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7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SACRAMENTO

10 THE PROTECT OUR COMMUNITIES)
FOUNDATION, BACKCOUNTRY AGAINST)
11 DUMPS, EAST COUNTY COMMUNITY)
ACTION COALITION and DONNA TISDALE,)

12 Petitioners/Plaintiffs,)

13 v.)

14 STATE WATER RESOURCES CONTROL)
BOARD, and DOES I -X,)

15 Respondents/Defendants,)

16 SAN DIEGO GAS AND ELECTRIC COMPANY,)
17 and DOES XI-XX,)

18 Real Parties in Interest)
19

Civ. No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND ATTORNEY’S FEES**

FILED BY FACSIMILE

20 Petitioners/plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION,
21 BACKCOUNTRY AGAINST DUMPS, EAST COUNTY COMMUNITY ACTION COALITION and
22 DONNA TISDALE (hereinafter “petitioners”) hereby petition the Court for a writ of mandate and for
23 preliminary and permanent injunctions and declaratory relief against respondents STATE WATER
24 RESOURCES CONTROL BOARD (hereinafter “the Board”) and DOES I through X, and real parties in
25 interest SAN DIEGO GAS AND ELECTRIC COMPANY *et al.*, and by this verified petition allege as
26 follows:

27 **INTRODUCTION**

28 1. This is a public interest lawsuit to protect petitioners’ and the public’s interest in securing

1 the Board's compliance with the California Environmental Quality Act ("CEQA"), Public Resources
2 Code ("PRC") section 21000 *et seq.*, the Water Code, and the Board's own regulations. Petitioners bring
3 this action to challenge (1) the Board's issuance of an order granting a federal Clean Water Act section
4 401 water quality certification ("Order") for the Sunrise Powerlink Project ("the Powerlink" or "the
5 Project"), (2) the Board's approval of the Environmental Impact Report ("EIR")/Environmental Impact
6 Statement ("EIS") for the Project, and (3) the Board's failure to make a required decision on petitioners'
7 Petition for Reconsideration of the Board's certification Order. This action is timely under CEQA
8 because it is filed within 30 days of the Board's January 11, 2011 Notice of Determination ("NOD").
9 PRC §21167.

10 2. The Board issued its certification Order and approved the EIR for the Project despite the
11 fact that (1) the EIR is gravely inadequate because it lacks biological and hydrological surveys and other
12 environmental information necessary to accurately evaluate and mitigate the Project's impacts and (2)
13 substantial new information became available and substantial Project alterations and changed
14 circumstances occurred after the EIR was certified, requiring preparation of a subsequent EIR.
15 Furthermore, the Board stymied public review and criticism of its actions by failing to give required
16 notice thereof to petitioners, misleading the public and petitioners about the date on which it issued its
17 certification, and using its fraudulent representations and petitioners' reliance thereon to refuse review of
18 their Petition for Reconsideration of the Order.

19 3. Petitioners therefore seek declaratory relief declaring the Board's purported rejection of
20 petitioners' reconsideration petition to be unlawful, a writ of mandate directing the Board to make a
21 decision on petitioners' timely reconsideration petition, a writ of mandate and declaratory judgment
22 directing the Board to set aside and vacate its approval of the Project, and an injunction forbidding all
23 activity pursuant to the Project that could result in any change or alteration in the physical environment
24 until the Board has taken all actions necessary to bring its approval of the Project into compliance with
25 CEQA.

26 VENUE AND JURISDICTION

27 4. This Court has jurisdiction over this action pursuant to Code of Civil Procedure ("CCP")
28 sections 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandate), and 1094.5

1 (administrative mandate); PRC sections 21168 and 21168.5 (California Environmental Quality Act);
2 Water Code section 13330(a) (judicial review of State Water Resource Control Board orders and
3 decisions); and Article VI, section 10, of the California Constitution.

4 5. Venue is proper pursuant to CCP sections 393(b) (actions against public officers), and 395
5 (actions generally) because the Board has its office within this County.

6 6. This petition is timely filed within all applicable statutes of limitations.

7 7. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a
8 copy of this Verified Petition and Complaint, and consistent with PRC section 21167.5, petitioners have
9 served the Board with notice of this suit.

10 **PARTIES**

11 8. Petitioner THE PROTECT OUR COMMUNITIES FOUNDATION (“POC”) is a
12 community organization formed in 2009 as the successor to The Protect Our Communities Fund, which
13 had been formed in 2006. POC is composed of numerous individuals and families residing in Southern
14 California who are directly affected by the approval of the Powerlink Project. POC’s purpose is the
15 promotion of a safe, reliable, economical, renewable and environmentally responsible energy future.
16 POC’s members currently use and intend to continue to use the lands, watersheds and water resources
17 that would be impacted by the Sunrise Powerlink Project and the energy generation facilities it would
18 induce for aesthetic, scientific, historic, cultural, recreational and spiritual enjoyment. The Powerlink –
19 and thus the Board’s certification Order for the Project – would harm the use and enjoyment of these
20 public environmental resources by POC’s members.

21 9. Petitioner BACKCOUNTRY AGAINST DUMPS (“BAD”) is a community organization
22 based in Boulevard, California, comprising numerous individuals and families residing throughout
23 Southern California. Members of BAD are directly affected by the planning and management of the
24 lands through which the Powerlink Project would run because that is where they live and recreate. BAD
25 and its members are interested in the proper planning and management of those lands in order to
26 maintain and enhance their ecological integrity, watershed values, groundwater resources, scenic beauty,
27 wildlife, recreational amenities and cultural resources. BAD’s members presently use and intend to
28 continue to use lands and waters that would be directly and adversely affected by the Powerlink Project

1 for aesthetic, scientific, historic, cultural, recreational and spiritual enjoyment. BAD members' use and
2 enjoyment of the pristine desert, forest and mountain areas of Southern California would be greatly
3 diminished by construction of the Powerlink Project because such development would harm the
4 recreational and aesthetic value of the wildlands they frequent. Some members of BAD rely for their
5 entire domestic, municipal, and agricultural water supply on the vulnerable aquifers that are threatened
6 with contamination and overdrafting by the development enabled by the Board's Order.

7 10. Petitioner EAST COUNTY COMMUNITY ACTION COALITION ("ECCAC") is a
8 coalition of community groups with the common goal of preserving the rural quality of life and the
9 natural resources of eastern San Diego County. ECCAC and its members seek to maintain the ecological
10 integrity, scenic beauty, wildlife, cultural resources, recreational amenities, watershed values and
11 groundwater resources in eastern San Diego County. ECCAC's members currently use and intend to
12 continue to use lands and waters that would be directly and adversely affected by the Powerlink Project
13 and related energy development it would induce for aesthetic, scientific, historic, cultural, recreational
14 and spiritual enjoyment. The Powerlink – and thus the Board's certification Order for the Project –
15 would harm the use and enjoyment of these East County public resources by ECCAC's members.

16 11. Petitioner DONNA TISDALE lives on Morningstar Ranch, located two miles west of Tierra
17 Del Sol Road in Boulevard, California. She is a member of plaintiffs BAD, POC, and ECCAC, and
18 Chairwoman of the County of San Diego's Boulevard Planning Group. Mrs. Tisdale currently uses and
19 intends to continue to use lands and waters that would be harmed by the Powerlink Project and related
20 energy development it would induce for activities including but not limited to hiking, family outings and
21 recreation, wildlife and wildflower viewing, sightseeing, photography, star gazing, quiet meditation, and
22 camping. The Powerlink – and thus the Board's Order approving the Project – would harm the use and
23 enjoyment of these public environmental resources by Ms. Tisdale.

24 12. Petitioners have authorized their attorney to file this lawsuit on their behalf to vindicate
25 their, and the public's, interest in securing the Board's compliance with CEQA, the Water Code, and the
26 Board's own rules and regulations, in connection with its review and approval of the Project.

27 13. Respondent STATE WATER RESOURCES CONTROL BOARD ("the Board") is the
28 agency authorized by the California Legislature and United States Environmental Protection Agency to

1 issue the water quality certification challenged in this case. It is also a responsible agency for the Project
2 under CEQA. As originally stated on its website, the Board issued its certification Order for the Project
3 on November 18, 2010.¹ On January 6, 2011, the Board purported to reject petitioners' Petition for
4 Reconsideration of the Order as untimely, despite the fact that such request was timely filed, based on
5 the Board's own public notice, as shown below.

6 14. The true names and capacities of respondents DOES I-X, inclusive, are unknown to
7 petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.
8 Petitioners will, with leave of Court if necessary, amend this Verified Petition when the true names and
9 capacities of said DOE respondents have been ascertained.

10 15. Real party in interest SAN DIEGO GAS AND ELECTRIC COMPANY ("SDG&E") is the
11 Project proponent and the applicant for the certification Order for the Powerlink Project.

12 16. Petitioners are unaware of the true names and capacities of real parties in interest DOES XI-
13 XX, inclusive, and therefore sue such real parties in interest herein by fictitious names. Petitioners are
14 informed and believe, and based upon such information and belief allege, that the fictitiously named real
15 parties are entities or individuals who have a direct and substantial economic interest in, or are the
16 recipients of, respondents' approval of the Project. When the true identities and capacities of these real
17 parties have been ascertained, petitioners will, with leave of the Court if necessary, amend this petition to
18 insert such identities and capacities.

19 FACTUAL BACKGROUND

20 17. As originally stated on its website, the Board issued its Order providing water quality
21 certification for SDG&E's Powerlink Project on November 18, 2010. The Order certifies "that as long
22 as all of the conditions listed [therein] or incorporated by reference are met, any discharge from [the
23 Powerlink] will comply with the applicable provisions of Clean Water Act sections 301 (Effluent
24 Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and
25 Implementation Plans), 306 (National Standards of Performance), and 307 (Toxic and Pretreatment
26

27 ¹ As discussed below, the Board claims that contrary to its written public notice and without
28 required notice to petitioners, it had issued the Order on a previous date, November 9, 2010.

1 Effluent Standards).” Order at 11-12. The Order also “serve[s] as Waste Discharge Requirements
2 pursuant to the Porter-Cologne Water Quality Control Act.” *Id.* at 12.

3 18. The Powerlink Project would involve the construction, operation and maintenance of a
4 series of new 500 kV and 230 kV transmission lines in San Diego and Imperial Counties. The new lines
5 would transmit up to 500 megawatts of electricity generated by industrial-scale power plants located
6 throughout the fragile desert and mountain ecosystem in Southern California. The Powerlink would
7 traverse more than 120 miles of pristine desert and mountain terrain, including sensitive waterways and
8 habitat for numerous endangered and other special status species.

9 19. The Powerlink is the subject of a joint Bureau of Land Management (“BLM”) and
10 California Public Utilities Commission (“CPUC”) Environmental Impact Report (“EIR”)/Environmental
11 Impact Statement (“EIS”), a final version of which (the “FEIR”) was issued on October 13, 2008.
12 Previous versions of the EIR include a Draft EIR (“DEIR”), published on January 3, 2008, and a
13 Supplemental DEIR (“SDEIR”), published on July 11, 2008. CPUC approved the Project – granting a
14 Certificate of Public Convenience and Necessity – on December 18, 2008. BLM issued a Record of
15 Decision approving the Project on January 20, 2009.

16 20. The selected Project route changed substantially from the DEIR and SDEIR to the FEIR,
17 with BLM and CPUC ultimately selecting a previously unidentified southern route as the preferred route
18 in the FEIR. The FEIR notes that the selected southern route would have numerous significant impacts,
19 including impacts to California waters. However, because of the Powerlink’s belated route change, the
20 FEIR lacks biological, hydrological and other resource surveys and other environmental information
21 necessary to accurately evaluate and mitigate the Project’s impacts. For example, the stream and
22 wetland delineations along the Powerlink route were not completed until long after the FEIR had been
23 released and CPUC had approved the Project. The Project’s impacts to these hydrological resources
24 have thus never been fully analyzed in a CEQA document.

25 21. The Powerlink would also have many other environmental impacts that have not yet been
26 analyzed in a CEQA document. These impacts are the result of substantial changes made to the Project
27 by the Project Modification Report (“PMR”), issued by SDG&E on May 14, 2010 and approved, as
28 modified, by CPUC and BLM in September, 2010. These changes include substantial route

1 modifications – nearly one mile in certain locations, new and modified construction yards, more
2 construction access pads and changed temporary work areas, among others. As disclosed in the PMR,
3 the Project changes would increase permanent impacts to “herbaceous wetlands, freshwater, and streams
4 (non-vegetated channel)” from the 0.13 acres identified in the FEIR to 1.1 acres, an *eight-fold increase*.
5 PMR at S-3. The PMR also shows that the modified Project would increase impacts to federal
6 jurisdictional waters along at least seven segments (or “PMR units”) of the Powerlink and would have
7 other new and more severe significant impacts. PMR at S-8 to S-10.

8 22. Despite the EIR’s inadequacies, and despite the fact that a subsequent EIR has not been
9 prepared to analyze the substantial new information arising and Project changes occurring after
10 publication of the FEIR, the Board issued the water quality certification Order, which was signed by
11 Executive Director Thomas Howard. The Board also made CEQA findings for the Project, which it
12 attached to the Order. The Board filed its CEQA NOD on January 11, 2011. This action is timely filed
13 within 30 days of the Board’s NOD. PRC §21167.

14 **PROCEDURAL BACKGROUND**

15 23. On October 15, 2009, SDG&E submitted to the Board an application for Clean Water Act
16 section 401 water quality certification. The Board deemed the application complete on November 15,
17 2009, and commenced a public comment period that ended December 14, 2009. In fact the application
18 was not complete, a fact pointed out by petitioners and eventually acknowledged – although never
19 rectified – by the Board. Petitioners timely submitted extensive comments to the Board on December
20 14, 2009, including a comment letter and an “Evaluation of Sunrise Powerlink Application for 401
21 Certification” prepared by University of California Professor Emeritus and noted hydrologist, Dr. Robert
22 Curry. In their comment letter, petitioners urged the Board to delay certification until accurate
23 environmental review as required by CEQA had been conducted, among other things.

24 24. On November 10, 2010, lead petitioner POC’s staff biologist David Hogan sent an email to
25 Clifford Harvey – the Board’s Environmental Scientist and its staff contact for the Powerlink
26 certification process – inquiring as to the status of the Board’s review of SDG&E’s Powerlink
27 certification application. Twenty days later, on November 30, 2010, the Board through Mr. Harvey
28 responded to petitioner’s email, informing petitioners that “[t]he 401 Certification for the Sunrise

1 Powerlink Project is now posted on the [Board’s] website” and “apologi[zing] for [the] delay in sending
2 this update.”² This was the *first* and *only* notice petitioners ever received that the Board had issued its
3 certification Order.

4 25. In response to this notice, on November 30, 2010, petitioners and their counsel
5 independently accessed the Board’s website via the link provided in Mr. Harvey’s email. As depicted in
6 the true and complete copy thereof attached as Exhibit 2 hereto, the Board’s website stated that the
7 certification Order had been “[i]ssued” on “11/18/2010.”

8 26. Petitioners relied on the issue date displayed on the Board’s website in timing the
9 preparation of their Petition for Reconsideration pursuant to 23 California Code of Regulations (“CCR”)
10 section 3867(c). Based on the Board’s purported November 18, 2010 issue date of its certification
11 Order, petitioners scheduled the filing of their Petition for Reconsideration for December 20, 2010, the
12 last business day before the close of the 30-day period for filing, since the 30th day fell on December 18
13 (a Saturday). Petitioners subsequently filed their Petition for Reconsideration by email on December 20.
14 The Board confirmed receipt of the petition on that date both by email on December 21, and in its
15 January 6, 2011 letter refusing to review the petition (a true and complete copy of which is attached
16 hereto as Exhibit 3).

17 27. On January 7, 2011, petitioners’ counsel received the Board’s January 6, 2011 letter
18 refusing to accept for review the Petition for Reconsideration. The Board alleges in its letter that the
19 certification Order was issued on November 9, 2010, *not* November 18, 2010, as it had represented on its
20 website. The Board’s letter also asserts that the letter transmitting the certification was signed on
21 November 12, 2010 and sent to the applicant on November 15, 2010. As shown by the “cc” list on the
22 certification Order transmittal letter (a true and complete copy of which is attached as Exhibit 4 hereto),
23 however, petitioners were not among those notified by the Order, even though the Board’s regulations
24 require that such notice be given to “all other parties known to be interested” in the certification action.
25 23 CCR §3859. Nonetheless, despite its misrepresentations as to the date the Order was issued and its
26

27 ² A true and complete copy of the entire email exchange between Mr. Hogan and Mr. Harvey is
28 attached as Exhibit 1 hereto.

1 failure to timely notify petitioners of its issuance, the Board asserted in its January 6, 2011 letter that the
2 deadline for receipt of petitions for reconsideration was December 9, 2010, and that petitioners’
3 December 20, 2010 reconsideration petition was therefore untimely.

4 28. After receiving the Board’s rejection letter, petitioners again accessed the Board’s “Clean
5 Water Act Section 401 – Certification and Wetlands Program” webpage and noticed that the Board had
6 made telling changes thereto. As shown in the January 9, 2011 printout of the Board’s webpage (a true
7 and complete copy of which is attached as Exhibit 5 hereto), the Board had changed the “Date Issued”
8 column heading to “Date Signed,” crossed out the “11/18/10” issuance date and inserted “11/09/10
9 (corrected)” as the newly alleged signature date.

10 29. Petitioners bring this action to challenge the Board’s certification Order for the
11 Powerlink Project, its approval of the Project EIR and its refusal to review petitioners’ Petition for
12 Reconsideration of the Order on its merits.

13 GENERAL ALLEGATIONS

14 30. Petitioners have performed any and all conditions precedent to the filing of this Verified
15 Petition and, to the extent required, have exhausted any and all available administrative remedies.

16 31. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law, within
17 the meaning of CCP section 1086. Unless this Court issues a writ of mandate setting aside the Board’s
18 certification Order, and ordering the Board to comply with the laws whose violation is alleged herein, the
19 environmental interests of petitioners and the public will be substantially and irreparably harmed. No
20 monetary damages or other legal remedy could adequately compensate for the harms to petitioners and
21 the environment that would arise if the Board’s unlawful conduct were allowed to stand.

22 32. Petitioners are also entitled to injunctive relief under CCP section 526 because the Project
23 threatens irreparable environmental harm. Unless enjoined, the Board and the real party in interest will
24 implement the Project despite its lack of compliance with applicable laws, causing undue and
25 unnecessary environmental degradation. Petitioners would thereby suffer irreparable harm due to the
26 Board’s failure to take the required steps to adequately protect the environment. Injunctive relief is thus
27 warranted under CCP 525 *et seq.* and PRC section 21168.9 to prevent irreparable harm to the
28 environment.

1 previous action or take new appropriate action.” *Id.* §3869(a)(3). Fourth, it may “direct the executive
2 director . . . to take appropriate action.” *Id.* §3869(a)(4). Nonetheless, the Board here failed to take *any*
3 of the four available actions. Indeed, it failed to review the substantive merits of petitioners’ Petition for
4 Reconsideration *at all*. Instead, in its January 6, 2011 letter, the Board improperly and unlawfully
5 refused to “accept for review” the Petition for Reconsideration.

6 39. Because the Board was required to act upon petitioners’ proper Petition for Reconsideration
7 but did not, it prejudicially abused its discretion. *See Joy Road Area Forest and Watershed Association*
8 *v. California Department of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 683-84 (holding
9 that agency abused its discretion by failing to “comply with its own rules”); *Tomlinson v. Qualcomm,*
10 *Inc.* (2002) 97 Cal.App.4th 934, 940 (holding that “[w]hen the Legislature authorizes a state
11 administrative agency to adopt regulations to implement or interpret a statutory scheme, [such as here,
12 under Water Code sections 1058 and 13160,] the regulations are presumptively . . . *binding* and courts
13 will enforce them” (emphasis added)).

14 40. The Board may assert that petitioners’ Petition for Reconsideration was properly ignored
15 because it was untimely. The Board is estopped from making this claim for three reasons: (1) the Board
16 failed to give petitioners timely notice of its certification Order; (2) the time period for filing a petition
17 was equitably tolled; and (3) the Board is equitably estopped from asserting untimeliness as a reason for
18 denying review of the Petition for Reconsideration.

19 **The Board Failed to Give Petitioners Timely Notice of Its Certification Order**

20 41. Pursuant to 23 CCR section 3859, “Copies of any certification or denial of a certification
21 issued shall be sent to the applicant, the state board (if not the certifying agency), appropriate regional
22 board(s) (if not the certifying agency[ies], EPA, the federal agency, and *all other parties known to be*
23 *interested* no later than three (3) days after taking the certification action” (emphasis added).

24 42. Having submitted extensive comments to the Board and made numerous contacts with its
25 staff regarding the Powerlink water quality certification, petitioners were unquestionably “other parties
26 known to be interested” in the Board’s certification decision. As such, petitioners were entitled to
27 notification of the Board’s certification action on the Powerlink Project within three days after it was
28 made. Nonetheless, it was not until November 30 – 21 days after the Board alleges it issued the

1 certification Order and only after *petitioners* contacted the Board regarding the status of its deliberations
2 – that the Board notified petitioners of its certification action. *See* Exhibit 1.

3 43. By failing to provide petitioners with timely notice of its certification action, the Board
4 contravened its own regulations and prejudicially abused its discretion. Furthermore, the Board’s failure
5 to provide petitioners with adequate notice precludes it from asserting untimeliness or failure to exhaust
6 remedies as a defense to petitioners’ claim that the Board is required to consider petitioners’ Petition for
7 Reconsideration on the merits.

8 **The Time Period for Filing a Petition for Reconsideration Was Equitably Tolled**

9 44. Equitable tolling is appropriately used “to disarm a defendant who, by his own deception,
10 has caused a claim to become stale and a plaintiff dilatory.” *Regents of the University of California v.*
11 *Superior Court* (1990) 20 Cal.4th 509, 533. Here, equitable tolling of the time period for filing a petition
12 for reconsideration is appropriate because (1) the Board’s fraudulent conduct resulted in the
13 “concealment of the operative facts that are the basis” of the Board’s denial of the Petition for
14 Reconsideration; (2) petitioners failed to “discover the operative facts” until after the time period had
15 expired; and (3) petitioners exercised “due diligence” until they discovered the operative facts.
16 *Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial – Statutes of Limitations*
17 (The Rutter Group, 2011) ¶6:81, p. 6-15.

18 45. First, as alleged above, the Board concealed the true date of issuance of the Powerlink
19 Project certification Order by (1) failing to provide petitioners with timely notice of issuance and (2)
20 fraudulently misrepresenting to petitioners that the Order was issued on November 18, 2010 instead of
21 November 9, 2010.

22 46. Second, as also alleged above, petitioners failed to discover the Order’s true date of issuance
23 until after December 9, 2010, the last day on which the Board asserts a petition for reconsideration could
24 have been timely filed.

25 47. Third, as further alleged above, petitioners diligently attempted to discern when
26 the Order was issued by (1) repeatedly contacting the Board’s staff to inquire about the status of the
27 certification process, (2) checking the Board’s list of water quality certification orders and their dates of
28 issuance on its website, and (3) filing a substantively adequate Petition for Reconsideration within the

1 time period petitioners were fraudulently led to believe was operative.

2 48. Therefore equitable tolling of the time period for filing a petition for reconsideration is
3 appropriate and the Board should be ordered to consider petitioners' Petition for Reconsideration on its
4 merits.

5 **The Board is Equitably Estopped from Asserting Untimeliness as a Reason for Denying Review of**
6 **Petitioners' Petition for Reconsideration**

7 49. The "essence of estoppel is that the party to be estopped has by false language or conduct
8 led another to do that which he or she would not otherwise have done and as a result thereof that he or
9 she has suffered injury." *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315 (internal
10 quotation and citation omitted). "The long-established rule in this state . . . is that estoppel may be
11 asserted against the government where justice and right require it." *Shuer v. County of San Diego* (2004)
12 117 Cal.App.4th 476, 486.

13 50. Here, the Board is estopped from asserting untimeliness as a reason for denying review of
14 petitioners' Petition for Reconsideration or as a defense to this action. As alleged above, (1) the Board
15 "was apprised of the facts," i.e. the true date on which the Order was issued; (2) the Board "intended that
16 its conduct be acted upon or acted in such a manner that [petitioners] had a right to believe it was so
17 intended;" (3) the petitioners were "ignorant of the true state of facts;" and (4) petitioners "relied on the
18 conduct to [their] injury." *Id.*

19 51. First, as alleged above, and as the Board admits, the Board was aware that Executive
20 Director Thomas Howard had signed the Powerlink Project certification Order on November 9, 2010,
21 instead of November 18, 2010. *See* Exhibit 4.

22 52. Second, as also alleged above, Mr. Harvey – one of the Board's staff members – specifically
23 instructed petitioners to access the Board's website for information on the Powerlink Project certification
24 Order. *See* Exhibit 1. Until well after petitioners filed their Petition for Reconsideration, the website
25 explicitly stated that the Order had been issued on "11/18/10." *See* Exhibit 2.

26 53. Third, as further alleged above, petitioners failed to discover the Order's true date of
27 issuance until after December 9, 2010, the last day on which the Board asserts a petition for
28 reconsideration could have been timely filed.

1 54. Fourth, as alleged above, petitioners relied on the Board's misrepresentation and filed their
2 Petition for Reconsideration on December 20, 2010. Petitioners were and are injured by the Board's
3 misrepresentation because the Board refused to accept and consider petitioners' Petition for
4 Reconsideration, alleging it was untimely filed.

5 55. Therefore equitable estoppel applies to preclude the Board from asserting that petitioners'
6 Petition for Reconsideration was untimely filed or that petitioners failed to exhaust their administrative
7 remedies. Accordingly, the Board should be ordered to accept and consider petitioners' Petition for
8 Reconsideration.

9 **SECOND CAUSE OF ACTION**

10 (Writ of Mandate and Declaratory Relief to Aside the Board's Certification
11 Order as Contrary to the California Environmental Quality Act)

12 56. The paragraphs set forth above are realleged and incorporated herein by reference.

13 57. Petitioner brings this Second Cause of Action pursuant to PRC sections 21168 and/or
14 21168.5, and 23 CCR section 3856(f) on the grounds that the Board failed to act in accordance with the
15 law, and committed a prejudicial abuse of discretion, in that the Board considered and granted water
16 quality certification for the Project in the absence of adequate and final CEQA documentation.

17 58. The Board is a "public agency" within the meaning of CEQA. PRC §21063. The Board's
18 discretionary action in providing water quality certification for the Powerlink Project is subject to the
19 requirements of CEQA. PRC §21065(c); 23 CCR §3856(f) ("the certifying agency shall be provided
20 with and have ample time to properly review a final copy of valid CEQA documentation before taking a
21 certification action"). CEQA requires public agencies to conduct environmental review before the
22 agency approves any project that may have a significant impact on the environment. PRC §§21002.1,
23 21061, 21151; CEQA Guidelines [14 CCR ("Guidelines")] §15004(a); 23 CCR §3856(f).

24 59. As a responsible agency under CEQA, the Board has numerous duties, including responding
25 to consultation by the lead agency, commenting on draft EIRs, determining the adequacy of EIRs,
26 preparing additional CEQA documentation in certain situations, and making CEQA findings. *See*
27 Guidelines §15096. A "responsible agency's ultimate decision of whether to approve all or part of a
28 project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the

1 decision-makers, and the public, with the information about the project that is required by CEQA.”
2 *RiverWatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186, 1207 (internal
3 quotation and citation omitted). Here, the EIR for the Powerlink Project is inadequate, as are the Board’s
4 CEQA findings. Further, a subsequent EIR must be prepared.

5 **A Subsequent EIR Must Be Prepared**

6 60. PRC section 21166 requires agencies to prepare an subsequent or supplemental EIR
7 (“SEIR”)³ if “substantial changes are proposed in the project” or “substantial changes occur with respect
8 to the circumstances under which the project is being undertaken” and either of these “will require major
9 revisions” to an already-prepared “environmental impact report.” An SEIR is also required where new
10 information that could not have been known previously becomes available. *Id.*

11 61. The SEIR requirement is refined in CEQA Guidelines section 15162, which specifies that
12 an SEIR is required where changes in the project or its circumstances will create “new significant
13 environmental effects or a substantial increase in the severity of previously identified significant effects.”
14 Guidelines §15162(a)(1)-(2). An SEIR is also required if new information shows that: the project would
15 have new significant effects; significant effects previously examined would be substantially more severe;
16 or mitigation measures are newly available or feasible. *Id.* §15162(a)(3).

17 62. It is normally the lead agency that must prepare a subsequent EIR, but in certain
18 circumstances the duty is transferred to a responsible agency. “If after the project is approved [by the
19 lead agency], any of the conditions [requiring preparation of an SEIR occurs,] a subsequent EIR . . . shall
20 only be prepared by the public agency which grants the next discretionary approval for the project, if any.
21 In this situation *no other responsible agency shall grant an approval for the project until the subsequent*
22 *EIR has been certified . . .*” Guidelines §15162 (emphasis added). Here, many conditions requiring

24 ³ A “[s]upplement to an EIR” is prepared “rather than a subsequent EIR” if a subsequent EIR
25 would be required by Guidelines section 15162 but “[o]nly minor additions or changes would be
26 necessary to make the previous EIR adequately apply to the project in the changed situation.”
27 Guidelines §15163(a). In this suit, petitioners allege that the Board failed to prepare a
28 subsequent EIR as required by Guidelines section 15162. Petitioners make no representations
regarding whether or not “minor additions or changes” to the Powerlink EIR could remedy this
legal inadequacy. Thus, petitioners use the term “SEIR” to encompass both subsequent and
supplemental EIRs.

1 preparation of an SEIR occurred after the lead CEQA agency, CPUC, approved the Project on December
2 18, 2008.

3 63. As alleged above, substantial new information has become available and substantial changes
4 in the Project and the circumstances surrounding it have occurred since the EIR was certified and CPUC
5 approved the Project on December 18, 2008. As discussed, the changes in the Project and its
6 circumstances would lead to newly significant or substantially increased impacts on water resources and
7 other resources. For example, the Project changes would increase permanent impacts to “herbaceous
8 wetlands, freshwater, and streams (non-vegetated channel)” from the 0.13 acres identified in the FEIR to
9 1.1 acres, an *eight-fold increase*. PMR at S-3. Under established CEQA jurisprudence, this substantial
10 increase in the impact area must be analyzed in an SEIR. *Mira Monte Homeowners Association v.*
11 *County of Ventura* (1985) 165 Cal.App.3d 357, 361-66 (holding that discovery of an additional 0.25
12 acres of impacted wetlands represented a significant adverse environmental impact).

13 64. Because the Board was the next public agency to grant a discretionary approval for the
14 Project after CPUC’s approval, the Board was required to prepare an SEIR to analyze the new
15 information and Project changes discussed, among others. Further, regardless of whether the Board was
16 the “public agency which grants the next discretionary approval for the project,” it was still prohibited
17 from “grant[ing] an approval for the project until the subsequent EIR ha[d] been certified.” Guidelines
18 §15162; *see also* 23 CCR §3856(f) (“the certifying agency shall be provided with and have ample time to
19 properly review a *final* copy of *valid* CEQA documentation before taking a certification action”
20 (emphasis added)).

21 **The Board’s CEQA Findings Are Inadequate**

22 65. CEQA Guidelines section 15096(h) states that responsible agencies “shall make the findings
23 required by section 15091 for *each significant effect* of the project and shall make the findings in section
24 15093 [(statements of overriding consideration)] if necessary” (emphasis added). “The findings must
25 ‘bridge the analytic gap between the raw evidence and ultimate decision’ so as to allow a reviewing court
26 to ‘to trace and examine the agency’s mode of analysis.’” *Mira Mar Mobile Community v. City of*
27 *Oceanside* (2004) 119 Cal.App.4th 477, 496 (quoting *Topanga Association for a Scenic Community v.*
28 *County of Los Angeles* (1974) 11 Cal.3d 506, 515).

1 7. For such other equitable or legal relief as the Court deems appropriate.

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3 Dated: February 7, 2011

Respectfully submitted,

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6 STEPHAN C. VOLKER
Attorney for petitioners

1 VERIFICATION

2 I, Stephan C. Volker, am the attorney for petitioners in this action. I make this verification on
3 behalf of the petitioners because they are absent from the county in which my office is located. I have
4 read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive
5 Relief and Attorney's Fees and know its contents. The facts therein alleged are true and correct to the
6 best of my knowledge and belief, and are based on documents within respondents' record underlying the
7 approvals challenged herein.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct, and that this Verification was executed in Oakland, California, on February 7, 2010.

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12 STEPHAN C. VOLKER
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