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9 Muskat La Cienega LLC

10
11 STATE OF CALIFORNIA
12 STATE WATER RESOURCES CONTROL BOARD

13
14 MUSKAT LA CIENEGA LLC,

15
16 Petitioner,

17
18 IN THE MATTER OF CALIFORNIA WATER
19 CODE SECTION 13267 INVESTIGATIVE
20 ORDER NO. R4-2022-0136, OF REGIONAL
21 WATER QUALITY CONTROL BOARD, LOS
22 ANGELES REGION, REQUIRING MUSKAT
23 LA CIENEGA LLC TO PROVIDE A
24 TECHNICAL REPORT FOR SUBSURFACE
25 INVESTIGATION AT 3221-3223 SOUTH LA
26 CIENEGA BOULEVARD (SCP NO. 1569)

Case No.:

MUSKAT LA CIENEGA LLC'S (1)
PETITION FOR REVIEW OF TECHNICAL
REPORTING ORDER R5-2018-0809
[WATER CODE § 13320 ET SEQ. AND 23
CCR § 2050 ET SEQ.]; (2) REQUEST FOR A
STAY [WATER CODE § 13321; 23 CCR §
2053]; (3) REQUEST FOR PREPARATION
OF THE ADMINISTRATIVE RECORD;
AND, (4) REQUEST FOR EVIDENTIARY
HEARING [AND 23 CCR § 2052]

27
28 **I. INTRODUCTION.**

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30 As set forth in detail below, Petitioner Muskat La Cienega LLC (Muskat) respectfully
31 requests that the State Water Resources Control Board (SWRCB) (1) review and rescind
32 Technical Reporting Order R4-2022-0136 issued to Muskat on August 25, 2022 (Order) by the
33 Regional Water Quality Control Board for the Los Angeles Region (LARWQCB) for the
34 property located at 3221-3223 South La Cienega Boulevard, County of Los Angeles, State of
35 California; (2) stay the Order pending this appeal; and, (3) hold an evidentiary hearing on the

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40 MUSKAT LA CIENEGA LLC'S (1) PETITION FOR REVIEW OF TECHNICAL
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1 merits of this Petition. Muskat also requests that the LARWQCB and SWRCB prepare the
2 administrative record in this matter.
3

4
5 **II. PETITION FOR REVIEW.**
6

7 **1. Name and Address of the Petitioner.**
8

9 Muskat La Cienega LLC, c/o Jeffery S. Pop, Esq., 9150 Wilshire Boulevard, Suite #241,
10 Beverly Hills, CA 90212-3429; jpop@poplawyer.com. Please copy Muskat's outside counsel
11 on all correspondence as follows: Summer L. Nastich, Nastich Law, a Professional Corporation,
12 2341 Derby Street, Berkeley, California, 94705, Summer@NastichLaw.com, (415) 794-4210.
13
14

15
16 **2. The Specific Action or Inaction of the Regional Board Which Petitioner Requests**
17 **the State Water Board Review.**
18

19 Muskat requests that the SWRCB review and rescind the Order. A true and correct copy
20 of the Order and cover letter thereto are attached hereto collectively as Exhibit 1.
21
22

23 **3. The Date on Which the Regional Board Acted or Refused to Act or on which the**
24 **Regional Board was Requested to Act.**
25

26 August 25, 2022, the date of the Order.
27

28 **4. The Reasons the Action or Failure to Act was Inappropriate or Improper.**
29

30 For the reasons, and based on the evidence and authority, set forth in the Points and
31 Authorities in Section 7, below, issuance of the Order was inappropriate, improper, not supported
32 by substantial evidence, and an abuse of discretion. For convenience, a summary of Muskat's
33 arguments and evidence is as follows: The Order is based primarily on soil samples that the
34 LARWQCB asserted (in Sections 2B and 2C) the Order were taken on the Muskat Property, but
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1 in fact the samples were not taken on the Muskat Property. Declaration of Jeffery S. Pop, Esq.
2 (Pop Dec.) at ¶6; Ex A (Survey of the Muskat Property conducted in September 2022). Because
3 the factual basis for the Order, as stated the Order itself, is inaccurate and incorrect, there are *no*
4 facts supporting the Order. Investigation of the Muskat Property as Ordered is also unwarranted
5 and unsupported by the data because the data show that the impacts asserted by the LARWQCB
6 to justify the Order originate on an adjacent property, the La Cienega Creative Properties Site at
7 3243 La Cienega Boulevard (LCCP Site). Further, Muskat is not an actual, threatened, or
8 suspected discharger because there is no evidence of any use, storage, or handling of any of the
9 constituents of concern on the Muskat Property at any time, and in fact the available evidence is
10 to the contrary. Finally, the Order fails to satisfy Water Code § 13267(b)(1)'s requirement that
11 the burden, including costs, of the ordered reports bear a reasonable relationship to their need.
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18 **5. The Manner in Which Petitioner is Aggrieved.**
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20 Muskat is aggrieved by the Order because, despite the facts that (1) the Order is premised
21 on inaccurate and incorrect facts, (2) there is no evidence of an actual, threatened, or suspected
22 discharge from the Muskat Property, (3) Muskat is not a discharger, and (4) the Order fails to
23 meet the requirements of Water Code § 13267(b)(1), the Order nevertheless obligates Muskat to:
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25
26

- 27 1. [S]ubmit by **October 28, 2022** a technical report containing items (a) through (c)
28 listed below:
29
30 a. Phase I environmental site assessment report that meets the standards of
31 American Society for Testing and Materials (ASTM) E1527-21 "*Standard*
32 *Practice for Environmental Site Assessments: Phase I Environmental Site*
33 *Assessment Process.*"
34
35 b. A conceptual site model (CSM) that evaluates the fate and transport of
36 contamination in the subsurface, distribution of contamination, exposure
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1 pathways, sensitive receptors and other relevant information, based on known
2 and available information.

3
4 c. The CSM and/or Phase 1 environmental site assessment report shall include the
5 following:

6
7 i. A brief summary of the Site history, a description of current and historical
8 business and facility operations at the site, and current Site and operational
9 status;

10
11 ii. Location of historical, current, and proposed buildings and/or structures (if
12 applicable); previous investigation, remediation, and/or field assessment
13 locations, including borings, groundwater monitoring wells, excavations,
14 soil sampling points, removal actions of construction/demolition debris,
15 etc.; and, any potential historical source areas, including, but not limited to,
16 clarifiers, sumps, chemical storage areas, paint booths, plating,
17 aboveground or underground storage tanks, tanklines/treatment lines, and
18 any waste treatment/discharge areas, etc. These locations and building(s)
19 (or structures) must be presented on an accurately scaled Site map;

20
21 iii. Any historical spill and mitigation records;

22
23 iv. Tables including all historic analytical data from current and previous
24 investigations of soil, soil vapor, and groundwater; and,

25
26 v. Scaled figures/maps showing plain and cross-section views of soil lithology
27 and laboratory analytical results of soil, soil vapor, and groundwater
28 sampling borings/points from the current and all previous site investigations.

29
30 2. Submit by **October 28, 2022**, a technical report consisting of a work plan for a
31 subsurface investigation that shall include sampling protocols for collecting soil
32 gas, soil, and groundwater samples, and laboratory analytical methods for
33 VOCs. At minimum, samples shall be collected at the locations of any potential
34 source areas, if known, or at several representative locations throughout the Site
35 if potential source areas are unknown. The locations of sampling locations must
36 be presented on a scaled site map. The Work Plan shall be prepared in
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1 accordance with the guidance documents that include the following: Advisory
2 – Active Soil Gas Investigations (July 2015 [link omitted]).
3

4 The Order itself states that the above work will cost between \$50,000 and \$175,000. Also,
5 Muskat’s primary source of income is rent from the Muskat Property and the cost estimate
6 provided by the LARWCB in the Order would represent an oppressive burden on Muskat as
7 discussed in the Request for a Stay, below. The Order therefore imposes an excessive,
8 unreasonable, and unnecessary financial burden on Muskat.
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11
12 **6. The Specific Action by the State or Regional Board Which Petitioner Requests.**
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14 Muskat requests that that SWRCB review and rescind the Order. Alternatively, Muskat
15 seeks an opportunity to resolve its alleged liability through a settlement with the LARWQCB.
16

17
18 **7. Points and Authorities in Support of Legal Issues Raised in this Petition.**
19

20 A. The stated factual basis for the Order is inaccurate and incorrect and as a result there are
21 no facts supporting the Order.
22

23 a. The soil samples on which the Order is based were not taken on the Muskat
24 Property.
25

26 California Water Code § 13267, subdivision (b)(1), under which the LARWQCB issued the
27 Order states, in pertinent part:
28

29
30 In conducting an investigation specified in subdivision (a), the regional board may
31 require that any person *who has discharged, discharges, or is suspected of having*
32 *discharged or, discharging, or who proposes to discharge waste within its region...*
33 *shall furnish, under penalty of perjury, technical or monitoring program reports*
34 *which the regional board requires. The burden, including costs, of these reports*
35 *shall bear a reasonable relationship to the need for the reports and the benefits to be*
36 *obtained from the reports. In requiring those reports, the regional board shall*
37 *provide the person with a written explanation with regard to the need for the reports,*
38

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1 and shall identify the evidence that supports requiring that person to provide the
2 reports. (Water Code § 13267(b)(1), as quoted in the Order at Section 3. Emphasis
3 added.)
4

5 In an attempt to satisfy the requirements of Water Code § 13267(b)(1) as quoted above, the
6 Order states,
7
8

9 The Regional Water Board has evidence from investigation reports for sampling
10 conducted for the LCCP Site *and that also included limited investigation beneath*
11 *the Muskat Site*, indicating that there is or has been a discharge of waste at or from
12 the [Muskat] Site that has or could affect the quality of waters of the State. The
13 evidence supporting this requirement is provided in Sections 2B, 2C, and 2D on the
14 previous page that indicates groundwater and soil beneath the Muskat Site have
15 been impacted by CVOCs. (Order at Section 4. Emphasis added to highlight the
16 inaccurate and incorrect parts of the Order.)
17

18 Sections 2B and 2C of the Order provide, respectively,
19

20 Muskat Site Groundwater Conditions - Three groundwater monitoring wells were
21 installed *at the Muskat Site* in 2019 as part of the environmental investigation work
22 for the LCCP Site. Monitoring well MW-21A was installed in the shallow
23 groundwater zone (well screen interval of 19 to 37 feet bgs), while monitoring wells
24 MW-21B and MW-22B were installed in the deeper groundwater zone (well screen
25 interval of 65 to 75 feet bgs, and 80 to 90 feet bgs, respectively). A shallower well
26 at MW-22 location was not installed because groundwater was not encountered
27 until approximately 80 feet bgs, consistent with observations of a shallower perched
28 groundwater zone that does not extend to the alley area. From December 2019
29 through December 2021, four groundwater monitoring events have been performed
30 at wells MW-21A, MW-21B, and MW-22B. The maximum sample concentrations
31 were 55 micrograms per liter (µg/L) of PCE and 14 µg/L of TCE, while other
32 CVOC breakdown products were not detected. The depth to groundwater has been
33 reported between 26 and 30 feet bgs in MW-21A, and between 71 and 73 feet bgs
34 in MW-21B and MW-22B. (Order at Section 2B. **Again, emphasis added to**
35 **highlight the inaccurate and incorrect parts of these Sections, as neither MW-**
36 **21A, MW-21B, nor MW-22B are at the Muskat Site.**)
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1 Muskat Site Soil Conditions – Soil samples were collected in December 2019 when
2 monitoring wells MW-21A/B and MW-22B were installed. A total of 18 soil
3 samples were collected, at five-foot intervals from 5 to 25 feet bgs at MW-21 and
4 5 to 65 feet bgs at MW-22. PCE was detected in 9 of the 18 soil samples, including
5 in soil as shallow as 5 and 10 feet bgs, with a maximum PCE concentration of 0.025
6 milligram per kilogram (mg/kg) at 30 feet bgs. TCE was detected in 1 of the 18
7 soil samples, at a concentration of 0.014 milligram per kilogram (mg/kg) at 45 feet
8 bgs. Other CVOCs were not detected. Because the potential source(s) of CVOCs is
9 unknown, it is not clear whether the areas of highest soil impacts have been
10 identified by the 2019 limited soil investigation. (Order at Section 2C. **Again, the**
11 **samples discussed in this Section were not taken from the Muskat Site)**
12

13 The conclusion drawn in these two sections, *i.e.*, that Muskat is has discharged, is discharging,
14 or is suspected of or threatening to discharge waste from the Muskat Property, is incorrect
15 because, contrary to the “facts” stated in the Order, *MW-21A/B and MW-22 are not on the*
16 *Muskat Property*. Pop Dec. at ¶6; Ex. A. As shown in the survey attached to the Pop Dec.,
17 MW-21A/B are more than four feet to the west of the Muskat Property and MW-22 is more than
18 nine feet to the south of the Muskat Property. *Id.* As such, contrary to the statements in the
19 Order that form the factual basis for its issuance to Muskat, there is no evidence of any discharge,
20 threatened discharge, or suspected discharge on or at the Muskat Property. Because the
21 LARWQCB premised the Order on the inaccurate and incorrect facts set forth in Sections 2B
22 and 2C, the Order should be rescinded.
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- 29 b. Muskat is not a discharger because the evidence indicates that there has never been
30 any use, storage, or handling of any of the constituents of concern on the Muskat
31 Property.
32

33 As to Section 2D of the Order, that Section actually supports Muskat’s contention that
34 Muskat is not an actual, threatened, or suspected discharger because it admits that there is no
35 evidence that any of the constituents of concern have been used, stored, or handled on the Muskat
36 Property. Specifically, Section 2D provides,
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1
2 In July 2018, Jeffrey Pop, as one Trustee of the former property owner, the M.
3 Stanley Muskat Irrevocable Trust, completed and provided the Regional Water
4 Board a Chemical Use Questionnaire (CUQ) for the Muskat Site. The Muskat CUQ
5 did not identify any historical sources of CVOCs from the Muskat Site. Historical
6 land uses and company names or tenants include tile and stone, trading and shipping,
7 engineering, warehousing, a small machine shop, and other companies with
8 names that do not clearly indicate land use details. The Muskat CUQ states that
9 Phase I and Phase II documents do not exist for the Muskat Site, that no CVOCs are
10 known to have been used at the Muskat Site, and that no chemical releases are
11 known to have occurred.
12

13 Mr. Pop actually completed the prior CUQ in 2018 and he recently completed an updated
14 CUQ to cover the gap between the prior one and the present. Pop Dec. at ¶7; Ex. B.
15 Together, these CUQs reflect Mr. Pop’s knowledge gleaned in his roles as attorney for Mr.
16 Muskat between 1978 to 2006 (during which time Mr. Muskat owned the Property),
17 Trustee of the M. Stanley Muskat Trust for the period 2015 to present (from 2006 to 2020
18 the Trust held title to the Muskat Property), and as Muskat’s general manager (between
19 2020 and the present during which time Muskat held, and continues to hold, title to the
20 Property). Pop Dec. at ¶¶3 through 5 and ¶7; Ex. B. The CUQs and Mr. Pop’s knowledge
21 confirm that none of the constituents of concern have been used, stored, or handled at the
22 Muskat Property since at least 1989. Pop Dec. at ¶¶7 and 8; Ex. B. But that’s not all. An
23 Environmental Database Report from 2018 *produced no records of any kind for the Muskat*
24 *Property*. Pop Dec. at ¶9; Ex. C (the EDR Report is provided herewith along with the
25 associated City Directory and Sanborn Maps). The absence of any evidence that any of
26 the constituents of concern have *ever* been used, stored, or handled at the Muskat Property
27 and, in fact, the available evidence is to the contrary, to makes *In the Matter of the Petition*
28 *of Larry and Pamela Canchola*, Order No. WQO 2003-0020, SWRCB/OCC FILE NO. A-
29 1554, November 19, 2003, dispositive here.
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1 In *Canchola*, as here, the LARWQCB issued an order under Water Code § 13267,
2 though in *Canchola* the order was issued to former owners of the property, the Cancholas,
3 in relation to MTBE as opposed to volatile organic compounds. *Canchola*, at 1. There,
4 like here, the Cancholas appealed to the SWRCB arguing that the order as to them was
5 inappropriate because they did not use or store MTBE at the Property during their
6 ownership. *Id.* at 3. There, as here, the LARWQCB's position was that the presence of
7 MTBE on the Property was sufficient to make the Cancholas PRPs and proper recipients
8 for an order as to MTBE. *Id.* ("The Regional Board...contends that the Cancholas are
9 property designated PRPs for the MTBE investigation because MTBE has been detected
10 in the soil and groundwater at the site.") The SWRCB rejected the LARWQCB's position
11 because, like here, there was "insufficient evidence in the record on MTBE to pinpoint its
12 source." *Id.* at 5. The SWRCB therefore concluded,
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20 In sum, the Cancholas have submitted uncontroverted evidence that they did not
21 use or store gasoline containing MTBE during their ownership of the UST site.
22 There are low levels of MTBE in soil and groundwater at some locations on-site.
23 *Evidence in the record regarding the source of the MTBE, however, is inconclusive.*
24

25 Successfully cleaning up MTBE pollution that threatens the Charnock wellfields is
26 an imperative. The State Board recognizes that broadening, rather than reducing,
27 the PRP list for the cleanup effort furthers that goal. The Board has previously held
28 that "it is appropriate and responsible for a Regional Board to name all parties for
29 which there is reasonable evidence of responsibility, even in cases of disputed
30 responsibility" in a cleanup order. *There must be substantial evidence, however, to*
31 *support a finding of responsibility.*
32

33 While the Board does not ordinarily second-guess the regional boards on these
34 kinds of issues, the Board is unable to conclude in this case that there is substantial
35 evidence in the existing record supporting a finding that the Cancholas are
36 responsible for MTBE pollution at the former UST site. *The evidence is insufficient*
37 *to rebut the Cancholas' uncontroverted evidence that they did not use or store*
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1 *MTBE during their ownership of the site. The Board, therefore, concludes that the*
2 *Regional Board cannot, at the present time, require the Cancholas to further*
3 *investigate or remediate MTBE pollution at the UST site. (Id. at 5-6. Internal*
4 *footnotes omitted, emphasis added.)*
5

6 Muskat’s case is even stronger than the Cancholas’ because, in addition to Muskat’s
7 uncontroverted evidence that none of the constituents of concern have ever been used, stored, or
8 handled on the Muskat Property, there is also no evidence of any actual, threatened, or suspected
9 discharge of any of the constituents of concern on the Muskat Property. Therefore, the Order
10 should be rescinded.
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12

13
14 B. Investigation of the Muskat Property is unwarranted and unsupported by the data because
15 the impacts in MW-21 and MW-22 originate in the vicinity of MW-7 on the LCCP Site.
16

17 As discussed in greater detail below, the groundwater, soil vapor, and soil data collected
18 to date from LCCP Site and other sites around the Muskat Property indicate that the source of the
19 constituents of concern originate not from the Muskat Property, but rather upgradient (northwest)
20 of the Muskat Property in the vicinity of monitoring well MW-7 on the LCCP Site. These data
21 also show that the Muskat Property is hydraulically downgradient or cross-gradient of the LCCP
22 Site, which means any impacts to the Muskat Property are *from* the LCCP Site, not the other way
23 around as implied by the Order.
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1 Groundwater

2 With respect to groundwater, the Muskat Property is downgradient or cross-gradient of
3 the LCCP Site (the source of PCE). Statements in Stantec Consulting Services, Inc.’s¹, *Off-Site*
4 *Groundwater Monitoring Well Installation and Fourth Quarter 2019 Groundwater Monitoring*
5 *Report*, January 19, 2020 to the contrary are contradicted by both the shallow and deep
6
7 groundwater elevation contour maps presented in that very report, which clearly show
8
9 groundwater flowing to the southeast— from the LCCP Site towards the Muskat Property
10
11 (though the report also wrap the 60 and 61 feet groundwater elevation contours for the shallow
12
13 groundwater zone to the southwest onto the Muskat Property east and south of monitoring well
14
15 MW-18A, despite the absence of any data to support drawing the contours in this fashion or even
16
17 draw contours eastward of monitoring well MW-17A). Declaration of Richard Vogl (Vogl Dec.)
18
19 at ¶¶6 and 7; Ex. Q; Stantec Consulting Services, Inc., *Off-Site Groundwater Monitoring Well*
20
21 *Installation and Fourth Quarter 2019 Groundwater Monitoring Report*, January 19, 2020,
22
23 Figures 3A and 3B, attached thereto and filed herewith. In fact, groundwater flow direction in
24
25 the vicinity of the LCCP Site and the Muskat Property has historically been to the south (making
26
27 the sites cross-gradient) and southeast (making the Muskat Property downgradient of the LCCP
28
29 Site). Vogl Dec. at ¶8; Ex. R through T; Stantec Consulting Services, Inc., *2017 Second Semi-*
30
31 *Annual Groundwater Monitoring Report* January 12, 2018, Figure 3; Stantec Consulting
32
33 Services, Inc., *2018 First Semi-Annual Groundwater Monitoring Report*, July 13, 2018 Figure 3;
34
35 Stantec Consulting Services, Inc., *2018 Second Semi-Annual Groundwater Monitoring Report*,
36
37 January 15, 2019, Figures 3A and 3B; and Stantec Consulting Services, Inc., *2019 First Semi-*
38
39 *Annual Groundwater Monitoring Report*, July 15, 2019, Figures 3A and 3B, all of which are
40
41 attached to Vogl Dec. and filed herewith. Groundwater monitoring activities conducted more

1 Stantec Consulting Services, Inc. is LCCP’s consultant.

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1 recently in June 2020, December 2020, and December 2021 also reflect a southeast groundwater
2 flow direction in both the shallow and deep groundwater zones, *i.e.*, flowing *from* the LCCP Site
3 in the area of MW-7 to the Muskat Property. Vogl Dec. at ¶9; Ex. U; Stantec Consulting
4 Services, Inc., *2021-Annual Groundwater Monitoring Report*, May 18, 2022, at Figures 3A and
5 3B.
6
7

8 Further, the highest PCE concentration in groundwater detected *anywhere* in the vicinity
9 of the Muskat Property was detected on the LCCP Site in monitoring well MW-7 (PCE
10 concentration 970 ug/L in March 2016). Vogl Dec. at ¶10; Ex. V; Stantec Consulting Services,
11 Inc., *2021-Annual Groundwater Monitoring Report*, May 18, 2022, Table 5, page 2 of 8,
12 attached thereto and filed herewith. This concentration is an order of magnitude higher than any
13 other PCE concentration detected in shallow or deep groundwater, including from the wells
14 closest to the Muskat Property (MW-21 and MW-22). *Id.* This too indicates that the source of
15 PCE in groundwater is located on the LCCP Site near monitoring well MW-7. *Id.* Further, PCE
16 concentrations detected in in December 2019 in MW-21A (55 ug/L) and MW-21B (35 ug/L),
17 both of which are located between monitoring well MW-7 on the LCCP Site (PCE concentration
18 440 ug/L) and the Muskat Property, also indicate that concentrations detected in MW-21A and
19 MW-21B originated upgradient, *i.e.*, on LCCP Site, and that the PCE plume in the area of
20 monitoring well MW-7 is the source of the PCE contamination detected in MW-21 and MW-22.
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28 *Id.*

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MUSKAT LA CIENEGA LLC'S (1) PETITION FOR REVIEW OF TECHNICAL
REPORTING ORDER R5-2018-0809 [WATER CODE § 13320 ET SEQ. AND 23 CCR § 2050
ET SEQ.]; (2) REQUEST FOR A STAY [WATER CODE § 13321; 23 CCR § 2053]; (3)
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1 Soil vapor

2 Turning to soil vapor, the Order appears to draw in large part from the incorrect and
3 technically flawed conclusions set forth in Stantec Consulting Services, Inc., *Off-Site*
4 *Groundwater Monitoring Well Installation and Fourth Quarter 2019 Groundwater Monitoring*
5 *Report*, January 19, 2020. In this report, Stantec incorrectly states that, “Based on prior on-site
6 assessments performed near groundwater monitoring well MW-7 [on the LCCP Site], soil vapor
7 sampling strongly supports the conclusion that the source of VOCs in groundwater at the [LCCP]
8 Site is located up-gradient and off-[of the LCCP] Site.” Vogl Dec. at ¶11; Ex. W, Stantec
9 Consulting Services, Inc.’s, *Off-Site Groundwater Monitoring Well Installation and Fourth*
10 *Quarter 2019 Groundwater Monitoring Report*, January 19, 2020, p. 4.1, attached thereto and
11 filed herewith. In actuality, the shallow soil vapor data for the LCCP Site indicate a likely
12 source of VOCs to the west of monitoring well MW-7 (the Muskat Property is to the east of
13 MW-7). *Id.* That is, the data indicate a source of PCE on the LCCP Site because a soil vapor
14 sample from 8-foot bgs at location AOC#11-SV-04-8’ on the LCCP Site of 13 ug/L was the
15 highest concentration of PCE in any of the shallow soil vapor samples collected in the vicinity of
16 monitoring well MW-7—this indicates a near surface source of PCE in this area. Vogl Dec. at
17 ¶11; Ex. X; Stantec Consulting Services, Inc., *Hydrogeological and CVOC Conceptual Site*
18 *Model Report*, July 15, 2016, at Figure 10, attached thereto and filed herewith. Although deeper
19 soil vapor samples around MW-7 were slightly higher (45 ug/L at AOC#11-SV-03-24’) near the
20 northeast property line of the LCCP Site, these concentrations are the same order of magnitude
21 as other deeper soil vapor samples on the LCCP Site in the vicinity of MW-7 (SV-01 (PCE 24
22 ug/L), SV-02 (PCE 28 ug/L), SV-05 (PCE 22 ug/L), SV-06 (PCE 28 ug/L)), which indicates that
23 these concentrations result from off-gassing from groundwater under the LCCP site rather than a
24 source of PCE in groundwater to the east of the LCCP Site. *Id.* Groundwater sampling results
25 from December 2019 for MW-17 (PCE <1.0 ug/L), MW-18 (PCE 64 ug/L), MW-21 (PCE 55
26 ug/L), and MW-22 (PCE 1.0 ug/L) are all significantly lower than the concentrations found in
27 the soil vapor samples around MW-7, which further supports the conclusion that the source of PCE
28 in groundwater at the LCCP Site is located up-gradient and off-[of the LCCP] Site.
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1 ug/L), and MW-22 (Dry) also do not indicate a source of PCE to groundwater other than the
2 LCCP Site, as these concentrations are all *an order of magnitude lower* than that detected in
3 MW-7 (PCE 440 ug/L) which is on the LCCP Site. Vogl Dec. at ¶12; Ex. Y; Stantec Consulting
4 Services, Inc., *Off-Site Groundwater Monitoring Well Installation and Fourth Quarter 2019*
5 *Groundwater Monitoring Report*, January 19, 2020, Figure 4, attached thereto and filed
6 herewith. Therefore, Stantec’s conclusion that the source of VOCs in groundwater is to the east
7 of the off-site LCCP Site is invalid, and in fact the LCCP is the source of PCE detected in MW-
8 21 and MW-22 adjacent to the Muskat Property. Vogl Dec. at ¶13.

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14 Soil

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16 Specifically as to soil, the very low concentrations of PCE in borings from MW-21 and
17 MW-22 are in no way reflective of a surface source. Rather, all of these (very low)
18 concentrations are within the range expected for sorption of PCE to soil from soil vapor
19 emanating from the area surrounding MW-7 on the LCCP Site. Vogl Dec. at ¶14. Specifically,
20 samples collected at 10-foot bgs from the borings for monitoring wells MW-21B (0.0028 mg /kg)
21 and MW-22B (0.0025 mg /kg), seven soil samples from depths of 5 to 15-feet bgs from the
22 boring for MW-22B (PCE concentrations ranging from 0.0025 mg/kg to 0.0054 mg/kg), and soil
23 samples from the MW-22B boring from 35 to 45 feet bgs (PCE concentrations ranging from
24 0.0028 mg/kg to 0.025 mg/kg). Vogl Dec. at ¶14; Ex. Z; Stantec Consulting Services, Inc., *Off-*
25 *Site Groundwater Monitoring Well Installation and Fourth Quarter 2019 Groundwater*
26 *Monitoring Report*, January 19, 2020, at Table 6, attached thereto and filed herewith. Although
27 measurable shallow groundwater is not present at this well location (MW-22), soil moisture
28 derived from the upgradient shallow groundwater impacted with PCE and TCE (MW-21A) is
29 present at these depths of 35 to 40 feet below grade, and these detections in the deeper soil
30 samples are reflective of soil moisture present within this deeper zone derived from shallow
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1 groundwater (PCE concentration of 35 ug/L and TCE concentration of 5.8 ug/L, December
2 2019), as opposed to being indicative of a nearby surface source of PCE. Vogl Dec. at ¶14. The
3 fact that these concentrations are the same order of magnitude as concentrations from soil
4 samples taken from the LCCP Site in the general vicinity of MW-7 indicates that the PCE in soil
5 samples from the MW-21 and MW-22 locations is due to proximity to MW-7 in that it is being
6 caused by sorption of PCE onto soil particles and organic carbon in the soil from the soil vapor
7 plume originating at the LCCP Site in the general vicinity of MW-7, and off-gassing from the
8 deeper groundwater plume that also originates at the LCCP Site in the general vicinity of MW-7
9 and is migrating from the LCCP site towards the southeast, *i.e.*, towards the Muskat Property.
10 *Id.* A quick calculation of the soil gas to soil partitioning using the County of San Diego Site
11 Assessment & Mitigation Vapor Risk Assessment Model 2000 updated July 29, 2010, using a
12 Henry's Law Constant for PCE of 0.75, a bulk density for dry soil of 1.80 gm/cc, air filled
13 porosity of 0.20, water filled porosity of 0.10, and soil/water distribution coefficient of 2.70
14 cm³/gm reveals that the range of PCE soil concentrations detected in MW-21 and MW-22 soil
15 borings (0.0025 to 0.0054, and 0.025 mg/kg) would be expected from partitioning from soil
16 vapor PCE concentrations of 0.660 ug/L to 1.43 ug/L, and 6.60 ug/L, respectively. *Id.* These
17 soil vapor concentrations are well within the observed vapor plume PCE concentrations
18 emanating from the source near MW-7 on the LCCP Site and concentrations expected from
19 vapor intrusion from the MW-7 source onto the Muskat Property (2.1 ug/L to 28 ug/L PCE in
20 adjacent soil vapor probes AOC#11-SV-06 and AOC#11-SV-09 located on the LCCP Site). *Id.*
21 In addition, the lack of elevated PCE concentrations in the 5 foot soil samples at soil borings for
22 MW-21 and MW-22, and the lack of a top down concentration profile with concentrations
23 decreasing at depth from an elevated surface concentration source, further support the conclusion
24 PCE detections in soil in the borings from MW-21 and MW-22 are reflective of impacts from the
25 LCCP site, as opposed to a nearby surface source for these contaminants. *Id.*

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1 Based on the above, the data show the that the LCCP Site is the source of the impacts in
2 MW-21A/B and MW-22 and therefore assessment of the Muskat Property as Ordered is
3
4 unwarranted.

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6 C. The Order fails to satisfy Water Code § 13267(b)(1)'s requirement that the burden,
7 including costs, of the ordered reports bear a reasonable relationship to their need.
8

9
10 Water Code § 13267(b)(1) expressly requires that the burden, including costs, of reports
11 ordered under that section “bear a reasonable relationship to the need for the reports and the
12 benefits to be obtained from the reports.” The Order fails this requirement because, as shown
13 above, there is no evidence that the Muskat Property is a source or potential source of impacts to
14 groundwater and in fact the uncontroverted evidence is to the contrary. This is evident in the
15 vagueness of the Order’s requirements that Muskat provide:
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19 [The] Location of historical, current, and proposed buildings and/or structures (*if*
20 *applicable*); previous investigation, remediation, and/or field assessment locations,
21 including borings, groundwater monitoring wells, excavations, soil sampling points,
22 removal actions of construction/demolition debris, *etc.*; and, *any potential* historical
23 source areas, including, but not limited to, clarifiers, sumps, chemical storage areas,
24 paint booths, plating, aboveground or underground storage tanks,
25 tanklines/treatment lines, and any waste treatment/discharge areas, *etc...**Any*
26 historical spill and mitigation records...(Order at (second) Section (1)(c)(ii) and
27 (1)(c)(iii). Emphasis added to highlight vagueness.)
28

29
30 And,

31
32 [A] technical report consisting of a work plan for a subsurface investigation that
33 shall include sampling protocols for collecting soil gas, soil, and groundwater
34 samples, and laboratory analytical methods for VOCs. At minimum, samples shall
35 be collected at the locations of *any potential source areas, if known, or at several*
36 *representative locations throughout the Site if potential source areas are unknown.*
37 (Order at (second) Section 2. Again, emphasis added to highlight vagueness.)
38
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40 MUSKAT LA CIENEGA LLC’S (1) PETITION FOR REVIEW OF TECHNICAL
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2 In addition to the Order’s vagueness, the Order is devoid of any analysis tying its requirements
3 and associated cost to the need for the demanded reports and investigation. This not only admits
4 that the LARWQCB lacks any evidence of actual, threatened, or suspected discharges from the
5 Muskat Property, but also distinguishes the Order from the one considered in *Sweeney v.*
6 *California Regional Water Quality Control Board, San Francisco Bay Region*, (2021) 61
7 Cal.App.5th 1, 1114-1115. In *Sweeney*,

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12 The CAO explained the need for the reports and identified the evidence supporting
13 the Board’s demand. The CAO included *dozens of findings* to explain the need for
14 the technical reports. *The Board concluded Sweeney had engaged in numerous*
15 *unauthorized activities at the Site* related to his unauthorized levee construction.
16 The Board found *these unauthorized construction activities removed crucial tidal*
17 *flow to the Site’s interior, and caused its tidal marsh areas to dry out and vegetation*
18 *to die off. The Board found Sweeney, without authorization, discharged fill material*
19 *into tidal waters at the Site. It further found Sweeney’s unauthorized activities*
20 *“adversely impacted beneficial uses at the Site including estuarine habitat, fish*
21 *migration, preservation of rare and endangered species, fish spawning, wildlife*
22 *habitat, and commercial and sport fishing.”* (*Sweeney*, 61 Cal.App.5th 1114.
23 Internal footnotes omitted. Emphasis added to highlight the distinction between
24 the facts in *Sweeney* and the facts here.)
25

26 And, unlike the Order here, the order in *Sweeney* directly tied the work required to
27 *Sweeney’s* actions and known facts about the site at issue. *Id.* at 1115 (stating, “For
28 example, one report ordered was a ‘Point Buckler Restoration Plan” which was to set forth
29 the “corrective actions *designed to restore...the water quality functions and value of the*
30 *tidal marsh...existing prior to [Respondents’] unauthorized activities.*” Again, emphasis
31 added to highlight the distinction between the facts in *Sweeney* and the facts here.) These
32 substantive findings in *Sweeney*, and the connection between them and the work required
33 by the order in that case is what allowed the *Sweeney* order to pass muster with the Court.
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1 In contrast, the Order issued to Muskat does not come anywhere near the same level in
2 terms detail, analysis, evidence, or connection between the required work and Muskat's
3 alleged actions (which are none). As such, the Order fails to comply with Water Code §
4 13267. *Sweeney*, 61 Cal.App.5th 1114-1115.
5
6

7 For all of the reasons stated above, and based on the cited authority and evidence,
8 Muskat requests that the SWRCB rescind the Order.
9

10
11 **8. Statement of Service of Petition.**
12

13 This Petition has been served as follows: To the State Water Resources Control Board via
14 email to waterqualitypetitions@waterboards.ca.gov with a hard copy to State Water Resources
15 Control Board, Office of Chief Counsel, Adrianna M. Crowl, P.O. Box 100, Sacramento, CA
16 95812-0100,
17
18

19 A copy of this Petition has also been sent to Renee Purdy, Executive Officer of the
20 LARWQCB, and another copy to the Case Manager, Mr. Dave Bjostad, both at Los Angeles
21 Regional Water Quality Control Board, 320 West 4th Street, Suite 200, Los Angeles, CA 90013.
22

23 Please note that full copies of the exhibits to the Petition and the Declarations supporting
24 the Petition were included on thumb drives enclosed with hard copies of the Petition. Full
25 copies of this Petition, the Declarations, and all of the associated Exhibits and Reports are also
26 available by clicking this rectangle:
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1 **9. Raising of the Issues Before the Regional Board.**
2

3 Muskat hereby raises these issues to the LARWQCB by service of this Petition on the
4 LARWCB. Although 23 CCR § 2050 allows for appeal directly to the SWRCB of any action or
5 failure to act by a Regional Board, and therefore Muskat need not do so, Muskat is more than
6 willing to discuss this matter directly with LARWQCB staff and/or first present this Petition and
7 the issues raised herein to the full LARWQCB.
8
9

10
11 **III. REQUEST FOR STAY.**
12

13 In accordance with 23 CCR § 2053(a), for the following reasons and based on the evidence
14 cited below and provided herewith, Muskat requests a stay of the Order and a hearing on this
15 request for a Stay.
16
17

18 In addition to the Order itself, which states that the work required under it is estimated to
19 cost \$50,000 to \$175,000, Muskat has filed herewith in support of this Petition the Pop Dec.
20 providing evidence of the substantial harm that will result if a stay is not granted. Specifically,
21 Muskat’s primary source of income is rent from the Muskat Property. Pop Dec. at ¶10. Muskat
22 is owned by the M. Stanley Muskat Trust and Muskat’s income, after operating expenses,
23 overhead, and reserves, is the Trust’s major source of income. *Id.* The Trust has three living
24 beneficiaries. *Id.* The primary beneficiary is 78 years old and wheelchair bound. *Id.* The costs
25 of performing the work required by the Order would significantly reduce the resources available
26 to care for the primary beneficiary, which is a substantial harm. *Id.* In sum, the work required
27 by the Order “would create an oppressive burden on Muskat.” *Id.*
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30 Also, no substantial harm to other interested persons or to the public interest will result if
31 a stay is granted. As set forth in the Vogl Dec., the available data and evidence all indicate that
32 the source of the materials is in fact the LCCP Site—a site with documented and extensive impacts
33 to soil and groundwater. Moreover, even assuming for the moment that this isn’t the case, staying
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1 the Order to Muskat will not hamper any investigative or remedial efforts at the LCCP Site, the
2 area in and around the alley and public roadway where MW-21 and MW-22 are in fact located,
3 or any of the surrounding area(s) because these efforts can continue regardless of a stay of the
4 Order. Therefore, no substantial harm to any other interested persons or the public interest will
5 result if a stay is not granted.
6

7
8 As set forth above and in the Declarations and exhibits attached hereto, there are clearly
9 substantial questions of fact and law regarding the propriety of the Order.
10

11 For all of these reasons, a stay is appropriate here.
12

13
14 **IV. REQUEST FOR PREPARATION OF THE ADMINISTRATIVE RECORD.**
15

16 By copy of this Petition to the Executive Officer, Muskat hereby requests preparation of
17 the administrative record in this matter by the LARWQCB and SWRCB.
18

19
20 **V. REQUEST FOR EVIDENTIARY HEARING.**
21

22 Muskat requests an evidentiary hearing at which the available evidence can be presented.
23 Muskat reserves the right to submit supplemental evidence and to request a hearing for the
24 purpose of considering additional evidence nor previously presented as permitted by 23 § CCR
25 2050.6; however, Muskat will make every reasonable effort to provide all of its evidence well in
26 advance of the hearing.
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1 **VI. CONCLUSION.**

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3 For the foregoing reasons and based on the evidence and authority provided above and
4 herewith, Muskat respectfully submits that the issuance of Technical Reporting Order R4-2022-
5 0136 was improper, inappropriate, unlawful, and not supported by substantial evidence. Muskat
6 therefore respectfully requests that the SWRCB grant this Petition and review and rescind the
7
8 Order.
9

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12 NASTICH LAW, A PROFESSIONAL CORPORATION
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17 Dated: September 22, 2022
18



19 Summer L. Nastich
20 Attorney for Petitioner, Muskat La Cienega LLC
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