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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Unauthorized Diversion and  
Use of Water by the California American Water  
Company; Cease and Desist Order WR 2009-0060

JOINT OPPOSITION TO PETITIONS  
FOR RECONSIDERATION OF STATE  
WATER RESOURCES CONTROL  
BOARD ORDER WR 2016-0016

STATE WATER RESOURCES CONTROL BOARD  
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CIVIL RIGHTS DIVISION  
SACRAMENTO

## I. INTRODUCTION

On July 19, 2016, the State Water Resources Control Board (“SWRCB”) issued Order WR 2016-0016 (“Order”), the final result of a lengthy and transparent process to amend an existing cease and desist order, Order WR 2009-0060 (“CDO”), issued in 2009 to California-American Water Company (“Cal-Am”). To be clear, Cal-Am is not and never has been in violation of the CDO. In fact, as the SWRCB found, Cal-Am has lowered its diversions from the Carmel River significantly beyond the minimum reductions required in the CDO. But once it became clear that due to substantial unexpected difficulties hampering Cal-Am’s development of major alternative water supplies, no alternative water source would be operational by the CDO’s deadline of December 31, 2016 to cease unauthorized Carmel River diversions, Cal-Am, Monterey Peninsula Regional Water Authority, Monterey Peninsula Water Management District, the Pebble Beach Company, and the City of Pacific Grove (collectively, “Applicants”) applied for a modification of the CDO’s compliance schedule. After an extensive evaluation of the various issues concerning Applicants’ request and receiving numerous comments from stakeholders, local agencies, community members, and environmental groups supporting an extension of the CDO, the SWRCB issued the Order, finding that “[a]mending the existing compliance schedule in [the CDO] is appropriate in light of the fishery agency’s support, the substantial mitigation measures that are completed, ongoing and planned for the immediate future, and the substantial hardships in immediately cutting off unlawful diversions where there is no clear alternative supply.” (Order, at p. 12.)

Nevertheless, Water Ratepayers Association of the Monterey Peninsula (“WRAMP”)<sup>1</sup> and Public Trust Alliance (“PTA”) now seek reconsideration of the Order, claiming lack of a fair hearing, that the *SWRCB* itself violated the CDO and failed to make a determination about the amount of water needed for public health and safety, that Cal-Am failed to diligently implement feasible projects, and that modification of the CDO violated of the public trust doctrine.<sup>2</sup>

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<sup>1</sup> WRAMP is also known as “Water Plus.”

<sup>2</sup> Given the nature of the two petitions for reconsideration, this opposition largely focuses on WRAMP’s petition and addresses PTA’s petition where applicable.

Because there is no legal or factual basis to either reconsider or overturn the Order, the SWRCB should deny the petitions in their entirety.

## **II. BACKGROUND**

In November 2015, Applicants filed an application for an order to modify the CDO, including an extension of the deadline for Cal-Am to eliminate unauthorized diversions from the Carmel River, with certain annual milestones to demonstrate progress and mandatory reductions of diversions if milestones were missed. In April 2016, Applicants filed an amended application (“Application”) to address an unexpected delay in the California Public Utilities Commission’s (“CPUC”) environmental review of the Monterey Peninsula Water Supply Project (“MPWSP”). Upon the filing of the initial application in 2015, the SWRCB implemented an ex-parte communications ban that remained in effect through July 19, 2016 when the SWRCB issued the Order.

The SWRCB issued a notice of the Application on May 6, 2016, and provided for a comment period until June 1, 2016 to receive input on the Application. On June 17, 2016, SWRCB staff issued their Preliminary Staff Recommendation to Modify Cease and Desist Order WR 2009-0060 California-American Water Company (“Preliminary Recommendation”) and Notice of Comment Deadline & Rationale Document for Preliminary Staff Recommendation (“Rationale”), which provided an additional comment period until July 13, 2016 to receive input on the Application, Preliminary Recommendation, and Rationale. In total, the SWRCB received and considered over 90 comment letters/emails. At its July 19, 2016 meeting, the SWRCB heard additional public comment on the Application and then unanimously adopted the Order. Thereafter, WRAMP and PTA each filed petitions for reconsideration of the Order. As detailed herein, neither petition provides any competent legal or factual basis to challenge the Order.

## **III. STANDARD OF REVIEW**

The SWRCB “may order a reconsideration of all or part of a decision or order on the board’s own motion or on the filing of a petition of any interested person or entity.” (Wat. Code § 1122; *See also*, 23 Cal. Code Regs. § 768.) The grounds upon which a petition for

reconsideration may be filed with the SWRCB include the following: “(a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (b) [t]he decision or order is not supported by substantial evidence; (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; [and] (d) [e]rror in law.” (23 Cal. Code Regs. § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

(SWRCB Order WR 2016-0017, § 2.0, p. 2.)

#### **IV. ARGUMENT**

WRAMP's petition (and PTA's to some extent)<sup>3</sup> attacking the SWRCB's issuance of the Order is based on assertions that (a) there was irregularity in the proceedings leading up to issuance of the Order, (b) the Order is not supported by substantial evidence; and (c) issuance of the Order involved an error of law. As detailed below, these assertions lack merit.

##### **a. There was No Irregularity in the Proceedings.**

In an unsuccessful attempt to demonstrate irregularity in the proceedings, WRAMP asserts that: (i) the SWRCB provided insufficient time to comment on the Application, Preliminary Recommendation, and Rationale; and (ii) SWRCB staff engaged in ex-parte communications with Cal-Am. Both assertions lack merit.

##### **i. The SWRCB provided all interested persons sufficient time to comment on the Application, Preliminary Recommendation, and Rationale.**

While WRAMP asserts that the SWRCB provided insufficient time and opportunity for

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<sup>3</sup> PTA does not specify the grounds upon which it challenges the issuance of the Order, but it appears that it asserts the issuance of the order involved an error of law.

WRAMP to comment on the Preliminary Recommendation and Rationale, the facts belie this assertion and demonstrate that WRAMP (and all interested persons) was given ample opportunity to comment. Initially, WRAMP was provided with the same amount of (and in some cases more) time as all other interested persons, including Applicants, to comment and was not treated unfairly. All interested persons had from May 6, 2016 to June 1, 2016 to comment on the Application, and from June 17, 2016 to July 13, 2016 to comment on the Application, Preliminary Recommendation, and Rationale. Despite not being legally required to provide any set number of days for comment on a request to amend a cease-and-desist order, the SWRCB provided two 26-day comment periods (52-days in total) prior to acting on the Application. WRAMP took full advantage of both comment periods by submitting three comment letters/emails (November 23, 2015; April 15, 2016; May 1, 2016) during the initial comment period and two comment letters/emails (June 18, 2016; July 18, 2016) after SWRCB staff issued the Preliminary Recommendation and Rationale. The SWRCB also provided interested persons with the opportunity to give public comment during its July 19, 2016 meeting, and many of the topics addressed in WRAMP's comment letters/emails were addressed by interested persons at that meeting. Further, while other public commenters were allowed three minutes to provide oral comments, a member of WRAMP was allowed to give over twenty minutes of public comment – the same amount of time given to Cal-Am – supported by a detailed PowerPoint presentation.<sup>4</sup> Thus, the facts clearly demonstrate that the SWRCB provided WRAMP with more than an adequate opportunity to comment on the Application, Preliminary Recommendation, and Rationale.

ii. SWRCB staff did not engage in ex-parte communications with Cal-Am.

While WRAMP does not cite any specific instances or otherwise provide supporting evidence, it asserts that SWRCB staff engaged in ex-parte communications with Cal-Am representatives. This assertion is unfounded. SWRCB staff did not engage in any ex-parte

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<sup>4</sup> Prior to this presentation on WRAMP's behalf, the Chair of the SWRCB even noted that WRAMP had been "very active" in the proceeding.

communications with Cal-Am representatives regarding amending the CDO, and Cal-Am is not aware of any ex-parte communications between SWRCB staff and other parties. As the party to whom the CDO was directed, and with reporting obligations under the CDO, Cal-Am since 2009 has regularly communicated with SWRCB staff about Cal-Am's compliance with the CDO. Additionally, Applicants and other interested persons met with SWRCB staff on several occasions leading up to the filing of the initial application in November 2015 for the purpose of understanding the range of issues and commitments that would be relevant to the SWRCB's consideration of an extension of the CDO. SWRCB staff made no commitments to approve an extension of the CDO, but the meetings were productive in assisting all interested persons in developing the broad suite of measures proposed in the Application. Once the initial application was filed in November 2015, the SWRCB implemented its ex-parte communications ban and the ban remained in place until the SWRCB issued the Order on July 19, 2016.

**b. The Order is Supported by Substantial Evidence.**

WRAMP makes a number of meritless arguments in asserting that issuance of the Order is not supported by substantial evidence, including that: (i) the SWRCB did not enforce the CDO by ensuring that unauthorized diversions ended by December 31, 2016; (ii) the SWRCB failed to address health and safety requirements in assessing whether to issue the Order; and (iii) evidence in the record does not demonstrate Cal-Am's diligent implementation of projects to replace unauthorized Carmel River diversions.

- i. Cal-Am remained in compliance with the CDO, and the SWRCB properly exercised its discretion to modify the CDO's compliance schedule.

The SWRCB has the authority to issue a cease-and-desist order with a schedule for water rights compliance, which it did in issuing the CDO against Cal-Am. The SWRCB also has broad discretion to modify a cease-and-desist order and revise a schedule of compliance contained in a cease-and-desist order. (*See*, Wat. Code § 1832, SWRCB Order WR 2010-0002.) In this case, the SWRCB exercised its discretion in a reasonable manner that recognized the significant efforts that Cal-Am (along with others) has taken in order to comply with the CDO. As

discussed below, and as set forth in the Order itself, Cal-Am has strictly complied with the CDO and is in fact in compliance today.

Moreover, although WRAMP complains about a lack of “intervention” by the SWRCB, the SWRCB does not implement water supply projects. As clearly noted in the Order, the SWRCB’s interest (in the CDO and the Order) is in ending unlawful diversions from the Carmel River, rather than supporting or ensuring the implementation of any particular water supply project. Indeed, the SWRCB rejected a suggestion by WRAMP that Cal-Am be forced to support the People’s Moss Landing Water Desalination Project.<sup>5</sup> Instead, the SWRCB noted that “implementing a large municipal water supply project is a long-term decision that affects a wide range of stakeholders and involves impacts to costs of service to existing users, to the environment, and to the cost of and potential for municipal growth,” and therefore sought to encourage compliance with “incentives to multiple stakeholders to make diligent progress.” (Order, at p. 9.) Recognizing that the “cliff” condition in the CDO would not be met due to delays in Cal-Am’s supplemental water supply project that were beyond its control, Cal-Am (and numerous other interested persons) prepared and filed the applications to amend the CDO. Those applications and the ensuing Order include more rigorous diversion limitations and other measures than were required under the CDO, in exchange for an extension of the “cliff” deadline to 2021. In short, Cal-Am and the SWRCB did everything possible to ensure compliance with the CDO, and have developed a reasonable set of measures in exchange for an extension of the compliance schedule. Granting the extension was well within the SWRCB’s authority.

ii. The SWRCB addressed health and safety requirements in assessing whether to issue the Order.

Despite WRAMP’s unfounded assertions to the contrary, the SWRCB did in fact consider health and safety requirements and impacts as part of its assessment of the Application. (See, Order, pp. 10-11.) The SWRCB assessed Cal-Am’s authorized diversions and the impacts if Cal-Am were required to cease all of its unauthorized diversions by the end of December

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<sup>5</sup> The People’s Moss Landing Water Desalination Project is a proposed desalination plant in Moss Landing.

2016. (*Id.* at p. 10.) Among other things, the SWRCB noted that such a cut-back in diversions would require the “purchase and importation of additional supplies at costs previously believed to be untenable” and that there was no indication that users were willing or able to transfer the necessary water for use by Cal-Am. (*Id.*) The SWRCB noted that “[w]ith respect to the claims of potential health and safety impacts, there is no established level of per capita water use required for health and safety in the U.S. or California.” (*Id.*) Nevertheless, the SWRCB assessed the annual average residential per-capita usage (55 to 57 gallons per person per day) in the Cal-Am service area from June 2014 through May 2016, which was in the lowest 12% of urban water users in the state. (*Id.*) The SWRCB also noted that numerous commenters pointed out that requiring Cal-Am to cut back further could potentially affect health and safety. (*Id.*) The SWRCB concluded that the Order “sets forth a clear method to address health and safety ....” (*Id.* at pp. 10-11.)

iii. The record demonstrates that Cal-Am diligently implemented projects to replace unauthorized Carmel River diversions.

The record demonstrates that Cal-Am complied with the CDO by diligently implementing various actions in collaboration with other stakeholders to replace unauthorized Carmel River diversions. The Application sets forth in detail the diligent and aggressive implementation measures that Cal-Am and other stakeholders have taken to comply with the CDO, including efficiency and conservation measures, measures to develop a primary alternative water supply, and measures to implement other projects to reduce unauthorized Carmel River diversions. (Application, § IV (A)(1)-(3) at pp. 8-15; *See also* Applicants’ June 29, 2016 comment letter at pp. 8-10.) These measures were also described in detail in some of the comment letters received by the SWRCB that make up part of the record in this matter. The Application further discusses the factors beyond Applicants’ control that would have made it infeasible to entirely eliminate unauthorized Carmel River diversions by December 31, 2016, including the failure of the Regional Desalination Project (“RDP”) and delays in the CPUC’s approval schedule for the MPWSP. (Application, § IV(B).) The Order itself acknowledges Cal-



Am's compliance with the CDO and diligent implementation of projects to replace unauthorized Carmel River diversions. (Order, § 1.0 at p. 1 [noting various measures that have been taken to reduce Carmel River diversions and stating that since adoption of the CDO Cal-Am's Carmel River annual diversions have "consistently been well below" the diversion limits in the CDO], § 2.0 at pp. 2, 3 [describing Cal-Am's compliance with the CDO and the measures taken to reduce unauthorized diversions]; § 5.1 at p. 7 [describing Cal-Am's compliance with the CDO].)

WRAMP also accuses the SWRCB of failing to "prevent or reverse Cal-Am's intentional termination of the [RDP]" and, in attempting to show a lack of diligence, argues that Cal-Am "abandoned" the RDP. The true facts are as follows: In 2010 and 2011, Cal-Am, Marina Coast Water District ("MCWD"), and the Monterey County Water Resources Agency ("MCWRA") entered into a series of agreements to pursue a regional desalination project and develop a new source of water as ordered by the CDO. But in July 2011, MCWRA declared the agreements void due to an illegal conflict of interest in violation of Government Code section 1090 on the part of a MCWRA board member who was also a sub-consultant of MCWD. The sub-consultant was eventually convicted of a felony for violating Section 1090. The Court of Appeal, First Appellate District, recently (August 18, 2016) affirmed a trial court decision declaring the agreements void. (*California-American Water Company v. Marina Coast Water Dist.* (2016) \_\_ Cal.Rptr.3d\_\_, 2016 WL 4400452/2016 Cal. App. LEXIS 702.) In 2012, after the conflict of interest was uncovered and the agreements declared void, and following court decisions finding California Environmental Quality Act violations and ordering preparation of a new environmental impact report and other obstacles, Cal-Am withdrew from the RDP. In approving Cal-Am's withdrawal, the CPUC noted, "[i]t is not reasonable to allow time to continue to elapse and costs to continue to accrue for the [RDP], a project that, due to a significant change in circumstances since 2010, has no reasonable prospect of achieving its goals." (CPUC Decision 12-07-008 (July 18, 2012) [emphasis added].) WRAMP is well aware of these circumstances, as

its related entity Water Plus attempted to claim, but was denied intervenor compensation in the applicable CPUC proceedings.<sup>6</sup>

**c. Issuance of the Order Did Not Involve an Error of Law.**

WRAMP and PTA, in varying forms, assert that issuance of the Order involved an error of law because the SWRCB failed to properly consider public trust resources.<sup>7</sup> A review of the record and applicable law demonstrates that these arguments lack merit.

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. [Citations.] As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation], and to preserve, so far as consistent with the public interest, the uses protected by the trust.

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.

(*Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal. 3d 419, 446,447 [emphasis added].)

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<sup>6</sup> It is also worth noting that while WRAMP attacks Cal-Am in this proceeding for failing to implement supplemental water supply projects in order to meet the CDO's December 31, 2016 deadline, WRAMP has been making (and continues to make) every effort in the CPUC proceeding on the MPWSP, and in a lawsuit filed in Monterey County Superior Court on June 28, 2016 (Case No. 16CV001983) against the County of Monterey, Monterey County Board of Supervisors, Monterey County Water Resources Agency, California Coastal Commission, California Coastal Commission Board of Commissioners [sic], and Cal-Am, to thwart Cal-Am's efforts to develop a primary alternative water supply.

<sup>7</sup> While seemingly lacking a link to the public trust issues, PTA requests that the SWRCB amend the Order to include a statement that "This order establishes a set of performance standards and does not constitute any sort of waiver for any requirement of existing California Law." With respect to this issue, PTA asserts that the Order is unclear as to what it requires of Cal-Am. A plain reading of the Order refutes this argument and obviates any concern over the need for clarifying language. The Order includes very specific requirements and associated timelines, and does not state or otherwise indicate that it constitutes a waiver of California law. Thus, the SWRCB should reject PTA's arguments and associated requests to the contrary.

The record demonstrates that Cal-Am (along with other stakeholders) has taken numerous actions to protect public trust resources in the Carmel River. The Application itself details various actions taken (or that will be taken) by Cal-Am and other stakeholders to address the potential effects of continued unauthorized diversions and to enhance and improve conditions for fish and wildlife resources in the Carmel River.<sup>8</sup> (Application, § I at p. 3 [discussing: (a) a forbearance agreement between Cal-Am and the Trust for Public Land for the forbearance of diversions from the Carmel River and dedication of approximately 1,000 acre-feet of water to the river; and (b) the Carmel River Reroute and San Clemente Dam Removal Project], § IV(A)(4) at p. 15-19 [discussing: (a) funding for Carmel River mitigation projects; (b) the Carmel River Reroute and San Clemente Dam Removal Project; (c) construction of fish passage facilities downstream of Los Padres Dam; (d) funding of a study for the long term disposition of Los Padres Dam; (e) the retirement of Rancho Canada golf courses and associated reduction in diversions from the Carmel River; and (f) Cal-Am’s commitment to fund and implement additional mitigation projects on the Carmel River to improve fish passage and habitat].) Further, a number of stakeholders focused on protecting public trust resources, including the Sierra Club and the Planning and Conservation League, commented in favor of the Application. (See, April 28, 2016 and July 11, 2016 joint letters from the Sierra Club and the Planning and Conservation League.) Similarly, the National Marine Fisheries Service (“NMFS”) commented that fisheries habitat on the Carmel River has improved since issuance of the CDO and that continued unauthorized diversions are unlikely to cause jeopardy of the South-Central California Coast steelhead. (September 14, 2015 NMFS letter.)

The SWRCB recognized the above described facts in considering the public trust resources as part of its assessment of the Application. (Order, § 1.0 at p. 1 [acknowledging that Cal-Am has “applied significant resources to fishery conservation and habitat improvement programs”], § 2.0 at p. 4 [same], § 5.1 at p. 7 [same; and acknowledging that NMFS commented

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<sup>8</sup> Because this information is set forth in detail in the Application, which is part of the record in this matter, it is not detailed herein.

that habitat has improved since 2009 and that continued unauthorized diversions would be unlikely to cause jeopardy of the South-Central California Coast steelhead], § 5.1 at p. 8 [noting that: (a) fish habitat has been improved and expanded; (b) there are plans to undertake large additional fishery habitat improvements; (c) robust fish rescue and habitat restoration projects have occurred and will continue to occur; and (d) additional instream flows have been secured], § 5.1 at p. 11 [noting that NMFS and other environmental organizations supported the Application].) Further, the SWRCB included conditions in the Order to ensure the supervision and protection of public trust resources during the extended period of unauthorized diversions. (Order, § 5.1 at p. 10 [discussing how the annual fisheries report required by the Order will provide additional assurance that the extension will not cause undue harm to the fishery], ¶ 4 at pp. 24-25 [condition requiring Cal-Am to provide funding for the preparation of an annual steelhead fishery report], ¶ 5 at p. 25 [condition specifying that if Cal-Am does not implement specified conservation measures, the SWRCB may revisit the Order to determine whether to make further adjustments to protect public trust resources], ¶ 6 at p. 25 [condition specifying that if Cal-Am does not remove the Carmel River Dam and Sleepy Hollow Ford before September 30, 2017, the SWRCB may reopen the Order to make further adjustments to improve fish passage in the Carmel River or otherwise protect public trust resources].)

In arguing that the SWRCB failed to review impacts to, and protect, public trust resources, WRAMP and PTA ignore the substantial evidence in the record detailing Cal-Am's past actions, as well as the additional obligations imposed by the Order. If those additional obligations are determined in the future to be inadequate, the Order expressly states that the SWRCB may revisit the Order to determine whether to make further adjustments to protect public trust resources. (*See*, Order, p. 24.) In so doing, the SWRCB properly carried out its duty to consider impacts to public trust resources and protect public trust uses whenever feasible. "What is 'feasible,' however, is a matter for the Board to determine. [I]n determining whether it is 'feasible' to protect public trust values like fish and wildlife in a particular instance, the Board must determine whether protection of those values, or what level of protection, is 'consistent

with the public interest.” (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778.) The SWRCB’s review of Cal-Am’s compliance with the CDO, as well as its adoption of the Order, is fully consistent with its duty to protect public trust values so far as consistent with the public interest.

**V. CONCLUSION**

The petitions filed by WRAMP and PTA ignore the facts and the law, both of which support the SWRCB’s issuance of the Order. The SWRCB, which had significant discretion in determining whether to adjust the CDO’s compliance schedule, proceeded properly and fairly in assessing the Application and issuing the Order. WRAMP and PTA conveniently ignore the significant efforts of Cal-Am and the other Applicants to reduce unauthorized diversions from the Carmel River, and also ignore the significant new conditions in the Order that served as the consideration for the extension of the CDO. Further, the SWRCB has jurisdiction to revisit the matters in the CDO and the Order in the future should it be necessary. Therefore, issuance of the Order was proper, WRAMP and PTA were not prejudiced, and their petitions for reconsideration should be denied.

Dated: September 2, 2016

Respectfully Submitted,

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On Behalf of Applicants