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16 CITY OF SANTA ROSA

17 BEFORE THE
18 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

19 In the Matter of the City of Santa Rosa's
20 Petition for Review of Action and Failure to Act
21 by the California Regional Water Quality
22 Control Board, North Coast Region, Denying
23 Nutrient Offset Project.

24 PETITION FOR REVIEW;
25 PRELIMINARY POINTS AND
26 AUTHORITIES IN SUPPORT OF
27 PETITION (WATER CODE
28 SECTION 13320)

INTRODUCTION

Petitioner City of Santa Rosa ("City"), in accordance with section 13320 of the Water Code, hereby petitions the State Water Resources Control Board ("State Water Board") to review the July 14, 2011 decision by the Regional Water Quality Control Board, North Coast Region's ("Regional Water Board") Executive Officer, denying the City's revised Laguna Nutrient Offset Project as unsuitable for compliance with the Regional Water Board's Nutrient Offset Program, on the basis that the project does not provide a clear long-term environmental benefit with respect to the overall management of Ludwigia in the Laguna de Santa Rosa.

1 The Executive Officer's denial is inconsistent with the Nutrient Offset Program, is not
2 reasonable as required by Water Code section 13000, impermissibly dictates the manner of
3 compliance in violation of Water Code section 13260, and is otherwise unsupported by findings or
4 evidence in the administrative record, all of which constitute an abuse of discretion.

5 The City's revised Laguna Nutrient Offset Project does, in fact, meet the criteria set forth in
6 the Nutrient Offset Program, and should have been approved consistent with Regional Water Board
7 staff's initial support for the Project and subsequent intensive discussions between Regional Water
8 Board and City staffs in which agreement was seemingly secured regarding several technical issues.
9 The City requests the State Water Board to reverse the Executive Officer's July 14, 2011 decision.

10 The issues and a summary of the bases for the Petition follow. At such time as the full
11 administrative record is available and any other material has been submitted, the City reserves the
12 right to file a more detailed memorandum in support of the Petition and/or in reply to the Regional
13 Board's response.¹

14 **1. NAME, ADDRESS, TELEPHONE, AND EMAIL FOR PETITIONER:**

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23 In addition, all materials in connection with this Petition for Review should also be provided
24 to the City's counsel at the following addresses:

25 Suzanne C. Rawlings
26 Asst. City Attorney
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100 Santa Rosa Avenue, Room 8
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¹ The State Board's regulations require submission of a statement of points and authorities in support of a petition (23 C.C.R. §2050(a)(7)), and this document is intended to serve as a preliminary memorandum. However, it is impossible to prepare a thorough statement or a memorandum that is entirely useful to the reviewer in the absence of the complete administrative record, which is not yet available.

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7 **2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE**
8 **BOARD IS REQUESTED TO REVIEW:**

9 The City seeks review of the July 14, 2011 decision by the Regional Water Board's
10 Executive Officer, denying the City's revised Laguna Nutrient Offset Project as unsuitable for
11 compliance with the Regional Water Board's Nutrient Offset Program, on the basis that the project
12 does not provide a clear long-term environmental benefit with respect to the overall management of
13 Ludwigia in the Laguna de Santa Rosa. The City asserts the revised Laguna Nutrient Offset Project
14 is compliant with the Regional Water Board's Nutrient Offset Program, and that the Executive
15 Officer's denial constitutes an abuse of discretion.

16 **3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:**

17 The Regional Water Board's Executive Officer denied the City's revised Laguna Nutrient
18 Offset Project on July 14, 2011.

19 **4. A STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR**
20 **IMPROPER:**

21 **A. The City's Treatment Facilities**

22 The City operates collection, treatment, storage, discharge, and reclamation facilities,
23 employing state of the art advanced, tertiary-treatment facilities, and producing high quality
24 recycled water that is beneficially reused in cutting edge water reclamation projects encouraged by
25 the California Legislature. Specifically, the City owns and operates the Santa Rosa Subregional
26 Water Reclamation System (the "Reclamation Plant"), a publicly-owned treatment works, which
27 currently collects, treats, recycles, and discharges an average dry weather flow of 15 million gallons
28 per day ("MGD") of industrial, commercial, and municipal wastewater from a of population of

1 approximately 225,000 in the Cities of Santa Rosa, Cotati, Rohnert Park, Sebastopol, and the
2 unincorporated South Park County Sanitation District.

3 The City's NPDES Permit allows the discharge of recycled water from the City's recycled
4 water storage ponds to the Laguna de Santa Rosa and/or Santa Rosa Creek, both tributaries to the
5 Russian River, from October 1st through May 14th of each year, in accordance with discharge
6 restrictions set forth in the Regional Water Board's Basin Plan. See City's NPDES Permit, Order
7 No. R1-2006-0045, at III.J. However, the City beneficially reuses most of its produced recycled
8 water throughout the year, providing agricultural operators with recycled water for beneficial water
9 reclamation and reuse (*i.e.*, agricultural irrigation of crops, including vineyards, orchards, animal
10 fodder, pasture, and specialty vegetable crops), participating in urban reuse² (*i.e.*, golf courses,
11 playing fields, and landscaped areas), or providing the water to the Geysers Recharge Project.

12 The City invested enormous resources into construction and operation of the Geysers
13 Recharge Project, a sophisticated energy project that took over ten years to complete. The Project
14 consists of a 41-mile pipeline to convey recycled water to the Geysers steamfield operators'
15 distribution network for steamfield injection and generation of electricity. The City is contractually
16 obligated to provide 4,600 million gallons each year to the steamfield operators (translating into an
17 average daily delivery of 12.62 MGD), and has been doing so since December 31, 2003. Operation
18 of the Geysers Recharge Project has allowed the City to beneficially reuse, rather than discharge, a
19 substantial portion of the recycled water produced by the Reclamation Plant, between 95% and
20 100% during the last four years of operation. Nonetheless, discharges to the Laguna de Santa Rosa
21 and Santa Rosa Creek between October 1st and May 14th of each year are necessary to maintain the
22 water balance within the City's facilities. For the past four discharge seasons, the City has
23 discharged a total of 71 days (13 days in the 2007/2008 discharge season, 0 days in the 2008/2009
24 discharge season, 9 days in the 2009/2010 discharge season, and 49 days in the 2010/2011
25 discharge season).
26
27
28

² Approximately 6,388 acres of urban and agricultural land are irrigated with recycled water.

1 **B. Controversial Nutrient Restrictions Included in the City's Most Recent**
2 **NPDES Permit**

3 In the early 1990s, the Laguna de Santa Rosa was placed on the State Water Resources
4 Control Board's ("State Water Board") Clean Water Act 303(d) List of Impaired Waterbodies for
5 failing to comply with the Regional Water Board's water quality standards for dissolved oxygen
6 and ammonia set forth in the Basin Plan. In response, the City undertook and completed substantial
7 upgrades to its treatment facility to further reduce the concentration of nutrients, including
8 ammonia, in the Laguna. In addition, the City funded an innovative dairy loan program that
9 provided funding for dairy farmers in the Laguna watershed to build barns to house cows during the
10 winter months, significantly reducing the amount of manure and nutrients washed off into the
11 waterways.

12 The Regional Water Board also adopted a Waste Reduction Strategy for the Laguna de
13 Santa Rosa to address potential sources of nutrients to the Laguna de Santa Rosa. The City worked
14 closely with the Regional Water Board to ensure compliance with the Waste Reduction Strategy.
15 Because of the development of the Waste Reduction Strategy, the Laguna de Santa Rosa watershed
16 was removed from the 303(d) List of Impaired Waterbodies in 1998.

17 Subsequently, in 2002, because dissolved oxygen levels were not being consistently attained
18 in every part of the Laguna, the Regional Water Board considered re-listing the Laguna de Santa
19 Rosa on the 303(d) List of Impaired Waterbodies for dissolved oxygen, nitrogen and phosphorous.
20 After much public comment, the Regional Water Board decided against re-listing the Laguna de
21 Santa Rosa on the 303(d) List for nitrogen and phosphorous, and instead, included the Laguna on
22 the Monitoring List. Given the capabilities of the City as compared to other entities in the region
23 and watershed, the City volunteered to work with the Regional Water Board to further study the
24 dissolved oxygen and nutrient issues in the Laguna de Santa Rosa.
25

26 Unfortunately, the United States Environmental Protection Agency ("USEPA") ignored the
27 very detailed information and rationale presented by the State and Regional Water Boards for not
28 listing the Laguna de Santa Rosa as impaired, and unilaterally listed the Laguna de Santa Rosa as

1 impaired for nitrogen and phosphorous. It is this listing by USEPA that has been carried forward to
2 subsequent 303(d) Lists that the Regional Water Board relies upon for the discharge limitations
3 underlying the activities that are the subject of this Petition.

4 At the time the City's NPDES Permit was renewed in 2006, Regional Water Board staff had
5 not drafted a Total Maximum Daily Load ("TMDL") to address the nutrient listings.

6 Notwithstanding significant protest by the City, and for the stated purpose of implementing the
7 Basin Plan's narrative water quality objective for "biostimulatory substances," the Regional Water
8 Board imposed the following effluent limitations for nitrogen and phosphorus:

9
10 "The Regional Board plans to develop and adopt total maximum daily loads
11 (TMDLs) for nitrogen and phosphorous which will specify wasteload allocations
12 (WLAs) for point sources and load allocations (LA) for non-point sources, as
13 appropriate. Following the adoption of these TMDLs by the Regional Water Board,
14 this Order will be issued with final WQBELs [water quality based effluent limits]
15 based on applicable WLAs. *Alternatively, in the absence of a TMDL at the end of
16 the compliance schedule authorized by this Order [Nov. 9, 2011], the final effluent
17 limitation for nitrogen and phosphorous will be zero, or no net loading⁵.*"

18 See NPDES Permit at Provision IV.A.1.g. (emphasis added). Footnote 5 explains:

19 "A 'no net loading' effluent limit may be met by: 1) reducing the effluent
20 concentration below detectable levels through source control and/or treatment; 2)
21 reducing loads through recycling/reclamation; and/or 3) reducing loads elsewhere in
22 the watershed by an amount at least equal to the amount discharged (and of
23 equivalent bioavailability) through an approved offset program."

24 *Id.*

25 Despite the City's extraordinary efforts to beneficially reuse of its recycled water, at the time
26 the NPDES Permit was adopted, there was no expectation by the City that it could comply with the
27 new, unprecedented alternative final limits of "zero" or "no net loading" for nutrients. The City's
28 expectation that a TMDL, which might ease the discharge requirements via calculation of a proper
waste load allocation, would be adopted on or before the compliance deadline of Nov. 9, 2011 was
equally bleak. Consistent with earlier objections, the City filed a Petition for Review with the State
Water Board on October 19, 2006 (SWRCB/OCC File No.A-1779), and a subsequent Petition for
Writ of Mandate was filed in Sonoma County Superior Court in July 2007, Case No. SCV 241194,

1 challenging the “zero” or “no net loading” alternative final limitations on the basis that they directly
2 contradicted State Water Board precedent (*e.g.*, State Water Board Order No. WQ 2001-06), were
3 not legally required, constituted an improper interpretation of the narrative objectives for
4 biostimulatory substances and chemical constituents, and were not supported by findings or
5 evidence in the administrative record.

6 **C. Nutrient Reduction Offset Program**

7
8 In July 2008, the City and Regional Water Board resolved the City’s legal action through the
9 Regional Water Board’s adoption of the Santa Rosa Nutrient Offset Program, Resolution No. R1-
10 2008-0061, (“Nutrient Offset Program”), a copy of which is attached hereto as **Exhibit A**. The
11 Nutrient Offset Program satisfied the NPDES Permit’s requirement that the “zero” or “no net
12 loading” limitations could be complied with by “reducing the loads elsewhere in the watershed by
13 an amount at least equal to the amount discharged (and of equivalent bioavailability) through an
14 approved offset program.” *See* NPDES Permit at Provision IV.A.1.g., footnote 5.

15 The Nutrient Offset Program sets forth the following detailed program elements:

- 16
- 17 • Identification by the City of the annual nutrient load to be offset
 - 18 • Criteria for nutrient reduction credits
 - 19 ○ Detailed method for direct measurement of nutrient reduction
 - 20 ○ Detailed method for estimated nutrient reductions
 - 21 ○ Margin of safety
 - 22 ○ No nutrient reduction credits for projects/activities already required by the
23 City’s NPDES permit for municipal storm water discharges.
 - 24 • Accounting for nutrient credits – Regional Water Board and City staff both
25 understood that due to the vagaries of variable and unpredictable annual discharge of
26 water and nutrients, project implementation timelines and varying nutrient reduction
27 values from short and long-term projects, an averaging period for compliance was
28 warranted. Thus, compliance with the no net loading requirement is calculated using
a three-year averaging period. The City is deemed compliant if the three-year
average difference between actual discharge and offset reduction credits is less than
or equal to zero mass units.
 - Effective date and banked credits – the “zero” or “no net loading” limitations are
effective November 9, 2011, and the first three-year average compliance
determination will occur in 2014 upon conclusion of the 2013-2014 discharge

1 season. Credit for any nutrient removal/reduction actions implemented after 2007
2 and prior to the 2011-2012 discharge season are available to “bank,” and apply to the
3 City’s first three-year average compliance period.

- 4 • Process for submission, review, and approval/disapproval – as specifically stated in
5 the Program, the process for obtaining approval for nutrient reduction projects is as
6 follows:
 - 7 ○ City identifies nutrient reduction project(s)
 - 8 ○ City submits description of nutrient reduction project(s) to RWQCB
9 documenting consistency with adopted Nutrient Offset Program
 - 10 ○ RWQCB accepts proposed nutrient reduction project(s)
 - 11 ○ City implements project(s)
 - 12 ○ City submits annual report documenting nutrient discharged and controlled.

13 *See Resolution No. R1-2008-0061,*

14 The City always viewed compliance with the Nutrient Offset Program as requiring a varied
15 mix of short and long-term projects, as neither Regional Water Board staff nor the City has
16 previously identified one singular project that would entirely offset the limited, seasonal discharge
17 of nutrients into the Laguna de Santa Rosa. The Nutrient Offset Program itself acknowledges this
18 fact by the constant reference to “project(s)” and inclusion of the three-year averaging period
19 necessary to allow implementation of a variety of projects. The Nutrient Offset Program can be
20 successful only if both the City and the Regional Water Board are invested and engaged in
21 successfully identifying and approving multiple projects that will undoubtedly vary in scope and
22 duration.

23 **D. The City’s Good Faith Efforts to Obtain Approval and Implement**
24 **Nutrient Reduction/Offset Compliance Projects**

25 Soon after the Nutrient Offset Program was adopted in July 2008, City staff began
26 the process of obtaining approval for early implementation of nutrient reduction projects. In
27 February 2009, and following several consultations with Regional Water Board staff, the
28 City provided Regional Water Board staff with a draft Laguna Sediment and Ludwigia
Removal Project for informal consideration and discussion. A meeting between City and
Regional Water Board staffs occurred in April 2009, during which Regional Water Board
staff indicated general concerns with the draft project and requested to meet at a later date to

1 discuss further. That meeting did not occur until June 2010, notwithstanding repeated
2 requests for the meeting from City staff. Further information was provided by the City
3 regarding the project; however, Regional Water Board staff indicated they would deny the
4 project if formally proposed.

5 Refocusing efforts to develop acceptable nutrient reduction projects, City staff again
6 met with Regional Water Board staff, including the Executive Officer, in October 2010.
7 The purpose of the meeting was to develop a list of potentially mutually agreeable nutrient
8 offset project options, including near and long-term projects, as both are necessary for
9 compliance with the effluent limitations set forth in the City's NPDES Permit. Based on
10 discussion at that meeting, in January 2011, City staff presented to Regional Water Board
11 staff various options for a near-term nutrient offset project that could be implemented in
12 2011. At that meeting, verbal support was given by the Executive Officer for the near-term
13 Laguna Ludwigia Nutrient Offset Project that is the subject of this Petition. The project
14 involves the City, in conjunction with the Laguna de Santa Rosa Foundation and the
15 Sonoma County Water Agency, removing Ludwigia from specified locations of the Laguna
16 de Santa Rosa. Ludwigia contains nutrients that are mineralized upon plant decay;
17 therefore, removing Ludwigia removes nutrients that could otherwise pose water quality
18 problems in the Laguna. Based on Regional Water Board staff support, the City undertook
19 the resource-intensive process of preparing a formal submission, and on March 14, 2011, the
20 Laguna Ludwigia Nutrient Offset Project was submitted to the Executive Officer for formal
21 approval.
22

23 On April 15, 2011, City staff received correspondence from Regional Water Board
24 staff, asking to resubmit the Laguna Ludwigia Nutrient Offset Project. Regional Water
25 Board staff was aware the City had submitted a project, but could not locate the document.
26 The City provided an electronic copy. During a call on May 16, 2011, Regional Water
27 Board staff suddenly reversed their previous support for the project, and indicated the
28 project was unacceptable. On May 20, 2011, the City received a letter from the Regional

1 Water Board's Executive Officer rejecting the Laguna Ludwigia Nutrient Offset Project and
2 listing technical concerns in an attachment to the letter. In that letter, the Executive Officer
3 expressed that acceptable nutrient offset projects would be those involving agricultural
4 discharges, specifically, dairies. While the City is currently investigating nutrient offset
5 options involving agricultural discharges, those projects are not required to be, nor will they
6 likely be, the exclusive projects by which the City will achieve compliance with the effluent
7 limitations in the NPDES Permit.

8 To salvage the project initially agreed upon, City staff spoke with the Regional
9 Water Board's Executive Officer on May 26, 2011, and the parties agreed the City would
10 resubmit the Laguna Ludwigia Nutrient Offset Project, revised to address the technical
11 concerns of Regional Water Board staff as set forth in the May 20, 2011 letter. A meeting
12 between City and Regional Water Board staffs, as well as a representative from the Laguna
13 Foundation, occurred that same day, during which Regional Water Board staff's technical
14 concerns and the City's proposed resolutions were discussed. With the technical
15 impediments seemingly resolved, a schedule for obtaining approval of the project was also
16 discussed, so as to ensure the project could move forward during Summer/Fall 2011.
17 Regional Water Board staff concurred with a July 15, 2011 date for approval of the
18 resubmitted project.

19 On June 6, 2011, the City submitted the revised Laguna Nutrient Offset Project to
20 the Regional Water Board, which responded to and resolved the technical questions and
21 concerns of Regional Water Board staff expressed in the May 20, 2011 letter, and as
22 discussed at the May 26, 2011 meeting. Throughout June 2010, City staff continued contact
23 with the Regional Water Board staff, offering assistance or clarification, if necessary, to
24 ensure the project would be approved. On June 30, 2011, Regional Water Board staff
25 indicated they were on track to meet the City's requested approval date of July 15, 2011
26 provided the parties could work through some "relatively minor last-minute concerns." City
27 and Regional Water Board staffs spoke further that day, and for the next week, regarding
28

1 Regional Water Board staff's further concerns, which, if resolved, would render the project
2 almost useless to the City in terms of nutrient removal credit, especially as compared to the
3 effort expended. The concerns raised went beyond any criteria set forth in the Nutrient
4 Offset Program, and imparted a clear signal that Regional Water Board staff simply did not
5 now want to approve any project involving Ludwigia removal. Instead, Regional Water
6 Board staff prefers the City to focus its nutrient reduction efforts on agricultural dischargers,
7 to supplement and expedite the Regional Water Board's agricultural discharge program.

8 On July 22, 2011, the City received a letter from the Regional Water Board's
9 Executive Officer, dated July 14, 2011, stating that the Laguna Nutrient Offset Project
10 (Revised Proposal) was unsuitable for compliance with the Nutrient Offset Program, on the
11 basis that the project does not provide a clear long-term environmental benefit with respect
12 to the overall management of Ludwigia in the Laguna de Santa Rosa. The Executive Officer
13 acknowledged the hard work and good faith effort of the City to identify and implement a
14 nutrient offset project, but again, diverted discussion of nutrient offset options to those
15 involving agriculture, including dairies.

16
17 **5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:**

18 The City's NPDES Permit requires compliance with the "zero" or "no net loading"
19 limitations for nutrients by November 9, 2011. Through the Nutrient Offset Program, compliance
20 with these limitations will be based on a three year average, commencing in the 2011-2012
21 discharge season, which begins October 2011. *See* Resolution R1-2008-0064 at Attachment 1, page
22 5. The City has been diligently pursuing projects for two and a half years so as to meet the
23 requirements, but to date, Regional Water Board staff has been unwilling to formally approve any
24 suggested projects, even after significant informal correspondence indicated approval was likely.
25 Because of the amount of time that must be devoted to project identification, approval, and
26 implementation before any nutrient reduction credits can be obtained and used for compliance
27 purposes, the City is critically concerned that it is being placed in a position whereby City staff is
28 and will undertake all necessary actions towards compliance, but the City will nonetheless be

1 unreasonably precluded from achieving compliance with its NPDES Permit due to Regional Water
2 Board staff's inaction.

3 Further, to date, the City has expended more than \$311,000 in good faith efforts to identify,
4 prepare, submit, and discuss with Regional Water Board staff acceptable nutrient offset projects,
5 and the Regional Water Board staff has yet to provide formal approval for any project under the
6 Nutrient Offset Program, which, by its own terms, was meant to "encourage the City to undertake
7 nutrient reduction projects." See Resolution R1-2008-0064 at Finding 7. Given the current
8 economic climate and declining municipal resources, the City is being placed in the untenable
9 situation of having to expend significant and limited resources with increasingly diminished
10 expectations that those resources will result in an approved project, all the while facing potential
11 non-compliance with stringent effluent limitations in an NPDES Permit, enforceable by third parties
12 and the Regional Water Board and for which strict penalties and other relief may apply.
13 Compounding the situation is the fact that the Regional Board Executive Officer's recent decision
14 was an abuse of discretion, not supported by findings or evidence in the administrative record.

15 **6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**
16 **PETITIONER REQUESTS:**

17 The City seeks an Order by the State Board that determines the City's revised Laguna
18 Nutrient Offset Project is compliant with the requirements of the Nutrient Offset Program and
19 approves the Project for implementation, or, alternatively, remands the matter to the Regional Water
20 Board for revision consistent with the State Board's findings of compliance.

21 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
22 **ISSUES RAISED IN THE PETITION:**

23 The City incorporates by reference the information presented in Section 4 above. The City
24 also reserves the right to supplement this statement of points and authorities upon receipt and
25 review of the administrative record.

26 The Executive Officer's denial is inconsistent with the Nutrient Offset Program, is not
27 reasonable as required by Water Code section 13000, impermissibly dictates the manner of
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1 compliance in violation of Water Code section 13260, and is otherwise unsupported by findings or
2 evidence in the administrative record, all of which constitute an abuse of discretion.

3 A. **The Executive Officer's Denial Improperly Implements and is**
4 **Inconsistent with the Nutrient Offset Program**

5 The Nutrient Offset Program applies to "actions implemented by the City to control
6 source[s] of nutrients to the Laguna other than its recycled water discharge." *See* Nutrient Offset
7 Program at page 1, second bullet point. Projects must be amenable to either direct or estimated
8 measurement of nutrients for purposes of calculating reduction credits, and include a margin of
9 safety for calculation of those credits so as to ensure demonstrable water quality benefits. *Id.* at
10 page 2. The City's revised Laguna Nutrient Offset Project satisfies these specified criteria.

11 The Regional Water Board's Executive Officer listed only one reason for the decision to
12 deny the City's revised Laguna Nutrient Offset Project, that is, "the project does not provide a clear
13 long-term environmental benefit with respect to the overall management of Ludwigia in the Laguna
14 de Santa Rosa." *See* July 14, 2011 letter. Whether the project provides a clear long-term
15 environmental benefit with respect to the overall management of Ludwigia is an irrelevant and
16 improper basis upon which the Executive Officer could base the denial, as no such criteria or
17 requirement for such a "long-term benefit" exists in the Nutrient Offset Program. The only relevant
18 factors for the Executive Officer to consider in this case was whether the City satisfied the express
19 requirements of the Program, which the City's revised Laguna Nutrient Offset Project does, in fact,
20 satisfy.

21 Given the extensive communication and diligence by City staff regarding all aspects of the
22 revised Laguna Nutrient Offset Project throughout project development, and the Executive Officer's
23 initial support for the project, the Executive Officer's subsequent denial can only be explained as
24 Regional Water Board staff simply now not wanting to approve any project involving Ludwigia
25 removal in the Laguna de Santa Rosa. Instead, the Regional Water Board prefers the City to focus
26 its nutrient reduction efforts on agricultural dischargers, to supplement and expedite the Regional
27 Water Board's agricultural discharge program. The Regional Water Board's desire for additional
28

1 control on agricultural discharges into the Laguna de Santa Rosa cannot and does not provide a
2 rational and supported basis to deny the revised Laguna Nutrient Offset Project as “unsuitable for
3 compliance with the Nutrient Offset Program.” See July 14, 2011 letter.

4 For these reasons, the State Water Board should find that the Regional Water Board’s
5 Executive Officer improperly implemented and acted inconsistently with the Nutrient Offset
6 Program when issuing the July 14, 2011 letter denying the City’s revised Laguna Nutrient Offset
7 Project.

8 **B. The Executive Officer’s Denial Improperly Dictates the Manner of Compliance**
9 **in Violation of Water Code section 13360**

10 State law mandates that “no waste discharge requirement or other order of a Regional Board
11 ... shall specify the design, location, type of construction, or particular manner in which compliance
12 may be had.” Water Code §13360(a)(emphasis added). Thus, the Regional Board may prescribe
13 legally authorized discharge limitations or restrictions, but the Regional Board may not mandate
14 how to achieve those limitations. *Id; Tahoe-Sierra Preservation Council v. SWRCB*, 210
15 Cal.App.3d 1421, 1438 (1989) (“the Water Board may identify the disease and command that it be
16 cured but not dictate the cure”) (emphasis added); see also *City of Los Angeles v. SWRCB, et al*,
17 Case No. BS 060 957 [related case *City of Burbank v. SWRCB, et al*, Case No. BS 060 960],
18 Statement of Decision (April 4, 2001) (finding that the requirement for a particular treatment or its
19 equivalent violated Water Code section 13360 [this portion of these two decisions were not
20 appealed by the State Water Resources Control Board, and remain controlling law]).

21 In this case, the Regional Water Board prescribed the “zero” or “no net loading” effluent
22 limitations in the City’s NPDES Permit, and adopted the Nutrient Offset Program as a mechanism
23 by which the City can achieve compliance. The City proposed a revised Laguna Nutrient Offset
24 Project in compliance with the Nutrient Offset Program, resolving any outstanding technical
25 concerns of Regional Water Board staff. Nonetheless, the Executive Officer denied the project, and
26 instead, twice endorsed nutrient offset options associated with agricultural discharges, including
27 dairies, as the only method by which the City could gain Regional Water Board approval and
28 compliance. See May 20, 2011 and July 14, 2011 letters from the Executive Officer. While the

1 City is currently investigating nutrient offset options involving agricultural discharges, those
2 projects are not required to be, nor will they likely be, the exclusive projects by which the City will
3 achieve compliance with the effluent limitations in the NPDES Permit.

4 The Regional Water Board Executive Officer's decision violates Water Code section 13360,
5 as the Regional Water Board is dictating the manner in which the City must comply with the
6 Nutrient Offset Program and the NPDES Permit's effluent limitations. As a result, the Regional
7 Water Board is depriving the City of the ability to use its ingenuity to determine the method by
8 which it will comply with the terms of its NPDES Permit. *See Tahoe-Sierra Preservation Council*
9 *v. SWRCB*, 210 Cal.App.3d at 1438 ("Section 13360 is a shield against unwarranted interference
10 with the ingenuity of the party"). That action is clearly contrary to the prohibitory mandate in
11 Water Code section 13360.

12 For these reasons, the State Water Board should find that the Regional Water Board's
13 Executive Officer violated Water Code section 13360 when issuing the July 14, 2011 letter denying
14 the City's revised Laguna Nutrient Offset Project.

15 C. **The Executive Officer's Denial is Not Reasonable as Required by Water Code**
16 **section 13000**

17 The California Legislature has found and declared that activities affecting water quality
18 "shall be regulated to attain the highest water quality which is *reasonable*, considering all demands
19 being made and to be made on those waters and the total values involved, beneficial and
20 detrimental, economic and social, tangible and intangible." *See* Water Code §13000 (emphasis
21 added). This section sets state policy and imposes an overriding requirement on the Regional
22 Boards that all orders be reasonable considering all circumstances.

23 The Regional Water Board Executive Officer's denial of the revised Laguna Nutrient Offset
24 Project is not reasonable, considering all of the related circumstances. As discussed herein, the
25 revised Laguna Nutrient Offset Project complies with the Nutrient Offset Program, and was
26 specifically developed due to Regional Water Board staff's support for that project. The City
27 worked diligently to resolve any technical questions or concerns initially raised by Regional Water
28 Board staff, and approval is now being unreasonably withheld without adequate justification.

1 Rejecting the City's proposed project in favor of undetermined future projects involving
2 agricultural dischargers, including dairies, is also unreasonable, and especially problematic, given
3 that the three-year average for determining compliance with the effluent limitations set forth in the
4 City's NPDES Permit begins October 2011. The City has already invested two and one half years
5 and more than \$311,000 into project development. The Nutrient Offset Program can be successful
6 only if both the City and the Regional Water Board are invested and engaged in successfully
7 identifying and approving multiple projects that will undoubtedly vary in scope and duration.
8 Given recent events, the City is pessimistic about securing future project approval.

9 For these reasons, the Regional Board Executive Officer's determination is clearly an
10 unreasonable action in violation of Water Code section 13000.

11 **D. The Executive Officer's Denial is Not Supported by Findings and Evidence.**

12 Orders adopted by the Regional Water Board not supported by the findings, or findings not
13 supported by the evidence, constitute an abuse of discretion. *Topanga Association for a Scenic*
14 *Community v. County of Los Angeles*, 11 Cal.3d 506, 515; *California Edison v. SWRCB*, 116 Cal.
15 App.3d 751, 761 (4th Dt. 1981); *see also In the Matter of the Petition of City and County of San*
16 *Francisco, et al.*, State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995). In this case, as discussed
17 herein, the Regional Water Board Executive Officer's denial of the revised Laguna Nutrient Offset
18 Project is not supported by adequate findings, and the singular finding made is not supported by
19 evidence in the administrative record.

20
21 As noted above, the Regional Water Board's Executive Officer listed only one reason for the
22 decision to deny the City's revised Laguna Nutrient Offset Project, that is, "the project does not
23 provide a clear long-term environmental benefit with respect to the overall management of
24 Ludwigia in the Laguna de Santa Rosa." *See* July 14, 2011 letter. This singular finding and basis
25 for denial is not adequate, and unsupported by evidence in the administrative record, as no such
26 criteria or requirement for such a "long-term benefit" exists in the Nutrient Offset Program.
27 Further, evidence in the administrative record demonstrates that the revised Laguna Nutrient Offset
28

1 Project does, in fact, satisfy the criteria in the Nutrient Offset Program, and was once a well-
2 supported project by Regional Water Board staff.

3 For these reasons, the State Water Board should find that the Regional Water Board's
4 Executive Officer abused her discretion when issuing the July 14, 2011 letter denying the City's
5 revised Laguna Nutrient Offset Project as the determination was not supported by adequate
6 findings, and the findings made were not supported by evidence in the administrative record.

7 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL**
8 **BOARD AND TO THE DISCHARGER:**

9 A true and correct copy of this Petition was mailed by First Class mail on August 15, 2011,
10 to the Regional Board at the following address:

11 Catherine Kuhlman, Executive Officer
12 California Regional Water Quality Control Board
13 North Coast Region
14 5550 Skylane Boulevard, Suite A
15 Santa Rosa, California 95403

16 **9. A STATEMENT THAT THE SUBSTANTIVE ISSUES AND OBJECTIONS RAISED**
17 **IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN**
18 **EXPLANATION WHY NOT:**

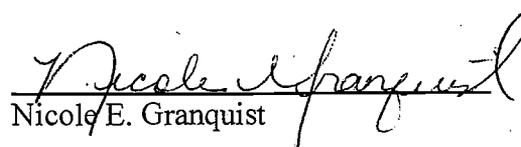
19 The July 14, 2011 letter denying the revised Laguna Nutrient Offset Project was issued by
20 the Executive Officer of the Regional Water Board without public notice and/or a comment period.
21 For this reason, the City had no opportunity to formally raise the substantive issues or objections
22 contained in this Petition to the Regional Water Board prior to issuance of the denial letter.

23 **10. PETITIONER'S REQUEST FOR ABEYANCE:**

24 The City wishes to place its Petition for Review in abeyance pursuant to 23 C.C.R.
25 §2050.5(d) to allow time for the City to attempt to resolve its concerns with the Regional Water
26 Board.

27 DATED: August 15, 2011

Respectfully submitted,

28 
Nicole E. Granquist

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. On August 15, 2011, I served the within document(s):

PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION (WATER CODE SECTION 13320)

BY MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

Catherine Kuhlman, Executive Officer
CRWQCB
North Coast Region
5550 Skyline Boulevard, Suite A
Santa Rosa, CA 95403

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on August 15, 2011, at Sacramento, California.


Cynthia Biscarra