

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of:

No.

THE COUNTY OF SAN DIEGO; THE CITY OF CARLSBAD; THE CITY OF CHULA VISTA; THE CITY OF CORONADO; THE CITY OF DEL MAR; THE CITY OF EL CAJON; THE CITY OF ENCINITAS; THE CITY OF ESCONDIDO; THE CITY OF IMPERIAL BEACH; THE CITY OF LA MESA; THE CITY OF LEMON GROVE; THE CITY OF NATIONAL CITY; THE CITY OF OCEANSIDE; THE CITY OF POWAY; THE CITY OF SAN DIEGO; THE CITY OF SAN MARCOS; THE CITY OF SANTEE; THE CITY OF SOLANA BEACH; AND THE CITY OF VISTA

**PETITION FOR REVIEW**

[Water Code § 13320(a)]

FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, IN ADOPTING ORDER NO. R9-2007-0001, NPDES PERMIT NO. CAS0108758

Attorneys for Petitioners

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I.

**INTRODUCTION**

1. Petitioners the County of San Diego; the City of Carlsbad; the City of Chula Vista; the City of Coronado; the City of Del Mar; the City of El Cajon; the City of Encinitas; the City of Escondido; the City of Imperial Beach; the City of La Mesa; the City of Lemon Grove; the City of National City; the City of Oceanside; the City of Poway; the City of San Diego; the City of San Marcos; the City of Santee; the City of Solana Beach and the City of Vista (collectively, "Petitioners") seek State Board review of the California Regional Water Quality Control Board, San Diego Region's ("Regional Board") adoption of Order No R9-2007-0001/NPDES Permit No. CAS0108758 ("Permit"). Petitioners contend that in adopting the Permit the Regional Board abused its discretion because: (1) the Regional Board was required to, but did not, cite to *any* legal authority in the Permit or in the accompanying Fact Sheet/Technical Report to support the imposition of certain Permit requirements that exceed federal law; and (2) the Regional Board erroneously cited to federal law as the source for its authority to impose other Permit requirements that exceed federal law when the correct source of the Regional Board's authority is state law, specifically the Porter-Cologne Water Quality Control Act, California Water Code Section 12000 *et seq.*

2. The Regional Board adopted the Permit on January 24, 2007. The Permit requires all large Municipal Separate Storm Sewer System ("MS4") operators in San Diego County to undertake measures to regulate discharges into and from their MS4s. As the Regional Board's staff, in official documents, has previously admitted, the Permit contains a number of provisions that exceed the requirements of the Federal Clean Water Act (33 U.S.C. §§ 1251 *et seq.*) and the Environmental Protection Agency's implementing regulations for storm water permits (40 C.F.R. Parts 122, 123 and 124). While the Petitioners do not dispute the Regional Board's authority to exceed the requirements of federal law when state law authorizes the Regional Board to do so, the Petitioners contend that, in such cases, the Regional Board is required to specify the state law that provides its authority to go beyond the requirements of federal law. In adopting the Permit, the Regional Board either failed to cite *any* authority or erroneously cited to federal law for its authority to adopt those portions of the

1 Permit that exceed federal law. By failing to cite to the applicable state law for those portions of the  
2 Permit that exceed federal law, the Regional Board abused its discretion.

3 3. The Petitioners therefore submit this Petition for review of the Permit pursuant to  
4 Water Code section 13320 and Title 23 of the California Code of Regulations. Petitioners respectfully  
5 request that the State Board correct the Regional Board's action by citing to the appropriate state law  
6 authority that supports the Regional Board's imposition of those portions of the Permit that exceed the  
7 requirements of federal law.

8 4. The Petitioners submit this Petition in order to exhaust all administrative remedies  
9 related to the Permit and to provide the State Board with an opportunity to correct the errors of the  
10 Regional Board. After exhaustion of their administrative remedies, the Petitioners, all or some of  
11 them, intend to file a test claim with the Commission on State Mandates to seek state funding for those  
12 portions of the Permit that exceed federal law and therefore represent state mandates subject to the  
13 funding provisions of Article XIII B, Section 6 of the California Constitution, as amended in 2004  
14 through Proposition 1A. In considering this Petition, the State Board, in its discretion, may wish to  
15 consider the potential financial implications to the State of California related to the funding of those  
16 portions of the Permit that exceed federal law, and, in light of those financial implications, consider  
17 the propriety of the state law requirements imposed by the Regional Board in the Permit. While the  
18 Petitioners do not challenge the Regional Board's authority to exceed the requirements of federal law  
19 when state law authorizes the Regional Board to do so, the Petitioners do contend that the portions of  
20 the Permit that exceed federal law are subject to the funding provisions of the California Constitution.

21 **II.**

22 **NAMES AND ADDRESSES OF PETITIONERS**

23 5. The names and contact information for Petitioners is as follows:

24 The County of San Diego, California	John Sansone
	1600 Pacific Highway, Room 355
	San Diego, CA 92101
	(619) 531-4860
	Fax: (619) 531-6005

1	City of Carlsbad, California	Ron Ball 1200 Carlsbad Village Drive Carlsbad, CA 92008 (760) 434-2891 FAX: (760) 434-8367
2		
3		
4	City of Chula Vista, California	Ann Y. Moore 276 Fourth Avenue Chula Vista, CA 91910 (619) 691-5037 FAX: (619) 409-5823 <a href="mailto:amoore@ci.chula-vista.ca.us">amoore@ci.chula-vista.ca.us</a>
5		
6		
7		
8	City of Coronado, California	Morgan L. Foley McDougal, Love, Eckis, Smith, Boehmer & Foley 460 N. Magnolia Avenue El Cajon, CA 92020 (619) 440-4444 FAX: (619) 440-4907 <a href="mailto:mfoley@mclex.com">mfoley@mclex.com</a>
9		
10		
11		
12	City of Del Mar, California	Tamara A. Smith McDougal, Love, Eckis, Smith, Boehmer & Foley 460 N. Magnolia Avenue El Cajon, CA 92020 (619) 440-4444 FAX: (619) 440-4907 <a href="mailto:tsmith@mclex.com">tsmith@mclex.com</a>
13		
14		
15		
16		
17	City of El Cajon, California	Morgan L. Foley McDougal, Love, Eckis, Smith, Boehmer & Foley 460 N. Magnolia Avenue El Cajon, CA 92020 (619) 440-4444 FAX: (619) 440-4907 <a href="mailto:mfoley@mclex.com">mfoley@mclex.com</a>
18		
19		
20		
21	City of Encinitas, California	Glenn Sabine Sabine and Morrison 110 Juniper Street San Diego, CA 92101
22		
23		
24	City of Escondido, California	Jeffrey R. Epp 201 North Broadway Escondido, CA 92025 (760) 839-4608 FAX: (760) 741-7541 <a href="mailto:jepp@escondido.org">jepp@escondido.org</a>
25		
26		
27		
28		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

City of Imperial Beach, California

James P. Lough  
McDougal, Love, Eckis, Smith, Boehmer & Foley  
460 N. Magnolia Avenue  
El Cajon, CA 92020  
(619) 440-4444  
FAX: (619) 440-4907  
[jlough@mclex.com](mailto:jlough@mclex.com)

City of La Mesa, California

Glenn Sabine  
Sabine and Morrison  
110 Juniper Street  
San Diego, CA 92101

City of Lemon Grove, California

James P. Lough  
McDougal, Love, Eckis, Smith, Boehmer & Foley  
460 N. Magnolia Avenue  
El Cajon, CA 92020  
(619) 440-4444  
FAX: (619) 440-4907  
[jlough@mclex.com](mailto:jlough@mclex.com)

City of National City, California

George Eiser, III  
1243 National City Boulevard  
National City, CA 91950  
(619) 336-4220  
FAX: (619) 336-4327  
[geiser@ci.national-city.ca.us](mailto:geiser@ci.national-city.ca.us)

City of Oceanside, California

John Mullen  
300 North Coast Highway  
Oceanside, CA 92054  
(760) 435-3969  
FAX: (760) 966-4457  
[jmullen@ci.oceanside.ca.us](mailto:jmullen@ci.oceanside.ca.us)

City of Poway, California

Lisa A. Foster  
McDougal, Love, Eckis, Smith, Boehmer & Foley  
460 N. Magnolia Avenue  
El Cajon, CA 92020  
(619) 440-4444  
FAX: (619) 440-4907  
[lfoster@mclex.com](mailto:lfoster@mclex.com)

1 City of San Diego

Timothy J. Miller  
1200 3<sup>rd</sup> Avenue, #1620  
San Diego, CA, 92101  
(619) 533-5800  
FAX: (619) 533-5856  
[millert@sandiego.gov](mailto:millert@sandiego.gov)

5  
6 City of San Marcos, California

Helen Holmes Peak  
Lounsbury, Ferguson, Altona & Peak, LLP  
960 Canterbury Place, #300  
Escondido, CA 92025  
(760) 743-1201  
FAX: (760) 743-9926  
[hhp@lfap.com](mailto:hhp@lfap.com)

10 City of Santee, California

Shawn D. Hagerty  
655 West Broadway, 15<sup>th</sup> Floor  
San Diego, CA 92101  
(619) 525-1300  
FAX: (619) 233-6118  
[Shawn.hagerty@bbklaw.com](mailto:Shawn.hagerty@bbklaw.com)

15 City of Solana Beach, California

James P. Lough  
McDougal, Love, Eckis, Smith, Boehmer & Foley  
460 N. Magnolia Avenue  
El Cajon, CA 92020  
(619) 440-4444  
FAX: (619) 440-4907  
[jlough@mclex.com](mailto:jlough@mclex.com)

20 City of Vista, California

Darold D. Pieper  
600 Eucalyptus Avenue  
Vista, CA 92084  
(760) 639-6119  
FAX: (760) 639-6120  
[dpieper@ci.vista.ca.us](mailto:dpieper@ci.vista.ca.us)

24 **III.**

25 **THE ACTION OF THE CALIFORNIA REGIONAL WATER BOARD SUBJECT TO THIS**  
26 **PETITION**

27 6. Petitioners seek review of the Regional Board's adoption of Order No. R9-2007-  
28 0001/NPDES No. CAS0108758, entitled "Waste Discharge Requirements for Discharges of Urban

1 Runoff from the Municipal Separate Storm Water Systems (MS4s) Draining the Watersheds of the  
2 County of San Diego, the Incorporated Cities of San Diego, the San Diego Unified Port District, and  
3 the San Diego County Regional Airport Authority.” A copy of the Permit is attached hereto as Exhibit  
4 “A” and incorporated herein.

5 **IV.**

6 **DATE THE REGIONAL WATER BOARD ACTED**

7 7. The Regional Board adopted the Permit on January 24, 2007.

8 **V.**

9 **STATEMENT OF THE REASONS THE ACTION WAS IMPROPER**

10 8. Petitioners contend that in adopting the Permit, the Regional Board abused its  
11 discretion because: (1) the Regional Board was required to, but did not, cite to *any* legal authority in  
12 the Permit or in the accompanying Fact Sheet/Technical Report to support the imposition of certain  
13 Permit requirements that exceed federal law; and (2) the Regional Board erroneously cited to federal  
14 law as the source for its authority to impose other Permit requirements that exceed federal law when  
15 the correct source of the Regional Board’s authority is state law, specifically the Porter-Cologne Water  
16 Quality Control Act, California Water Code section 13000 *et seq.*

17 9. As part of the administrative process before the Regional Board, Petitioners submitted  
18 written and oral comments, including a chart analyzing the legal source of each requirement of the  
19 permit, which demonstrated that significant portions of the Permit exceed the requirements of federal  
20 law. As illustrated in Exhibit “B” attached hereto and incorporated herein, the Regional Board’s staff,  
21 in official documents, has also previously admitted that at least 40% of the Regional Board’s storm  
22 water requirements “exceed the federal regulations.” Through their written and oral comments,  
23 Petitioners had requested that the Regional Board cite to the specific state law that provided the  
24 Regional Board with authority to “exceed the federal regulations.” The Regional Board either failed  
25 to do so, or in circular fashion, erroneously cited to federal authority as the authority to “exceed the  
26 federal regulations.”

27 10. An example of a Permit requirement for which the Regional Board failed to cite to any  
28 applicable legal authority in the Permit or in the accompanying Fact Sheet/Technical Report is the

1 Hydromodification Plan requirements found in Section D.1.g of the Permit. In fact, the Regional  
2 Board has provided almost no legal support for the individual Permit requirements in the Permit's  
3 Jurisdictional Urban Runoff Management Program and its components. This is true of the  
4 Hydromodification Plan requirements of Permit section D.1.g; the Construction Component included  
5 at Permit section D.2; the Existing Development Component included at Permit section D.3; and the  
6 Illicit Discharge Detection and Inspection Component included at Permit section D.4. This by no  
7 means an inclusive list, and further explanation is available in the attached Memorandum of Points and  
8 Authorities.

9 11. Examples of Permit requirements for which the Regional Board erroneously cited to  
10 federal law include the many inspection and reporting requirements in the Permit which "exceed the  
11 federal regulations." As support for such requirements, the Regional Board merely cited back to  
12 federal law, rather than the provisions of applicable state law. This is especially true of the Permit's  
13 Watershed Urban Runoff Management Program requirements included at Permit section E. The  
14 Regional Board cited no legal authority for the individual provisions of this section, and only cited to  
15 general provisions in the federal regulations that provide authority to issue permits on watershed basis.  
16 Despite the Regional Board's contentions, these regulations do not provide the authority to implement  
17 the kind of strict requirements the Regional Board included in Permit section E. Nevertheless, when  
18 confronted with these comments during the Permit renewal process, the Regional Board contended  
19 that all of the permits requirements were adopted pursuant to federal authority. (*See Responses to*  
20 *Comments II, dated December 13, 2006, pp. 44.*) This is simply erroneous.

21 12. By failing to cite to appropriate legal authority, the Regional Board has abused its  
22 discretion. The factual and legal support for the Petitioner's claims is more fully set forth in the  
23 Memorandum of Points and Authorities filed herewith.

## 24 VI.

### 25 **HOW PETITIONERS ARE AGGRIEVED**

26 13. Petitioners are co-permittees on the Permit approved by the Regional Board.  
27 Petitioners operate MS4 systems including street gutters and storm drains, and are charged with  
28 implementing the Permit within their respective boundaries. Petitioners have the right to know the

1 legal basis for the requirements imposed through the Permit and are aggrieved by the Regional  
2 Board's failure to cite authority or by its failure to correctly cite authority. This is particularly true  
3 because the Petitioners believe that the requirements of the Permit that exceed federal law are state  
4 mandates subject to the funding provisions of the California Constitution. In addition, Petitioners  
5 must implement the requirements of the Permit and must certify to the Regional Board that they have  
6 the legal authority to do so. In order to make such a certification, Petitioners need to know under what  
7 specific authority the Regional Board acted when it adopted the relevant portions of the Permit.

8 14. Petitioners attempted to correct the problems with the Regional Board's action by  
9 providing input to the Regional Board during the Permit renewal process. To that end, Petitioners  
10 participated in the administrative process of the Permit's development by, among other things,  
11 submitting written comments on Permit drafts and appearing at public hearings. However, the  
12 Regional Board did not amend the Permit and the Fact Sheet/Technical Report to address Petitioners'  
13 comments, and Petitioners are therefore aggrieved by the Regional Board's action.

14 **VII.**

15 **ACTIONS PETITIONERS REQUEST THE STATE WATER BOARD TAKE**

16 15. Petitioners respectfully request that the State Board correct the Regional Board's action  
17 by citing to the appropriate state law authority that supports the Regional Board's imposition of those  
18 portions of the Permit that exceed the requirements of federal law. In addition, the State Board, in its  
19 discretion, may wish to consider the potential financial implications to the State of California related  
20 to the funding of those portions of the Permit that exceed federal law, and, in light of those financial  
21 implications, consider the propriety of the state law requirements imposed by the Regional Board in  
22 the Permit. While the Petitioners do not challenge the Regional Board's authority to exceed the  
23 requirements of federal law when state law authorizes the Regional Board to do so, the Petitioners do  
24 contend that the portions of the Permit that exceed federal law are subject to the funding provisions of  
25 the California Constitution.

26 ///

27 ///

28 ///

1 VIII.

2 **STATEMENT OF POINTS AND AUTHORITIES FOR LEGAL ISSUES**

3 16. Petitioners have filed a separate Memorandum of Points and Authorities with this  
4 Petition and, by this reference, that Memorandum is incorporated into this Petition as if fully set forth  
5 at this point.

6 IX.

7 **LIST OF INTERESTED PERSONS IN THIS MATTER**

8 17. Petitioners have requested that the Regional Board forward a list of interested persons  
9 to the State Board.

10 X.

11 **STATEMENT OF COPIES FURNISHED**

12 18. In accordance with the requirements of Title 23, Section 2050(a)(8) of the California  
13 Code of Regulations, a copy of this Petition has been sent to the Regional Water Quality Control  
14 Board, San Diego Region.

15 XI.

16 **ADMINISTRATIVE RECORD**

17 19. Petitioners have requested that the Regional Board prepare a copy of the administrative  
18 record for the State Board's review.

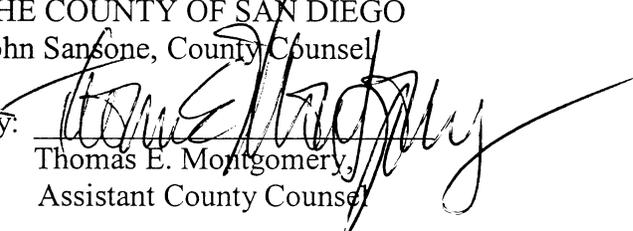
19 XII.

20 **CONCLUSION**

21 20. For the reasons set forth in this Petition and in the related documents filed here with,  
22 Petitioners respectfully request that the State Water Resources Control Board review the Permit and  
23 take the actions requested herein or any other actions as the State Board deems appropriate.

24 Dated: 2-22-07

25 THE COUNTY OF SAN DIEGO  
John Sansone, County Counsel

26 By:   
27 Thomas E. Montgomery,  
28 Assistant County Counsel

1 Dated: 2/22/07

CITY OF ENCINITAS

Randal R Morrison

2  
3 By: Randal R Morrison  
Deputy Glenn Sabino, City Attorney  
2.22.07

4 Dated: 2/22/07

CITY OF LA MESA

5  
6 By: Randal R Morrison  
Deputy Glenn Sabino, City Attorney  
2.22.07

8 Dated: Feb 22, 2007

CITY OF SANTEE

9  
10 By: MDA  
Shawn D. Hagerty, City Attorney

11 Dated: Feb. 22, 2007

CITY OF CARLSBAD

12  
13 By: Ron Ball  
Ron Ball, City Attorney

15 Dated: February 22, 2007

CITY OF ESCONDIDO

16  
17 By: Jennifer McCain  
Jennifer McCain,  
Assistant City Attorney

19 Dated: 2-22-07

CITY OF OCEANSIDE

20  
21 By: John Mullen  
for John Mullen, City Attorney

22 Dated: \_\_\_\_\_

CITY OF SAN MARCOS

23  
24 By: \_\_\_\_\_  
Helen Holmes Peak, City Attorney

26 Dated: Feb 22, 2007

CITY OF VISTA

27  
28 By: Darold D. Pieper  
Darold D. Pieper, City Attorney

1 Dated: \_\_\_\_\_

CITY OF ENCINITAS

2  
3 By: \_\_\_\_\_  
Glenn Sabine, City Attorney

4 Dated: \_\_\_\_\_

CITY OF LA MESA

6 By: \_\_\_\_\_  
Glenn Sabine, City Attorney

7  
8 Dated: FEB 22, 2007

CITY OF SANTEE

9  
10 By:   
Shawn D. Hagerty, City Attorney

11 Dated: FEB. 22, 2007

CITY OF CARLSBAD

12  
13 By:   
Ron Ball, City Attorney

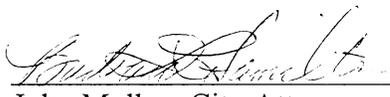
14  
15 Dated: February 22, 2007

CITY OF ESCONDIDO

16  
17 By:   
Jennifer McCain,  
Assistant City Attorney

18  
19 Dated: 2-22-07

CITY OF OCEANSIDE

20  
21 By:   
for John Mullen, City Attorney

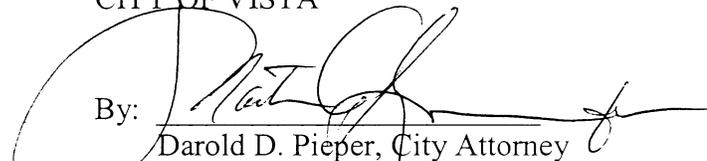
22 Dated: 02.23.2007

CITY OF SAN MARCOS

23  
24 By:   
Helen Holmes Peak, City Attorney

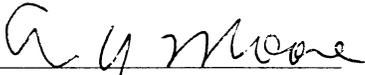
25  
26 Dated: FEB 22, 2007

CITY OF VISTA

27  
28 By:   
Darold D. Pieper, City Attorney

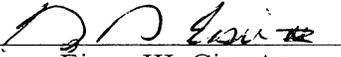
1 Dated: Feb 22, 2007

CITY OF CHULA VISTA

2  
3 By:   
Ann Y. Modre, City Attorney

4 Dated: February 22, 2007

CITY OF NATIONAL CITY

6 By:   
George Eiser, III, City Attorney

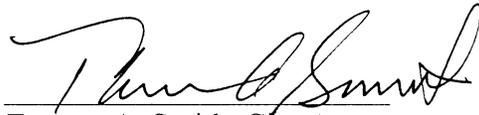
8 Dated: 22 FEBRUARY '07

CITY OF CORONADO

9  
10 By:   
Morgan L. Foley, City Attorney

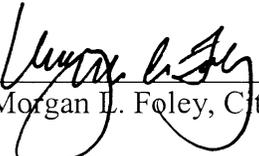
11 Dated: Feb 22, 2007

CITY OF DEL MAR

13 By:   
Tamara A. Smith, City Attorney

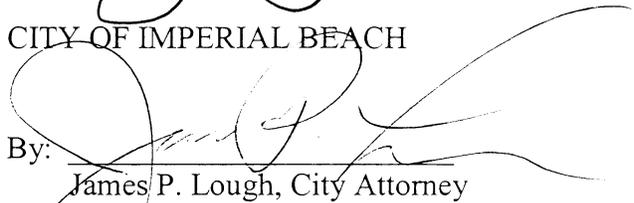
15 Dated: 22 FEBRUARY 07

CITY OF EL CAJON

16  
17 By:   
Morgan L. Foley, City Attorney

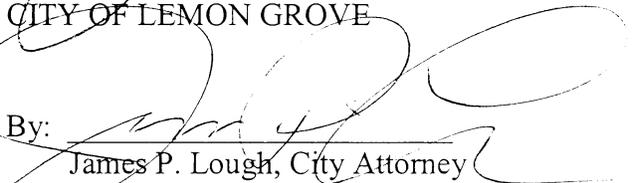
18 Dated: February 27, 2007

CITY OF IMPERIAL BEACH

19  
20 By:   
James P. Lough, City Attorney

21  
22 Dated: February 22, 2007

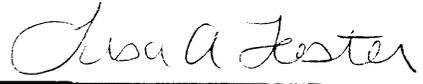
CITY OF LEMON GROVE

23  
24 By:   
James P. Lough, City Attorney

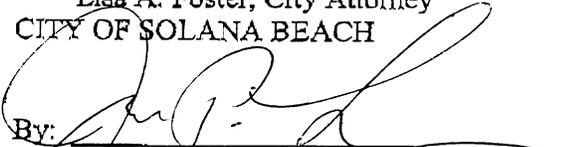
25  
26 Attorneys for Petitioners

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

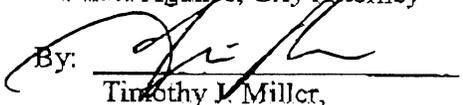
Dated: FEBRUARY 22, 2007 CITY OF POWAY

By:   
Lisa A. Foster, City Attorney

Dated: February 22, 2007 CITY OF SOLANA BEACH

By:   
James P. Lough, City Attorney

Dated: 2/23/07 CITY OF SAN DIEGO  
Michael Aguirre, City Attorney

By:   
Timothy J. Miller,  
Deputy City Attorney

Attorneys for Petitioners