do not need to recite the "magic words 'the EIR is inadequate'"—or, in this case, "supplemental environmental review is required"—in order to exhaust. *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th at 795. Instead, courts look to the "true character of the[ ] challenges" to

[3] Comments from any party, not only a petitioner, satisfy the exhaustion requirement. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1199-1200 (2004).

determine if the relevant issues were addressed. *Id.* at 793.[4] In short, to exhaust, Petitioners need only "fairly apprise[ ]" the agency of the "substance of the issue[s]." *Save Our Residential Env't*, 9 Cal. App. 4th at 1750; *see also Sierra Club v. Tahoe Reg'l Planning Agency*, 916 F. Supp. 2d 1098, 1109 (E.D. Cal. 2013) (A party's objections only need to be "'sufficiently specific so that the agency has the opportunity to evaluate and respond to them.'") (quoting *Tracy First v. City of Tracy*, 177 Cal. App. 4th 912, 926 (2009)).

B. Public Comments Were Sufficiently Specific to Apprise the State Board of the Relevant Facts and Issues.

The general public raised comments sufficient to apprise the State Board of the substantial impacts that would follow from the Board's significant revisions to the 2012 Waiver. Despite those comments and revisions, the State Board neither conducted subsequent CEQA analysis nor even affirmatively determined that such analysis was unnecessary.

Interested parties emphasized the significant impacts of critical *substantive* changes to the 2012 Waiver from the outset. Chief among these concerns was the conviction that the changes would gut the Regional Board's ability to implement the Modified Waiver effectively. SB 5815 (The "proposed revisions substantially and illegally limit the ability of the [Regional Board] to implement the order"). Interested parties explained that restricting certain reporting requirements "severely limits the amount of information that [the State Board will] have moving forward to determine the efficacy of the program," and the information the State Board "ha[s] now is not sufficient . . . to determine the impact of [the] order." SB 6554. The uncertainty surrounding the significant impacts of the State Board's draft order led one party to comment that "[o]ne would think that an unprecedented regulation of this scale would have been subjected to some sort of predictive analysis." SB 6370-71. Even the Regional Board felt hamstrung by the State Board's changes, noting that the "reporting requirements [absent in the updated draft order] are the only requirements that will allow the Central Coast Water Board to measure progress to reduce nitrate loading over time to better protect water quality." SB 6694. These

[4] *See also Ctr. for Biological Diversity*, 185 Cal. App. 4th at 889-90 (holding that comments about "water supply issues" exhausted a CEQA claim that the agency failed to include a statutorily required water supply assessment in its Final EIR); *Save Our Residential Env't v. City of W. Hollywood*, 9 Cal. App. 4th 1745, 1750 (1992) (holding that comments regarding the negative effects of a project in a specific community exhausted a CEQA claim regarding the analysis of alternative sites).

and other comments drew the State Board's attention to the potentially broad environmental and operational implications of its changes. At a minimum, the comments revealed that the Modified Waiver's potential effects were uncertain.

Many parties were equally vocal about the significant impacts that would result from removing *monitoring* provisions in the 2012 Waiver. The Regional Board had stated that "[d]etermining the relative contribution of pollution from individual dischargers is the necessary next step to resolve the severe water quality problems [in the Central Coast Region]." RB 4850. Accordingly, one group of concerned citizens warned the State Board that, "[b]y eliminating both [monitoring and nitrogen ratio balance requirements], the [Board] has severely hampered this program's ability to address one of the . . . Region's most severe and pervasive problems, contaminated groundwater." SB 5838. Another coalition lamented that the "significant changes proposed . . . provide insufficient information to enforce the order or to evaluate the relationship between farm practices and water quality." SB 6261. The State Board's frequent and successive revisions were especially problematic, as they "resulted in a much-reduced capacity to evaluate nitrate loading and effectiveness of on[-]farm management practices, both of which are ultimately necessary for the prevention of continued impacts on water quality, specifically quality of groundwater used for drinking water in rural households." SB 6716 (comments on third draft). The likelihood of significant new environmental effects was apparent from these comments.

The public's comments about the Modified Waiver's significant environmental impacts and the clear lack of information about the extent of these impacts were sufficient to apprise the State Board of the need to conduct additional environmental review. As mentioned above, the purpose of the exhaustion requirement is satisfied if agencies have the opportunity to address the issues that form the basis of a petitioner's challenge. During the administrative process, the State Board heard parties' concerns regarding the substantial nature of the changes it made to the 2012 Waiver. And it heard parties' concerns regarding the lack of information about the environmental effects of the Modified Waiver. Though no parties said the magic words "supplemental environmental review is required," these comments broadcast to the State Board the need for such review. The State Board admitted that it had "made revisions to the [2012 Waiver] significantly," SB 6480, and it had the opportunity to

respond to the public's comments by calling for additional review or justifying its refusal to conduct further analysis. It failed to do so.

Prior decisions by California courts show that the comments raised to the State Board were sufficient to exhaust Petitioners' CEQA claim. For example, in *State Water Resources Control Board Cases*, the Court of Appeal held that the petitioners exhausted a claim about the State Board's inadequate analysis of environmental effects by raising the issue's substance before the Board. 136 Cal. App. 4th at 795. "Although the . . . parties did not use the magic words 'the EIR is inadequate,' they did bring to the Board's attention their position that the record before the Board did not contain an adequate analysis of the [project's] potential impact[s]." *Id.* Similarly here, comments addressing the substantial changes to the project and the State Board's inadequate analysis of those changes' effects are sufficient to exhaust Petitioners' CEQA claim.

Likewise, in *Center for Biological Diversity v. County of San Bernadino*, the petitioner claimed that the project proponents failed to include a water supply agreement in their final environmental impact review, as required by statute. 185 Cal. App. 4th at 879-80, 890. The court held that comments raising "the issue of whether the [final]EIR sufficiently addresses water supply" were enough to exhaust this specific statutory claim, even though the precise legal inadequacy was never cited during the administrative proceedings. *Id.* at 890 (The "County was apprised of the relevant facts and issues, and the purpose of the exhaustion doctrine was satisfied without the citation of Water Code provisions . . . ."). Similarly here, though neither Petitioners nor other commenters specifically cited Public Resources Code Section 21166, they raised the significance of the State Board's changes and the Board's lack of analysis evaluating these changes. And, as discussed above, Petitioners brought critical new information to the Board's attention by introducing the U.C. Davis Report.

The State Board quotes *Coalition for Student Action v. City of Fullerton*, 153 Cal. App. 3d 1194, 1198 (1984), for the proposition that "[m]ere objections to the *project*, as opposed to the procedure, are not sufficient to alert an agency to an objection based on CEQA." State Board Demurrer ("Demurrer") at 9; *see also Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego*, 196 Cal. App. 4th 515, 521 (2011) (holding that "general, unelaborated objections" were insufficient to exhaust a CEQA claim). In both cases, the petitioners' failure to exhaust lay in their failure to object to

specific CEQA analyses that the agencies had affirmatively conducted. In the present case, not only did the State Board fail to conduct any additional CEQA analysis, it did not even affirmatively determine that such analysis was unnecessary. As a result, Petitioners have had no analysis or determination to which they could specifically object.

Moreover, the administrative comments in this case are more specific than those in *Coalition for Student Action*. In *Coalition for Student Action*, the court held that "a relatively few bland and general references to environmental matters" were insufficient to exhaust the petitioner's CEQA claim. 153 Cal. App. 3d at 1198. Here, public comments raised specific, targeted concerns criticizing the lack of information about the Modified Waiver's environmental effects that would result from the State Board's changes. SB 6261 ("The significant changes proposed . . . provide insufficient information to enforce the order or to evaluate the relationship between farm practices and water quality"). In contrast to the "generalized" environmental comments in *Coalition for Student Action*, 153 Cal. App. 3d at 1197, the targeted, substantive public comments here were sufficiently specific to apprise the State Board of Petitioners' concerns regarding the inadequate impact analysis.

In conclusion, the exhaustion doctrine simply seeks to ensure that agencies have the opportunity to address issues before litigation, and therefore requires a petitioner to bring the substance—or "true character"—of its eventual challenges before the agency during the administrative process. *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th at 792-93. Petitioners are not required to tick through whole chapters of the California Code to preserve potential issues for judicial review. Here, the State Board had a fair opportunity to respond to the public's comments describing the significant changes to the 2012 Waiver and lamenting the absence of an adequate impact analysis. These comments apprised the Board of the public's concerns regarding the need for additional environmental review and were sufficient to exhaust Petitioners' CEQA claim.

III. The Petitioners' Prayer for Relief Properly Requests a Peremptory Writ of Mandate, as Provided by California Water Code Section 13330.

The State Board mischaracterizes the Petitioners' prayer for relief as a request for declaratory judgment. The prayer for relief, however, is for "a peremptory writ of mandate," Amended Verified Petition for Writ of Mandate ("Amended Pet.") at 18 (line 16), which is the proper administrative

remedy under California Water Code section 13330 ("Not later than 30 days from the date of service of a[n] . . . order issued by the state board under this division, . . . any aggrieved party may file with the superior court a petition for writ of mandate for review thereof."). *See also* Cal. Code Civ. Proc. § 1094.5(f) ("The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order . . . be set aside, it may order . . . respondent to take such further action as is specially enjoined upon it by law . . . ."). The Petitioners' prayer for relief requests that the Court issue a peremptory writ of mandate ordering the State Board to comply with applicable law. Specifically, Petitioners request that the Court, in addition to finding that the State Board failed to comply with CEQA, "direct[ ] the State Board to prepare and circulate for public review and comment a CEQA-compliant environmental review and disclosure document." Amended Pet. at 18 (lines 23-24).

Petitioners' prayer for relief is distinguishable from the declaratory relief denied by the court in the case cited by the State Board, *County of Los Angeles v. California State Water Resources Control Board*. Demurrer at 12-13; 143 Cal. App. 4th 985, 1002 (2006). In that case, the plaintiffs requested declaratory relief on a number of issues, effectively asking the court to answer a series of questions but do nothing else. *Id.* In contrast to the relief requested in *County of Los Angeles*, here, Petitioners request a writ of mandate that compels agency action in compliance with the law. This requested relief is proper under California Water Code section 13330.

CONCLUSION

For the foregoing reasons, the Court should deny the State Board's Demurrer to Petitioners' fifth cause of action under CEQA.

Date: February 19, 2015 Respectfully submitted,

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PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

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

On February 19, 2015, I served the foregoing **PETITIONERS' OPPOSITION TO DEMURRER OF RESPONDENT STATE WATER RESOURCES CONTROL BOARD TO AMENDED VERIFIED PETITION FOR WRIT OF MANDATE** on all persons named below by placing true and correct copies thereof for Federal Express next-business-day delivery at Stanford, California, addressed as follows:

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I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed February 19, 2015 at Stanford, California.

Lynda F. Johnston

LYNDA F. JOHNSTON