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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of San Diego Coastkeeper and Coastal Environmental Rights Foundation, for Review of Action by the California Regional Water Quality Control Board, San Diego Region, in Adopting the National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region; Order No. R9-2013-001, as Amended by Order Nos. R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266	ENVIRONMENTAL PETITIONERS' RESPONSE TO PERMITEE PETITIONS FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100 SWRCB/OCC FILE A-2456(a through l)

In accordance with the State Water Board's Notice of Complete Petition (30-Day Response) dated March 15, 2016 and the April 5, 2016 letter granting a time extension for responses until May 16, 2016, San Diego Coastkeeper and Coastal Environmental Rights Foundation (collectively "Environmental Petitioners") hereby submit timely responses to Petitions submitted by Orange County Permittees (collectively referred to as "Permittee Petitioners") in SWRCB/OCC FILE A-2456(a thru l).

I. Introduction

As a preliminary matter, this Response to Permittee Petitions is limited to Permittee Petitioners' legal and factual claims regarding alternative compliance pathways and requirements.

As related to safe harbors and alternative compliance pathways, Permittee Petitioners' arguments essentially boil down to three main claims that can be summarized as follows; 1) the Regional Board abused its discretion because, Permittee Petitioners claim, it is impossible to achieve water quality standards and the Order requires MS4 permittees to achieve water quality standards via receiving water limitations; 2) by not allowing a Safe Harbor during the planning phase, the Regional Board violated WQO 2015-0075; and, 3) despite the fact that Permittees have not achieved water quality standards to date, the iterative WQIP process itself is sufficient to allow for protection under the safe harbor during plan development.

None of these assertions by Permittee Petitioners is factually or legally supported. From a practical standpoint, acceptance of these claims by the Board would be a departure from Clean Water Act requirements and from long-standing principles governing the regulation of water quality.

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II. **The Regional Board Did Not Abuse Its Discretion By Foreclosing Safe Harbor Protection During Plan Development**.

Central to Permittee Petitioner's abuse of discretion argument is the underlying assumption that compliance with the MS4 permit's receiving water limitations is impossible. Operating under that unsubstantiated assumption Permittee Petitioners rehash old assertions that Regional and State Boards do not possess the authority to include receiving water limitations provisions that require achievement of water quality standards in MS4 permits. Based on this alleged impossibility and alleged abuse of discretion Permittee Petitioners then conclude that safe harbor protections are legally required under federal law.

Specifically, Permittee Petitioners claim, "the Regional Board's denial of a means to comply with the Permit during WQIP development exceeds its authority under federal law and is an abuse of discretion. The Clean Water Act does not mandate that MS4 dischargers strictly comply with numeric limits."[1] They continue, "many of the referenced numeric limits in the Permit go beyond the MEP standard enacted by Congress because MEP does not mandate permit terms that are impracticable."[2] Petitioners provide a single 11th Circuit case in support of their contention that standards beyond the MEP are unlawful and violate the Clean Water Act and its governing regulations.[3] That case, however, is entirely inapplicable to the facts as they exist here and to the San Diego MS4 permit.

In *Hughey*, the 11th Circuit Court had before it a factual impossibility. Specifically, at the time storm water discharges from a construction site were occurring, Georgia's state permitting agency responsible for issuing NPDES stormwater permits did not have in place a process for issuing a permit for those discharges. Thus, it was impossible for the defendant to obtain a permit

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[1] Permittee's Petition, p. 6.
[2] Id., Page 7
[3] *Hughey vs JMS Development Corp,* 78 F.3d 1523 (11th Cir. 1996).

from any governmental agency. At the same time, because discharges of stormwater from the site were proven to be inevitable, achievement of zero discharge was deemed an impossibility. In its holding, the Court ruled narrowly only as to under what circumstances the CWA's zero-discharge provisions were inapplicable to permittees. In doing so, the *Hughey* Court developed a four-part test and held that, "Congress did not intend (surely could not have intended) for the zero discharge standard to apply when: (1) compliance with such a standard is factually impossible; (2) no NPDES permit covering such discharge exists; (3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal."[4]

The very narrow *Hughey* exception is not applicable to this case. As the zero-discharge standard is not at issue in San Diego, NPDES coverage does exist, the discharges are not minimal, and the dischargers are not in compliance with state and local pollution control requirements including receiving water limitations, the *Hughey* case has no applicability whatsoever to the San Diego regional MS4 permit.

Importantly, and in direct contradiction to Permittee Petitioners' claims, the State Board and Courts have already answered the question of whether permits can include provisions beyond the MEP standard and include strict compliance with water quality standards, answering in a definitive and resounding "Yes".

Directly on point is *Building Industry Ass'n of San Diego County vs. State Water Resources Control Bd*.[5] In 2001 the San Diego Regional Board adopted a MS4 permit that included receiving water limitations language requiring that discharges from the MS4 do not cause or contribute to water quality standard violations. The BIA petitioned, and subsequently filed a writ, challenging receiving water limitation inclusions into the permit. Permittee Petitioners

[4] *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996).
[5] 124 Cal.App.4th 866

claims here echo the BIA arguments in that case. Specifically, the BIA's challenge centered on the assertion that the San Diego regional stormwater permit, "violates state and federal law because the permit provisions are too stringent and impossible to satisfy."[6] "Among its numerous contentions, Building Industry argued that the Water Quality Standards provisions in the Permit require strict compliance with state water quality standards beyond what is "practicable" and therefore violate federal law."[7] The appeals Court's holding in that case is directly on point in refuting Permittee Petitioner's claims here and is excerpted below:

> "On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable." (33 U.S.C. § 1342(p)(3)(B)(iii).) In the published portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards".[8]

To attempt to support their position Petitioners repeatedly frame compliance with receiving water limitations as a factual impossibility. They fail, however, to provide evidence supporting this claim. Importantly, the EWMPs developed in Los Angeles are premised on the simple fact that compliance with WQSs and TMDL WLAs *is* achievable and can be modeled, planned, and implemented, and consultants and permittees involved in that development agree that compliance will be achieved through EWMP implementation. Through innovative and award winning drought awareness and Green Infrastructure initiatives now available to address MS4 discharges and their

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[6] Bldg. Indus. Ass'n of San Diego Cty. v. State Water Res. Control Bd., 124 Cal. App. 4th 866, 871.

[7] Id at 877

[8] Id at 871. The court continued, "Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act." Id. at 884

impacts, Permittees are better suited than ever to achieve compliance in a limited time frame if properly motivated and dedicated.

The San Diego regional MS4 permit requires development of Water Quality Improvement Plans (WQIPs) precisely because Permittee actions and strategies over these many years have failed to realize the goals of previous permits and the CWA, including protecting water quality standards of receiving waters. Environmental Petitioners share the Regional and State Board view, as well as the view of those who have undertaken EWMP and RAA analyses, that this failure is not borne out of impossibility, but instead results from the lack of political will, funding, and prioritization. Thus, a more prescriptive permit will ensure those goals would finally be met.[9]

Permittee Petitioners' efforts regarding their abuse of discretion claims amount to little more than using the adoption of a safe harbor provision as a second chance to challenge the inclusion of receiving water limitations language in municipal storm water permits. This issue, however, has been definitively settled by the State Board, EPA, and Courts, and is dispositive of Permittee Petitioner's federal law arguments.

III. The Regional Board Did Not Violate WQO 2015-0075 By Not Providing Safe Harbors During The Planning Phase

Permittee Petitioners next argue the amended permit violates State Water Board Order WQ 2015-0075. Specifically, Permittee Petitioners argue that Order directed all Regional Boards to establish alternative compliance pathways in their MS4 permits. The Petition summarizes, "the Regional Board's action is directly contrary to the State Board's Order directing regional water

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[9] Permit Finding 18, "The Copermittees have been able to achieve improvement in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the CWA." P. 6 of R9-2015-0100.

boards to establish alternative compliance pathways and is in conflict with the findings and conclusions on which the Order is predicated."[10] Petitioners restate this assertion numerous times throughout their Petition.[11]

Permittee Petitioners misread and mischaracterize the plain language of WQ 2015-0075. The State Board Order's clear language demonstrates the Board meant only to,

> "*direct* all regional water board *to consider* the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward. In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles. We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific regions".[12]

The only specific direction given in the Order is a direction to *consider* the approach taken by the Los Angeles Regional Board. A direction to consider an approach is not a direction to include safe harbors.[13] Instead, what the plain language clearly demonstrates is that the Order directs any region that decides to include safe harbors into their permits to either incorporate the principles or show why given principles are not appropriate for the region or permit. If the State Board had wanted to require safe harbors it would and could have clearly done so. It did not.[14]

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[10] P. 10 of OC Ps and As

[11] See, for example, ""The State Board not only directed regional water boards to adopt alternative compliance pathways…" P. 10 of Petitioner's Points and Authorities.

[12] WQO 2015-0075, p. 51. Emphasis added.

[13] The State Board confirms that "strict compliance with water quality standards is discretionary in MS4 permits…" (WQO 2015-0078, p. 31). Thus, the Regional Board had discretion to require either strict compliance or an alternative compliance pathway.

[14] We note that this interpretation is consistent with the interpretation expressed by the EPA in its letter to SWRCB clarifying that while the State Board, "WQ Order [2015-0075] directs all Regional Boards to consider the approach in the LA MS4 permit, [the Order] does not require its use."

Nonetheless, Permittee Petitioners are correct in noting the Order requires a region that includes a safe harbor to consider the WMP/EQMP approach and either incorporate the principles in WQ 2015-0075 or explain why each of the principles is inapplicable or inappropriate.[15]

Permittee Petitioners point specifically to State Board Order Principle #3 in asserting that because, "the Permit does not include any region-specific or permit-specific reason why compliance during the development process was not included"[16] the permit violates the State Board Order. In short, their argument is that Principle #3 of the State Board Order requires regional water boards to adopt alternative compliance options – including during the planning phase - absent certain regional or permit specific reasons. In actuality, that principle instead requires a region that *chooses* to incorporate safe harbors to do so in a way that allows permittees to come into compliance with RWL without being in violation of the RWLs, "during full **implementation** of the compliance alternative".[17] The plain language of Principle #3 call for safe harbor protection only during "implementation". Clearly absent is language allowing protection during "planning". We must assume that the State Board knew what it was doing when it excluded the word "planning" and included the word "implementation". This is even more apparent when viewed alongside language in WQ 2015-0075 just two pages earlier where the Order expressly recognizes the difference between "implementation" and "planning".[18] It is clear

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[15] For detailed explanation of how the amended MS4 permit does not comply with the State Board Order and did not incorporate required principles or explain why they were inapplicable or inappropriate for our region, *see* Environmental Petitioners' Memorandum of Points and Authorities, pages 27-36.

[16] OC Petition/Ps and As, p. 11.

[17] WQO 2015-0075, page 52, emphasis added.

[18] See, for example, "We understand that deeming a discharger in compliance with receiving water limitations during the **planning** phase, not just the **implementation** phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation." (p. 49, emphasis added); "the safe harbor in the **planning** phase is appropriate only if it is clearly constrained…" (Id., emphasis added); and "It is the **implementation** of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water

the plain language of the Order merely requires regional boards to consider the WMP/EWMP safe harbor approach and nothing in Principle #3 dictates application of the safe harbor during the planning phase. Rather, Principle #3 states that when a safe harbor is adopted, protection *should* be granted during "implementation". Nothing in the State Board Order requires provisions that allow for compliance during safe harbor planning and development, and none should be allowed.

IV. Development Of WQIPs Does Not Constitute Cause For Safe Harbor Protection

Permittee Petitioners next argue that a safe harbor is warranted during the planning phase because the WQIP development process is, "sufficiently reasonable and constrained," and contains, "clear, enforceable provisions."[19] As discussed in detail in our Petition, Environmental Petitioners dispute both the legality and appropriateness of the safe harbor provision in the San Diego Permit. However, even if a safe harbor that is rigorous, ambitious, transparent, and finite is incorporated into the permit (which it is not), that safe harbor analysis and process is distinct and separate from both the purpose of, and analysis required by, development of WQIPs. Importantly, for all but one of the permittees in San Diego County - the majority of permittees covered by this permit - WQIP planning, development, and approval has concluded and implementation has begun.[20] Unlike in Los Angeles where the safe harbor and reasonable assurance analysis process is a required element for those permittees that undertake WMP/EWMP planning and development, for those permittees in San Diego County the two processes and analyses will not occur concurrently. While development and implementation of WQIPs is required by the San Diego permit, engaging in safe harbor analysis is an entirely optional process to be undertaken at the

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limitations; the **planning** phase is essential, but should only be as long as necessary…" (Id, emphasis added.) The highlighted language demonstrates the Order purposefully distinguishes between "implementation" and "planning" phases throughout.

[19] OC Petition, p. 12.

[20] For a complete list of acceptance letters for final WQIPs throughout San Diego County see: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/wqip.shtml, last accessed April 4, 2016. All but one of the final WQIPs has been accepted by the Regional Board, and implementation of WQIPs is currently under way throughout San Diego County.

discretion of each permittee.[21] In this way the option is exactly as its name indicates; an *alternative* compliance *option*. Thus, should San Diego County permittees choose to conduct a safe harbor analysis they would do so voluntarily and through an update to their already-approved WQIPs. Since the San Diego County permittees have received approval from the San Diego Regional Board for their WQIPs, any efforts to incorporate safe harbors would be subject to permit provision F.2.c. governing WQIP updates. Provision F.2.c. contains within it no clear or enforceable deadlines, milestones, or timeframes under which a permittee must plan, develop, and finalize a safe harbor analysis. In actuality, WQIP updates may occur at any time so long as several procedural rules are followed, and the planning phase can potentially be infinite.[22] As such there exists no constraint on the timeframe through which safe harbors may be planned, developed, or approved, and there are no clear, enforceable requirements limiting the planning phase of the safe harbor.

This distinct difference between WQIPs and the safe harbor in the San Diego permit is highlighted when one considers the purposes of the WQIP versus the purpose of the safe harbor provision in the San Diego MS4 permit. The express purpose and goal of the iterative WQIP process is aimed at, "achieving the outcome of improved water quality in MS4 discharges and receiving waters," and, "to achieve improvements in the quality of discharges from the MS4s." While improving the quality of discharges is certainly a laudable goal and one Environmental Petitioners support, it does not equate to compliance with the Clean Water Act, Porter Cologne Act, or receiving water limitations. A proper safe harbor provision, by contrast, would theoretically require a rigorous, ambitious, transparent, and detailed identification and analysis that ultimately resulted in a showing that compliance with effluent and receiving water limitations would be achieved through enforceable actions and schedules. By way of example, numeric goals

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[21] See Provision B.3.c. of the MS4 permit, "Each Copermittee **has the option** to utilize the implementation…to demonstrate compliance…" Emphasis added.

[22] *See* provision F.2.c.

expressed as numeric concentration-based or load-based goals would be required in a proper safe harbor analysis in the San Diego permit, where such metrics are not required in the WQIPs.

To illustrate further, WQIPs require permittees to choose highest priority water quality conditions (HPWQCs) and develop plans to address those conditions.[23] HPWQCs, however, have thus far often been limited to one condition in an entire watershed. For instance, the San Diego River WQIP chose a single HPWQC, bacteria, as the condition to be addressed via the WQIP even though waters throughout the San Diego River watershed are impaired for numerous constituents and/or conditions, including toxicity, nitrogen and phosphorous, and low dissolved oxygen, among many others. As a result, actions required under the WQIP will predominantly, if not overwhelmingly, be aimed at addressing bacteria in that watershed while other 303(d) listed impairments will remain unaddressed. Further, because no RAA or other detailed analysis is required to show how implemented measures will ultimately achieve the desired outcomes, the WQIPs themselves are vastly different from the safe harbor compliance options. The WQIPs, while more prescriptive than previous permits, are still merely a more detailed embodiment of the iterative process. Thus, they are inadequate to provide the necessary measures to ensure achievement of receiving water limitations.

Permittee Petitioners continue by arguing that the WQIP process is the functional equivalent of establishing TMDLs and TSOs for each of its 303(d) listed waterbodies[24], and thus the WQIP - even in the absence of the Safe Harbor - is sufficiently constrained and reasonable to justify safe harbors during plan development. This assertion is disingenuous at best. While Environmental Petitioners can imagine a TMDL or TSO functional equivalent resulting from a truly rigorous, ambitious, and enforceable reasonable assurance analysis for each impaired waterbody, the WQIPs, absent a safe harbor and reasonable assurance analysis with enforceable measures and metrics, fall far short of ensuring compliance with receiving water limitations or

[23] *See* permit Sections II.B.2. and II.B.3.
[24] OC Petition, page 13.

addressing each impairment of San Diego regional waterbodies. If, in fact, Petitioner Permittees were correct that the WQIPs alone resulted in the equivalent of TMDLs and TSOs for each of its 303(d) listed waterbodies it would stand to reason that there would be no need for the safe harbor level of analysis or implementation at all. Under such a scenario the WQIPs themselves would address all 303(d) impairments and include plans, schedules, and goals for addressing such impairments. In reality the WQIPs do not require nearly the same level of identification and analysis as would a robust, rigorous, transparent, and accountable RAA. The very reason for safe harbors and their associated analysis is to require Permittees to demonstrate with a sufficient level of detail and certainty that compliance will result.[25] Petitioners confuse the level of analysis and ultimate goals of the two related, but separate, provisions, one of which is mandatory and one of which is elective, and in doing so misguidedly attempt to convince the State Board that either is sufficient to assure compliance with receiving water limitations. As we have detailed above and in our Petition, such assurance is present neither in the WQIP process nor the San Diego safe harbor provision.

We once again reference letters and comments in the record from the Environmental Protection Agency that conclude that, "there is insufficient basis to conclude that the permittees are or will be in compliance," during the planning and development phase of the safe harbor.[26] Absent the rigorous identification, analysis, and review required by a proper RAA, no such assurances can or do exist. As detailed in our Petition, the State Board itself points out specifically that safe harbor analysis is intended to add additional assurance that actions undertaken by permittees will actually result in achieving compliance with receiving water limitations; "the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees

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[25] *See* Order 2015-0075, page 37, explaining, "the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones," and, "competent use of the reasonable assurance analysis should facilitate achievement of final compliance."

[26] November 16, 2015 letter from David Smith to Laurie Walsh, Subject: "EPA Comments on Regional MS4 Permit Revisions".

are choosing appropriate controls and milestones."[27] Absent the results and conclusion of a rigorous analysis, no such assurance is demonstrated or should be assumed.

In one last attempt to make an appeal for protections under the safe harbor during the planning phase Permittee Petitioner's assert that, "the State Board should review the rigorousness of the Regional Board's alternative compliance option."[28] They then go on to explain what is required under the WQIP plan development. Here, Permittee Petitioners again mistake the type of analysis required in the WQIP process with the level of analysis required in the safe harbor provision. Our Petition demonstrates in detail that the safe harbor option – combined with the WQIP – is not sufficiently constrained but is instead completely open ended, does not require final compliance with receiving water limitations, and lacks rigor, accountability, and transparency because it not accompanied by any meaningful assurance analysis guidelines or requirements for ultimate achievement. Because the WQIP, even when combined with the alternative compliance provision, is insufficient to warrant application of the safe harbor provision, the WQIP process *on its own* is not and cannot be sufficient to demonstrate eventual compliance with RWL. If the WQIP were on its own sufficient, an additional level of analysis and rigor required by a proper safe harbor would not have been required.

Permittee Petitioners argue, "it would be unjustifiable to allow enforcement of a standard when the plan for attaining that standard is being developed by the Petitioners and reviewed by the Regional Board."[29] Yet this type of planning and implementation is exactly what has been and should have been occurring through the iterative process since at least 2001. To now claim that a more prescriptive provision aimed at addressing ongoing Permittee failures must allow for compliance with the iterative process to equate to compliance with receiving water limitations is to

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[27] WQO 2015-0075 at 37.
[28] OC Petition, page 12.
[29] OC Petitioner Ps and As, p. 14.

completely turn established law on its head.[30] In fact, such a scheme would violate WQ 2015-0075 Principle #1 which requires that safe harbor provisions, "should not deem good faith engagement in the iterative process to constitute such compliance."[31]

Candidly, Permittee Petitioners express their true frustration with the Permit, claiming "the absence of compliance when the Petitioners are undergoing WQIP planning is patently unfair." Permittee Petitioners' blatant and continued violation of the MS4 Permit – despite the perceived threat of litigation due to a lack of a safe harbor –demonstrates an "interim" safe harbor would only undermine the incentive alternative compliance might provide. Decades in to our region's municipal stormwater permitting program millions of citizens in San Diego cannot safely wade, recreate, swim, or fish in our waters. Permittee Petitioners have an ongoing responsibility to the citizenry to correct this injustice. Their continued failure to do so to date is patently unfair. Permittee Petitioners should be incentivized to comply – not rewarded for failing to do so.

V. Conclusion

In closing, Environmental Petitioners ask the State Board not to substitute its findings for the findings of the San Diego Regional Board on whether protection during plan development is proper. While the State Board may have found the Los Angeles WMP/EWMP process sufficiently constrained in the particular instance where many TMDLs and other regulatory measures exist to ultimately ensure compliance, the State Board's Order did not dictate application of the safe harbor during the safe harbor planning and development phase. Rather, WQ 2015-0075 found protection during this planning phase to be, "not unreasonable". Here, it is likewise "not unreasonable" that,

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[30] For a more detailed discussion of laws governing compliance with receiving water limitations and the absence of safe harbors in previous permits, see Environmental Petitioner's Ps and As, pp 8-9, and R9-2015-0100 Fact Sheet page F-45 and F-46.

[31] WQO 2015-0075, p. 51.

in a different regional context, the San Diego Regional Board chose not to shield recalcitrant Permittees during plan development.

Respectfully submitted via electronic mail,

Dated: May 16, 2016

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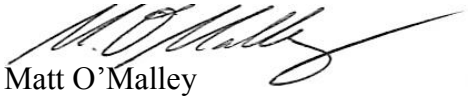

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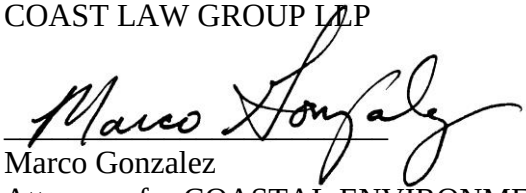

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I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1140 S. Coast Highway 101, Encinitas CA 92024.

On May 16, 2016 I served the within document described **as ENVIRONMENTAL PETITIONERS' RESPONSE TO PERMITEE PETITIONS FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100; SWRCB/OCC FILE A-2456(a through l)** on the following interested parties in said action via electronic mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 16, 2016, at San Diego, California.

Sara Kent