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10 STATE OF CALIFORNIA
11 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
12 LOS ANGELES REGION

13 In the Matter of Petition for Review of the Los
Angeles Regional Water Quality Control Board
14 Executive Officer's Action to Approve, with
Conditions, Nine Watershed Management
15 Programs Pursuant to the Los Angeles County
Municipal Separate Storm Sewer System (MS4)
16 Permit (Order No. R4-2012-0175; NPDES
17 Permit No. CAS004001)

**MEMORANDUM ON BEHALF OF
LOWER LOS ANGELES RIVER
WATERSHED MANAGEMENT GROUP
LEAD PERMITTEE IN OPPOSITION TO
PETITION BY NATURAL RESOURCES
DEFENSE COUNCIL AND OTHERS
CHALLENGING WATER MANAGEMENT
PROGRAM APPROVALS**



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1 **I. INTRODUCTION**

2 The City of Signal Hill (“City”) is lead Permittee for the Lower Los Angeles River (“LLAR”)
3 Watershed Management Program (“WMP”). The other cities in the LLAR WMP group are: Downey,
4 Lakewood, Long Beach, Lynwood, Paramount, Pico Rivera, and South Gate. The Los Angeles
5 County Flood Control District is also a member of the LLAR, but it may file its statement in a
6 separate coordinated filing prepared by counsel for the County of Los Angeles. The City is also a
7 member of the Los Cerritos Channel WMP group, and that group will be submitting a separate
8 comment letter as well.

9 The LLAR group coordinated a WMP that meets both the letter and the spirit of the 2012 Los
10 Angeles County MS4 NPDES Permit (“LA Permit”). The Los Angeles Regional Water Quality
11 Control Board (“Regional Board”) should *deny* the Petition of the Natural Resources Defense Council,
12 Heal the Bay, and Los Angeles Waterkeeper (collectively, “Environmental Petitioners”), who seek to
13 eviscerate the entire Permit process by requesting this Board undo years of work and declare all
14 WMPs invalid based upon a procedural technicality. The Environmental Petitioners’ substantive
15 claims against the LLAR’s finally approved WMP also lack merit.

16 This Board should eschew the invitation of the Environmental Petitioners to now revise the
17 essential structure of the LA Permit, which was more than two years in the drafting, and another two-
18 and-a-half years in the administrative review process. Rather, the Board should focus on the real
19 implementation challenges – the challenge of funding and implementing the WMPs in order to attain
20 the goals of the LA Permit and the Clean Water Act.

21 **II. THE ENVIRONMENTAL PETITIONERS’ CHALLENGE TO THE TECHNICAL**
22 **PROCEDURE IN WHICH THE EXECUTIVE OFFICER APPROVED THE**
23 **WATERSHED MANAGEMENT PLANS “WITH CONDITIONS” SHOULD BE**
24 **REJECTED AS EITHER ILL-FOUNDED OR MOOT**

25 **A. The Appropriate Standard of Review**

26 In seeking review of the action of the Executive Officer of the Los Angeles Board issued on
27 behalf of the Board, the Environmental Petitioners have conflated and confused two different
28 procedural paths involving different standards of review. The standard for the State Water Resources



1 Control Board (“State Board”) to review a factual determination of liability or other fact-based
2 determination originally issued by the Regional Board is the “substantial evidence” standard. (*In Re:*
3 *Stinnes-Western Chemical Corp.*, Order No. 86-16 (State Board 1986).) But, the standard under the
4 LA Permit for a determination of whether either the Regional Board or the Executive Officer should
5 approve or deny a final plan submitted by a watershed management group is *not* a “substantial
6 evidence” standard. Rather, any such action is a discretionary policy decision made by the appropriate
7 body (in this case, the Executive Officer) as to whether the final watershed management plan does (or
8 does not) meet the requirements of the LA Permit.

9 Contrary to the implication of the Environmental Petitioners, this is not a fact-bound decision
10 governed by the “substantial evidence” standard, and the State Board’s determination of its standard
11 for reviewing a Regional Board decision on specific facts as contained in *Stinnes-Western Chemical*
12 *Corp.* has no application to this petition.¹

13 Rather, the Respondents submit that the proper standard is whether or not the Executive
14 Officer abused his discretion in determining that the submitted final watershed management plan
15 sufficiently met the requirements of the LA Permit to merit that he “accept” the plan. This involves a
16 more limited review of whether (or not) the Executive Officer properly exercised his discretion in
17 reviewing the watershed management plan and determining that it fairly met the LA Permit
18 requirements.

19 The Respondents now demonstrate why, as to the LLAR WMP, the Executive Officer
20 exercised his discretion to approve the WMP in a reasonable fashion fully consistent with the LA
21 Permit.²

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23 ¹ The Environmental Petitioners also cite Code of Civil Procedure section 1094.5(b) as a basis for their argument that the
24 Executive Officer’s decision must be “supported by the evidence.” (Petition Memo. at p. 5, fn. 17 & 18.) But Section
25 1094.5(a) specifies that it applies when there is a judicial inquiry into a final administrative order “made as a result of a
26 proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the
determination of facts is vested in the inferior tribunal. . .” The LA Permit does not require a hearing by the Executive
Officer (or this Board) before determining whether or not to accept a final watershed management plan, nor does it require
evidence “to be taken” as part of any deliberation by the Executive Officer. Thus, Code of Civil Procedure section
1094.5’s “substantial evidence” review standard is inapplicable to this Petition process.

27 ² Respondents believe that many of the legal positions they raise are common to other watershed groups, and anticipate
28 that members of the Lower San Gabriel River group and others may join in parts or all of the legal arguments contained in
this Memorandum.



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B. The Red Herring Claims that the Executive Officer Acted Beyond His “Delegated” Authority

The Environmental Petitioners start with an initial argument that is a red herring—whether the Executive Officer acted within his delegated authority to “conditionally approve” the plans. The Environmental Petitioners then answer the question they prefer to address—the conditional approval issue—with a resounding “No.” Specifically, they argue that the Executive Officer “acted outside of his legally delegated authority.” (*EP Memo.* at 6.)

The Environmental Petitioners’ procedural argument is flawed. Initially, they confuse the question of “delegated authority” from this Board with the question of whether anyone—this Board, the State Board, or the Executive Officer – had any power under the LA Permit to do anything other than approve the final plans unconditionally. According to the Environmental Petitioners, no one, not even the State Board, has such authority. Thus, the matter is not whether the Executive Officer acted within the scope of authority “delegated” to him by this Board. (*EP Memo.* at 6:4-5.)

Rather, the Environmental Petitioners seek to obtain a ruling that no one, not even this Board, has authority to conditionally approve a WMP. To answer that question, Respondents turn to the words of the LA Permit itself and to the long-term practice and policy of this Board.

C. The LA Permit’s Plain Language Does Not Require an “Unconditional Approval” of a Watershed Management Plan

The Environmental Petitioners’ argument with respect to the nature of the Executive Officer’s letter of April 28, 2015 to the LLAR watershed group starts with a false premise—that the letter was something other than an “approval” letter. We turn first to the actual text of the letter, which is part of Exhibit B to the Petition.³ The letter signed by the Executive Officer states on page 3:

The Los Angeles Water Board hereby approves, subject to the following conditions, the LLAR WMG’s January 28, 2015 revised draft WMP. The Board may rescind this approval if all of the following conditions are not met to the satisfaction of the Board within the timeframe provided below. [Listing of conditions].

³ The Respondents refer only to items posted on this Board’s website with respect to the Petition aside from their separate Request for Official Notice, which is filed concurrently with this Memorandum.



1 Each of the “conditions” that follow are directives to make minor changed to the WMP that are
2 clerical in nature. For example, one directive said to: “Revise ‘Submit LRS to Regional Board’
3 deadline to April 28, 2017.” (*Id.* at 3.) Another states: “The City of Long Beach submitted its
4 Statement of Legal Authority to the Los Angeles Water Board on February 26, 2015. Include this
5 Statement of Legal Authority in the WMP appendix section containing the other Permittees’ legal
6 authority statements.” (*Ibid.*) What the approved WMP constitutes is the submitted WMP plus these
7 clerical changes (i.e., “conditions”) made by a certain date. This is further supported by the fact that
8 the approval letter goes on to state that “the Permittees of the LLAR WMG shall begin
9 implementation of the approved WMP *immediately.*” (*Id.* at 4 [emphasis added].) Therefore, the
10 approval on April 28, 2015 was a full approval of the LLAR WMP, and that approval was entirely
11 consistent with the procedures of the LA Permit.

12 The Environmental Petitioners claim that this letter constitutes an abuse of discretion by the
13 Executive Officer because the “only authority delegated to him by the Regional Board was to approve
14 or deny the WMPs.” (*EP Memo.* at 6). The Environmental Petitioners are wrong for two reasons:

15 (1) The plain words of the LA Permit allow the Executive Officer to approve a watershed
16 management plan “on behalf of the Regional Board.” This language is found on page 55 of the LA
17 Permit, Table 9. The Executive Officer therefore had express authority to sign a letter approving the
18 LLAR WMP. Thus, there is no valid question about whether the Executive Officer “exceeded his
19 authority”; he did exactly what the LA Permit allowed him to do.

20 (2) Even if the Executive Officer’s April 28, 2015 letter was construed to focus on the
21 conditions imposed as part of the overall approval, it would make no difference. This is so because
22 the LA Permit simply allows either the Regional Board or the Executive Officer on behalf of the
23 Board to issue an “approval or denial” of a final plan. The LA Permit is not a straight jacket that
24 requires that the approval (or denial) be “unconditional.”

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1 Table 9 of the LA Permit at page 55 simply states in pertinent part:

Part	Provision	Due Date
VI.C.4.c.	Approval or denial of final plan by Regional Water Board or by the Executive Officer on behalf of the Regional Water Board	3 months after submittal of final plan

8 The LA Permit in Table 9 references Part VI.C.4.c, but that section only provides requirements
9 for those Permittees that “elect to develop a [regional] Watershed Management Program.” It does not
10 contain any requirement that constrains this Board (or its Executive Officer) on how it can review and
11 issue any “approval or denial” of a final plan. (LA Permit at 57, Part VI.C.4.c).

12 Thus, the plain language in Table 9 does not require that the LA Board issue an “approval or
13 denial *without any conditions*”, and the LA Permit does not elsewhere contain such language with
14 respect to the approval process for WMPs. NPDES permits, such as the LA Permit, are to be
15 construed based upon their plain language. In this case, the plain language of the permit does not
16 require an unconditional approval (or denial), and that plain language should stand. (See *Alaska*
17 *Community Action on Toxics v. Aurora Energy Serv., LLC*, 765 F.3d 1169, 1172 (9th Cir. 2014)
18 [NPDES permit to be interpreted like a regulation, which “should be construed to give effect to the
19 natural and plain meaning of its words.”].)

20 **D. Even if the LA Permit’s Approval Language Was Deemed “Ambiguous”, the**
21 **Permit’s Structure and Extrinsic Evidence Support the Executive Officer’s**
22 **Approval with Conditions of the LLAR WMP**

23 Even if, for argument’s sake, there was some ambiguity in Table 9 to the LA Permit on the
24 scope of an “approval” and whether that word meant to exclude an “approval with conditions”, then
25 this Board should consider the structure of the LA Permit and extrinsic evidence in order to interpret
26 the ambiguity. (See *NRDC v. County of Los Angeles*, 725 F.3d 1194, 1205 (9th Cir. 2013) [“If,
27 however, the permit’s language is ambiguous, we may turn to extrinsic evidence to interpret its
28 terms.”].)



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1. The Text and Structure of Part VI.C. of the LA Permit Does Not Support Imposing any Artificial Requirement of an Approval “Without Conditions”

The text and structure of Part VI.C. of the LA Permit is designed to impose conditions upon the Permittees who elect to proceed with a WMP (or EWMP). Part VI.C. emphasizes the flexibility inherent in this process:

C. Watershed Management Programs

1. General

- a. The purpose of this Part VI.C. is to allow Permittees the *flexibility* to develop Watershed Management Programs to implement the requirements of this Order on a watershed scale through *customized* strategies, control measures, and BMPs. (LA Permit at 47-48 [emphasis added].)

Throughout the rest of Part VI.C., the language continues to describe the flexible nature of the watershed management program process. Part VI.C.1.f.iv., for example, requires that those participating in a WMP “modify strategies, control measures, and BMPs as necessary based on analysis of monitoring data. . . .” Part VI.C.2.b. in turn provides that a Permittee’s “full compliance with all requirements and dates for their achievement in an approved Watershed Management Program. . . shall constitute a Permittee’s compliance with the receiving water limitations provisions in Part V.A. of this Order. . . .” (LA Permit at 53.)

Thus, the structure of Part VI.C. seeks to impose conditions and a timetable on the Permittees who elect to proceed with a WMP or EWMP. There is absolutely nothing in the structure or language of Part VI.C. that suggests that it was intended to limit the discretion of this Board (or its Executive Officer acting on its behalf) in the precise manner of “approving” a WMP.

The State Board, in its Final Order resolving the 37 petitions filed after adoption of the LA Permit in 2012, references Table 9 in part as support for the State Board’s conclusion that: “First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and comment period.” (Order WQ 2015-0075 at 37, fn. 111.) The State Board’s conclusion, that the process for review of a WMP included public comment, is borne out in this case. The Environmental Petitioners commented on the LLAR group’s revised



1 WMP by letter dated March 25, 2015. There was nothing in that comment letter, however, that
2 interpreted the “approval” process as one requiring an unconditional approval.

3 **2. This Board (and its Staff’s) Long-Standing Policy and Practice of Approval**
4 **of Submitted Documents with Conditions**

5 The Board knows and can recognize that both it and Regional Board staff approve numerous
6 work plans, technical reports, and other submittals with conditions. This type of “approval with
7 conditions” is often practiced with respect to other provisions in the LA Permit.

8 To take recent examples of the long-standing Board policy of approvals with conditions, we
9 request that the Board take official notice of the following five documents and one undisputed fact:⁴

- 10 1) June 19, 2015 letter of Executive Officer to Upper San Gabriel River watershed group
11 approving with conditions the Coordinated Integrated Monitoring Program;
- 12 2) June 24, 2015 letter of Executive Officer to Alamitos Bay/Los Cerritos Channel watershed
13 group approving with conditions the Coordinated Integrated Monitoring Program;
- 14 3) June 18, 2015 letter of Executive Officer to Lower Los Angeles River watershed group
15 approving with conditions the Coordinated Integrated Monitoring Program;
- 16 4) June 4, 2015 letter of Executive Officer to Upper Santa Clarita watershed group approving
17 with conditions the Coordinated Integrated Monitoring Program;
- 18 5) July 10, 2015 letter of Executive Officer to Santa Monica Bay Jurisdictional Group 2 & 3
19 EWMP group approving with conditions the Coordinated Integrated Monitoring Program.⁵
- 20 6) Undisputed fact: The Respondents request that the Board take judicial notice of the fact
21 that the LA Regional Board has issued over the past 20 years countless letters approving
22 work plans, technical reports, and other documents with “conditions.”

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26 ⁴ Respondents are filing concurrently with this memorandum a formal Request for Official Notice of the five referenced
27 documents. This request is made pursuant to Government Code section 11515, Evidence Code sections 452
and 453, and section 648.2 of Title 23 of the California Code of Regulations.

28 ⁵ On June 19, 2015, the Executive Officer sent a letter approving the Lower San Gabriel River watershed group’s
coordinated integrated monitoring program without any conditions.



1 This Board should consider the vast amount of extrinsic evidence of how its staff has for years
2 conditioned approval letters, and must conclude that the language in Table 9 is fully consistent with
3 the long-standing policy and practice of an “approval with conditions.”

4 3. *This Board Should Construe Its Own Permit to Allow for Conditional*
5 *Approvals in Implementing a Very Complicated Permit*

6 As a public policy, this Board has the opportunity to construe even an arguably ambiguous
7 provision of the LA Permit in a common sense manner. In this instance, the Board should adopt a
8 common sense reading of the term “approval” as stated in Table 9 of the LA Permit to provide the
9 flexibility of an approval with conditions.

10 The U.S. Court of Appeals for the Second Circuit applied a similar common sense
11 interpretation to a statutory provision of the Clean Air Act requiring that EPA “approve or deny” a
12 state submittal under that Act. The language at issue in the Clean Air Act is remarkably similar to the
13 language in the LA Permit:

14 Section 7401(a)(2) provides that the Administrator of EPA “shall within four months
15 after the date required for a submission of a plan [by the State] approve or disapprove
16 (the) plan, or any portion thereof.” (*Connecticut Fund for the Environment, Inc. v.*
EPA, 672 F.2d 998, 1002 (2d Cir. 1982), cert. denied, 459 U.S. 1035 (1982)
(Connecticut Fund).)

17 Notwithstanding the “approve or disapprove” language contained in a Congressional mandate,
18 the EPA conditionally approved a State Implementation Plan (“SIP”) submitted by the State of
19 Connecticut. An environmental group petitioned the Court of Appeals to review the approval arguing
20 that: “the literal ‘approve or disapprove’ language of [section] 7410(a)(2) and the absence of any
21 mention of conditional approvals in the Clean Air Act preclude EPA’s conditional approval.”
22 (*Connecticut Fund, supra*, 672 F.2d at 1006.)

23 The Second Circuit rejected this argument concluding that such a narrow interpretation of the
24 term “approve” would frustrate the overall purpose of the statutory scheme. As Circuit Judge
25 Newman wrote for the Court of Appeal:

26 But this Court has held that an agency’s power to approve conditionally is inherent in
27 the power to approve or disapprove.

28 “[T]he power to condition. . . approval on the incorporation of certain amendments is
necessary for flexible administrative action and is inherent in the power to approve or



1 disapprove. We would be sacrificing substance to form if we held invalid any
2 conditional approval but affirmed an unqualified rejection accompanied by an opinion
3 which explicitly stated that approval would be forthcoming if modifications were
4 made.” (*Connecticut Fund, supra*, 672 F.2d at 1006 [quoting *McManus v. CAB*, 86
5 F.2d 414, 419 (2d Cir.), cert. denied, 366 U.S. 928 (1961)].)

6 This Board should adopt the same position of the Second Circuit Court of Appeals and
7 construe the language contained in the LA Permit concerning the power to approve or reject a WMP
8 (or an EWMP) in a common sense fashion and allow for the inherent power to conditionally approve
9 such a plan submittal.

10 **E. Alternatively, the Board Should Rule that the Environmental Petitioners’**
11 **Complaint Is Moot in Light of a Subsequent Development—The Filing on June**
12 **12, 2015 of a Revised WMP Responding to All Conditions and the Issuance on**
13 **July 22, 2015 of a “Final Approval” Letter**

14 Alternatively, the Environmental Petitioners’ claim as to the “procedural impropriety” of the
15 Executive Officer’s determination is now moot. The Executive Officer issued his letter on April 28,
16 2015 and gave the LLAR group until June 12, 2015 to address the conditions contained in the letter.
17 The LLAR group timely submitted a revised final WMP on June 12, 2015. A copy of that final WMP
18 is part of the materials posted on the Board’s website for this hearing.

19 More critically, on July 21, 2015, the Executive Officer, on behalf of this Board, issued a final
20 approval letter of the LLAR WMP. A copy of that letter is part of the separate Request for Official
21 Notice, item No. 1, Exhibit “A”.⁶ Therefore, the LLAR group has addressed each of the conditions
22 listed in the conditional approval letter of April 28, 2015. Thus, the Environmental Petitioners’
23 argument that the approval was only “conditional” is *moot* because the Board subsequently issued a
24 final approval letter without any conditions. (*See Santa Monica Baykeeper v. City of Malibu* (2011)
25 193 Cal.App.4th 1538, 1547-48 [“An appeal should be dismissed as moot when the occurrence of
26 events renders it impossible for the appellate court to grant appellant any effective relief.”; held that
27 challenge to EIR for construction of Legacy Park in city was moot when before determination of
28 appeal the park was already completed].)

⁶ The Executive Officer, acting on behalf of the Board also issued final approval letters as to the Lower San Gabriel River watershed group. A copy of that letter is attached to Respondents’ Request for Official Notice, items No. 2, Exhibit “B”.



1 In this particular instance, the Environmental Petitioners seek a remedy – reversal of a
2 conditional approval – when the conditions have already been met.⁷ Thus, like the plaintiff in *Santa*
3 *Monica Baykeeper*, the Board should dismiss the Petition as moot with respect to its procedural
4 argument.

5 F. **The Environmental Petitioners’ Suggestion that a Full Permit Modification Was**
6 **Required for an Approval “With Conditions” Is Erroneous**

7 Alternatively, the Environmental Petitioners suggest that the Executive Officer’s approval
8 “with conditions” constitutes an improper modification of the LA Permit. Indeed, the Environmental
9 Petitioners suggest that the Board (as the agency issuing the LA Permit) must follow requirements to
10 formally modify the LA Permit, including giving notice and issuing a new draft permit. (*EP Memo.* at
11 10). This procedural suggestion is nonsense. It assumes the conclusion – i.e., that the LA Permit
12 somewhere contains the words “approval without conditions” in Table 9 (or elsewhere). The plain
13 language of the LA Permit, its structure, and available extrinsic evidence, however, all support a
14 rejection of the Environmental Petitioners’ efforts to revise the current LA Permit and insert the
15 language “without conditions” after the word “approval” in Table 9.

16 Moreover, the “conditions” cited in the approval letter are only clerical in nature, requesting
17 that certain language be added in certain sections or that an attachment be included. Therefore, the
18 approval was an approval of the WMP with those clerical changes included as part of the approval.
19 This point is further supported by the fact that the approval letter required that the WMP group “shall
20 begin implementation of the approved WMP immediately.” (Petition, Exhibit B, LLAR WMP
21 Approval Letter at 4.) Consistent with Table 9, which states that the next step in the process after
22 approval is “begin implementation” of WMP, this demonstrates that the Executive Officer’s action
23 was an approval of the WMP, and not a permit modification.

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26 ⁷ This fact also ends the Environmental Petitioners’ concern that the so-called “conditional approvals” were left open
27 ended based upon a theoretical Board action after June 12, 2015 to impose an additional round of conditional approvals.
28 The Environmental Petitioners argued that this might allow the Executive Officer to “indefinitely extend the Permit’s
deadlines.” (*EP Memo.* at 7:19-24). Once again, the actual facts have mooted this potential concern of the Environmental
Petitioners.



1 There is no need to modify the LA Permit, and the alternative suggestion by the Environmental
2 Petitioners to the contrary should be rejected.

3 **III. THE APPROVED WATERSHED MANAGEMENT PROGRAMS MEET ALL**
4 **PERMIT REQUIREMENTS**

5 Environmental Petitioners finally arrive at their objections to the approved WMPs. However,
6 Environmental Petitioners' arguments are so lacking in substance or explanation that they should not
7 be afforded any weight. The LLAR watershed group answers the claimed deficiencies in a
8 concurrently filed comment letter, which includes a chart of the LLAR WMP group rebutting the
9 allegations contained in the March 26, 2015 letter of the Environmental Petitioners.

10 For the arguments regarding the Reasonable Assurance Analysis ("RAA"), the City
11 incorporates by reference the comments of the Lower San Gabriel River ("LSGR") watershed group
12 because the LSGR RAA also included the LLAR and Los Cerritos Channel watershed groups. The
13 City also highlights that the Petition argued: "the conditions included in the conditional approvals *fail*
14 *to address any of the RAA inadequacies identified by RWQCB staff.*" (EP Memo. at 14:20-22
15 [emphasis in original].) However, the Environmental Petitioners' offer absolutely no arguments or
16 factual bases to support that blanket allegation.

17 The LLAR WMP satisfied the LA Permit requirements, as demonstrated by the Executive
18 Officer's final approval letter, and the Petition's claims otherwise lack any merit.

19 **IV. CONCLUSION**

20 For the foregoing reasons, the City respectfully requests that the Regional Board deny the
21 Petition in its entirety and allow the LLAR group continue with implementing its approved WMP.

23 DATED: August 3, 2015

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