BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

PETITION FOR REVIEW;
PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION (WATER CODE 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.
The Executive Officer’s denial is inconsistent with the Nutrient Offset Program, is not
reasonable as required by Water Code section 13000, impermissibly dictates the manner of
compliance in violation of Water Code section 13260, and is otherwise unsupported by findings or
evidence in the administrative record, all of which constitute an abuse of discretion.

The City’s revised Laguna Nutrient Offset Project does, in fact, meet the criteria set forth in
the Nutrient Offset Program, and should have been approved consistent with Regional Water Board
staff’s initial support for the Project and subsequent intensive discussions between Regional Water
Board and City staffs in which agreement was seemingly secured regarding several technical issues.

The City requests the State Water Board to reverse the Executive Officer’s July 14, 2011 decision.

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

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

Miles A. Ferris
Director of Utilities
City of Santa Rosa
4300 Llano Road
Santa Rosa, California 95407
Telephone: (707) 543-4202
Facsimile: (707) 543-3936
Email: mferris@srcity.org

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

Suzanne C. Rawlings
Asst. City Attorney
Office of the City Attorney
City of Santa Rosa
100 Santa Rosa Avenue, Room 8
Santa Rosa, CA 95404

¹The 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.
2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

The City seeks review of the July 14, 2011 decision by the Regional Water Board's 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. The City asserts the revised Laguna Nutrient Offset Project is compliant with the Regional Water Board’s Nutrient Offset Program, and that the Executive Officer’s denial constitutes an abuse of discretion.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:

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

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

A. The City’s Treatment Facilities

The City operates collection, treatment, storage, discharge, and reclamation facilities, employing state of the art advanced, tertiary-treatment facilities, and producing high quality recycled water that is beneficially reused in cutting edge water reclamation projects encouraged by the California Legislature. Specifically, the City owns and operates the Santa Rosa Subregional Water Reclamation System (the “Reclamation Plant”), a publicly-owned treatment works, which currently collects, treats, recycles, and discharges an average dry weather flow of 15 million gallons per day (“MGD”) of industrial, commercial, and municipal wastewater from a of population of
approximately 225,000 in the Cities of Santa Rosa, Cotati, Rohnert Park, Sebastopol, and the unincorporated South Park County Sanitation District.

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

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

2 Approximately 6,388 acres of urban and agricultural land are irrigated with recycled water.
B. **Controversial Nutrient Restrictions Included in the City’s Most Recent NPDES Permit**

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

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

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

Unfortunately, the United States Environmental Protection Agency ("USEPA") ignored the very detailed information and rationale presented by the State and Regional Water Boards for not listing the Laguna de Santa Rosa as impaired, and unilaterally listed the Laguna de Santa Rosa as
impaired for nitrogen and phosphorous. It is this listing by USEPA that has been carried forward to subsequent 303(d) Lists that the Regional Water Board relies upon for the discharge limitations underlying the activities that are the subject of this Petition.

At the time the City’s NPDES Permit was renewed in 2006, Regional Water Board staff had not drafted a Total Maximum Daily Load (“TMDL”) to address the nutrient listings. Notwithstanding significant protest by the City, and for the stated purpose of implementing the Basin Plan’s narrative water quality objective for “biostimulatory substances,” the Regional Water Board imposed the following effluent limitations for nitrogen and phosphorus:

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

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

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

Id.

Despite the City’s extraordinary efforts to beneficially reuse of its recycled water, at the time the NPDES Permit was adopted, there was no expectation by the City that it could comply with the new, unprecedented alternative final limits of “zero” or “no net loading” for nutrients. The City’s 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,
challenging the “zero” or “no net loading” alternative final limitations on the basis that they directly
contradicted State Water Board precedent (e.g., State Water Board Order No. WQ 2001-06), were
not legally required, constituted an improper interpretation of the narrative objectives for
biostimulatory substances and chemical constituents, and were not supported by findings or
evidence in the administrative record.

C. Nutrient Reduction Offset Program

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

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

- Identification by the City of the annual nutrient load to be offset

- Criteria for nutrient reduction credits
  - Detailed method for direct measurement of nutrient reduction
  - Detailed method for estimated nutrient reductions
  - Margin of safety
  - No nutrient reduction credits for projects/activities already required by the
    City’s NPDES permit for municipal storm water discharges.

- Accounting for nutrient credits – Regional Water Board and City staff both
  understood that due to the vagaries of variable and unpredictable annual discharge of
  water and nutrients, project implementation timelines and varying nutrient reduction
  values from short and long-term projects, an averaging period for compliance was
  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
season. Credit for any nutrient removal/reduction actions implemented after 2007 and prior to the 2011-2012 discharge season are available to “bank,” and apply to the City’s first three-year average compliance period.

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

See Resolution No. R1-2008-0061,

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

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

Soon after the Nutrient Offset Program was adopted in July 2008, City staff began the process of obtaining approval for early implementation of nutrient reduction projects. In February 2009, and following several consultations with Regional Water Board staff, the 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
discuss further. That meeting did not occur until June 2010, notwithstanding repeated
requests for the meeting from City staff. Further information was provided by the City
regarding the project; however, Regional Water Board staff indicated they would deny the
project if formally proposed.

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

On April 15, 2011, City staff received correspondence from Regional Water Board
staff, asking to resubmit the Laguna Ludwigia Nutrient Offset Project. Regional Water
Board staff was aware the City had submitted a project, but could not locate the document.
The City provided an electronic copy. During a call on May 16, 2011, Regional Water
Board staff suddenly reversed their previous support for the project, and indicated the
project was unacceptable. On May 20, 2011, the City received a letter from the Regional
Water Board’s Executive Officer rejecting the Laguna Ludwigia Nutrient Offset Project and listing technical concerns in an attachment to the letter. In that letter, the Executive Officer expressed that acceptable nutrient offset projects would be those involving agricultural discharges, specifically, dairies. While the City is currently investigating nutrient offset options involving agricultural discharges, those projects are not required to be, nor will they likely be, the exclusive projects by which the City will achieve compliance with the effluent limitations in the NPDES Permit.

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

Regional Water Board staff concurred with a July 15, 2011 date for approval of the resubmitted project.

On June 6, 2011, the City submitted the revised Laguna Nutrient Offset Project to the Regional Water Board, which responded to and resolved the technical questions and concerns of Regional Water Board staff expressed in the May 20, 2011 letter, and as discussed at the May 26, 2011 meeting. Throughout June 2010, City staff continued contact with the Regional Water Board staff, offering assistance or clarification, if necessary, to ensure the project would be approved. On June 30, 2011, Regional Water Board staff indicated they were on track to meet the City’s requested approval date of July 15, 2011 provided the parties could work through some “relatively minor last-minute concerns.” City and Regional Water Board staffs spoke further that day, and for the next week, regarding
Regional Water Board staff's further concerns, which, if resolved, would render the project almost useless to the City in terms of nutrient removal credit, especially as compared to the effort expended. The concerns raised went beyond any criteria set forth in the Nutrient Offset Program, and imparted a clear signal that Regional Water Board staff simply did not now want to approve any project involving Ludwigia removal. Instead, Regional Water Board staff prefers the City to focus its nutrient reduction efforts on agricultural dischargers, to supplement and expedite the Regional Water Board’s agricultural discharge program.

On July 22, 2011, the City received a letter from the Regional Water Board’s Executive Officer, dated July 14, 2011, stating that the Laguna Nutrient Offset Project (Revised Proposal) was unsuitable for compliance with the 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. The Executive Officer acknowledged the hard work and good faith effort of the City to identify and implement a nutrient offset project, but again, diverted discussion of nutrient offset options to those involving agriculture, including dairies.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

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

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

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

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

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

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

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

A. The Executive Officer’s Denial Improperly Implements and is
Inconsistent with the Nutrient Offset Program

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

The Regional Water Board’s Executive Officer listed only one reason for the decision to
deny the City’s revised Laguna Nutrient Offset Project, that is, “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.” See July 14, 2011 letter. Whether the project provides a clear long-term
environmental benefit with respect to the overall management of Ludwigia is an irrelevant and
improper basis upon which the Executive Officer could base the denial, as no such criteria or
requirement for such a “long-term benefit” exists in the Nutrient Offset Program. The only relevant
factors for the Executive Officer to consider in this case was whether the City satisfied the express
requirements of the Program, which the City’s revised Laguna Nutrient Offset Project does, in fact,
satisfy.

Given the extensive communication and diligence by City staff regarding all aspects of the
revised Laguna Nutrient Offset Project throughout project development, and the Executive Officer’s
initial support for the project, the Executive Officer’s subsequent denial can only be explained as
Regional Water Board staff simply now not wanting to approve any project involving Ludwigia
removal in the Laguna de Santa Rosa. Instead, the Regional Water Board prefers the City to focus
its nutrient reduction efforts on agricultural dischargers, to supplement and expedite the Regional
Water Board’s agricultural discharge program. The Regional Water Board’s desire for additional
control on agricultural discharges into the Laguna de Santa Rosa cannot and does not provide a rational and supported basis to deny the revised Laguna Nutrient Offset Project as “unsuitable for compliance with the Nutrient Offset Program.” See July 14, 2011 letter.

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

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

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

In this case, the Regional Water Board prescribed the “zero” or “no net loading” effluent limitations in the City’s NPDES Permit, and adopted the Nutrient Offset Program as a mechanism by which the City can achieve compliance. The City proposed a revised Laguna Nutrient Offset Project in compliance with the Nutrient Offset Program, resolving any outstanding technical concerns of Regional Water Board staff. Nonetheless, the Executive Officer denied the project, and instead, twice endorsed nutrient offset options associated with agricultural discharges, including dairies, as the only method by which the City could gain Regional Water Board approval and compliance. See May 20, 2011 and July 14, 2011 letters from the Executive Officer. While the
City is currently investigating nutrient offset options involving agricultural discharges, those projects are not required to be, nor will they likely be, the exclusive projects by which the City will achieve compliance with the effluent limitations in the NPDES Permit.

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

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

C. The Executive Officer’s Denial is Not Reasonable as Required by Water Code section 13000

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

The Regional Water Board Executive Officer’s denial of the revised Laguna Nutrient Offset Project is not reasonable, considering all of the related circumstances. As discussed herein, the revised Laguna Nutrient Offset Project complies with the Nutrient Offset Program, and was specifically developed due to Regional Water Board staff’s support for that project. The City worked diligently to resolve any technical questions or concerns initially raised by Regional Water Board staff, and approval is now being unreasonably withheld without adequate justification.
Rejecting the City's proposed project in favor of undetermined future projects involving agricultural dischargers, including dairies, is also unreasonable, and especially problematic, given that the three-year average for determining compliance with the effluent limitations set forth in the City's NPDES Permit begins October 2011. The City has already invested two and one half years and more than $311,000 into project development. The Nutrient Offset Program can be successful only if both the City and the Regional Water Board are invested and engaged in successfully identifying and approving multiple projects that will undoubtedly vary in scope and duration. Given recent events, the City is pessimistic about securing future project approval.

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

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

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

As noted above, the Regional Water Board's Executive Officer listed only one reason for the decision to deny the City's revised Laguna Nutrient Offset Project, that is, "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." See July 14, 2011 letter. This singular finding ad basis for denial is not adequate, and unsupported by evidence in the administrative record, as no such criteria or requirement for such a "long-term benefit" exists in the Nutrient Offset Program. Further, evidence in the administrative record demonstrates that the revised Laguna Nutrient Offset
Project does, in fact, satisfy the criteria in the Nutrient Offset Program, and was once a well-supported project by Regional Water Board staff.

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

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

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

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

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

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

10. **PETITIONER’S REQUEST FOR ABEYANCE:**

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

DATED: August 15, 2011

Respectfully submitted,

Nicol 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