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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of:

THE CITY OF SAN JUAN
CAPISTRANO

FOR REVIEW OF ACTION BY THE
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION, IN AMENDING
ORDER NO. R9-2013-0001 BY
ADOPTING ORDER NO. R9-2015-0100
(NPDES NO. CAS0109266)

**RESPONSE TO PETITIONS FOR
REVIEW**

[SWRCB/OCC File No. A-2456(k)]

[Water Code § 13320(a); Cal. Code Regs., tit.
23, § 2050 *et seq.*]

SHAWN HAGERTY
J.G. ANDRE MONETTE
REBECCA ANDREWS
655 West Broadway, 15th Floor
San Diego, CA 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118
Attorneys for Petitioner:
City of San Juan Capistrano, California

I.

INTRODUCTION

The City of San Juan Capistrano, California (“City”) respectfully submits this Response to Petitions for Review of the Regional Water Quality Control Board, San Diego Region’s (“Regional Board”) action adopting Order No. R9-2015-0100 (NPDES No. CAS0109266) (“Final Permit” or “Permit”), which amended Order No. R9-2013-0001 (“Initial Permit”), as amended by Order No. R9-2015-0001 (“Amended Permit”). This Response focuses on two issues that are legally and factually related to the present proceeding: first, procedural and substantive issues arising from San Diego Coastkeeper and Coastal Environmental Rights Foundation’s (“Environmental Petitioners”) joint petition for review of the Final Permit (SWRCB / OCC File No. A-2456(a)), and second, issues arising from the removal from abeyance of petitions challenging the Final Permit, but not petitions challenging the Initial Permit and Amended Permit.

The City is a municipal corporation organized pursuant to California law and the California Constitution. The City owns and operates a large municipal separate storm sewer system (“MS4”) within the Regional Board’s jurisdiction and as such is subject to regulation under the Permit. At all times mentioned herein, the City has acted pursuant to applicable legal requirements, and with great concern for the impacts that discharges from its MS4 may have on surrounding surface waters, and the environment in general.

II.

BACKGROUND

The City is a Permittee under the Final Permit, and enrolled after the adoption of the Amended Permit, together with other cities in Orange County (“Orange County Permittees”).¹ The City is also a Petitioner in the present case (SWRCB/OCC File No. A-2456(k)).

On May 8, 2013, the Regional Board adopted the Initial Permit by way of Order No. R9-

¹ The Orange County Permittees are the City of Aliso Viejo, City of Dana Point, City of Laguna Beach, City of Laguna Hills, City of Laguna Niguel, City of Laguna Woods, City of Mission Viejo, City of Rancho Santa Margarita, City of San Clemente, City of San Juan Capistrano, County of Orange and the Orange County Flood Control District. Pursuant to a Water Code section 13228 designation agreement between the San Diego and Santa Ana Regional Boards, MS4 discharges within the San Diego Regional Board’s jurisdiction from the City of Lake Forest will be regulated by the Santa Ana Regional Board after NPDES Permit No. CAS 618030 is reissued.

1 2013-0001. The Final Permit governs the large municipal separate storm sewer system (“MS4”)
2 discharges in San Diego County, South Riverside County and South Orange County. The Initial
3 Permit, however, only applied to the San Diego County permittees.² The City and other Orange
4 County Permittees were not yet enrolled in the Permit and were still subject to an individual
5 NPDES permit, Order R9-2009-0002 (“2009 Permit”) which was applicable only to the Orange
6 County Permittees.

7 On May 20, 2014, the Orange County Permittees filed a Report of Waste Discharge,
8 pursuant to 40 C.F.R. § 122.21 and Water Code § 13260, as the 2009 Permit was set to expire on
9 or about December 16, 2014. The Regional Board did not consider the Report of Waste
10 Discharge and made only minor changes to the Amended Permit when it enrolled the City and
11 other Orange County Permittees.

12 On November 18, 2015, the Regional Board amended the Amended Permit to enroll the
13 County of Riverside Permittees³ and to add, among other provisions, Provision B.3.c, the
14 “Prohibitions and Limitations Compliance Option” (referred to in this Response as the
15 “Alternative Compliance Option”). The Alternative Compliance Option allows permittees the
16 option to use the implementation of the Water Quality Improvement Plan to demonstrate
17 compliance with the requirements of Provisions A.1.a [prohibition on discharges from MS4s in a
18 manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in
19 receiving waters], A.1.c [subjecting discharges from MS4s to the waste discharge prohibitions in
20 the Basin Plan], A.1.d [prohibition on discharges from MS4s to ASBS], A.2.a [prohibition on
21 discharges from MS4s causing or contributing to the violation of water quality standards in
22 receiving waters], and A.3.b [requiring compliance with certain WQBELs established for
23 TMDLs]. The City filed a petition expressing its support for alternative compliance and seeking
24 inclusion of the time period during development of a Water Quality Improvement Plan (“WQIP”)

25 _____
26 ² The San Diego County Permittees are the cities of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon,
27 Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San
28 Marcos, Santee, Solana Beach, and Vista, the County of San Diego, the San Diego County Regional Airport
Authority, and San Diego Unified Port District.

³ The Riverside County Permittees are the City of Murrieta, City of Temecula, City of Wildomar, County of
Riverside, and Riverside County Flood Control and Water Conservation District.

1 within the Alternative Compliance Option and challenging the Regional Board’s lack of authority
2 to issue a single Permit to three geographically, politically, and environmentally distinct regions.
3 (SWRCB/OCC File No. A-2456(k).) This petition is currently active.

4 This Response addresses two procedural issues raised by petitions challenging the
5 Regional Board’s actions. First, because petitions challenging the Initial Permit and Amended
6 Permit remain in abeyance but are factually and legally related to the petitions before this Board,
7 due process requires that the Board’s decision does not resolve, moot, or dismiss issues raised in
8 petitions currently held in abeyance without proper notice and an opportunity to submit
9 information and comments. Second, Environmental Petitioners’ lack standing to challenge the
10 Permit’s Alternative Compliance Option as applied to the City and Orange County Permittees
11 because they only challenge its application to San Diego Permittees. Environmental Petitioners
12 have not asserted any injury resulting from the application of the Alternative Compliance Option
13 to the City; they have not traced any injury suffered in San Diego County to Orange County
14 Permittees, and they cannot redress their alleged injuries by eliminating the Alternative
15 Compliance Option from the City.

16 This Response also addresses three substantive issues raised by the petitions. First, even
17 if Environmental Petitioners have standing to challenge the application of the Alternative
18 Compliance Option to Orange County Permittees, their petition does not raise any such challenge.
19 Second, the absence of such a challenge illuminates the Regional Board’s lack of authority to
20 enroll the City and Orange County Permittees in a permit written for San Diego County
21 Permittees. Finally, the Alternative Compliance Option does not violate the Clean Water Act or
22 Order WQ 2015-0075.

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III.

RESPONSE

A. Response to Procedural Issues

The City responds to two procedural issues raised by this Board’s consideration of the petitions. First, due process prohibits the Board from resolving, mooted or dismissing issues raised in petitions currently held in abeyance without providing notice and an opportunity to submit information and comments. Second, Environmental Petitioners lack standing to challenge the Permit’s Alternative Compliance Option as applied to the City and Orange County Permittees because they only challenge the Alternative Compliance Option’s application to San Diego Permittees.

1. **Due Process Requires Notice Prior to Addressing Issues in Petitions Held In Abeyance**

Pursuant to California Code of Regulations, title 23, section 2054, this Board activated the City’s Petition, which had been held in abeyance, when it accepted 11 other petitions, on the basis that the City’s Petition is legally and factually related to the other petitions challenging the Final Permit. In addition to being related to the other 11 petitions challenging the Final Permit, the City’s Petition is legally and factually related to those petitions challenging the Initial Permit and Amended Permit. It appears, however, that this Board did not activate the petitions challenging the Initial Permit or Amended Permit and that the issues presented in those petitions are not before the Board at this time and will not be considered in the present proceedings without notice to the City.

Due process requires adequate notice and an opportunity to respond.⁴ Due process requirements are applicable to state agency decision making and are foundational requirements of fair state administration.⁵ Legal doctrines of issue preclusion⁶ and exhaustion of administrative

⁴ U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a); Cal. Code Regs., tit. 23, § 2055 [requiring notice and opportunity to be heard on issues taken up on Board’s own motion].

⁵ See *Morongo Band of Indians v. State Water Res. Ctrl. Bd.* (2009) 45 Cal.4th 731, 738.

⁶ See *Taylor v. Hawkinson* (1957) 47 Cal.2d 893, 896-897.

1 remedies⁷ require the Board to provide adequate notice and an opportunity to respond to the
2 issues the Board will decide.⁸ The Board therefore cannot consider and resolve, moot, or dismiss
3 issues raised in petitions currently held in abeyance, before providing all affected persons known
4 to the Board with notice and an opportunity to submit information and comments.⁹

5 **2. Environmental Petitioners Lack Standing to Challenge the Permit As Applied**
6 **to the City**

7 A petitioner must have standing as an “aggrieved party” to assert claims before this
8 Board.¹⁰ “One is considered ‘aggrieved’ whose rights or interests are injuriously affected” by a
9 decision.¹¹ To demonstrate standing, a petitioner must meet three requirements: (1) suffer injury
10 in fact; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be
11 redressable by the requested remedy.¹² Environmental Petitioners lack standing to challenge the
12 Permit’s Alternative Compliance Option as applied to the City because they have not
13 demonstrated any actual injury and the alleged injuries cannot be traced to the application of the
14 Alternative Compliance Option to the City or be redressed by eliminating the Alternative
15 Compliance Option.

16 **a. Environmental Petitioners Do Not Allege an Injury as to the City or**
17 **Orange County Permittees**

18 An “injury in fact” is an “invasion of a legally protected interest which is (a) concrete and
19 particularized ... and (b) actual or imminent, not conjectural or hypothetical.”¹³ The injury in fact
20 requirement “helps to ensure that the plaintiff has a ‘personal stake in the outcome of the
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24 ⁷ *Schutte & Koerting, Inc. v. Regional Water Quality Ctrl. Bd.* (2007) 158 Cal.App.4th 1373, 1385 [“the
25 requirement of exhaustion is a jurisdictional prerequisite, not a matter of judicial discretion”].

26 ⁸ See also Cal. Code Regs., tit. 23, § 2055.

27 ⁹ *Ibid.*

28 ¹⁰ Water Code, § 13320(a); *El Dorado Irrig. Dist. v. State Water Res. Ctrl. Bd.* (2006) 142 Cal.App.4th 937,
977.

¹¹ *El Dorado Irrig. Dist., supra*, 142 Cal.App.4th at p. 977.

¹² *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560.

¹³ *Ibid.*

1 controversy.”¹⁴ Where an organization challenges a government decision, the party seeking
2 review must be “among the injured” and allege injury to a particular interest.¹⁵

3 Environmental Petitioners lack standing to challenge the Alternative Compliance Option
4 as to the City, in part, because they do not allege an injury to their organizational interests
5 occurring in the City or Orange County waters. Environmental Petitioners’ state their
6 organizational interest as “a direct interest in protecting the quality of San Diego County’s aquatic
7 health and resources, including San Diego Bay, the San Diego River, the Pacific Ocean and other
8 San Diego area waters.”¹⁶ Their members “live and/or recreate in and around the San Diego area
9 and their alleged interests are limited entirely to San Diego waters.”¹⁷

10 The two alleged injuries occurring to Environmental Petitioners’ interests are likewise
11 limited to San Diego County and the San Diego County Permittees. They are that:

12 (1) “bacteria, metals, and other pollutants” are discharged “at unsafe levels to rivers, lakes,
13 and beaches in San Diego County” which has damaging effects on human health, aquatic
ecosystems, aquatic animals, and plant life; and

14 (2) “San Diego County’s high rate of urbanization and persistent water quality problems
15 ... exacerbate[] problems of stormwater volume, rate, and pollutant loading” that violate
water quality standards.¹⁸

16 Nowhere in the Petition or supporting memorandum do Environmental Petitioners allege
17 an interest in or injury occurring in the City or even in Orange County. All injuries are alleged to
18 occurring San Diego County and from San Diego County Permittees.¹⁹ General allegations of
19 injury occurring in the Pacific Ocean do not satisfy the ‘injury in fact requirement’ because such
20 an allegation fails to specify that any injury occurred in or around the City or Orange County.

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22 ¹⁴ *Susan B. Anthony List v. Driehaus* (2014) 134 S.Ct. 2334, 2341.

23 ¹⁵ *Sierra Club v. Morton* (1972) 405 U.S. 727, 734-735; *Sumner v. Earth Island Inst.* (2009) 555 U.S. 488,
493.

24 ¹⁶ Environmental Petitioners’ Petition (“Env. Pet.”) p. 4.

25 ¹⁷ Env. Pet. pp. 4-5 [members “live and/or recreate in and around the San Diego area ... including the coastline
and lagoons in and around San Diego County ... members directly benefit from San Diego County waters ...
enormous consequences for San Diego County residents ... rivers, lakes, and beaches in San Diego County San
Diego County’s high rate of urbanization and persistent water quality problems ...”].

26 ¹⁸ Env. Pet. p. 5.

27 ¹⁹ Env. Pet. pp. 4-5 [“interest in protecting the quality of San Diego County’s aquatic health and resources[,]
... members who live and/or recreate in and around the San Diego area ... including the coastline and lagoons in and
around San Diego County ... members directly benefit from San Diego County waters ... enormous consequences
for San Diego County residents ... rivers, lakes, and beaches in San Diego County San Diego County’s high rate
of urbanization and persistent water quality problems ...”].

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1 **B. Response to Substantive Issues**

2 Environmental Petitioners lack standing to challenge the Alternative Compliance Option
3 as applied to the City and Orange County Permittees. Even if Environmental Petitioners have
4 standing, however, their petition does not raise any such challenge. The absence of such a
5 challenge provides further evidence of the Regional Board’s lack of authority to enroll the City
6 and Orange County Permittees in a permit written for San Diego County Permittees. Finally, the
7 Alternative Compliance Option in the Final Permit, as applied to the City, is not inconsistent with
8 State Water Resources Control Board Order WQ-2015-0075 (“WQ 2015-0075”), except as
9 otherwise challenged in the City’s petition.

10 1. **Environmental Petitioners Do Not Challenge The Alternative Compliance**
11 **Pathway As Applied to Orange County Permittees**

12 Environmental Petitioners do not challenge the Alternative Compliance Option as applied
13 to the City but direct their challenge solely at the San Diego County permittees. As noted in the
14 discussion on standing, above, Environmental Petitioners’ interests and alleged injuries are
15 limited to San Diego County.²⁴ The facts relevant to the Environmental Petitioners’ claims are
16 limited to San Diego County permittees.²⁵

17 Environmental Petitioners’ arguments against the Alternative Compliance Option are
18 based entirely on San Diego County’s previous regulatory requirements, not on requirements
19 applicable to the City.²⁶ They allege that the Alternative Compliance Option renders the
20 receiving water limitations requirement less stringent than the “2007 or Original 2013
21 Permits[,]”²⁷ and that “previous San Diego permits already incorporated this [regional watershed]
22 paradigm shift.”²⁸ The City, however, was not enrolled under the 2007 permit or the Original 2013
23 Permit (referred to in this Response as the “Initial Permit”). The City was a permittee under the

24 _____
24 Env. Pet. pp. 4-5.

25 25 Env. Pet. p. 3 [“monitoring demonstrates that the San Diego County MS4s discharge pollution to receiving
waters”].

26 26 Env. Pet. p. 7 [“The 2001, 2007, and Original 2013 San Diego County MS4 Permit ... The permit regulated
the City of San Diego, the County of San Diego, and 19 other entities in San Diego County, including incorporated
cities, the San Diego Unified Port District, and the San Diego County Regional Airport Authority.”].

27 27 Env. Pet. p. 14.

28 28 Memorandum in support of (“Mem.”) Env. Pet. p. 21.

1 separate 2009 Permit and the Amended Permit. As a result, Environmental Petitioners do not
2 allege that the Alternative Compliance Option renders the Final Permit or its effluent limitations
3 less stringent than any permit previously applicable to the City’s discharges.

4 Because no petitioner has challenged the Alternative Compliance Option as applied to the
5 City, the City has not received notice and an opportunity to fully address the appropriateness of
6 the Alternative Compliance Option as applied to the City’s discharges. It is therefore improper
7 for this Board to consider the issue on its own without providing the City with adequate notice
8 and an opportunity to respond.

9 **2. Environmental Petitioners’ Petition Demonstrates the Inappropriateness of**
10 **Enrolling Orange County Permittees in a Permit Written for San Diego**
11 **County Permittees**

12 The lack of any allegations related to Orange County is further evidence that there is no
13 basis in fact, law, or regulation to enroll three geographically and politically separate counties and
14 MS4s within those counties under a single permit. Large MS4s are required to obtain a permit for
15 all discharges from a storm sewer system.²⁹ MS4s apply for a permit by submitting a report of
16 waste discharge to the applicable regulatory agency.³⁰ A permit may either be “one system-wide
17 permit covering all discharges from municipal separate storm sewers within a large [MS4] ... or
18 ... distinct permits for appropriate categories of discharges within a large [MS4.]”³¹ In either
19 case, federal regulations require that storm sewer systems covered under a permit either be
20 “adjacent” or “interconnected.”³²

21 The Regional Board has no authority to enroll the City as a permittee under the Final
22 Permit written for the San Diego County permittees because the City’s MS4 cannot be considered
23 part of “one system” with San Diego County permittees and Riverside permittees or part of an
24

25 ²⁹ 40 C.F.R. § 122.26(a)(3)(i).

26 ³⁰ Water Code, § 13260; 40 C.F.R. 122.21.

27 ³¹ 40 C.F.R. § 122.26(a)(3)(ii). Appropriate categories of discharges regulated under a single permit include
28 “all discharges owned or operated by the *same municipality*; located within the *same jurisdiction*; all discharges
within a system that discharge to the *same watershed*; discharges *within a system* that are *similar in nature*; or for
individual discharges from municipal separate storm sewers *within the system*

³² 40 C.F.R. § 122.26(a)(3)(iv).

1 appropriate category of discharges within a single large system that includes the San Diego and
2 Riverside County permittees.³³ As set forth in more detail in the City’s petition, the City’s MS4
3 does not interconnect with San Diego or Riverside Counties but is separated from Riverside
4 County to the east by the Santa Ana Mountains and from San Diego County to the south by the
5 122,000-acre Marine Corps Base Camp Pendleton; the City’s MS4 does not discharge to the same
6 hydrologic unit as MS4s within San Diego or Riverside Counties; and there is no single
7 jurisdiction or regional management agency with authority over a storm water management
8 program.

9 Finally, the City operates a mature fifth term stormwater program that has markedly
10 different water quality issues than San Diego and Riverside County permittees. The Final Permit
11 disregards the maturity of the City’s stormwater program, the City’s geography, soil conditions
12 and other land use and environmental differences that make “one-size-fits-all” approach
13 inappropriate.

14 The City’s MS4 is not physically interconnected with San Diego and Riverside County
15 permittees. The City’s MS4 discharges to a separate hydrologic unit than San Diego and
16 Riverside County permittees. The City’s MS4 is not adjacent to any San Diego or Riverside
17 County but is separated by the Santa Ana Mountains and the Marine Corps Base Camp
18 Pendleton. There is no single jurisdiction with authority over the stormwater programs in San
19 Diego, Riverside and Orange Counties. The Regional Board lacks authority to enroll the City in
20 the Final Permit under these circumstances. Environmental Petitioners’ lack of a challenge to the
21 Alternative Compliance Option as applied to the City highlights the importance of the Regional
22 Board’s improper actions.

23 **3. Compliance with the Alternative Compliance Option Does Not Violate the**
24 **Clean Water Act or This Board’s Order WQ 2015-0075**

25 Environmental Petitioners seek elimination of the Alternative Compliance Option on the
26 grounds that: (a) it violates anti-backsliding requirements;³⁴ (b) it is inconsistent with wasteload

27 _____
33 40 C.F.R. 122.26(a)(3).

34 Mem. Env. Pet. pp. 13-26.

1 allocations established in total maximum daily loads (“TMDLs”);³⁵ and (c) it is inconsistent with
2 State Board Order WQ 2015-0075.³⁶ This Board has already addressed and resolved
3 Environmental Petitioners’ anti-backsliding and TMDL challenges in favor of an alternative
4 compliance pathway and the Alternative Compliance Option in the Final Permit is consistent with
5 this Board’s governing principles for an alternative compliance pathway contained in Order WQ
6 2015-0075.

7 a. **This Board Already Resolved Environmental Petitioners’ Anti-**
8 **Backsliding and TMDL WLA Challenges to the Alternative**
9 **Compliance Option**

10 (1) ***Anti-Backsliding Provisions are Inapplicable to Receiving Water***
11 ***Limitations***

12 Environmental Petitioners allege that the Alternative Compliance Option violates federal
13 anti-backsliding provisions under Clean Water Act Section 402(o) by weakening the receiving
14 water limitations in the 2007 Permit and Original Permit. Section 402(o) of the Act provides that
15 for specific effluent limitations established on the basis of specific sections of the Act, a permit
16 may not be renewed or reissued that contains effluent limitations which are less stringent than the
17 comparable effluent limitations in the previous permit. As noted above, the City was not a
18 permittee under either the 2007 Permit or the Original Permit. Environmental Petitioners do not
19 allege that the Alternative Compliance Option constitutes backsliding from the City’s previous
20 regulatory requirements.

21 Even if Environmental Petitioners challenged the Alternative Compliance Option as
22 applied to the City, the challenge is precluded by this Board’s precedential decision in Order WQ
23 2015-0075.³⁷ In WQ 2015-0075, this Board determined that the federal anti-backsliding
24 prohibition “is inapplicable” to receiving water limitations that are “not established based on
25

26 _____
27 ³⁵ *Id.* at p. 26.

28 ³⁶ *Id.* at pp. 27-34.

³⁷ See State Board Order WR 96-1, footnote 11 [“the [State Board] designates all decisions or orders adopted by the [State Board] at a public meeting to be precedent decisions”].

1 either section 301(b)(1)(C) or section 303(d) or (e) [of the Clean Water Act].”³⁸ As in the 2001
2 Los Angeles MS4 Order, the receiving water limitations provision in the 2009 Permit was not
3 based on either section 301(b)(1)(C) or section 303(d) or (e). Therefore, the anti-backsliding
4 provisions are inapplicable.

5 This Board’s conclusion is supported by the law applicable to federal anti-backsliding
6 provisions. First, the receiving water limitations language in the Final Permit is not an “effluent
7 limitation” as defined in the Act. An “effluent limitation” is “any restriction established by a
8 State or the Administrator on quantities, rates, and concentrations of chemical, physical,
9 biological, and other constituents which are discharged from point sources into navigable waters,
10 the waters of the contiguous zone, or the ocean, including schedules of compliance.”³⁹ An
11 “effluent limitation” is thus a limit measured at the point of discharge from a point source. In
12 contrast, the receiving water limitations language measures compliance in the receiving water.

13 Second, even if the receiving water limitations language could be characterized as an
14 “effluent limitation,” it is not one developed in accordance with the specific sections listed in
15 Section 402(o). It is not a technology-based effluent limitation established based on best
16 professional judgment in accordance with Section 402(a)(1)(B). Rather, it derives its legal
17 authority from Section 402(p)(3)(B). Moreover, as the Ninth Circuit makes clear, the receiving
18 water limitations language is not (and could not be) a technology-based or water-quality based
19 effluent limitation established on the basis of Section 301(b)(1)(c) because Section 301 has no
20 application to MS4 permits.⁴⁰ Finally, the receiving water limitations language is not an effluent
21 limitation developed under Section 303(d) or (e), which involve the continuing planning process
22 and TMDLs. At its core, the receiving water limitations language an exercise of discretion under
23 the “such other provisions” language of Section 402(p)(3)(B)(iii) and is not subject to Section
24 402(o).

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27 ³⁸ Order WQ-2015-0075, pp. 19-20.

28 ³⁹ 33 U.S.C. § 1362(11).

⁴⁰ *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165.

1 (2) ***The Alternative Compliance Option is Consistent With TMDL***
2 ***WLA Requirements***

3 Environmental Petitioners further allege that the Alternative Compliance Option violates
4 the Clean Water Act’s requirement to make MS4 permits consistent with the assumptions and
5 requirements of TMDL WLAs.⁴¹ They argue that the Alternative Compliance Option creates safe
6 harbor that excuses compliance with interim and final TMDL requirements. This Board has
7 already considered and resolved these general allegations in Order WQ 2015-0075.⁴² Permitting
8 authorities retain broad discretion to determine how to translate WLA into an MS4 permit,
9 including the use of BMP-based requirements.⁴³ This Board affirmed the watershed management
10 program approach to TMDL incorporation in Order WQ 2015-0075 and reaffirmed the BMP-
11 based requirements as appropriate treatment of TMDL WLAs in NPDES permits.⁴⁴

12 Finally, Environmental Petitioners do not identify any specific City-TMDL WLA that
13 may be excused or eliminated. Their challenge is limited entirely to TMDLs “in waterbodies
14 throughout San Diego County.”⁴⁵

15 Consistent with federal law, this Board has already determined that anti-backsliding
16 provisions are inapplicable to receiving water limitations in MS4 permits and that Regional Board
17 retain broad discretion to incorporate TMDL WLAs into an MS4’s permit. Environmental
18 Petitioners’ arguments are therefore precluded by this Board’s precedential decisions on these
19 matters.

20 b. **The Alternative Compliance Option Does Not Violate Order WQ**
21 **2015-0075**

22 Environmental Petitioners allege that the Alternative Compliance Pathway is inconsistent
23 with Order WQ 2015-0075, because, among other reasons already addressed elsewhere in this
24

25 ⁴¹ Mem. Env. Pet. p. 26; 40 C.F.R.. § 122.44(d)(1)(vii)(B).

26 ⁴² Order WQ 2015-0075, pp. 54-61.

27 ⁴³ Id. p. 57 (citing 2014 USEPA Memorandum, “Establishing Total Maximum Daily Load (TMDL) Wasteload
28 Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs” Nov. 26,
2014.)

⁴⁴ Id. p. 58.

⁴⁵ Mem. Env. Pet. p. 26.

1 Response, it: (i) does not contain a reasonable assurance analysis requirement; (ii) allows good
2 faith engagement in an iterative process to constitute compliance with receiving water limitations
3 and does not require actual achievement of established goals; and (iii) does not include multi-
4 benefit water supply projects. Each of these allegations is inaccurate.

5 (1) ***Order WQ 2015-0075 Does Not Require a Reasonable Assurance***
6 ***Analysis and the Final Permit's Required Analysis is Sufficient***

7 Environmental Petitioners argue that the Alternative Compliance Option is inconsistent
8 with Order WQ 2015-0075 because it does not include a reasonable assurance analysis or
9 equivalent process based on modeling.⁴⁶ This argument is unavailing. Order WQ 2015-0075
10 does not require every Regional Water Quality Control Board to include the same modeling
11 process in the LA MS4 Permit. Instead, this Board requires procedural “rigor and accountability”
12 in the Alternative Compliance Option, stating:⁴⁷

13 Permittees should be required, through a transparent process, to show that they
14 have analyzed the water quality issues in the watershed, prioritized those issues,
15 and proposed appropriate solutions. Permittees should be further required, again
16 through a transparent process, to monitor the results and return to their analysis to
17 verify assumptions and update the solutions. Permittees should be required to
18 conduct this type of adaptive management on their own initiative without waiting
19 for direction from the regional water board.

20 The Final Permit's Alternative Compliance Option is rigorous and accountable.
21 It requires Permittees to assess water quality issues using a quantitative analysis “with
22 clearly stated assumptions ... [that] quantitatively demonstrate[s] that the implementation
23 of water quality improvement strategies ... will achieve the final numeric goals[.]”⁴⁸
24 Development and application of this analysis, including prioritization of issues,⁴⁹ must be
25 conducted pursuant to a public participation process.⁵⁰ The Final Permit also requires a
26 transparent monitoring and adaptive management process that is again subject to review
27 by members of the public, including revision of the quantitative analysis.⁵¹ The

28 ⁴⁶ Mem. Env. Pet., p. 28.

⁴⁷ Order WQ 2015-0075 p. 52.

⁴⁸ Final Permit, Provision B.3.c.(1)(b)(i).

⁴⁹ Final Permit, Provision B.2.

⁵⁰ Final Permit, Provision B.3.c.(1)(b)(ii).

⁵¹ Final Permit, Provisions B.3.c.(1)(c), (d); F.1.a.(1)(b).

1 procedural requirements in the Final Permit for the Alternative Compliance Option thus
2 fulfill Order WQ 2015-0075’s standards for rigor and transparency.

3 (2) *The Final Permit’s Adaptive Management Requirements Are*
4 *“Significant Undertakings Beyond the Iterative Process”*

5 Environmental Petitioners contend that the Final Permit allows good faith engagement
6 and implementation of the iterative process to constitute compliance with Receiving Water
7 Limitations.⁵² These contentions misconstrue the rigorous and transparent adaptive management
8 requirements that are part of the Alternative Compliance Option as a stand-alone iterative
9 process. The Alternative Compliance Option in the Final Permit is not just an iterative process.
10 It also requires the City to “pursue significant undertakings beyond the iterative process” and in
11 so doing, to be deemed in compliance with receiving water limitations.⁵³

12 These significant undertakings include pursuing a “well-defined, transparent, and finite
13 alternative path to permit compliance” and an adaptive management component.⁵⁴ A finite
14 alternative path includes provisions with “clear, concrete and finite milestones and deadlines”
15 consistent with the goal of preventing exceedances of receiving water limitations and taking into
16 account technological, operation, and economic factors that affect control measures.⁵⁵ The Final
17 Permit includes a requirement to develop the following: (1) milestones and deadlines for interim
18 and final WQBELs established by a TMDL; (2) milestones and deadlines for interim and final
19 pollutants and conditions listed on the Section 303(d) list that do not have a TMDL; and (3)
20 milestones and deadlines for interim and final pollutants and conditions identified as receiving
21 water priorities in the WQIP.⁵⁶ Each final numeric goal must be accompanied by a schedule for
22 compliance and include at least one annual milestone and a date for its achievement.⁵⁷

23 The Alternative Compliance Option also requires the City to adjust its compliance
24 program by making annual assessments and reports, including proposing program modifications

25 _____
52 Mem. Env. Pet. p. 31.

26 53 See Order WQ 2015-0075 . 16; Final Permit, Provision B.3.c.(2).

27 54 Order WQ 2015-0075 p. 16.

28 55 Order WQ 2015-0075 pp. 33-34.

56 Final Order, Provision B.3.c.(a)(i)-(iii)

57 Final Order, Provision B.3.c.(a)(vi)-(vii).

1 when schedules are shown to be inaccurate or milestones are missed and obtaining Regional
2 Board approval of those modifications.⁵⁸ The Final Permit thus contains a well-defined,
3 transparent, and finite alternative path beyond an iterative process, consistent with Principle 7 of
4 Order WQ 2015-0075. Although the City has requested that the State Board extend the
5 Alternative Compliance Option to the development of the WQIP, the City generally supports the
6 Alternative Compliance Option. With limited adjustment, as set forth in the City’s Petition, the
7 State Board should uphold the Alternative Compliance Option against the Environmental
8 Petitioners’ challenges.

9 **IV.**

10 **SUPPORT FOR PETITIONS OF ORANGE COUNTY AND RIVERSIDE COUNTY**

11 **PERMITTEES**

12 The City supports the petitions filed by the Orange County Permittees, and specifically
13 concurs with the arguments raised by the Cities of Dana Point and Laguna Beach that it is
14 impracticable to strictly and immediately comply with all of the discharge prohibits and receiving
15 water limitations in the Final Permit. To require such compliance is beyond the “maximum
16 extent practicable” standard in federal law and requires a showing by the Regional Board that
17 such limitations can reasonably be achieved.⁵⁹

18 The City also supports the petition filed by the Riverside County Permittees. This
19 petition provides additional reasoning as to why this Board should provide alternative compliance
20 during the development of the WQIP and why the permittees in Riverside, San Diego and Orange
21 Counties should be covered by individual NPDES permits.

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23 ///

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27 ⁵⁸ Final Order, Provisions B.3.c.(2)(c)-(d); F..2.c; F.3.b.(3).

28 ⁵⁹ See *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 624-625; Water Code,
§§ 13241, 13263.

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V.

CONCLUSION

For the reasons set forth in this Petition and in the related documents filed herewith, the relief sought in Environmental Petitioners' petition should be denied.

Dated: May 16, 2016

BEST BEST & KRIEGER LLP

By: 

SHAWN HAGERTY
J.G. ANDRE MONETTE
REBECCA ANDREWS
Attorneys for Petitioner
City of San Juan Capistrano