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**STATE OF CALIFORNIA**  
**STATE WATER RESOURCES CONTROL BOARD**

In the matter of the Petition of:  
  
THE CITY OF SAN CLEMENTE  
  
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(j)]

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

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I.

**INTRODUCTION**

The City of San Clemente, 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”).<sup>1</sup> The City is also a Petitioner in the present case (SWRCB/OCC File No. A-2456(j)), and in one other petition challenging the Initial Permit (SWRCB/OCC File No. A-2254(m)).

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<sup>1</sup> 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 On May 8, 2013, the Regional Board adopted the Initial Permit by way of Order No. R9-  
2 2013-0001. The Final Permit governs the large municipal separate storm sewer system (“MS4”)  
3 discharges in San Diego County, South Riverside County and South Orange County. The Initial  
4 Permit, however, only applied to the San Diego County permittees.<sup>2</sup> The City and other Orange  
5 County Permittees were not yet enrolled in the Permit and were still subject to an individual  
6 NPDES permit, Order R9-2009-0002 (“2009 Permit”) which was applicable only to the Orange  
7 County Permittees. The City filed a petition challenging the Initial Permit on June 7, 2013  
8 (SWRCB / OCC File No. A-2254(m)). That petition is currently being held in abeyance.

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

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

25 \_\_\_\_\_  
26 <sup>2</sup> 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.

<sup>3</sup> 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 TMDLs]. The City filed a petition expressing its support for alternative compliance and seeking  
2 inclusion of the time period during development of a Water Quality Improvement Plan (“WQIP”)  
3 within the Alternative Compliance Option and challenging the Regional Board’s lack of authority  
4 to issue a single Permit to three geographically, politically, and environmentally distinct regions.  
5 (SWRCB/OCC File No. A-2456(j).) This petition is currently active.

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

18 This Response also addresses three substantive issues raised by the petitions. First, even  
19 if Environmental Petitioners have standing to challenge the application of the Alternative  
20 Compliance Option to Orange County Permittees, their petition does not raise any such challenge.  
21 Second, the absence of such a challenge illuminates the Regional Board’s lack of authority to  
22 enroll the City and Orange County Permittees in a permit written for San Diego County  
23 Permittees. Finally, the Alternative Compliance Option does not violate the Clean Water Act or  
24 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.<sup>4</sup> Due process requirements are applicable to state agency decision making and are foundational requirements of fair state administration.<sup>5</sup> Legal doctrines of issue preclusion<sup>6</sup> and exhaustion of administrative

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<sup>4</sup> 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].

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

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

1 remedies<sup>7</sup> require the Board to provide adequate notice and an opportunity to respond to the  
2 issues the Board will decide.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> “One is considered ‘aggrieved’ whose rights or interests are injuriously affected” by a  
9 decision.<sup>11</sup> 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.<sup>12</sup> 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.”<sup>13</sup> The injury in fact  
20 requirement “helps to ensure that the plaintiff has a ‘personal stake in the outcome of the  
21  
22  
23

24 <sup>7</sup> *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 <sup>8</sup> See also Cal. Code Regs., tit. 23, § 2055.

27 <sup>9</sup> *Ibid.*

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

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

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

<sup>13</sup> *Ibid.*

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

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.”<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup> 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.

21 \_\_\_\_\_  
22 <sup>14</sup> *Susan B. Anthony List v. Driehaus* (2014) 134 S.Ct. 2334, 2341.

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

24 <sup>16</sup> Environmental Petitioners’ Petition (“Env. Pet.”) p. 4.

25 <sup>17</sup> 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 <sup>18</sup> Env. Pet. p. 5.

27 <sup>19</sup> 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.       **Alleged Injuries Occurring in San Diego County Are Not Traceable to**  
2   **and Cannot be Remedied by the City**

3                   Environmental Petitioners also lack standing to challenge the Alternative Compliance  
4                   Option as applied to the City because the alleged injuries are not fairly traceable to the City.  
5                   Traceability requires a causal nexus between the alleged injury and conduct by a defendant, not  
6                   by a third party.<sup>20</sup> According to their petition, the Environmental Petitioners' alleged injuries are  
7                   traced to the Regional Board's failure to adequately control urban stormwater runoff through the  
8                   Final Permit, because the Final Permit suffers from legal deficiencies, including that the  
9                   Alternative Compliance Option constitutes backsliding.<sup>21</sup> To redress these alleged injuries,  
10                  Environmental Petitioners seek an amendment to the Permit that would remove the Alternative  
11                  Compliance Option from all permittees.

12                  At no point do Environmental Petitioners allege the Alternative Compliance Option  
13                  constitutes backsliding from a permit regulating discharges from the City's MS4.<sup>22</sup> Similarly,  
14                  there are no allegations that high urbanization rates in the City or Orange County cause or  
15                  exacerbate the alleged injuries in San Diego County.<sup>23</sup> Finally, there is no allegation that  
16                  eliminating the Alternative Compliance Option from Orange County Permittees will redress the  
17                  injuries allegedly occurring in San Diego County.

18                  Because Environmental Petitioners have not alleged an interest in or injury occurring in  
19                  or from the City or even Orange County, have not fairly traced any injury in San Diego County to  
20                  the Alternative Compliance Option as applied to the City or Orange County Permittees, and  
21                  cannot obtain any remedy through removing the Alternative Compliance Option from the City or  
22                  Orange County permittees, Environmental Petitioners lack standing to challenge the Alternative  
23                  Compliance Option as applied to the City and Orange County Permittees.

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25                  <sup>20</sup> *Simon v. E. Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 43.

26                  <sup>21</sup> Env. Pet., pp. 4-5.

27                  <sup>22</sup> 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."].

28                  <sup>23</sup> Cf. Env. Pet. p. 5 [complaining of "San Diego County's high rate of urbanization and persistent water  
quality problems ..."].



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.<sup>24</sup> The facts relevant to the Environmental Petitioners’ claims are  
16 limited to San Diego County permittees.<sup>25</sup>

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.<sup>26</sup> They allege that the Alternative Compliance Option renders the  
20 receiving water limitations requirement less stringent than the “2007 or Original 2013  
21 Permits[,]”<sup>27</sup> and that “previous San Diego permits already incorporated this [regional watershed]  
22 paradigm shift.”<sup>28</sup> 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 \_\_\_\_\_  
25 <sup>24</sup> Env. Pet. pp. 4-5.

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

27 <sup>26</sup> 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.”].

28 <sup>27</sup> Env. Pet. p. 14.

<sup>28</sup> 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.<sup>29</sup> MS4s apply for a permit by submitting a report of  
16 waste discharge to the applicable regulatory agency.<sup>30</sup> 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.]”<sup>31</sup> In either  
19 case, federal regulations require that storm sewer systems covered under a permit either be  
20 “adjacent” or “interconnected.”<sup>32</sup>

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 <sup>29</sup> 40 C.F.R. § 122.26(a)(3)(i).

26 <sup>30</sup> Water Code, § 13260; 40 C.F.R. 122.21.

27 <sup>31</sup> 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*

<sup>32</sup> 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.<sup>33</sup> 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;<sup>34</sup> (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”);<sup>35</sup> and (c) it is inconsistent with  
2 State Board Order WQ 2015-0075.<sup>36</sup> 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.<sup>37</sup> 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 <sup>35</sup> *Id.* at p. 26.

28 <sup>36</sup> *Id.* at pp. 27-34.

<sup>37</sup> 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].”<sup>38</sup> 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.”<sup>39</sup> 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.<sup>40</sup> 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 <sup>38</sup> Order WQ-2015-0075, pp. 19-20.

28 <sup>39</sup> 33 U.S.C. § 1362(11).

<sup>40</sup> *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.<sup>41</sup> 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.<sup>42</sup> Permitting  
8 authorities retain broad discretion to determine how to translate WLA into an MS4 permit,  
9 including the use of BMP-based requirements.<sup>43</sup> 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.<sup>44</sup>

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.”<sup>45</sup>

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

26 <sup>42</sup> Order WQ 2015-0075, pp. 54-61.

27 <sup>43</sup> 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.)

<sup>44</sup> Id. p. 58.

<sup>45</sup> 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.<sup>46</sup> 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:<sup>47</sup>

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[.]”<sup>48</sup>  
24 Development and application of this analysis, including prioritization of issues,<sup>49</sup> must be  
25 conducted pursuant to a public participation process.<sup>50</sup> 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.<sup>51</sup> The

28 <sup>46</sup> Mem. Env. Pet., p. 28.

<sup>47</sup> Order WQ 2015-0075 p. 52.

<sup>48</sup> Final Permit, Provision B.3.c.(1)(b)(i).

<sup>49</sup> Final Permit, Provision B.2.

<sup>50</sup> Final Permit, Provision B.3.c.(1)(b)(ii).

<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

12 These significant undertakings include pursuing a “well-defined, transparent, and finite  
13 alternative path to permit compliance” and an adaptive management component.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

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

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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.<sup>58</sup> 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.<sup>59</sup>

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

28 <sup>59</sup> 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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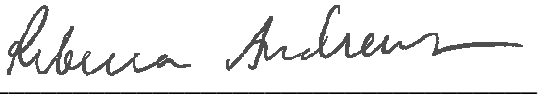
V.

**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

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