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**CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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| In the Matter of Section 13267 Amended Order No. R3-2025-0031 of the California Regional Water Quality Control Board for the Central Coast Region (Geotracker ID: T10000023147) | PETITION FOR REVIEW AND REQUEST FOR STAY OF EFFECTIVE DATE OF SECTION 13267 SECOND AMENDED ORDER NO. R3-2025-0031<br><br>[WAT. CODE, §§ 13320, 13321; 23 C.C.R. §§ 2050, 2050.05, 2053] |

Pursuant to California Water Code section 13320 and California Code of Regulations, title 23, section 2050, Moss Landing Power Company LLC[1] and Vistra Corp. (collectively, "Vistra" or "Petitioners") hereby petition the State Water Resources Control Board ("State Board") to review and vacate the Section 13267 Second Amended Order No. R3-2025-0031 issued by Ryan E. Lodge, Executive Officer of the California Regional Water Quality Control Board for the Central Coast Region ("Regional Board"), on September 22, 2026.

Pursuant to section 13321 of the California Water Code and California Code of Regulations, title 23, section 2053, Vistra also requests the State Board stay the effective date of the Second Amended Order.

Pursuant to California Code of Regulations, title 23, sections 2050.5, subdivision (d), and 2053, subdivision (b), Vistra further requests that the State Board stay the Second Amended Order and hold this Petition in abeyance while Vistra seeks to resolve this matter with the Regional Board. Vistra is committed to working with the Regional Board to resolve its objections to the Second Amended Order and is engaging in ongoing discussions with the Regional Board. Vistra will notify the State Board when discussions conclude and advise as to whether the State Board should end the abeyance and proceed with its review or dismiss the petition.

Vistra also requests that the Regional Board prepare the administrative record in this matter.

## PETITION FOR REVIEW

### I. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF PETITIONERS

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[1] Petitioners dispute, and reserve all rights to challenge, that Moss Landing Power Company LLC is a proper party to the Second Amended Order.

## II. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE PETITION

The State Board is requested to review the Regional Board's action in issuing the Second Amended Order No. R3-2025-0031, in the form of a "concurrence" letter that "constitutes an amendment to the requirements of the [original Order]." A true and correct copy of the April 25, 2025, Original Order No. R3-2025-0031 is attached to this Petition as Exhibit D. On July 8, 2025, Vistra submitted a Work Plan to assess potential impacts to surface water under the Original Order. A true and correct copy of the July 2025 Work Plan is attached to this Petition as Exhibit E. On January 28, 2026, the Regional Board issued a letter rejecting the July 2025 Work Plan, providing comments, requesting an updated work plan, and purporting to amend Order No. R3-2025-0031. A true and correct copy of the Regional Board's January 28, 2026, letter is attached to this Petition as Exhibit F. On May 11, 2026, Vistra submitted a revised Work Plan to address the comments in the Regional Board's January 28, 2026, letter. A true and correct copy of the May 2026 Work Plan is attached to this Petition as Exhibit G. On September 22, 2026, the Regional Board issued a letter of "concurrence," in which it accepted the May 2026 Work Plan, which the Regional Board claimed "constitute[d] an amendment" to the Original Order ("the Second Amended Order"). A true and correct copy of the September 22, 2026, letter is attached to this Petition as Exhibit H.

## III. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT

The Regional Board acted on September 22, 2026, when it issued the letter purporting to amend the original Order, which this Petition refers to as the "Second Amended Order," though in fact the letter did not satisfy the requirements to properly constitute an amended order.

## IV. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER

As set forth in detail in the Statement of Points and Authorities (see Part VII, *infra*), the issuance of the Second Amended Order by the Regional Board was unlawful and improper because the burden of the Second Amended Order does not bear a reasonable relationship to the need and benefits of the reporting.

## V. THE MANNER IN WHICH PETITIONERS ARE AGGRIEVED

Vistra is aggrieved because the Second Amended Order obligates Vistra to take extensive actions to "inform the [Regional Board] about the extents, if any, of surface water impacts resulting from the [January 2025 fire]." (Ex. H at p. 3.) The amendment specifically recognizes that there may be no groundwater impacts as evidence to support the Regional Board's Order, and thus the (1) the Regional Board's revised work plan called for by Second Amended Order No. R3-2025-0031 is not supported by evidence and (2) the burdens of the Second Amended Order does not bear a reasonable relationship to the need and benefits of the work.

Second Amended Order No. R3-2025-0031 includes, among other things, requirements from the previous iterations of this Order that Vistra: (1) define a study area for surface materials sampling that encompasses a broader aerial deposition footprint consistent with Requirement 1.a of the original Order R3-2025-0031, including areas where cathode metals have allegedly been documented outside the Interagency Modeling and Atmospheric Assessment Center ("IMAAC") soot plume boundary used by the Work Plan, rather than limiting it to the IMAAC soot plume boundary, overlapping watershed areas, and downstream surface waters; (2) expand its surface water evaluation under Requirement 1.b to ensure watershed flow path and monitoring location analyses assess potential runoff impacts to Elkhorn Slough, Moro Cojo Slough, Bennett Slough, Moss Landing Harbor, the Pacific Ocean, and other affected water bodies, rather than limiting those analyses by the IMAAC boundary; (3) propose laboratory analyses equivalent to those required by Requirement 1.f of the original Order R3-2025-0031, rather than limiting testing to select battery-related and rack-related metals, conditionally analyzing polyaromatic hydrocarbons and dioxins and furans based on screening levels of certain metals, and using ecological and health-based screening criteria to limit analyte selection or reporting prior to delineation of impacts; (4) revise soil sampling methodologies to account for shallow deposition depths of approximately 2 to 5 millimeters and avoid dilution of fire-related materials; (5) analyze surface water samples for total metals, which is unfiltered and captures both dissolved and particulate metal concentration, rather than using 0.45-micron field filtration; and (6) resubmit a

revised Work Plan to Assess Potential Fire-Related Releases to Surface Water by November 23, 2026. (Ex. F at 2–4; Ex. H at 3.)

## VI. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD THAT PETITIONERS REQUEST

Vistra requests that the State Board accept this Petition and vacate the Second Amended Order. Vistra also seeks a stay of the effective dates of the Second Amended Order. Vistra further requests that the State Board stay the Second Amended Order and hold this Petition in abeyance while Vistra seeks to resolve this matter in discussions with the Regional Board. Vistra reserves its right to amend this Petition.

## VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION

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## I. Factual Background and Procedural History

Vistra Corp. is the indirect parent company of Moss Landing Energy Storage 1, LLC, the owner and operator of the Moss Landing 300-megawatt battery energy storage facility ("ML300") located at 7301 State Highway 1, Moss Landing, CA 95039. (Ex. A ¶ 4.) A fire occurred at the ML300 building on January 16, 2025. (*Ibid*.) Since the fire, Vistra has been committed to diligently investigating potential impacts to provide accurate and scientifically based information that will be useful to the community. (*Ibid*.) Vistra has fully cooperated with federal, state, and local agencies in addressing and investigating the potential impacts from the fire. (*Ibid*.) The United States Environmental Protection Agency ("USEPA") issued a Notice of Federal Response Action, asserting that the Moss Landing "site is within the jurisdiction of EPA and the EPA On-Scene Coordinator (OSC) is charged with coordinating, directing, and reviewing the work of responders to ensure compliance with the [National Contingency Plan (NCP), 40 CFR Part 300]." (*Id.* ¶ 5; Ex. J [Notice of Federal Response Action].) In coordination with various federal, state, and local agencies, Vistra continues engaging in community sampling, among other efforts, to investigate potential human health impacts from the fire. (Ex. B ¶ 5; Ex. C ¶ 4.)

On April 25, 2025, the Regional Board issued Original Order No. R3-2025-0031, which concerns the investigation of potential surface water quality impacts from the ML300 fire. (Ex. D at 5.) The Original Order directed Vistra to submit a "work plan to assess discharges and threats of discharges to surface water bodies that are within the area of aerial deposition of burn soot, ash, and/or other materials released during the January 16, 2025 fire and any subsequent flare ups." (*Ibid.*) Vistra filed a Petition for Review of Order No. R3-2025-0031 on May 27, 2025. (Ex. K.) On July 1, 2025, the State Water Resources Control Board acknowledged receipt of the petition and approved Vistra's request to hold the matter in abeyance until May 27, 2027, thereby preserving Vistra's administrative review rights while allowing the parties the opportunity to work toward resolution. (Ex. L.)

Accordingly, on July 8, 2025, Vistra submitted "Work Plan to Assess Potential Fire-Related Releases to Surface Water" pursuant to Order No. R3-2025-0031. (Ex. E.)

On January 28, 2026, the Regional Board rejected that Work Plan submitted in response to

Original Order No. R3-2025-0031, asserting that Vistra failed to satisfy requirements relating the area of study, analytes to be studied, soil sampling methodology, and surface water sampling methodology. (Ex. F at 2–4.) On February 27, 2026—Vistra filed a Petition for Review of amended Order No. R3-2025-0031. (Ex. M.) On February 28, 2026, the State Water Resources Control Board acknowledged receipt of the petition. (Ex. B ¶ 10.)

In response to this rejection, on May 11, 2026, Vistra submitted the "Work Plan to Assess Potential Fire-Related Releases to Surface Water Phase I – Watershed Evaluation," which included revisions to address the Regional Board's concerns. (Ex. G.)

On September 22, 2026, the Regional Board sent Vistra a letter titled "Concurrence with Work Plan to Assess Potential Fire-Related Releases to Surface Water Phase I – Watershed Evaluation." (Ex. H.) In that letter, the Regional Board stated that it "considers the Revised Work Plan complete" and that it "concurs with the proposed scope of work. (*Id.* at p. 2.) The Regional Board commanded Vistra to "submit a sampling work plan as described in Section 5 of the Revised Work Plan" by November 23, 2026. (*Id.*) The Regional Board stated that in its view the September 22, 2026, letter "constitutes an amendment" to the Original Order. (*Id.* at p. 3.) The Regional Board estimated the cost of compliance with the Second Amended Order by implementing the Revised Work Plan and submitting the required sampling work plan as "approximately $50,000." (*Ibid*.) And the Regional Board acknowledged that it does not know if there are any surface water impacts to monitor for, stating that the work would "collect information that will inform the [Regional Board] about the extents, *if any*, of surface water impacts" from the fire. (*Ibid.* (emphasis added).)

A more detailed recitation of the facts underlying this Petition are set forth in the original Petition filed May 27, 2025, as well as the second Petition, filed February 27, 2026. (See Exs. K and M.) For the purpose of brevity, the factual and legal contentions contained in these previous two Petitions are not repeated herein verbatim. However, the factual and legal contentions contained in those documents also form the basis of the instant Petition and are incorporated herein by reference. (*Ibid.*) All issues raised in the previous two Petitions are reserved, and Vistra reserves the right to supplement the instant Petition.

Vistra is open to continuing ongoing discussions with the Regional Board regarding Vistra's objections to and efforts to comply with the Second Amended Order. It is Vistra's hope that, through these discussions, Vistra's objections can be resolved in a mutually agreeable fashion. However, to preserve its rights, Vistra has commenced the instant proceeding. Pursuant to 23 C.C.R. section 2050.5, subdivision (d), Vistra also respectfully requests that the Regional Board agrees to hold this Petition in abeyance and that the State Board holds this Petition in abeyance while these attempts to reach an informal resolution remain ongoing.

## II. Legal Standard

Section 13267, subdivision (b)(1) of the Water Code requires that the Regional Board support its orders "with a written explanation with regard to the need for the [ordered action]" and "identify the evidence that supports requiring that person" to comply with the order. Before taking any action, "the Regional Board . . . must ensure that there is a factual and legal basis in the record for its decision and must indicate its reasoning and the factual basis for its decision to the affected parties." (*In the Matter of Project Alpha* (Cal. St. Wat. Res. Bd. Jan. 17, 1974) State Board Order No. WQ 74-1, 1974 WL 353662 *1, *2.)

In reviewing an order issued by a Regional Board, the State Board "[u]pon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, . . . may direct that the appropriate action be taken by the regional board, refer the matter to another state agency having jurisdiction, take the appropriate action itself, or take any combination of those actions." (Wat. Code, § 13320.) Further, the State Board has long affirmed that to uphold an action of a Regional Board, the challenged action must be supported by substantial evidence. (See, e.g., *In the Matter of Stinnes-Western Chemical Corp.* (Cal. St. Wat. Res. Bd. Sept. 18, 1986) State Board Order No. WQ 86-16, 1986 WL 25523 *1, *6; *In the Matter of Exxon Co., U.S.A.* (Cal. St. Wat. Res. Bd. Aug. 22, 1985) State Board Order No. WQ 85-7, 1985 WL 20026 *1, *6.) Under this standard of review, the State Board undertakes "an examination of the record to establish the existence or nonexistence of substantial evidence"—that is "credible and reasonable evidence"—"to support the action taken." (*Exxon Co.*, *supra*, at pp. *5–6 [disputed tax records alone were not substantial evidence

that petitioner was prior owner of underground storage tanks].) Substantial evidence exists only if there is a "reasonable factual basis" supporting the challenged order. (*Stinnes-Western Chemical Corp.*, *supra*, at p. *6.) The State Board is not limited to the record before the Regional Board and can consider "'any other relevant evidence' which it wishes in reviewing the order." (*Exxon Co.*, *supra*, at p. *6 [quoting Wat. Code, § 13320, subd. (b)].)

## III. Legal Argument

### A. The Regional Board's Attempt to Amend the Original Order by Sending the September 22, 2026, Letter Was Procedurally Improper.

The Regional Board purported to amend the original Order via the September 22 letter, which provides that the request for a sampling work plan "constitutes an amendment to the requirements" of the original Order. (Ex. H at p. 3.) This attempt to amend a formal investigative order of the Regional Board through a simple letter is procedurally improper and invalid. The letter cites no authority permitting the Regional Board to amend a formal investigative order in this fashion.

The deficiencies of the September 22 letter are apparent from a comparison to the original Order. The original Order, labelled an "Investigative Order," make a series of formal factual findings, including those the Regional Board is required to make to undertake an investigative action, such as a finding that the "burdens . . . of these reports bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports." (See Ex. D; see Wat. Code, § 13267, subd. (b)(1).) Moreover, the original Order contains information about Petitioner's appeal rights. (Ex. D at p. 5.)

The September 22 letter has just two pages of substance and contains none of these elements required to properly issue an order, yet purports to order Vistra to undertake burdensome activities, while continuing to require and expand unnecessary measures from the Original Order. And the omission of any appeal information could have deprived Vistra of its statutory appeal rights.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." (*Morton v. Ruiz* (1974) 415 U.S. 199, 235.) And, "[t]o meet the requirement of fairness, the Regional Board, before acting on . . . proposed orders, must ensure that there is a factual and legal basis in the record for its decision and must indicate its reasoning and the factual basis for its decision to the affected parties." (*In the Matter of Project Alpha*, State Board Order No. WQ 74-1, 1974 WL

353662, at *2 (Cal. St. Wat. Res. Bd. Jan. 17, 1974).) The Regional Board's attempt to amend its Original Order via the September 22 letter entirely fails these basic prerequisites. The September 22 letter was therefore procedurally inadequate, and the Regional Board's action embodied in that letter should be vacated on this basis alone.

### B. Even If the September 22, 2026 Letter Constitutes an Amended Order, the Regional Board Failed to Comply with Section 13267, and Substantial Evidence Does Not Support the Second Amended Order's Requirements.

The Regional Board's "Amended Order"[2] is also improper because there is no factual or legal basis in the record for requiring Vistra to perform the ordered sampling. Vistra has never denied that sampling is warranted and has fully cooperated with federal, state, and local agencies in addressing and investigating the potential impacts from the fire. (See Ex. A ¶ 4.) Vistra's objection is to the unjustified and overly burdensome scope that the Second Amended Order imposes, which cannot be justified. Ultimately, the Regional Board is improperly ordering Vistra to conduct a forensic study of all potential impacts from Vistra's Moss Landing facility and to develop a Watershed Sampling Work Plan for a highly complex, multidisciplinary, and extremely broad watershed-scale study, without a factual basis. (See Exs. D, E, F.) The Regional Board attempts to disguise these requirements as an investigation of potential impacts from the ML300 fire, but they are disconnected from the investigative purpose asserted in the Second Amended Order.

The Regional Board did not satisfy Section 13267's requirements that it provide "a written explanation with regard to the need for" the Second Amended Order or that it "identify the evidence that supports requiring" Vistra to comply with the Second Amended Order. (Wat. Code, § 13267, subd. (b)(1).) Indeed, although section 13267 "requires the burden of conducting site investigations and producing reports to be reasonable in light of the benefits to be obtained" (*Sweeney v. Cal. Reg'l Water Quality Control Bd.* (2021) 61 Cal.App.5th 1093, 1115 [hereafter *Sweeney*]), the Second Amended Order is not supported by substantial evidence. The letter purporting to be an amended order proclaims the entirely unsupported and unreasoned conclusion that the burdens of the Regional Board's

[2] Vistra does not concede that the September 22 letter constitutes a properly amended order and does not waive any argument concerning its validity; solely for ease of discussion, it is referred to herein as an "Amended Order."

requirements "bear[] a reasonable relationship to their need." Substantial evidence also does not justify the Second Amended Order's scope. Sampling for the extensive list of required analytes, including compounds that aren't meaningful constituents of the batteries at issue or that are naturally occurring in the area, will only yield unhelpful and confusing data that will not aid in "attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored." (State Water Resources Board Resolution No. 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304, § III.G ["Resolution No. 92-94"].)

**1. No Factual Basis Supports a "Need" for the Scope of the Second Amended Order.**

Though Vistra submitted a revised work plan, Vistra maintains that no factual basis supports a need for the scope of the revised work plan the Regional Board required. The Regional Board fails to explain the "need" for, nor is there a reasonable factual basis for, the *scope* of the Second Amended Order's requirements, which per State Board policy, must "promote[] attainment of . . . background water quality." (Resolution No. 92-49 § III.G.) Pursuant to State Board Resolution No. 92-49, the "need" justifying an investigative order must relate to a "discharge or threatened discharge." (See *ibid.*) Specifically, regional boards are obligated to "[r]equire one or more persons identified as a discharger associated with *a discharge or threatened discharge* . . . to undertake an investigation," "to determine if an unauthorized hazardous substance discharge has occurred," and to "[e]nsure that dischargers are required to clean up and abate the effects of discharges in a manner that promotes attainment of . . . background water quality"—meaning "the water quality that existed before *the* discharge." (Resolution No. 92-49, ¶¶ 4–5, §§ I.C, III.G [emphasis added].) The "discharge" at issue in the Second Amended Order is the "***discharges*** of waste" "originating at or near the January 16, 2025 fire" through air transport, stormwater runoff, and infiltration to soil and groundwater at and near building ML 300. (Ex. H at 2-3 [emphasis added].) The ultimate purpose of the investigatory orders must be to "[e]nsure that dischargers are required to clean up and abate the effects of discharges in a manner that promotes attainment of" the "background water quality" that existed before that discharge—the January 16, 2025

fire. (Resolution No. 92-49 §§ II.A.3, III.G .) As such, the Second Amended Order must explain and support with evidence the need to conduct an investigation of the impacts of the ML300 fire to determine the "background water quality" that existed prior to the discharge; a necessary precursor is an understanding of what conditions existed immediately before the January 16, 2025.

The "evidence" the Regional Board cites in the Second Amended Order fails to connect the ordered sampling and revised work-plan development, or their timelines, with data regarding the potential impacts from the ML300 fire. The totality of the "evidence" included in this Second Amended Order included general references to prior agency correspondence. (Ex. H at 2–3). None of this evidence justifies the need for (let alone explains) requiring Vistra to conduct sampling on the overbroad scope set forth in the Second Amended Order. The cited materials do not demonstrate why these broadened analytical and geographic requirements are necessary to evaluate potential impacts from the ML300 fire or justify the scope or timeline imposed by the Regional Board. This alone warrants setting aside the Second Amended Order. (See *Project Alpha*, *supra*, 1974 WL 353662 at pp. *2–3 [setting aside Regional Board action because "[t]here were no findings or indication for the record as to the reasoning or factual basis for the [Regional Board's] decision"].)

In the Original and First Amended orders, the Regional Board made a number of additional requests. Vistra's Petition filed February 27, 2026, addressed the many reasons why those requests were unsupported. The May 11, 2026 work plan did not incorporate those unsupported requests. Because the Regional Board accepted that work plan in its Second Amended Order, Vistra understands the Regional Board to have abandoned the unsupported requests. Additionally, the Regional Board has agreed to remove certain unsupported requests. To the extent the Regional Board believes the Second Amended Order continues to include the following requests, Vistra maintains its previously stated objections that they are unsupported and thus unlawful:

- Previous iterations of this Order commanded preparation of a sampling work plan and sampling on a scope that extended beyond the IMAAC soot plume boundary and required modeling and mass-loading calculations that are unreasonable and extremely burdensome relative to any demonstrated benefit. (See Ex. F at 2–3.) Referencing only

one study and no site-specific data as justification for expanding the study area, the Regional Board rejected Vistra's delineation of the study area because it relied on the IMAAC modeled soot boundary and included overlapping watershed areas and downstream surface water bodies. (*Ibid.*) However, water bodies within this boundary have already been identified, and the effort to calculate mass loading from aerial deposition is disproportionate to any benefit because potential impacts can be evaluated through targeted sampling of potentially impacted media. (Ex. C ¶ 5.)

- Previously, the Regional Board objected to Vistra's proposed analytes as too narrow, but they were properly focused on battery-related metals and related building materials and proposed additional analyses only if screening thresholds were exceeded. (See Ex. F at 3; Ex. C ¶ 9.) Vistra's approach was appropriately tailored to materials known to be present in ML300 batteries or potentially present in associated building components. (Ex. C ¶ 9.) The use of ecological and health-based screening levels is also a reasonable and useful approach for determining whether additional sampling is warranted and avoids speculative over-testing. (*Ibid*.) While the Second Amended Order approved a work plan that does not propose any sampling or analysis, Vistra preserves this objection should the Regional Board believe the Second Amended order continues to impose these requests.
- Previously, the Regional Board also questioned whether Vistra's soil sampling methodology adequately evaluates shallow deposition depths identified in a referenced study and rejected Vistra's proposal to field-filter surface water samples at 0.45 microns, instead recommending analysis for total metals, unfiltered. But Vistra's soil sampling approach would adequately evaluate any potential impacts from the fire without significant dilution. (Ex. C ¶¶ 6–8.) Vistra's proposed sampling approach was consistent with standard environmental investigation practices. (*Id.* at ¶ 6.) Measuring metal concentrations in a 2–5 mm surface soil interval, as proposed by the Regional Boad, is inconsistent with standard methods for evaluating environmental impacts. (See

*ibid.*) Further, Vistra's proposed use of human-health and ecological risk assessments is not based on concentrations in such a narrowly defined surficial layer. (*Id.* at ¶¶ 6-8.) Vistra's consultant, Terraphase, is unaware of any case in which environmental soil characterization or the need for a remedial response were determined based on mm-scale soil samples. (*Ibid.*) It is unclear what meaningful information the sampling ordered by the Regional Board would provide or what actionable next steps it would support. (*Ibid.*) Sampling such thin layers of soil, precisely and consistently, is extremely difficult, if not impossible, and disproportional to any benefit. (See *id.* ¶ 6.)

- Previously, the Regional Board required total metals analysis, which is overbroad and unnecessary to accomplish the objective of assessing potential impacts from the fire. Measuring total metals in surface water is generally inappropriate because total metal concentrations are driven almost entirely by turbidity, or total suspended solids (TSS). (Ex C ¶ 7.) TSS can vary widely as a function of water depth, currents, tides and tidal stage, wind, and other hydrodynamic conditions. (*Ibid.*) As a result, measured total metal concentrations largely reflect the amount of sediment that happens to be physically disturbed near the sampling location at the time of sampling. Consequently, total metal concentrations will be higher in turbid water than in clear water. (*Ibid.*) This information is not representative of dissolved metals in the water column. (*Ibid.*) Characterizing surface water is best done using filtered samples because filtration isolates the dissolved fraction, which is typically the most environmentally relevant, chemically stable, and comparable across space and time. (*Id.* at ¶ 8.) Dissolved metal concentrations are more consistent over time, less sensitive to short-term physical disturbances (e.g., wind, boat traffic, runoff), and easier to compare between locations, seasons, and studies. (*Ibid.*) This is particularly important for trend analysis and distinguishing between impacts and background conditions. (*Ibid.*) Accordingly, this request is overly broad.

Water Code section 13267 requires that the burden, including costs, of required reports bears a

reasonable relationship to the need for and benefits of those reports. (Wat. Code, § 13267, subd. (b)(1); *Sweeney,* 61 Cal.App.5th at p. 1115.) The Regional Board's expansion of the study area beyond the plume boundary, its prior insistence on additional modeling and mass-loading calculations, and its prior rejection of targeted, screening-based analytical approaches would impose substantial burdens without evidence demonstrating commensurate need or benefit. Because the Second Amended Order is not supported by substantial evidence and does not satisfy section 13267's reasonable-relationship requirement, it must be vacated.

### C. The Burdens of the Second Amended Order Do Not Bear a Reasonable Relationship to its Needs or Benefits.

The Second Amended Order is also improper because the burden it imposes is not reasonably related to the benefits of ordering an overly broad work plan that cannot identify potential impacts from the fire. The Water Code requires that "[t]he burden, including costs, of [any reports required under section 13267] shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." (Wat. Code, § 13267, subd. (b)(1); see also *Sweeney,* 61 Cal.App.5th at p. 1115 ["burden of conducting site investigations and producing reports" must "be reasonable in light of the benefits to be obtained"].) The Second Amended Order is unduly burdensome because it is part of a process under which the Regional Board will later command overly inclusive sampling that is costly and likely to cause confusion for the public, which might be disturbed by seasonal weather patterns—and will not yield significant benefits beyond the sampling Vistra is already performing or has proposed in its submitted work plans. (See Ex. C ¶ 9.)

The Regional Board assumes the Second Amended Order meets the Water Code's requirement, simply reciting that "[t]he burden, including costs, of [these reports bear] a reasonable relationship to the need for the report[s] and the benefits to be obtained." (Ex. H at p. 3.) But that conclusory assertion does not take into account the actual burdens imposed by the Second Amended Order. As previously stated, the Regional Board's Second Amended Order would require Vistra to carry out burdensome sampling on an unsupportable scope. (Ex. C ¶ 9; see Ex. K.) The Regional Board provides no explanation or justification for the very costly scope of the Second Amended Order, whose complexity will require a level of effort incommensurate with the objective stated in the Second Amended Order.

(See, e.g., Ex. C ¶ 5.)

The Second Amended Order is unduly burdensome because it directs that a plan be prepared for overly inclusive sampling that is costly and likely to cause confusion for the public—and will not yield significant benefits. As discussed above, a map of the soot plume has already been developed, so there is no need to perform a new and costly watershed analysis, when the water bodies have already been identified as being within the soot plume. (Ex. C ¶ 5.) And the calculation of mass loading from aerial deposition—if the Regional Board continues to require it—is unnecessary because the potential impacts from the fire can instead be determined through sampling of potentially impacted media. (*Ibid*.) The significant expansion of the soil sampling and surface water sampling methodologies is also not reasonably tailored to the purposed objectives. (*Id*. at ¶ 6.) Therefore, the burdens imposed by the Second Amended Order are neither necessary nor reasonable considering the needs of the Second Amended Order.

The Regional Board's Second Amended Order imposes significant financial costs that are disproportional to any purported benefits. The realistic cost of preparing a professional, highly technical, and well-thought-out work plan for the required scope of work in the Original Order R3-2025-0031 is approximately $50,000 to $75,000, and the cost of implementing a study with the scope required by the Original Order No. R3-2025-0031 can readily exceed $250,000. (Ex. C ¶ 10.)

The Second Amended Order also orders a timeline that likely conflicts with the upcoming historic El Niño rainy season, for which the Governor of California has declared a state of emergency. *See* "Governor Newsom proclaims state of emergency to bolster statewide El Nino preparedness, protect California," GOVERNOR GAVIN NEWSOM (Sept. 21, 2026), accessible at https://www.gov.ca.gov/2026/09/21/governor-newsom-proclaims-state-of-emergency-to-bolster-statewide-el-nino-preparedness-protect-california/. This timing is entirely due to delays and decisions by the Regional Board. Vistra submitted an initial work plan under this order on July 8, 2025. (See Ex. E.) The Regional Board did not provide comments on that plan until January 28, 2026—already a year after the Moss Landing fire. (See Ex. F.) Vistra submitted a revised work plan under the Regional Board's direction on May 11, 2026. (See Ex. G.) The Regional Board waited more than four months

before simply approving that work plan in a two-page letter on September 22, 2026. (See Ex. H.) The letter orders Vistra to submit a work plan for sampling in November, 2026, and upon approval of that work plan the Regional Board will likely order it be implemented immediately. If the Regional Board orders sampling to begin during the upcoming historic rainy season, it will be because the Regional Board has not moved quickly enough to enable sampling *before* that period.

Sampling during the forecast winter weather conditions, particularly during periods of heavy rainfall, will present both safety and data quality concerns. (Ex. C ¶ 11.) Heavy rainfall and storm conditions will make field activities more difficult and potentially unsafe, while surface-water samples collected during active rainfall will be influenced by ongoing stormwater inputs. (*Ibid*.) Therefore, the timing and delays imposed by the Regional Board will reduce the feasibility of safely completing the work and will limit the usefulness and representativeness of the resulting data. (*Ibid*.)

Finally, the Second Amended Order fails to address the non-economic burdens it imposes. For example, there is significant risk of public confusion and the potential for alarm, due to sampling for constituents that are obviously unrelated to the actual impacts of the fire. (Ex. C ¶ 9.) Further, there could be elevated levels of ubiquitous or unrelated constituents that cannot be traced to the fire but that nonetheless could cause concern for the community. (*Ibid.*)

Thus, not only would the testing be duplicative and financially costly, it would not yield readily interpretable data relevant or necessary to the characterization of background water quality or identify impacts from the fire, and it could cause confusion and alarm in the public. (Ex. C ¶ 9) The burden of the process (of which the Second Amended Order is a part) under which the Regional Board will later command overly inclusive sampling that is costly and likely to cause confusion for the public, which might be disturbed by seasonal weather patterns—and will not yield significant benefits beyond the sampling Vistra is already performing or has proposed in its submitted work plans—far outweighs the minimal benefit of testing for unnecessary or confounding substances.

Considering the circumstances, there is no reasonable relationship between the burdens imposed by the Second Amended Order, on the one hand, and any need for and benefit of the Second Amended Order, on the other. Instead, the Second Amended Order fall woefully short of this standard.

There is no need for the overly inclusive sampling commanded by the Second Amended Order—and no basis to require Vistra to perform it. The Second Amended Order therefore cannot be sustained and must be vacated.

## IV. Conclusion

For the foregoing reasons, the Second Amended Order should be vacated. Vistra further requests that the State Board stay the Second Amended Order and hold this Petition in abeyance while Vistra seeks to resolve this matter with the Regional Board.

## VIII. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGER, IF NOT THE PETITIONERS

A true and complete copy of this Petition was sent via email to the Regional Board at Ryan.Lodge@waterboards.ca.gov. Further, a courtesy copy of this Petition was sent electronically to the attorney for the Regional Board at Sophie.Froelich@waterboards.ca.gov.

## IX. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN EXPLANATION OF WHY THE PETITIONERS WERE NOT REQUIRED OR WAS UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE THE REGIONAL BOARD

Through various correspondences since the Original Orders were issued in 2025, and through ongoing discussions, Vistra has informed the Regional Board of the substantive issues and objections raised in this Petition and that there is no factual and technical basis to support the Second Amended Order. (Ex. A ¶¶ 6–8; Exs. K, N.) The Regional Board has responded to Vistra through various letters, among other communications, dismissing these concerns. (See Ex. A ¶¶ 6–8; see also Ex. K.)

## X. A COPY OF A REQUEST TO THE REGIONAL BOARD FOR PREPARATION OF THE REGIONAL BOARD RECORD, INCLUDING A COPY OF THE TAPE RECORDING OF THE REGIONAL BOARD ACTION OR A TRANSCRIPT, IF AVAILABLE

Vistra also requests that the Regional Board prepare the administrative record in this matter. A copy of the request is attached as Exhibit O.

## REQUEST FOR STAY

Second Amended Order No. R3-2025-0031 requires Vistra to submit a sampling work plan by November 23, 2026. (Ex. H at p. 3.) Pursuant to section 13321 of the California Water Code and 23 C.C.R. section 2053, Vistra respectfully requests that the State Board stay the effective date of the Second Amended Order pending resolution of Vistra's Petition.

As explained below, there will be substantial harm to Vistra if the stay is not granted, there will not be substantial harm to other interested persons or the public if a stay is granted, and there are substantial questions of fact or law regarding the disputed action. This request for a stay is supported by a declaration, made under penalty of perjury, by Abbey Hudson (counsel for Vistra), who has knowledge of the relevant facts. (See Ex. B.)

### I. THERE WILL BE SUBSTANTIAL HARM TO THE PETITIONERS OR TO THE PUBLIC INTEREST IF A STAY IS NOT GRANTED

If a stay of the Second Amended Order is not granted, Vistra will suffer substantial harm in the time that will be required to resolve the Petition. (See *In the Matter of Dep't of the Navy* (Cal. St. Wat. Res. Bd. Oct. 19, 2009) State Board Order No. WQ 2009-13, 2009 WL 6527514 *1, *3.)

Here, the Second Amended Order imposes significant, immediate, and costly obligations on Vistra. Most notably, and as Vistra has communicated to the Regional Board throughout various correspondences, overly broad and expansive sampling will yield unhelpful and confusing data that will not aid in "attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored." (See Resolution No. 92-49; Ex. B ¶ 7; Ex. A ¶¶ 6–8.) As discussed above, the requirements under the Second Amended Order are substantial, the costs of compliance are significant, and the timelines are impractical.

As explained above, compliance with these various requirements will impose a significant burden on Vistra, including costs, resources, and time. (See Ex. C ¶ 10.) And because of the short timeline imposed by the Regional Board, without a stay, there is every chance that Vistra will have to bear this burden even if Vistra's petition is ultimately granted by the State Board. (See *ibid*.) Further, Vistra must comply with the Second Amended Order by the specified due dates or face a fine of up to $1,000 for each day the work plans are not received by the Regional Board. (Ex. H at p. 3.) Thus,

Vistra will face substantial harm if a stay is not granted. (See Ex. B.)

## II. THERE WILL BE NO SUBSTANTIAL HARM TO OTHER INTERESTED PERSONS AND TO THE PUBLIC INTEREST IF A STAY IS GRANTED

There will be no substantial harm to other interested persons or to the public interest if a stay of the Second Amended Order is granted. (Ex. B ¶ 6.) As discussed above, the requirements imposed by the Second Amended Order provide minimal benefit because they are overly inclusive. They are not supported by substantial evidence, are costly, and would not effectively achieve the objective of accurately assessing any potential impacts of the ML300 fire.

Additional time would allow for proper coordination between Vistra and the Regional Board to maximize the usefulness of any existing testing and to avoid imposing additional and unnecessary burdens on all parties. Accordingly, there will be no substantial harm to the public interest if a stay is granted. (Ex. B ¶ 6.)

## III. THERE ARE SUBSTANTIAL QUESTIONS OF FACT OR LAW REGARDING THE DISPUTED ACTION

There are substantial questions of fact and law regarding the Second Amended Order, as outlined in Part IV and Part VII of the Petition, *supra*. (Ex. B ¶ 7.) The Second Amended Order admits significant factual questions, including:

(1) whether the Regional Board's order is supported by substantial evidence; and

(2) whether the burden of the reporting required by the Second Amended Order bears a reasonable relationship to the need and benefits of the reporting.

## Conclusion

For the foregoing reasons, the State Board should stay the effective date of the Second Amended Order, pending the resolution of this Petition.

DATED: October 22, 2026

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Abbey Hudson*
Abbey Hudson

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