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Attorneys for Petitioners, City of South Lake Tahoe,
County of El Dorado, County of Placer

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

1 In Re: the Petition of:

2 CITY OF SOUTH LAKE TAHOE, COUNTY OF
3 PLACER, COUNTY OF EL DORADO,
4 Petitioners.

5 Waste Discharge Requirements Order No. R6T-
6 2011-0101 (NPDES No. CAG616001)

**PETITION BY CITY OF SOUTH
LAKE TAHOE, COUNTY OF
PLACER AND COUNTY OF EL
DORADO FOR REVIEW OF
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
LAHONTAN REGION ORDER NO.
R6T-2011-0101**

7 The City of South Lake Tahoe, the County of Placer, the County of El Dorado
8 (collectively "Petitioners") hereby request review of the Updated Waste Discharge Requirements
9 and National Pollutant Discharge Elimination System ("NPDES") Permit For Storm Water/Urban
10 Runoff Discharges From El Dorado County, Placer County, and the City of South Lake Tahoe
11 Within the Lake Tahoe Hydrologic Unit Order No. R6T-2011-0101, NPDES No. CAG616001
12 ("Permit") issued by the Lahontan Regional Water Quality Control Board (Regional Board).

13 Review of the Permit is requested pursuant to section 13320 of the Water Code and
14 sections 2050 et seq. of Title 23 of the California Code of Regulations. The Permit is
15 inappropriate and improper because it unlawfully requires Petitioners to comply with
16 extraordinary discharge conditions, including without limitation new monitoring and reporting
17 requirements relating to the total maximum daily load ("TMDL") recently established to achieve
18 the State's Lake Tahoe transparency objective. Such Permit requirements are inappropriate and
19 unlawful for the reasons set forth in Petitioners' accompanying Statement of Points and
20 Authorities, which is supported by Petitioners' comment letters and other references being filed
21 and served concurrently with this Petition. Those reasons include that the Permit requirements
22 impose extraordinary compliance costs upon Petitioners that the Regional Board has failed to
23 consider as required by the Water Code, including pursuant to Water Code section 13241. Such
24 costs also constitute unfunded state mandates in violation of Article XIII B, section 6, of the
25 California Constitution. Further, the Permit also is improper because it singles out Petitioners and
26 fails to consider how the actions of other entities within the Lake Tahoe Hydraulic Unit impact
27 the clarity of Lake Tahoe. For all the reasons specified in Petitioners' accompanying Statement
28

1 of Points and Authorities, the State Board should remand the Permit to the Regional Board with
2 direction to revise the Permit to provide more flexible compliance options and to defer the
3 compliance schedule for implementing the Permits new TMDL-related requirements. Such
4 changes are required to make the new Permit conform to law, to make the Permit's compliance
5 costs reasonable, and to better integrate the Permit requirements relating to the Lake Tahoe clarity
6 objective and TMDL with other Permits and land-use planning and land management programs
7 being implemented by the Tahoe Regional Planning Agency and others.

8 1. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL OF THE PETITIONERS:

9 A. The Petitioners' contact information is as follows:

- 10 (1) Petitioner City of South Lake Tahoe
11 City of South Lake Tahoe
12 Attn: Patrick Enright, City Attorney
13 1901 Airport Road
14 South Lake Tahoe, CA 96150
15 Telephone: (530) 542-6046
16 Facsimile: (530) 542-6173
- 17 (2) Petitioner County of El Dorado
18 El Dorado County
19 Attn: Louis B. Green, County Counsel
20 330 Fair Lane
21 Placerville, CA 95667
22 Telephone: (530) 621-5770
23 Facsimile: (530) 621-2937
- 24 (3) Petitioner County of Placer
25 Placer County
26 Attn: Anthony J. LaBouff, County Counsel
27 175 Fulweiler Avenue
28 Auburn, CA 95603
Telephone: (530) 889-4044
Facsimile: (530) 889-4069

23 B. In addition, all materials in connection with this Petition, and the administrative
24 record, should be provided to:

25 Kronick Moskovitz Tiedemann & Girard
26 Attn: Eric N. Robinson, State Bar No. 191781
27 400 Capitol Mall, 27th Floor
28 Sacramento, CA 95814
Telephone: (916) 321-4500
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2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THIS PETITION REQUESTS THE STATE BOARD TO REVIEW IS AS FOLLOWS:

Petitioners seek review of the Regional Board's adoption of Order No. R6T-2011-0101, Updated Waste Discharge Requirements and National Pollutant Discharge Elimination System (NPDES) Permit For Storm Water/Urban Runoff Discharges From El Dorado County, Placer County, and the City of South Lake Tahoe Within the Lake Tahoe Hydrologic Unit (Permit). A copy of the Permit is attached hereto as Exhibit A.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT:

The date on which the Regional Board acted or failed to take action in the adoption of the Permit was December 6, 2011.

4. THE FOLLOWING STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

A full and complete statement of the reasons why the Regional Board's actions and/or inactions were unlawful and improper is provided in the attached Statement of Points and Authorities.

5. PETITIONERS ARE AGGRIEVED IN THE FOLLOWING MANNER:

Petitioners are aggrieved by the actions and/or inactions of the Regional Board because the Petitioners and the communities and ratepayers bear the costs of, and risks of potential liabilities arising from, the Regional Board's actions and inactions that are the subjects of this Petition.

6. PETITIONERS REQUEST THE FOLLOWING SPECIFIC ACTIONS:

Petitioners request that the State Board review the administrative record, the Permit, this Petition and the accompanying Statement of Points and Authorities, and that the State Board issue an order or orders accomplishing the following:

- A. Vacate the Permit and remand it back to the Regional Board for further consideration of: (1) the consequences of the unfunded mandates required by the Permit; (2) how the activities of other entities within the LTHU affect clarity and impact the TMDL program; and

1 (3) the reasonable alternative methodologies to provide equivalent or greater TMDL reductions.

2 B. Order that:

- 3 1. The Regional Board consider the Petitioners' economic conditions and the
4 consequences of requiring the monitoring and TMDL reductions pursuant to Water
5 Code section 13241;
- 6 2. The Regional Board provide justification for the onerous monitoring and TMDL
7 reductions required in the Permit;
- 8 3. That the Regional Board require a partnership with other entities, including
9 regulatory agencies such as itself, that calls for participation in any requirements to
10 monitor and reduce pollutant discharges; and
- 11 4. That the Regional Board show that certain actions attributable to the Petitioners
12 cause an adverse affect to water quality in Lake Tahoe.

13 C. Order any other necessary conforming changes consistent with the above or the
14 Statement of Points and Authorities.

15 Finally, the Water Code and State Board's regulations provide for the issuance of stays of
16 regional board orders in connection with a petition for review. At this time, the Petitioners
17 believe that a stay might not be necessary. However, the Petitioners may subsequently request a
18 stay of one or more provisions of the Permit in accordance with the State Board's regulations.

19 7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES
20 RAISED IN THIS PETITION:

21 Petitioners provide a Statement of Points and Authorities, which includes support for the
22 legal issues raised in this Petition.

23 8. THIS PETITION WAS SENT TO THE REGIONAL BOARD:

24 On January 5, 2012, a true and correct copy of this Petition and the accompanying
25 Statement of Points and Authorities was mailed by First Class mail to the Regional Board at the
26 following address:

27 Harold Singer
28 Executive Director
California Regional Water Quality Control Board, Lahontan Region
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

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9. THE SUBSTANTIVE ISSUES AND/OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD:

The substantive issues or objections raised in this Petition all were raised before the Regional Board prior to adoption of the Permit.

DATED: January 5, 2012

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

By 

Eric N. Robinson
Attorneys for Petitioners CITY OF SOUTH LAKE
TAHOE, COUNTY OF PLACER AND COUNTY
OF EL DORADO

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PROOF OF SERVICE

I, Terri Whitman, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On January 5, 2012, served a copy of the within document(s):

**PETITION BY CITY OF SOUTH LAKE TAHOE, COUNTY OF PLACER AND
COUNTY OF EL DORADO FOR REVIEW OF CALIFORNIA REGIONAL
WATER QUALITY CONTROL BOARD LAHONTAN REGION ORDER NO.
R6T-2011-0101**

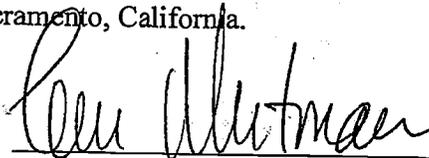
- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

See Attached Service List

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 that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 5, 2012, at Sacramento, California.



Terri Whitman

1 *In Re: the Petition of City of South Lake Tahoe, County of Placer, County of El Dorado*
2 *Waste Discharge Requirements Order No. R6T-2011-0101 (NPDES No. CAG616001)*

3 SERVICE LIST

4 CALIFORNIA REGIONAL WATER QUALITY
5 CONTROL BOARD, LAHONTAN REGION:

6 Harold Singer
7 Executive Director
8 California Regional Water Quality Control
9 Board, Lahontan Region
10 2501 Lake Tahoe Boulevard
11 South Lake Tahoe, CA 96150

12 Telephone: (530) 542-5400
13 Facsimile: (530) 544-2271
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STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION

ORDER NO. R6T-2011-0101
NPDES NO. CAG616001

**UPDATED WASTE DISCHARGE REQUIREMENTS AND NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT
FOR
STORM WATER/URBAN RUNOFF DISCHARGES FROM EL DORADO
COUNTY, PLACER COUNTY, AND THE CITY OF SOUTH LAKE TAHOE
WITHIN THE LAKE TAHOE HYDROLOGIC UNIT**

FINDINGS

The California Regional Water Quality Control Board, Lahontan Region (hereinafter referred to as the Water Board) finds that:

A. Discharger Information and Permit History

1. The City of South Lake Tahoe (City), El Dorado County, and Placer County discharge storm water/urban runoff to surface waters of the Lake Tahoe Hydrologic Unit (LTHU). These discharges occur within various hydrologic sub-areas (watersheds) throughout the LTHU. The City, El Dorado County, and Placer County are considered Co-Permittees under this National Pollutant Discharge Elimination System (NPDES) Permit and are referred to collectively as "Permittees".
2. These Updated Waste Discharge Requirements and NPDES Permit for Storm Water/Urban Runoff Discharges from El Dorado County, Placer County, and the City of South Lake Tahoe will be referred to throughout this Order as the "Permit."
3. Prior to issuance of this Permit, storm water discharges from the Permit Area were covered under Order No. R6T-2005-0026, adopted by the Regional Water Board on October 12, 2005, which replaced Order No. 6-00-82, adopted by the Regional Water Board on October 12, 2000.
4. The Permittees submitted Reports of Waste Discharge in April 2010, requesting renewal of waste discharge requirements under the National Pollutant Discharge Elimination System (NPDES) program to permit storm water discharges from municipal storm collection, conveyance, and treatment facilities within their jurisdictions.

B. Permit Area

1. The jurisdictional areas of the City, El Dorado County, and Placer County that fall within the LTHU are considered the "Permit Area." The Permittees are responsible for all storm water/urban runoff discharges in the Lake Tahoe watershed within the LTHU of their respective City and Counties.
2. Federal, state, regional, or local entities within the Permittees' jurisdictional boundaries and not currently named in this Permit may operate storm drain facilities and/ or discharge storm water to storm drains and receiving waters covered by this NPDES Permit. The Permittees may lack legal jurisdiction over these entities under State and Federal constitutions.

The Water Board will coordinate with these entities not named in this Permit that operate storm drain facilities and/ or discharge storm water to storm drains and receiving waters covered by this NPDES Permit to implement programs that are consistent with the requirements of this Permit.

3. Permittees should work cooperatively to control the contribution from pollutants from one jurisdiction to an adjacent jurisdiction through inter-agency agreements or other formal arrangements.

C. Nature of Discharge

1. Municipal point source discharges of runoff from urbanized areas remain a leading cause of impairment of surface waters in California. Urban runoff contains wastes, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the waters of the State and their designated beneficial uses. The most common pollutant categories in urban runoff within the LTHU include total suspended solids, sediment (due to anthropogenic activities); pathogens (e.g., bacteria, viruses, protozoa); nutrients (e.g., nitrogen and phosphorus); oxygen demanding substances (decaying vegetation, animal waste); oil, grease, and other petroleum hydrocarbons; and trash. In general, the pollutants that are found in municipal storm water runoff can harm human health and aquatic ecosystems.
2. In addition, the high volumes and high velocities of storm water discharged from municipal separate storm sewer systems (MS4s) into receiving waters can adversely impact aquatic ecosystems and stream habitat and cause stream bank erosion and physical modifications. These changes are collectively termed "hydromodification".

3. Lake Tahoe's deep water transparency, as measured by the Secchi disk, has been declining since transparency measurement began in the late 1960's. The Lake Tahoe TMDL Report (November 2010) identifies elevated levels of very fine sediment (particles less than 16 microns) and increased algal growth rates as the causes of transparency loss. Consequently, the primary pollutants of concern for storm water treatment in the LTHU are the number of fine sediment particles (less than 16 microns) and the mass of nutrients that support algal growth (nitrogen and phosphorus).
4. One of the leading sources of very fine sediment particles is roadways. To enhance the safety of motorists in the winter months, the Permittees' winter roadway operations include the application of traction abrasive and deicing materials. If not properly applied and recovered, traction abrasives can be a significant source of the pollutants of concern.
5. Storm water runoff within the Permittees jurisdiction generally flows into pipes and open channels and often passes through pretreatment vaults, treatment basins, and other treatment structures before being discharged to surface waters or land. This Permit describes all storm water management infrastructure maintained by the Permittees as "collection, conveyance, and treatment facilities". For purposes of this Permit, collection, conveyance, and treatment facilities are synonymous with "municipal separate storm sewer systems" or MS4s.

D. Federal, State and Regional Regulations

1. The Water Quality Act of 1987 added § 402(p) to the Clean Water Act (CWA) (33U.S.C. § 1251-1387). This section requires the United States Environmental Protection Agency (U.S. EPA) to establish regulations setting forth NPDES requirements for storm water discharges in two phases.
 - a. U.S. EPA Phase I storm water regulations were directed at MS4s serving a population of 100,000 or more, and storm water discharges associated with ten categories of industrial activities, including construction activities disturbing more than five acres. In addition, municipalities whose storm water discharges contribute to violations of water quality standards or is a significant contributor of pollutants to waters of the United States may also be issued a NPDES permit under Phase I. Consequently, some MS4s that serve a population below 100,000, such as the Permittees, were brought into the Phase I program by NPDES permitting authorities.

The Phase 1 regulations were published on November 16, 1990 (55 Fed. Reg. 47990).

- b. U.S. EPA Phase II storm water regulations are directed at storm water discharges not covered in Phase I, including small MS4s (population of less than 100,000) in urbanized areas, small construction projects (less than five acres, but greater than one acre), municipal facilities with delayed coverage under the Intermodal Surface Transportation Efficiency Act of 1991, and other discharges for which the U.S. EPA Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard, or is a significant contributor of pollutants to waters of the U.S. The Phase II Final Rule was published on December 8, 1999 (64 Fed. Reg. 68722).
2. The CWA allows the U.S. EPA to authorize states with an approved environmental regulatory program to administer the NPDES program in lieu of the U.S. EPA. The State of California is an authorized State. The Porter-Cologne Water Quality Control Act (California Water Code) authorizes the State Water Resources Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of wastes that could affect the quality of waters of the State, including waters of the United States, and tributaries thereto.
3. Under CWA § 303(d), States are required to identify a list of impaired water bodies and develop and implement Total Maximum Daily Loads (TMDLs) for these waterbodies (33 USC § 1313(d)(1)). Lake Tahoe is listed on the CWA § 303(d) impaired water bodies list. On November 16, 2010 the Water Board adopted an amendment to its Water Quality Control Plan to incorporate a TMDL for Lake Tahoe. The amendment was approved by the State Water Board on April 19, 2011 and the TMDL was approved by the United States Environmental Protection Agency on August 17, 2011. The Basin Plan amendment established pollutant load reduction requirements for urban storm water discharges for fine sediment particles, total nitrogen, and total phosphorus. Section IV of this Permit incorporates approved load reduction requirements as effluent limits for municipal storm water discharges in the LTHU and requires the preparation of Pollutant Load Reduction Plans to meet established waste load reduction requirements.
4. This Permit does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following.

First, this Permit implements federally mandated requirements under CWA § 402, subdivision (p)(3)(B)(33 U.S.C. § 1342(p)(3)(B)). This includes federal requirements to effectively prohibit non-storm water discharges and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. The authority exercised under this Permit is not reserved state authority under the Clean Water Act's savings clause (cf. *Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, this Permit implements federally mandated requirements under 303(d) of the CWA and section 122.44(d)(1)(vii)(B) of the Code of Federal Regulations. Specifically, the provisions of this Permit to implement the Lake Tahoe TMDL are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards (33 U.S.C. § 1313(d)). Once the U.S. EPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable waste load allocation. (40 CFR 122.44(d)(1)(vii)(B)).

Second, the Permittees' obligations under this Permit are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Water Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding that comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there

is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Resources Control Board decisions, in many respects this Permit does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Permit, therefore, regulates the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Third, the Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order subject to certain voting requirements contained in the California Constitution. (See California Constitution XIII D, section 6, subdivision (c); see also *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App. 4th 1351, 1358-1359.) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Permittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)). To the extent that the local agencies have voluntarily availed themselves of the permit, the program is not a state mandate. (*Accord County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.) The local agencies' voluntary decision to file a report of waste discharge proposing a program based permit is a voluntary decision not subject to subvention. (See *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIII B, Section (6) of the California Constitution.

5. The Water Board adopted a Water Quality Control Plan (Basin Plan) for the Lahontan Region on March 31, 1995. The Basin Plan specifies the beneficial uses of water bodies within the LTHU and contains both narrative and numerical water quality objectives for these waters. The

following beneficial uses identified in the Basin Plan apply to all watersheds covered by this Permit:

- a. Municipal and domestic supply,
 - b. Agricultural supply,
 - c. Water contact recreation,
 - d. Non-contact water recreation,
 - e. Ground water recharge,
 - f. Freshwater replenishment,
 - g. Navigation,
 - h. Commercial and sport fishing,
 - i. Cold freshwater habitat,
 - j. Wildlife habitat,
 - k. Preservation of biological habitats of special significance,
 - l. Rare, threatened, or endangered species,
 - m. Migration of aquatic organisms,
 - n. Spawning, reproduction, and development,
 - o. Water quality enhancement, and
 - p. Flood peak attenuation/flood water storage
6. State Water Board Resolution No. 68-16 contains the state Antidegradation Policy, titled "Statement of Policy with Respect to Maintaining High Quality Waters in California" (Resolution 68-16), which applies to all waters of the state, including ground waters of the state, whose quality meets or exceeds (is better than) water quality objectives. Resolution No. 68-16 is considered to incorporate the federal Antidegradation Policy (40 CFR131.12) where the federal policy applies, (State Water Board Order WQO 86-17). Administrative policies that implement both federal and state antidegradation policies acknowledge that an activity that results in a minor water quality lowering, even if incrementally small, can result in violation of Antidegradation Policies through cumulative effects, for example, when the waste is a cumulative, persistent, or bioaccumulative pollutant.

Federal Antidegradation Policy (40 CFR131.12) states that the State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

- a. Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
- b. Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on

the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.

- c. Where high quality waters constitute an outstanding National resource, including waters of exceptional recreational or ecological significance like Lake Tahoe, that water quality shall be maintained and protected.

The proposed Permit requirements are consistent with both state and federal antidegradation policies. Permittees storm water management and pollutant load reduction plan actions will reduce pollutant loading to Lake Tahoe consistent with established TMDL requirements to maintain and improve water quality.

7. The requirements in this Permit may be more specific or detailed than those enumerated in federal regulations under 40 CFR122.26 or in U.S. EPA guidance. However, the requirements have been designed to implement and be consistent with the federal statutory mandates described in CWA § 402(p)(3)(B)(ii) and (iii) and the related federal regulations. Consistent with federal law, all of the conditions in this permit could have been included in a permit adopted by U.S. EPA in the absence of the in lieu authority of California to issue NPDES permits.

E. Storm Water Management Plans

1. The 2005 permit (Order R6T-2005-0026) required the Permittees to develop and implement comprehensive, activity-based storm water management programs that include construction, commercial, industrial, and residential site controls coupled with a facilities inspection program and thorough public outreach and education plans. Each Permittee prepared and submitted detailed Storm Water Management Plans (SWMPs) as required.
2. The current SWMPs provide many of the necessary elements for the Permittees' storm water programs. It will be necessary for the Permittees to update and re-submit their current SWMPs to incorporate all requirements in Section III.B of this permit, and to reflect current conditions and planned activities.

F. Total Maximum Daily Loads – Lake Tahoe

1. On November 16, 2010 the Water Board adopted Resolution R6T-2010-0058, amending the Basin Plan to incorporate the Total Maximum Daily Load (TMDL) for sediments and nutrients for Lake Tahoe to restore Lake Tahoe to meet the water quality objective for the lake's deep water transparency. The TMDL identified pollutant loads by source category, set load allocations at a basin-wide scale, and identified an implementation plan for restoring Lake Tahoe's deep water transparency.
2. The approved Basin Plan amendment requires the Permittees and the California Department of Transportation (CalTrans) to meet pollutant load reduction requirements specified by the Lake Tahoe TMDL. Pollutant load allocation tables are included in Attachment B of this Permit. The Basin Plan acknowledges that these agencies will likely consider a variety of alternative treatment options, roadway operations practices, and local ordinances to reduce average annual pollutant loads to meet load reduction requirements.
3. The permit incorporates numeric and narrative effluent limitations consistent with 40 CFR 122.44(d) that implement the Lake Tahoe TMDL pollutant load reduction requirements. The approved Basin Plan amendment replaces some of the concentration-based storm water effluent limits with effluent limits expressed as annual average pollutant load reduction requirements for the primary pollutants of concern. The Basin Plan eliminated the application of the concentration-based limit for oil and grease to municipal runoff in deference to the Basin Plan's more stringent receiving water limit. Similarly, the Basin Plan removed the concentration-based iron limit because there is no evidence indicating that urban runoff is a source of iron.
4. The Basin Plan amendment and the Lake Tahoe TMDL require Lake Tahoe basin municipalities and the CalTrans to develop and implement comprehensive Pollutant Load Reduction Plans (PLRPs) to describe how proposed operations and maintenance activities, capital improvements, facilities retrofit projects, ordinance enforcement, and other actions are expected to meet required pollutant load reduction requirements. PLRPs provide the Permittees the opportunity to prioritize pollutant load reduction efforts and target sub-watersheds that generate the highest annual average pollutant loads.
5. Permittees have primarily relied upon state and federal grant sources to fund water quality improvement infrastructure programs and generally use in-house resources for water quality operations and maintenance practices. As of November 2011 there are fewer grant

funds available and economic conditions have negatively impacted local government budgets. Consequently, Permittees will need to effectively prioritize infrastructure and operations expenditures to maximize pollutant load reductions with available funding.

6. The Water Board developed the Lake Clarity Crediting Program (see Attachment D of this Permit) to establish protocols for accounting and tracking pollutant load reductions within the urban environment.
7. The Lake Tahoe TMDL baseline pollutant loading and load reduction requirements are provided as average annual estimates. For consistency with the TMDL requirements, the Lake Clarity Crediting Program uses average annual pollutant load estimates generated by numeric models. Verification of field conditions and water quality monitoring are needed to ensure that on-the-ground, measured variables are in line with model input parameters and that measured pollutant loading is consistent with modeled estimates.
8. On February 9, 2011 the Water Board Executive Officer issued the Permittees and the California Department of Transportation an Order to submit technical reports in accordance with California Water Code Section 13267 requiring the development of jurisdiction-specific baseline load estimates for the Lake Tahoe TMDL pollutants of concern. The submitted baseline pollutant load estimates provide the basis for translating percentage based pollutant load reduction requirements defined by the TMDL into jurisdiction-specific, particle and mass-based pollutant load reduction requirements.
9. The Lake Tahoe TMDL requires new development and re-development project proponents and private property retrofit efforts to first consider opportunities to infiltrate storm water runoff from impervious surfaces. At a minimum, permanent storm water infiltration facilities must be designed and constructed to infiltrate runoff generated by the 20 year, 1-hour storm, which equates to approximately one inch of runoff over all impervious surfaces during a 1-hour period. Infiltrating runoff volumes generated by the 20 year, 1-hour storm may not be possible in some locations due to shallow depth to seasonal groundwater levels, unfavorable soil conditions, or other site constraints such as existing infrastructure or rock outcroppings. In the event that site constraints prohibit opportunities to infiltrate the runoff volume generated by a 20 year, 1-hour storm, project proponents must either (1) meet the numeric effluent limits contained in Basin Plan Table 5.6-1, or (2) document coordination with one of the Permittees or CalTrans to demonstrate that storm water treatment facilities treating private property discharges and public right-of-way storm water are sufficient

to meet the Permittees' or CalTrans'; average annual fine sediment and nutrient load reduction requirements.

10. The Basin Plan amendment and the Lake Tahoe TMDL requires municipalities to annually demonstrate on a catchment (i.e. sub-watershed) basis that no increased loading in fine sediment particle, total nitrogen, and total phosphorus will result from any land-disturbing activity permitted in the catchment. The permit includes a narrative effluent limitation to implement this provision.
11. The approved Basin Plan amendment acknowledges a decline in nearshore water quality as evidenced by increased growth of attached algae. Pollutant load reduction actions taken to implement the Lake Tahoe TMDL, including pollutant load reductions required by this Permit, are anticipated to improve the nearshore environment by decreasing pollutant loads entering the lake. Additional analysis, however, is needed to quantify this benefit and to determine if additional resource management actions are needed to address the nearshore water quality problems. Such analysis is beyond the scope of this permit.

G. Public Notification

1. The issuance of waste discharge requirements pursuant to California Water Code section 13370 et seq. is exempt from the California Environmental Quality Act in accordance with California Water Code section 13389. *County of Los Angeles et al., v. California Water Boards et al.*, (2006), 143 Cal.App.4th 985.
2. The Water Board has notified the Permittees, and interested agencies and persons of its intent to issue waste discharge requirements for this discharge, and has provided them with an opportunity to make statements and submit their comments.
3. This Permit shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect 90 days from Order adoption date provided the Regional Administrator of the U.S. EPA has no objections.
4. Pursuant to Cal. Water Code § 13320, any aggrieved party may seek review of this Permit by filing a petition with the State Board within 30 days of the date of adoption of the Permit by the Regional Water Board. A petition must be sent to:

State Water Resources Control Board
Office of the Chief Counsel
P.O. Box 100

Sacramento, CA 95812-0100

5. This Permit may be modified or alternatively revoked or reissued prior to its expiration date or any administrative extension thereto, in accordance with 40 CFR 122.41(f) and 122.62.

IT IS HEREBY ORDERED that Order No. R6T-2005-0026 is rescinded, and in order to meet the provisions contained in Division 7 of the Cal. Water Code and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, the Permittees shall comply with the following:

I. Non-Storm Water Discharges

- A. The Permittees shall, within their respective jurisdictions, effectively prohibit non-storm water discharges into its collection, conveyance, and treatment facilities and receiving waters, except where such discharges:
 1. Originate from a State, Federal, or other source for which they are preempted from regulating by State or Federal law; or
 2. Are covered by a separate individual or general NPDES permit, or conditional waivers; or
 3. Flows from firefighting activities.
- B. Pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1) the following categories of non-storm water discharges need only be prohibited from entering the Permittees storm water collection, conveyance, and treatment facilities and receiving waters if such categories of discharges are identified by the Permittee (in its SWMP) as a source of pollutants to waters of the United States and the State of California:
 1. Waterline flushing
 2. Landscape irrigation
 3. Diverted stream flows
 4. Rising groundwater
 5. Uncontaminated groundwater infiltration [as defined by 40 CFR 35.2005(20)]
 6. Uncontaminated pumped groundwater
 7. Discharges from potable water sources
 8. Fountain drains
 9. Air conditioning condensation
 10. Irrigation water
 11. Springs
 12. Water from crawl space pumps
 13. Footing drains

14. Lawn watering
15. Individual residential car washing
16. Flows from riparian habitats and wetlands
17. Dechlorinated swimming pool and spa discharges

- C. When a non-storm water discharge category listed above is identified as a source of pollutants to waters of the State, Permittees shall either:
1. Prohibit the discharge category from entering its storm water collection, conveyance, and treatment system; or
 2. Authorize the discharge category and require implementation of appropriate or additional Best Management Practices to ensure that the discharge will not be a source of pollutants; or
 3. Require or obtain coverage under separate Regional or State Water Board permit for the discharge.

II. Other Prohibitions

- A. Unless specifically granted, authorization pursuant to this Permit does not constitute an exemption to applicable discharge prohibitions prescribed in the Basin Plan.
- B. Discharges from the Permittees' collection, conveyance, and treatment facilities that cause or contribute to a violation of narrative or numeric water quality standards or objectives, as listed in Attachment E and F, are prohibited.
- C. Discharges from the Permittees' collection, conveyance, and treatment facilities shall not cause or contribute to a condition of nuisance.
- D. Storm water discharges regulated by this Permit shall not contain a hazardous substance equal to or in excess of a reportable quantity listed in 40 CFR Part 117 and/or 40 CFR Part 302.
- E. The removal of vegetation or disturbance of ground surface conditions between October 15 of any year and May 1 of the following year is prohibited. Where it can be shown that granting a variance would not cause or contribute to the degradation of water quality, a variance to the dates stated above may be granted in writing by the Executive Officer.
- F. Discharge of any waste or deleterious material to surface waters of the LTHU is prohibited.

- G. The discharge, or threatened discharge, attributable to human activities, of solid or liquid waste materials, including soil, silt, clay, sand, and other organic and earthen materials to the surface waters of the LTHU is prohibited.
- H. The discharge or threatened discharge, attributable to human activities, of solid or liquid waste materials, including soil, silt, clay, sand and other organic and earthen materials, to lands below the high-water rim of Lake Tahoe or within the 100-year floodplain of any tributary to Lake Tahoe, is prohibited.
- I. The discharge or threatened discharge, attributable to new development in Stream Environment Zones, of solid or liquid waste, including soil, silt, sand, clay, rock, metal, plastic, or other organic, mineral or earthen materials to Stream Environment Zones in the LTHU is prohibited.
- J. Waste discharge prohibitions in this Section do not apply to discharges of stormwater when wastes in the discharge are controlled through the application of management practices or other means and the discharge does not cause a violation of water quality objectives.

III. Storm Water Program Implementation

A. Legal Authority

1. No later than **March 15, 2013**, Permittees shall establish, maintain, and enforce the necessary legal authority to prohibit, including, but not limited to:
 - a. Illicit connections and illicit discharges to its collection, conveyance, and treatment facilities,
 - b. The discharge of non-storm water to the Permittees' storm water collection, conveyance, and treatment facilities from:
 - (1) Washing or cleaning of gas stations, auto repair garages, or other types of automotive service facilities
 - (2) Mobile auto washing, carpet cleaning, steam cleaning, sandblasting and other such mobile commercial and industrial operations
 - (3) Areas where repair of machinery and equipment which are visibly leaking oil, fluid or antifreeze, is undertaken
 - (4) Storage areas for materials containing grease, oil, or other hazardous substances, and uncovered receptacles containing hazardous materials
 - (5) Swimming pool and hot tubs
 - (6) Industrial/ Commercial areas
 - (7) Concrete truck cement, pumps, tools, and equipment washout

- (8) Spills, dumping, or disposal of materials such as fuel or chemical wastes, batteries, and any other materials which have the potential to adversely impact water quality
- (9) Trash container leachate
- (10) Permittee-owned and -operated facilities

2. Permittees shall maintain and enforce adequate legal authority to:
 - a. Control through interagency agreement, the contribution of pollutants from one municipal jurisdiction to another
 - b. Require persons within their jurisdiction to comply with conditions in the Permittees' ordinances, permits, or orders (i.e. hold dischargers to its collection, conveyance, and treatment facilities accountable for their contributions of pollutants and flows)
 - c. Remove illicit connections to public storm water collection, conveyance, and treatment facilities
 - d. Control the discharge of spills, dumping, or material disposal other than storm water to public storm water collection, conveyance, and treatment facilities
 - e. Utilize enforcement measures (e.g., stop work orders, notice of violations, fines, referral to City, County, and/ or District Attorneys, etc.) by ordinances, permits, contracts, orders, administrative authority, and civil and criminal prosecution
 - f. Control the quality of storm water runoff from industrial and construction sites
 - g. Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions including the prohibition on illicit discharges.
 - h. Require the use of control measures to prevent or reduce the discharge of pollutants to the maximum extent practicable.
3. No later than **March 15, 2012** each Permittee shall submit a statement certified by its legal counsel as to whether or not the Permittee possesses the legal authority necessary to comply with this Permit. If the Permittee finds that it does not have the necessary legal authority, the statement must identify specific deficiencies.

No later than **March 15, 2013** each Permittee shall submit a statement certified by its legal counsel that the Permittee possesses all necessary

legal authority to comply with this Permit through adoption of ordinances and/ or municipal code modifications. The statement shall include:

- a. Identification of all departments within the jurisdiction that conduct urban runoff related activities and their roles and responsibilities under this Order. Include an up-to-date organization chart specifying these departments and key personnel positions.
- b. Citation of urban runoff related ordinances and the reasons they are enforceable.
- c. Identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances.
- d. Description of how these ordinances or other legal mechanisms are implemented and actions taken can be appealed.
- e. Description of how the municipality can issue administrative orders and injunctions, or if it must go through the court system for enforcement actions.

B. Storm Water Management Plans

Federal Regulations (40 CFR 122.26(d)(2)(iv)) require the Permittees to develop and implement a Storm Water Management Plan (SWMP) during the term of this Order. Each Permittee shall amend its SWMP to include components 1-9 below.

Permittees shall submit amended SWMPs for Water Board consideration no later than **March 15, 2013**. The Water Board will circulate the amended SWMPs for public comment and will consider accepting them at a publically noticed meeting.

If no hearing for SWMP acceptance is requested during the public comment period, the Executive Officer may accept the amended SWMPs.

1. Construction Component

Each Permittee shall implement a Construction Component of its SWMP to reduce pollutants in runoff from construction sites that involve more than three cubic yards of soil disturbance during all construction phases. The SWMP shall include a description of procedures for identifying inspection priorities and enforcing control measures. At a minimum the construction component plan shall address the following:

- a. Construction Site Inventory

Permittees shall develop and update, at least annually, a complete inventory of construction sites within its jurisdiction that involve more than three cubic yards of soil disturbance. This requirement is applicable to all construction sites regardless of whether the construction site is subject to the General Construction Permit (Order R6T-2011-0019). The use of a Geographical Information System (GIS) database is highly recommended, but not required.

b. Construction Site Outreach

Permittees shall conduct construction site outreach efforts that include, at a minimum, measures to educate construction site operators about local ordinance and other regulatory requirements and applicable enforcement mechanisms prior to construction commencement.

c. Construction Site Prioritization and Inspection

Permittees shall develop a prioritization process for its watershed-based inventory (developed pursuant to III.B.1.a above) by threat to water quality. Each construction site shall be classified as a high, medium, or low threat to water quality. In evaluating threat to water quality each Permittee shall consider (1) the magnitude of fine sediment particle discharge potential; (2) site slope; (3) project size and type; (4) stage of construction; (5) proximity and connectivity to receiving water bodies; and (6) any other factors the Permittee deems relevant.

Each Permittee shall conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and discharge prohibitions contained in this Permit in accordance with Section II.B of the Monitoring and Reporting Program (Attachment C). Inspections shall include review of site erosion control and BMP implementation plans. Inspection frequencies and priorities shall be determined by the threat to water quality prioritization.

During the construction season (May 1 through October 15 of each year), each Permittee shall inspect each high priority construction site and all construction projects overseen by the Permittee (e.g. erosion control and storm water treatment projects) at least once per week. Each Permittee shall inspect medium and low priority construction sites at a frequency sufficient to ensure that sediment and other pollutants are controlled and that unauthorized non-storm water discharges are prevented.

d. Construction Site Enforcement

Permittees shall enforce their storm water ordinances and other regulatory mechanisms for all construction sites to maintain compliance with local ordinances and discharge prohibitions contained in this Permit. Permittees shall document any non-compliance with Permit or ordinance requirements and report identified compliance issues as part of their Annual Report as described under Section IV.C of the Monitoring and Reporting Program (Attachment C).

In accordance with the Enforcement Response Plan required under Section III.B.8 of this Permit, each Permittee shall follow up on inspection findings and take actions necessary for construction sites to comply with Permit requirements.

e. Oversight by Others

Permittees may make use of construction site outreach, inspection, and enforcement actions taken by other responsible agencies (such as the Tahoe Regional Planning Agency or the Water Board). If a Permittee chooses to use the efforts of other agencies to meet Permit requirements, Permittees must provide detailed documentation of the outreach, inspection, and/or enforcement action taken by others.

2. Commercial, Industrial, Municipal and Residential Component

Each Permittee shall implement SWMP elements to reduce, to the maximum extent practicable, pollutants in runoff from commercial, industrial, municipal, and residential properties within its jurisdiction. The purpose of this Component is to identify potential pollutant sources, prioritize existing or potential water quality threats associated with different land uses, and provide outreach, education, and enforcement measures to reduce and/or eliminate storm water pollution from these sources.

a. Commercial, Industrial, and Municipal Site Inventory and Prioritization

Each Permittee shall develop and annually update an inventory of high priority commercial, industrial, and municipal activities and pollutant sources. The high priority commercial, industrial, and

municipal site inventory shall consider including the following business types and activities:

- (1) Automobile mechanical repair, maintenance, or cleaning;
- (2) Automobile and other vehicle body repair or painting;
- (3) Retail or wholesale fueling;
- (4) Eating or drinking establishments;
- (5) Mobile carpet, drape or furniture cleaning;
- (6) Concrete mixing or cutting;
- (7) Painting and coating;
- (8) Mobile pool and spa cleaning;
- (9) Snow removal and storage activities;
- (10) Parking areas with more than 30 parking spaces;
- (11) Off-pavement parking and storage yards;
- (12) Municipal maintenance yards.

The use of a Geographical Information System (GIS) database is highly recommended, but not required.

b. Commercial, Industrial, and Municipal Site Outreach

Permittee outreach efforts shall include, at a minimum, educating commercial, industrial, and municipal site operators about local ordinances and other regulatory measure and associated tiered enforcement mechanisms applicable to commercial, industrial, or municipal site runoff problems.

c. Commercial, Industrial, and Municipal Site Inspections

Each Permittee shall implement a program to inspect high priority commercial, industrial, and municipal sites at least once per year in accordance with Section II.C of the Monitoring and Reporting Program (Attachment C).

d. Commercial, Industrial, and Municipal Site Enforcement

Permittees shall enforce their storm water ordinances and other regulatory mechanisms for all commercial, industrial, and municipal sites to maintain compliance with applicable local ordinances and discharge prohibitions contained in this Permit. Permittees shall document any non-compliance with ordinance and/or Permit requirements and report inspection findings as part of their Annual Report as described under Section IV.D of the Monitoring and Reporting Program (Attachment C).

In accordance with the Enforcement Response Plan required under Section III.B.8 of this Permit, each Permittee shall follow up on inspection findings and take actions necessary for commercial, industrial, and municipal sites to comply with Permit and local ordinance requirements.

e. Oversight by Others

Permittees may make use of commercial and industrial site outreach, inspection, and enforcement actions taken by other responsible agencies (such as the Tahoe Regional Planning Agency or the Water Board). If a Permittee chooses to use the efforts of other agencies to meet Permit requirements, Permittees must provide detailed documentation of the outreach, inspection, and/or enforcement action taken by others.

f. Residential Property – Source Identification and Prioritization

Each Permittee shall identify high priority residential areas and activities for targeted outreach and education. At a minimum, these areas/activities should include:

- (1) Automobile repair and maintenance;
- (2) Off-pavement automobile parking;
- (3) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
- (4) Disposal of household hazardous waste (e.g., paints, cleaning products);
- (5) Snow removal activities

g. Residential Property Outreach and Enforcement

Permittees shall develop and implement a program to target education and outreach efforts toward identified high priority activities. Such outreach program should include coordination with other Lake Tahoe Basin agencies involved with BMP implementation, including but not limited to the Tahoe Resource Conservation District and the Tahoe Regional Planning Agency Erosion Control Team.

In accordance with the Enforcement Response Plan required under Section III.B.8 of this Permit, each Permittee shall take actions necessary for residential sites to comply with Permit and local ordinance requirements.

3. Storm Water Facilities Inspection Component

Each Permittee shall develop and implement a comprehensive inspection program to assess the condition of its storm water collection, conveyance and treatment facilities and maintenance needs on a catchment, or sub-watershed basis in accordance with the following requirements, and Section II.A of the Monitoring and Reporting Program (Attachment C).

- a. Each Permittee shall develop and maintain an up-to-date and accurate system map of its collection, conveyance, and treatment facilities.
- b. Each Permittee shall inspect its storm water collection, conveyance and treatment systems at least once annually and maintain a database of inspection findings.
- c. As part of its storm water collection, conveyance, and treatment system inspections, each Permittee shall evaluate and identify potential pollutant sources including but not limited to: private property/residential runoff, commercial site runoff, eroding cut slopes, eroding road shoulders, intercepted groundwater discharges, excessive traction abrasive application, and construction site tracking.
- d. Each Permittee shall document and prioritize identified maintenance needs and perform needed maintenance to ensure storm water systems effectively collect, convey, and treat urban runoff as designed.

4. Illicit Discharge Detection and Elimination Component

Permittees shall implement an Illicit Discharge Detection and Elimination Component containing measures to actively seek and eliminate illicit discharges and connections. At a minimum the Illicit Discharge Detection and Elimination Component shall include the following elements:

- a. Each Permittee shall visually inspect all storm water collection, conveyance, and treatment systems at least once annually as described in Section II.A of the Monitoring and Reporting Program (Attachment C) for evidence of illicit discharges, illicit connections, or other sources of non-stormwater discharges.
- b. Each Permittee shall establish and implement a program to investigate and inspect any portion of the storm water collection

and conveyance system that indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water. Each Permittee shall establish criteria to identify portions of the system where follow-up investigations are needed to determine whether illicit discharges, illicit connections, or other sources of non-storm water have occurred or are likely to occur.

- c. In accordance with the Enforcement Response Plan required under Section III.B.8 of this Permit, each Permittee shall implement and enforce its ordinances, orders, or other legal authority or regulatory mechanism to prevent and eliminate illicit discharges and connections to its storm water collection and conveyance system.
- d. Each Permittee shall promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from its storm water collection and conveyance system. Each Permittee shall facilitate public reporting through development and operation of a public hotline. Public hotlines can be Permittee-specific or shared by Permittees. All storm water hotlines should be capable of receiving reports in both English and Spanish 24 hours per day, seven days per week. Permittees shall respond to and resolve each reported incident. Each Permittee shall keep a record of all reported incidents and how each was resolved.

5. New Development and Redevelopment Component

For new development and redevelopment projects, Permittees shall require project proponents to incorporate permanent stormwater treatment facilities that are designed to infiltrate, at a minimum, runoff generated by the 20 year, 1-hour storm, which equates to approximately one inch of runoff over all impervious surfaces during a 1-hour period.

If infiltrating the entire volume of the 20 year, 1-hour storm is not possible at a given new development or redevelopment site, the Permittee shall require project proponents to infiltrate as much runoff as possible and either:

- a. Document how the project proponent will treat runoff to meet the numeric effluent limits described in Table III.B.1 below; or
- b. Document coordination with the project proponent to demonstrate that shared storm water treatment facilities treating private property discharges and public right-of-way storm water are sufficient to meet the municipality's average annual fine sediment and nutrient

load reduction requirements described in Section IV.B of this Permit.

Table III.B.1 – Numeric effluent limits for runoff discharges

| <u>Constituent</u> | <u>Units</u> | <u>Land Treatment/ Infiltration Systems</u> | <u>Surface Waters</u> |
|--------------------|--------------|---|-----------------------|
| Total Nitrogen | mg/L as N | 5.0 | 0.5 |
| Total Phosphorus | mg/L as P | 1.0 | 0.1 |
| Turbidity | NTU | 200 | 20 |
| Oil and Grease | mg/L | 40 | 2.0 |
| Total Iron | mg/L | 4.0 | 0.5 |

6. Public Education Component

Permittees shall implement a public education program using any appropriate media to increase the community's knowledge of the effect of urban runoff on surface waters and the measures the public can take to help control storm water pollution and encourage behavior to reduce pollutant discharges.

7. Municipal Personnel Training and Education Component

Permittees shall ensure that all municipal personnel and contractors responsible for implementing Permit requirements, for operating municipal facilities covered under Section III.B.2 of this Permit, and for conducting inspections required under Section III.B1-5 of this Permit are adequately trained and educated to perform such tasks.

8. Enforcement Response Plan

Each Permittee shall develop and implement a progressive Enforcement Response Plan. The Enforcement Response Plan shall outline how each Permittee will respond to violations (e.g. non-compliance with municipal codes, ordinances, statutes, standards, specifications, permits, and contracts) and describe how Permittees will address repeat and continuing violations through progressively stricter responses to achieve compliance. The Enforcement Response Plans shall describe how each Permittee will implement the enforcement response types listed below.

- a. Verbal Warnings – Verbal warning are primarily consultative in nature. At a minimum, verbal warning shall specify the nature of the violation and describe required corrective actions.

- b. Written Notices – Written notices of violations (NOVs) shall stipulate the nature of the violation and required corrective action with deadlines for taking such actions.
- c. Escalated Enforcement Measures – The Permittees shall have the legal ability to employ any combination of the enforcement actions listed below (or their functional equivalent) and to escalate enforcement response where necessary to correct persistent violations, repeat or escalating violations, or incidents that have the potential to cause significant detrimental impacts to human health or the environment.
 - (1) Citations (with fines) – The Enforcement Response Plan shall indicate when the Permittees will assess monetary fines, which may include civil and administrative penalties.
 - (2) Stop Work Orders – Permittees shall have the authority to issue stop work orders that require construction, industrial, and commercial activities to be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate BMPs.
 - (3) Withholding of Plan Approvals or Other Authorizations – Where a facility, site, or operation is in violation the Enforcement Response Plan shall address how the Permittee's own approval process affecting the facility, site, or operation's ability to discharge to the Permittee's collection, conveyance, and treatment facilities can be used to abate the violation.
 - (4) Additional Measures – Permittees may also use other escalated measures provided under local legal authorities.

9. Fiscal Analysis

Each Permittee shall conduct a fiscal analysis of its urban runoff management program in its entirety, including development and implementation of both SWMP and Pollutant Load Reduction Plans (IV.C below), along with operations and maintenances costs. This analysis shall, for each fiscal year covered by this Permit, evaluate the expenditures (such as capital, operation and maintenance, education, and administrative expenditures) necessary to achieve Permit compliance. Such analysis shall include a description of the source(s) of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

IV. Lake Tahoe Total Maximum Daily Load Implementation – Pollutant Load Reduction Requirements

A. Baseline Pollutant Loads

The Lake Tahoe TMDL expresses waste load allocations for the urban upland source, which includes discharges from the Permittee's municipal storm water collection, conveyance, and treatment facilities, as percent reductions from a basin-wide baseline load. The baseline basin-wide pollutant loads for the TMDL reflect conditions as of water year 2003/2004 (October 1, 2003 – September 30, 2004), hereafter referred to as "baseline".

To translate basin-wide urban runoff load reduction requirements into jurisdiction-specific load reduction requirements, the Water Board has required the Permittees to conduct a jurisdiction-scale baseline load analysis as the first step in the TMDL implementation process for the urban pollutant source. Each permittee has completed this analysis, and the submitted baseline pollutant load estimates are the basis for the particle number- and mass-based effluent limits in this Permit (Table IV.B.1).

Permittees will likely gather additional information in the future to enhance the accuracy of the baseline load analysis. Similarly, numeric models used to estimate pollutant loads may be improved over time. Should a Permittee determine that updated load estimation tools or other information are expected to change its baseline pollutant load estimate may request that the Water Board amend its baseline load estimate. Requests for baseline load estimate amendment must include a description of any new information informing the estimate, the magnitude of the proposed adjustment, and a discussion of how the baseline load estimate adjustment will (or will not) change the Permittees Pollutant Load Reduction Plan. Water Board staff will bring all requests to amend Permittee baseline load estimates to the Water Board for consideration.

B. Pollutant Load Reduction Requirements and Water Quality-Based Effluent Limits

For the first five year milestone, jurisdiction-specific waste load reduction requirements, incorporated into this Permit as average annual particle number- and mass-based effluent limits (Table IV.B.1), are calculated by multiplying the percentage of reduction required by the urban uplands for each pollutant by each jurisdiction's individual baseline load. Each jurisdiction must reduce fine sediment particle (FSP), total phosphorus (TP), and total nitrogen (TN) loads by 10%, 7%, and 8%, respectively, by **September 30, 2016.**

Table IV.B.1 – Maximum average annual particle number- and mass-based effluent limits for Fine Sediment Particles (FSP) Total Phosphorus (TP) and Total Nitrogen (TN) to meet the first five year TMDL milestone

| Jurisdiction | Baseline FSP (# of particles) | FSP Allowable Load | Baseline TP (kg) | TP Allowable Load | Baseline TN (kg) | TN Allowable Load |
|--------------------------|-------------------------------|----------------------|------------------|-------------------|------------------|-------------------|
| El Dorado County | 2.2×10^{19} | 2.0×10^{19} | 1043 | 970 | 4082 | 3755 |
| Placer County | 2.6×10^{19} | 2.3×10^{19} | 1111 | 1033 | 4635 | 4264 |
| City of South Lake Tahoe | 1.9×10^{19} | 1.7×10^{19} | 789 | 734 | 3361 | 3092 |

Pollutant load reductions shall be measured in accordance with the processes outlined in the Lake Clarity Crediting Program Handbook (Attachment D). To demonstrate compliance with the average annual fine sediment particle pollutant load reduction requirements outlined in Table IV.B.1, each Permittee must earn and maintain Lake Clarity Credits in accordance with Table IV.B.2 for water year October 1, 2015 to September 30, 2016, and for subsequent water years.

Table IV.B.2 – Minimum Lake Clarity Credit Requirements

| Jurisdiction | Min. Lake Clarity Credit Requirement* |
|--------------------------|---------------------------------------|
| El Dorado County | 220 |
| Placer County | 260 |
| City of South Lake Tahoe | 190 |

*The Lake Clarity Crediting Program Handbook defines one (1) Lake Clarity Credit as equal to 1.0×10^{16} fine sediment particles with a diameter less than 16 micrometers

To ultimately achieve the deep water transparency standard, Permittees shall reduce FSP, TP, and TN loading according to the requirements in the Lake Tahoe TMDL outlined for the "Urban Upland" pollutant source (Attachment B). In accordance with the TMDL, incremental pollutant load reductions will result in attaining the deep water transparency standard by the year 2076.

C. Pollutant Load Reduction Plans

Each Permittee shall prepare a detailed plan describing how it expects to meet the pollutant load reduction requirements described in Section IV.B above. Permittees shall submit a plan no later than **March 15, 2013** that shall include, at a minimum, the following elements:

1. Catchment registration schedule

The Pollutant Load Reduction Plan (PLRP) shall include a list of catchments that the Permittee plans to register pursuant to the Lake

Clarity Crediting Program (see Attachment D) to meet load reduction requirements. The list shall include catchments where capital improvement projects have been constructed since May 1, 2004 that the Permittee expects to claim credit for, and catchments where projects will be constructed during this Permit term.

The list may also include catchments where Permittees plan actions other than capital improvements (such as enhanced operations and maintenance). The plan shall describe which catchments the Permittee anticipates it will register for each year of this Permit term.

2. Proposed pollutant control measures

For each catchment in the registration plan, the PLRP shall describe storm water program activities to reduce fine sediment particle, total phosphorus, and total nitrogen loading.

3. Pollutant load reduction estimates

For each catchment in the registration plan (or a catchment subset that provides adequate representation of various land use and management practice variables) Permittees shall provide estimates of both baseline pollutant loading and expected pollutant loading to demonstrate that proposed actions will, over the course of this Permit term, reduce the Permittee's jurisdiction-wide pollutant load by the amounts specified in Section IV.B above. The pollutant load reduction estimate shall differentiate between estimates of pollutant load reductions achieved since May 1, 2004 and pollutant load reductions from actions not yet taken.

4. Load reduction schedule

The PLRP shall describe a schedule for achieving the pollutant load reduction requirements described in Section IV.B above. The schedule shall include an estimate of expected pollutant load reductions for each year of this Permit term based on preliminary numeric modeling results.

5. Annual adaptive management

The PLRP shall include a description of the internal process and procedures to annually assess storm water management activities and associated load reduction progress. The adaptive management discussion shall describe how the Permittee will use information from the previous years' monitoring and implementation efforts to make needed adjustments to ensure compliance with the load reduction requirements specified in Section IV.B.

The Water Board will circulate the submitted PLRPs for public review and will consider PLRP acceptance at a Water Board meeting. Each Permittee's PLRP must be accepted by the Water Board for Permittees to achieve Permit compliance.

D. Land Use Changes and Management Practices

If either land use changes or management practices associated with development or re-development result in a reduction of pollutant loads from the estimated baseline, then this reduction can be counted toward meeting pollutant load reduction requirements. Conversely, actions to eliminate any pollutant load *increase* from these changes will not be counted towards the annual load reduction requirements.

In accordance with the Basin Plan, Permittees must ensure that changes in land use, impervious coverage, or operations and maintenance practices do not increase a catchment's average annual baseline pollutant load.

E. Storm Water Facility Operations and Maintenance

Permittees shall operate and maintain storm water collection, conveyance, and treatment facilities to ensure, at a minimum, that the baseline pollutant loading specified in Table IV.B.1 does not increase.

F. Pollutant Load Reduction Progress

To demonstrate pollutant load reduction progress, each Permittee shall submit a Progress Report by **October 1, 2013**. The Progress Report shall include:

1. A list of erosion control and storm water treatment projects the Permittee completed between the May 1, 2004 and October 15, 2011.
2. Pollutant load reduction estimates for all erosion control and storm water projects and any other load reduction actions up to October 15, 2011. The report shall compare the pollutant load estimates for work completed with the pollutant load reduction requirements described in Section IV.B above.

G. Pollutant Load Reduction Monitoring Requirements

Permittees shall comply with all monitoring and reporting requirements specified in Section I of the attached Monitoring and Reporting Program (Attachment C).

V. Receiving Water Limitations

The Permittees shall comply with discharge prohibitions specified in Sections I and II of this Permit through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the Permittees' SWMPs and other requirements of this Permit, including any modifications. The Permittees' SWMPs shall be designed to achieve compliance with the requirements of Sections I and II of this Permit. If exceedances of water quality objectives or water quality standards (collectively, WQS) persist notwithstanding implementation of the SWMPs and other requirements of this Permit, the Permittees shall assure compliance with discharge prohibitions and receiving water limitations in Sections I and II of this Permit by complying with the following procedure:

1. Upon a determination by either the Permittee or the Water Board that discharges are causing or contributing to an exceedance of an applicable WQS, the Permittee shall notify and thereafter submit a report to the Water Board that describes Best Management Practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of WQSs. The report may be incorporated into the annual report required under Section IV of the Monitoring and Reporting Program (Attachment C) unless the Water Board directs an earlier submittal. The report shall include an implementation schedule. The Water Board may require modifications to the report.
2. Within 30 days following approval of the report described above by the Water Board, the Permittee shall revise its SWMP and monitoring program to incorporate approved modified BMPs that have been and will be implemented, implementation schedule, and any additional monitoring required.
3. Implement the revised SWMP and monitoring program in accordance with the approved schedule.

So long as the Permittee has complied with the procedures set forth above and is implementing its revised SWMP, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Water Board to develop additional BMPs.

VI. Administrative Provisions

- A. The Regional Board reserves the right to revise any portion of this Order upon legal notice to, and after opportunity to be heard is given to, all concerned parties.

- B. All terms of the attached Monitoring and Reporting Program (Attachment C) are hereby incorporated by reference as requirements under this Permit.
- C. Each Permittee shall comply with the Standard Provisions, Reporting Requirements, and Notifications contained in Attachment G of this Order. This includes 24 hour/5 day reporting requirements for any instance of non-compliance with this Order as described in section B.6 of Attachment G.
- D. All plans, reports, and subsequent amendments submitted in compliance with this Order shall be implemented immediately (or as otherwise specified) and shall be an enforceable part of this Order upon submission to the Regional Board. All Permittee submittals must be adequate to implement the requirements of this Order.
- E. This Order expires on **December 5, 2016**. The Permittees must file a report of waste discharge in accordance with Title 23, California Code of Regulations, no later than 180 days in advance of such date as application for an updated Municipal NPDES Permit.

The report of waste discharge must include a draft updated Pollutant Load Reduction Plan as outlined in Permit Section IV.C. The updated Pollutant Load Reduction Plan shall describe how each Permittee will meet the pollutant load reduction requirements for the second five-year TMDL implementation period, defined as the ten-year load reduction milestone in Attachment B. Specifically, the updated Pollutant Load Reduction Plans shall demonstrate how each Permittee will reduce baseline fine sediment particle, total nitrogen, and total phosphorus loads by 21 percent, 14 percent, and 14 percent, respectively, by the end of the next permit term.

F. Table of Required Submittals

| Permit Submittal | Permit Section | Submittal/Required Completion Date |
|---|----------------|------------------------------------|
| Analysis of Existing Legal Authority | III.A.4 | March 15, 2012 |
| Statement of Legal Authority | III.A.4 | March 15, 2013 |
| Amended Storm Water Management Plan | III.B | March 15, 2013 |
| Pollutant Load Reduction Plan | IV.C | March 15, 2013 |
| Pollutant Load Reduction Progress Report | IV.F | October 1, 2013 |
| Report of Waste Discharge and updated Pollutant Load Reduction Plan | VI.D | June 9, 2016 |

| Monitoring and Reporting Program Submittal | Attach. C Section | Submittal/Required Completion Date |
|--|-------------------|--|
| Two (2) Catchment Credit Schedules | I.D | March 15, 2012 |
| Storm Water Monitoring Plan | III.C | July 15, 2012 |
| Annual Report | IV | March 15, 2014 and annually thereafter |
| Development Impact Statement | I.G, IV.I | March 15, 2014 and annually thereafter |

I, Harold J. Singer, Executive Officer, do hereby certify that the forgoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Lahontan Region, on December 6, 2011.


HAROLD J. SINGER
EXECUTIVE OFFICER

- Attachments:
- A. Fact Sheet
 - B. Pollutant Load Allocation Tables
 - C. Monitoring and Reporting Program
 - D. Lake Clarity Crediting Program Handbook V1.0
 - E. Water Quality Objectives
 - F. Compliance with Water Quality Objectives
 - G. Standard Provisions, Reporting Requirements, and Notifications

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County of Placer and County of El Dorado

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

1 In Re: the Petition of:

2 CITY OF SOUTH LAKE TAHOE, COUNTY OF
3 EL DORADO, COUNTY OF PLACER,
4 Petitioners.

5 Waste Discharge Requirements Order No. R6T-
6 2011-0101 (NPDES No. CAG616001)

**STATEMENT OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION BY CITY OF SOUTH
LAKE TAHOE, COUNTY OF
PLACER AND COUNTY OF EL
DORADO FOR REVIEW OF
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
LAHONTAN REGION ORDER NO.
R6T-2011-0101**

7
8 **I. INTRODUCTION**

9 Petitioners CITY OF SOUTH LAKE TAHOE, COUNTY OF PLACER and COUNTY
10 OF EL DORADO seek review of Order No. R6T-2011-0101, Updated Waste Discharge
11 Requirements and National Pollutant Discharge Elimination System ("NPDES") Permit for Storm
12 Water/Urban Runoff Discharges from El Dorado County, Placer County, and the City of South
13 Lake Tahoe Within the Lake Tahoe Hydrologic Unit ("Permit") adopted by the California
14 Regional Water Quality Control Board, Lahontan Region ("Regional Board") on December 6,
15 2011.

16 As described in more detail below, the Regional Board's approval of the new Permit is
17 inappropriate and improper. The Permit dramatically increases the Petitioners' compliance
18 burdens in a way that will reduce their ability to carry out water quality protection actions on the
19 ground. By requiring extensive and complex condition assessments, monitoring and reporting
20 obligations, the Regional Board failed to adequately explain or justify the new Permit
21 requirements, and failed to consider the economic feasibility of those requirements. The Permit
22 inappropriately makes the Petitioners solely responsible for confirming new modeling programs
23 developed by the Regional Board, placing a substantial financial and administrative burden on the
24 Petitioners. The Regional Board acted inappropriately by adopting a Permit which seeks to
25 implement a regional Total Maximum Daily Load ("TMDL"), in the absence of a regional,
26 comprehensive implementation and monitoring program. The Permit imposes requirements
27 which are more stringent than those required by federal law, and the Regional Board failed to
28 perform the necessary economic impact analysis before imposing such requirements. The

1 Permit's new water quality monitoring and condition assessments constitute unfunded state
2 mandates that violate the California Constitution.

3 The Petitioners are committed to meeting their water quality protection obligations and
4 have worked diligently and cooperatively with the Regional Board to protect Lake Tahoe's water
5 quality. The Petitioners are confident that if the State Water Resources Control Board ("State
6 Board") remands the Permit back to the Regional Board, the Petitioners will be able to continue
7 to work cooperatively with the Regional Board in developing a revised Permit with requirements
8 that are efficient, effective, equitable and lawful. To that end, the Petitioners request that the
9 State Board remand the Permit to the Regional Board with direction to amend the Permit to
10 reduce the compliance burden on the Petitioners by developing more flexible, appropriate and
11 realistic monitoring and condition assessment requirements. In addition, the Petitioners request
12 that the State Board direct the Regional Board to revise the Permit's TMDL-related requirements
13 to defer compliance with, and to phase in, those requirements as a part of a comprehensive and
14 collaborative regional water quality program.

15 The Permit changes requested by Petitioners will help to ensure that their increasingly
16 scarce public resources (i.e., tax dollars) will be spent on actions that actually improve Lake
17 Tahoe's transparency (the prime objective of the Permit's new requirements), while minimizing
18 threats to their ability to maintain essential public services, like police protection and fire
19 protection that directly affect human health and safety.

20 **Facts and Procedural History**

21 Lake Tahoe ("Lake") is a large freshwater lake located in the Sierra Nevada. It is located
22 within California and Nevada and was designated an Outstanding National Resource Water by the
23 State Board due to its extraordinary deep water transparency. The Lake is fed by 63 different
24 streams. The Lower Truckee River is the only outflow, but evaporation is the primary source of
25 water loss for the Lake.

26 Two decades of rapid growth during the middle of the 20th century led to concerns about
27 human-induced changes to the Lake Tahoe environment. Urban development is concentrated
28

1 around the lake shore. As a result of environmental concerns, a bi-state compact signed by the
2 Governors of California and Nevada, and ratified by the U.S. Congress in 1969, created the Tahoe
3 Regional Planning Agency ("TRPA") to oversee development in Lake Tahoe.

4 In 1972, the federal Water Pollution Control Act ("Clean Water Act" or "CWA") was
5 amended to provide that the discharge of pollutants to waters of the United States from any point
6 source is unlawful unless the discharge is in compliance with a NPDES permit. The 1987
7 amendments to the CWA added section 402(p), which established a framework for regulating
8 storm water discharges under the NPDES Program. (Permit, Attachment A, p. 1.) Under the
9 CWA and its implementing regulations, municipalities whose storm water discharges clearly
10 contribute to violations of state water quality standards (called water equality objectives in
11 California) or significantly contribute pollutants to the waters of the United States must operate
12 their municipal separate storm sewer systems ("MS4s") pursuant to a NPDES permit. (Permit, p.
13 3.) The City of South Lake Tahoe, County of Placer, and County of El Dorado (*i.e.*, the
14 Petitioners) discharge storm water/urban runoff to surface waters of the Lake Tahoe Hydrologic
15 Unit ("LTHU"). (Permit, p. 1.)

16 Water quality objectives and standards for water bodies are identified in Regional Water
17 Quality Control Plans, which are commonly referred to as Basin Plans. The Regional Board
18 adopted a Water Quality Control Plan ("Basin Plan") for the Lahontan Region on March 31,
19 1995. The Basin Plan specifies the beneficial uses of water bodies within the LTHU and contains
20 both narrative and numerical water quality objectives for these waters. (Permit, p. 6.) One of the
21 water quality objectives specified for Lake Tahoe is "transparency." Water bodies that do not
22 meet their established water quality objectives are considered "impaired" water bodies. Under
23 CWA § 303(d), states are required to identify a list of impaired water bodies and to develop and
24 implement Total Maximum Daily Loads ("TMDLs") for these water bodies (33 U.S.C. §
25 1313(d)(1)).

26 Lake Tahoe is listed on the CWA § 303(d) impaired water bodies list because the state's
27 transparency water quality objective in the Basin Plan is not being met. According to the
28

1 Regional Board, the water quality objective for Lake Tahoe's deep water transparency has been
2 impaired for the last four decades. (Permit, Attachment A, p. 3.) The Regional Board and the
3 Nevada Division of Environmental Protection ("NDEP") developed the bi-state Lake Tahoe
4 TMDL to identify the pollutants responsible for deep water transparency decline and to develop a
5 plan to reduce pollutant loads and to restore Lake Tahoe's deep water transparency, as measured
6 by the Secchi depth, to the annual average levels recorded in 1967-1971. (Permit, Attachment A,
7 p. 3.) On November 16, 2010, the Regional Board adopted Resolution R6T-2010-0058,
8 amending the Basin Plan to incorporate the TMDL for sediments and nutrients for Lake Tahoe to
9 restore Lake Tahoe to meet the state's water quality objective for deep water transparency. The
10 TMDL identified pollutant loads by source category, set load allocations at a basin-wide scale,
11 and outlined a plan for restoring Lake Tahoe's deep water transparency. (Permit, p. 9.)

12 The Petitioners' storm water/urban runoff discharges were previously authorized by their
13 former NPDES permit, R6T-2005-0026 adopted October 12, 2005. (Permit, p. 1.) "The
14 Permittees submitted Reports of Waste Discharge in April 2010 requesting renewal of waste
15 discharge requirements under the NPDES program to permit storm water discharges from
16 municipal storm collection, conveyance, and treatment facilities within their jurisdictions."
17 (Permit, p. 1.)

18 On August 10, 2011, the Regional Board notified Petitioners and other interested parties
19 of its intent to update the Municipal NPDES Permit for storm water discharges from the City of
20 South Lake Tahoe and portions of El Dorado and Placer Counties within the LTHU. (Permit,
21 Attachment A p. 9) At that time, the Regional Board released a draft tentative Order/Permit for
22 public comment. (Permit, Attachment A, p. 10.) Thereafter, on September 15, 2011, Petitioners
23 commented on the draft Permit via correspondence to the Regional Board. Those comments
24 raised serious concerns about the draft Permit.

25 The Regional Board made minor revisions to the Permit based on the comments, and
26 released another draft proposed Permit for public comment on October 31, 2011. (Permit,
27 Attachment A, p. 10.) By correspondence dated November 30, 2011, Petitioners submitted
28

1 comments on the revised draft proposed Permit to the Regional Board. Petitioners also attended
2 the Regional Board hearing, held on December 6, 2011, and submitted substantive oral comments
3 regarding the draft proposed Permit. On December 6, 2011, the Regional Board adopted the final
4 Updated Waste Discharge Requirements and NPDES Permit For Storm Water/Urban Runoff
5 Discharges From El Dorado County, Placer County, and the City of South Lake Tahoe Within the
6 Lake Tahoe Hydrologic Unit. (Order No. R6T-2011-0101; NPDES No. CAG616001.)

7 The new Permit imposes substantial and complex new requirements that seek to achieve
8 the state's Lake Tahoe transparency objective by applying the state's new Lake Tahoe TMDL to
9 Petitioners. The new Permit seeks to reduce Lake Tahoe's fine sediment particle, phosphorus,
10 and nitrogen loads to be reduced by 65 percent, 35 percent, and 10 percent, respectively. (Permit,
11 Attachment A, p. 3.) According to the Regional Board, the newly adopted "Permit is an
12 important implementation tool that holds the municipal jurisdictions on the California side of the
13 Lake Tahoe Basin accountable for achieving water quality improvements required by the Lake
14 Tahoe TMDL." (Permit, Attachment A, p. 4.) Implementation of the TMDL reduction
15 requirement significantly increases the Petitioners' compliance burden, compared to their
16 previous NPDES permit. (See Permit, Attachment A, p. 2 ["This permit update maintains the
17 previous storm water management program requirements and adds pollutant load reduction and
18 associated monitoring requirements to implement the Lake Tahoe Total Maximum Daily Load
19 program."].) The new Permit's increased requirements include implementation of Catchment
20 Credit Schedules, Condition Assessments, Condition Assessment Method Alternatives,
21 Assessment of Impacts Influencing Baseline Pollutant Loads, Catchment Scale Runoff Water
22 Quality Monitoring, and Best Management Practice Effectiveness Monitoring. (See Exhibit A to
23 Statement of Points and Authorities describing [Pollutant Load Reduction Monitoring Program
24 and Water Quality Monitoring Program incorporated into new Permit as Attachments C and D].)

25 As fully explained below, Petitioners respectfully submit that the new Permit will waste
26 scarce public resources on compliance with new monitoring and reporting obligations at the direct
27 expense of investing those same resources in on-the-ground actions that actually improve Lake
28

1 Tahoe water quality. For the reasons set forth below, the Petitioners request that the State Board
2 review the new Permit and remand it to the Regional Board with direction to revise the Permit to
3 provide more flexibility and time to implement the Permit's TMDL-related requirements.

4 **II. AUTHORITY TO CHALLENGE THE REGIONAL BOARD'S NEWLY**
5 **ADOPTED PERMIT**

6 Under Water Code section 13320, the State Board reviews petitions in light of "the record
7 before the regional board, and any other relevant evidence which, in the judgment of the State
8 Board, should be considered to effectuate and implement the policies of" the Porter-Cologne
9 Water Quality Control Act. (Water Code § 13320(b).) The State Board may uphold the Regional
10 Board's approval of the Permit as appropriate and proper or the State Board may find that the
11 action of the Regional Board was inappropriate and improper. (Water Code § 13320(b).) If the
12 State Board finds that the Regional Board's actions were inappropriate or improper, it may take
13 appropriate action itself, direct the Regional Board to take the appropriate action, refer the issue
14 to another state agency with jurisdiction, or take any combination of these actions. (Water Code
15 § 13320(c).)

16 Pursuant to title 23, section 2050 (a) of the California Code of Regulations, this Petition is
17 timely because the Petitioners bring it within 30 days of the Regional Board's December 6, 2011,
18 approval of the Permit giving rise to this Petition. Petitioners respectfully request that the State
19 Board grant the Petition and remand the Permit to the Regional Board with direction to provide
20 more flexible compliance options and to defer compliance dates for the Permit's TMDL-related
21 requirements.

22 **III. ANALYSIS AND ARGUMENT**

23 **A. THE REGIONAL BOARD SHOULD BE DIRECTED TO REVISE THE**
24 **PERMIT TO DEFER TMDL-RELATED COMPLIANCE**
25 **OBLIGATIONS UNTIL THEY ARE INEGRATED INTO A**
26 **COMPREHENSIVE BASIN-WIDE APPROACH TOWARD**
27 **ACHIEVING THE LAKE TAHOE CLARITY TMDL REDUCTIONS**

28 **1. The Tahoe Regional Planning Authority**

The Lake Tahoe Basin is unique in that there is a compact between the federal
government and the states of California and Nevada that governs much of the planning and land

1 use (including water quality) aspects in the Lake Tahoe Basin. The Tahoe Regional Planning
2 Authority ("TRPA") is an inter-governmental planning authority comprised of a 15-member
3 Governing Board, seven from California, seven from Nevada and one non-voting Presidential
4 Appointee. Over the past three decades and continuing today, the primary tools the TRPA uses to
5 regulate and provide water quality improvements are the TRPA Regional Plan and the
6 Environmental Improvement Program ("EIP"). According to TRPA, the relationship to the
7 TRPA Plan and the EIP is as follows:

8 The TRPA Regional Plan describes the needs and goals of the
9 Region and provides statements of policy to guide decision-making
10 as it affects the Region's resources. The Regional Plan, with all of
11 its elements, provides for achievement and maintenance of the
12 adopted environmental threshold carrying capacities while
13 providing for opportunities for orderly growth and development.
14 The Regional Plan's Goals and Policies includes a hierarchal
15 relationship between the goals and policies, other plans such as the
16 transportation and water quality plans, the regulatory code, plan
17 area statements, community plans, best management practices
18 (BMPs), and programs including capital improvement programs,
19 restoration programs and monitoring and evaluation programs. The
20 EIP is the capital improvement program for the basin. The
21 regulatory program addresses new development or construction and
22 the remediation of past impacts through traditional regulatory
23 ordinance and permitting requirements. The EIP is primarily
24 directed at remediation of impacts associated with past
25 development and management actions. It moves beyond the
26 limitations of ordinance and permitting to accomplish regulatory
27 goals by identifying physical, scientific, and regulatory program
28 improvement needs and then mobilizing the resources to achieve
 them. Inclusion in the EIP does not constitute approval of any
 project or activity that is subject to approval by TRPA or any other
 permitting entity. Each project or activity must be evaluated on its
 own merits and any significant impacts mitigated to less than
 significant.

22 (Tahoe Regional Planning Authority, Environmental Improvement Program, The Cooperative
23 Effort to Preserve, Restore, and Enhance the Unique Natural and Human Environment of the
24 Lake Tahoe Region, (April 25, 2001), Volume 1 (Program Overview) p.6.) available at
25 <http://www.trpa.org/documents/docdwnlds/EIP/volume1.pdf>.

26 A Primary component of the TRPA regulatory (land use) program is the allocation of
27 commercial and residential building allocations between local jurisdictions. Fundamental to these
28 allocations are the implementation and success of EIP projects. EIP projects consist of capital

1 projects, research, technical assistance and operation and maintenance actions that effectively
2 seek to improve existing environmental conditions in the Tahoe Basin. Over \$1 billion has been
3 spent in the Tahoe Basin on EIP projects.

4 TRPA is in the process of updating the TRPA Regional Plan. That update is expected to
5 be completed in December 2012. The initial draft will be circulated in mid-March, with a goal
6 for adoption by the TRPA Board of Directors in December 2012.

7 **2. The Permit Did Not Consider Consistency With The TRPA Programs,
8 And The Requirement To Comply With The Permit's TMDL-Related
9 Requirements Should Be Deferred Until a Consistency Analysis With The
10 Soon-to-Be Released TRPA Plan Update Is Completed**

11 Despite numerous pleas from the Petitioners, the Regional Board failed to consider the
12 impacts of the Permit on the TRPA Basin Plan or EIP Program, programs that have served the
13 basis for land use and environmental improvements in the Tahoe Basin for over 30 years. This is
14 true even though the TRPA Basin Plan Update is due for release in only a few months.

15 Petitioners have raised substantial concerns that the Permit is not consistent with the TRPA Plan
16 and the EIP and that the inconsistencies jeopardize the effectiveness of the Petitioners' most
17 effective environmental protection and improvement tool. These inconsistencies not only make
18 compliance with both the Permit and the TRPA Plan problematic, but also jeopardize the ability
19 of the Petitioners to regulate land use and implement EIP projects effectively. In its November 30,
20 2011 letter, the City of South Lake Tahoe illustrated the importance of the TRPA programs when
21 requesting a delay in adopting the Permit so that the Permit and the TRPA programs could be
22 reconciled. That letter stated:

23 Since 1987, the Environmental Improvement Program (EIP) has
24 been the leading funding and regulatory program for water quality
25 improvements in the Tahoe Basin. Construction of EIP projects
26 historically has been the measurement of water quality performance
27 for local agencies. It is necessary for local agencies to have a high
28 level of EIP project delivery, in order to obtain development rights
regulated by the Tahoe Regional Planning Agency (TRPA). TRPA
is currently updating its Regional Plan. Presently, there are no
indications of any significant changes to the EIP or performance
based development right allocations in the updated Regional Plan.

1 In addition, reconciliation with TRPA's programs would allow the Petitioners to utilize
2 other regional tools to protect water quality from air deposition of pollutants on Lake Tahoe from
3 airborne sources like automobiles. The TMDL indicates that airborn deposition is a substantial
4 contributor to the Lake's transparency objective impairment. The Regional Board's failure to
5 consider the impact on the TRPA programs was an error that the State Board should direct the
6 Regional Board to correct by revising the Permit.
7

8 **3. Only Through Reconciliation With TRPA'S Programs Can Basin Wide
9 Pollutant Loads Actually Be Reduced**

10 The new Permit seeks to implement basin-wide pollutant load reduction objectives
11 outlined in the Basin Plan Amendment. This goal can be met through TRPA's programs. The
12 Permit however, only regulates the activities of the Petitioners representing three Tahoe Basin
13 jurisdictions and does not consider or account for source pollutants entering the Petitioners'
14 jurisdictions from other entities within the LTHU. Under the Permit, the Petitioners are "the only
15 Tahoe Basin jurisdictions with enforceable TMDL implementation requirements" and the only
16 jurisdictions subject to possible enforcement actions if they are unable to meet the Permit's
17 requirements. (Placer County Letter, Sept. 15, p. 3.) The Permit itself acknowledges that
18 "Federal, state, regional, or other local entities within the Permittees' jurisdictional boundaries
19 and not currently named in this Permit may operate storm drain facilities and/or discharge storm
20 water to storm drains and receiving waters covered by this NPDES Permit. The Permittees may
21 lack legal jurisdiction over these entities under State and Federal constitutions." (Permit p. 2.)
22 Yet, the Permit forces the Petitioners to secure and spend substantial funding to meet the
23 extensive assessment, monitoring, inspection and reporting requirements, without the potential
24 benefit or support of a comprehensive basin-wide approach to TMDL implementation. These
25 requirements were incorporated contrary to, and without anything more than passing
26 consideration to, the comments submitted requesting more time to comply with Permit conditions
27 implementing the TMDL. (Placer County Letter, Sept. 15, p. 2; City of South Lake Tahoe Letter,
28 Nov. 30, p. 2; County of El Dorado Letter, Nov. 30, Attachment, p. 8.) As Petitioner Placer

1 County stated in its comment to the Regional Board: "It is imperative that stakeholder interests at
2 federal, state and local levels are fully engaged in TMDL implementation, such that the burden of
3 implementation, including possible enforcement actions, does not rest solely on the California
4 NPDES Municipal Petitioners." (Placer County Letter, Sept. 15, Attachment 1, p. 2.) The time
5 for complying with the new Permit conditions implementing the TMDL should be deferred "until
6 there is a cohesive and coordinated plan for how load reductions will be targeted and tracked
7 from all pollutant source categories." (County of El Dorado Letter, Nov. 30, Attachment, p. 8.)

8 **4. Only Through Reconciliation With TRPA'S Programs Can Agency**
9 **Expenditures Be Leveraged And Coordinated To Maximize The Public**
10 **Benefit Of Pollution Control Expenditures**

11 The expenditures necessary to comply with the Permit's extensive monitoring and TMDL
12 reduction requirements are not justified in the absence of a comprehensive and well-integrated
13 implementation and funding strategy for the Lake Tahoe TMDL. "The regulations in the Tahoe
14 Basin, between agencies, need to be coordinated and consistent in order to reduce the duplication
15 of efforts and unreasonable administrative costs." (City of South Lake Tahoe Letter, Nov. 30, p.
16 2.)

17 When the Regional Board amended the Basin Plan to include the TMDL and the TMDL
18 implementation program, it assumed that a comprehensive monitoring program would be
19 developed. (Basin Plan Amendment, p. 17.) The Basin Plan amendment states that the "Regional
20 Board expects funding, implementing, and regulatory agencies to assist in developing a
21 comprehensive TMDL monitoring plan within the first two years following TMDL adoption by
22 USEPA." (Basin Plan Amendment, p. 17.) However, funding agencies have concerns over the
23 piecemeal effect of the Permit. This is highlighted in the City of South Lake Tahoe's letter
24 dated November 30, 2011, which states:

25 It is important to leverage resources available from other agencies,
26 when working as a basin, to protect Lake Tahoe's water quality.
27 Before adopting a new permit, it may be useful to develop a clearer
28 understanding of how inter-agency partners will work together to
meet permit requirements. This is referenced in the California
Tahoe Conservancy (Conservancy) letter to Lahontan, which
indicates the Conservancy's desire to participate in developing a
comprehensive funding strategy and monitoring program. As

1 Patrick Wright, CTC Executive Director, states it is" ... difficult to
2 justify these expenditures in the absence of a comprehensive and
3 well-integrated implementation and funding strategy for the Lake
Tahoe TMDL." The Permit should not be adopted until these
comprehensive strategies have been developed, to ensure that the
Permit requirements are feasible.

4 Thus, even the California Tahoe Conservancy—not just the three municipal storm water
5 Permittees—faulted the Regional Board’s Permit approach for imposing new requirements that
6 would divert to monitoring and reporting tasks precious public resources that could otherwise be
7 spent to accomplish on-the-ground water quality protection actions.

8 Moreover, the Basin Plan amendment clearly contemplates a comprehensive monitoring
9 program that “will assess progress of TMDL implementation and provide a basis for reviewing,
10 evaluating, and revising TMDL implementation actions as needed.” (County of El Dorado Letter,
11 Nov. 30, Attachment, p. 8.) The Basin Plan amendment refers to the Lake Tahoe Regional
12 Stormwater Monitoring Program (“RSWMP”), which is a collaborative regional program that is
13 currently unfunded, but being developed. The Basin Plan amendment envisioned that the
14 Petitioners would participate in the RSWMP or a similar monitoring program, in collaboration
15 with funding and regulatory agencies, and as part of a comprehensive regional monitoring
16 program. While recognizing funding issues in developing the RSWMP, the Permit ignores such
17 collaboration, and instead requires implementation by the three Tahoe Basin jurisdictions over
18 which the Regional Board asserts enforcement authority.

19 The Permit recognizes that “[e]ffective implementation and pollutant load reduction
20 tracking will require a well-designed water quality monitoring program that can be applied with
21 an adaptive management framework.” (Permit, Attachment A, p. 8.) The Permit states that the
22 RSWMP “is expected to serve this purpose for urban storm water” but the RSWMP “is still under
23 conceptual development and lacks a program director and a defined organizational structure.”
24 (*Id.*) The Permit also states that “[i]nitial estimates suggest full RSWMP implementation and
25 management may cost more than one million dollars per year, which exceeds currently available
26 monitoring resources.” (*Id.*) Despite acknowledging the necessity of a comprehensive water
27 quality monitoring program, the Regional Board adopted the Permit it describes as “focused on
28

1 initiating critical water quality monitoring elements to provide data to support future water
2 adaptive management processes.” (*Id.*) In fact, Petitioner El Dorado County provided the
3 Regional Board with a range of points supporting a deferral of permitting requirements:

4 [T]he TMDL Management System that is associated with tracking
5 compliance within the Crediting Program has created many tools
6 (Pollutant Load Reduction Model (PLRM), BMP Rapid
7 Assessment Methodology (RAM), Road RAM, Catchment Credit
8 Schedules and the Accounting and Tracking Tool) that the local
9 jurisdictions must learn and utilize in order to track Permit
10 compliance. It is our belief that these newly created tools are at
11 times cumbersome, time consuming, have tremendous
12 administrative burden associated with them and, in some cases, lack
13 scientific backing. The tools are also not adequately integrated;
14 meaning that many processes are either duplicative or are unduly
15 inefficient to accomplish. Because of this and the upcoming Lake
16 Tahoe TMDL Management System Project, which seeks to further
17 integrate the tools and make many TMDL processes run more
18 efficiently, the County requests that Lahontan delay Permit
19 adoption until the TMDL Management System Project is complete
20 so that the County does not expend resources that it currently does
21 not have working through inefficient processes.
22 Furthermore, the six traditional NPDES Program minimum control
23 measures (Public Education and Outreach; Illicit Discharge
24 Detection and Elimination; Public Involvement; Construction Site
25 Controls; Post-Construction Controls and Municipal Operations
26 Controls) will require a substantial amount of work to ensure
27 compliance and will take the focus away from the real intent of the
28 Permit, which is reducing fine sediment loading to Lake Tahoe.
The minimum control measures, while valuable in some
jurisdictions, represent an outdated, one-size-fits-all approach that
does not make sense in the Lake Tahoe Basin, where the focus is on
Lake clarity.

(El Dorado County November 30, 2011 Comments, p. 1-2)

22 Rather than applying TMDL-related requirements in the Permit after the Regional Board
23 develops and implements the comprehensive water quality monitoring program, that the Regional
24 Board described as necessary in the TMDL, the Regional Board inappropriately chose to adopt a
25 Permit that forces the Petitioners to perform their own independent, costly and piecemeal water
26 quality monitoring programs first. The State Board should remand the Permit to the Regional
27 Board with direction to modify the Permit to provide more flexibility in compliance options and
28 to provide more time to comply with the Permit’s TMDL-related requirements.

1 The untested nature and the uncertain benefits to be derived from implementation of the
2 BMP and Road RAM tools raises the question of whether the costs associated, in government
3 funds and staff time, are a reasonable use of shrinking local government funds. (El Dorado
4 County November 30 Comment Letter, Attachment, p. 6.) The City of South Lake Tahoe
5 recognized that implementation of the BMP and Road RAM and other tools would be addressed
6 in an upcoming TMDL Management System Project and requested a delay in adoption of the
7 Permit "to avoid spending precious resources on potentially inefficient processes." (City of South
8 Lake Tahoe November 30 Comment Letter p. 2.) The City also expressed concern that the
9 "requirement to inspect all [stormwater] facilities annually may not be needed." (City of South
10 Lake Tahoe September 14 Comment Letter, p. 3.) "The City has [greater than] >1500 sediment
11 traps which currently are not given much credit in reducing fine sediment loads. Several years of
12 inspections indicate that many of the sediment traps don't require yearly maintenance." (*Id.*)
13 Yet, the Permit requires such yearly inspections. (Permit, p. 17.) The Permit requires the
14 Petitioners to perform extensive and costly monitoring and condition assessments, to confirm
15 nascent modeling tools, which need to be further developed and integrated with a regional water
16 quality monitoring program. The Regional Board acted inappropriately and improperly by
17 adopting a Permit which requires the Petitioners to expend limited public funds to implement
18 programs which need to be further developed and refined to maximize water quality benefits.

19 **2. The Permit's Monitoring And TMDL Reduction Requirements Cannot Be**
20 **Implemented Due To Petitioner's Fiscal Restraints**

21 Petitioners are committed to reducing the pollutant loads affecting Lake Tahoe and have
22 diligently participated in the development of the TMDL and the Permit. This is borne out by
23 Petitioners submission of technical reports to develop jurisdiction-specific baseline load estimates
24 for the Lake Tahoe TMDL pollutants of concern. (Permit, p. 10.) Unfortunately, at this time,
25 implementation of the Permit's monitoring and TMDL reduction requirements is financially
26 impossible. (El Dorado Comment Letter, November 30, 2011.) Moreover, implementation of the
27 Permit's onerous new programs is financially infeasible for the Petitioners and their communities
28 in these dire economic times. "The time and costs associated with the monitoring and reporting,

1 in addition to the TMDL modeling requirements, are unreasonable and will greatly reduce the
2 ability of the local agencies to actually complete projects and maintenance that will reduce
3 pollutant loads.” (City of South Lake Tahoe Comment Letter, November 30, 2011, p. 1, para. 3;
4 Nichols Consulting Engineers Letter, Nov. 29, comment 9.) “The County is willing to continue
5 to spend an equivalent level, or slightly enhanced amount of resources on its Stormwater
6 Program, however, complying with the Permit, as drafted, will require approximately two million
7 dollars per year (\$2,000,000.00) in resources that the County simply does not have.” (*Id.* at p. 2.)

8 During the development of the Permit, Petitioners repeatedly told the Regional Board
9 that the Permit’s implementation requirements would be extremely difficult to satisfy, given the
10 Petitioners’ existing budgets and the their limited ability to secure additional funding. (*See* City
11 of South Lake Tahoe Letter, Sept. 14, pp. 2-3, comment 12; Placer County Letter, Sept. 15, p. 1;
12 Placer County Letter, Sept. 15, Attachment 1, p. 2; El Dorado County Comment Letter,
13 September 15, 2011 p. 1; El Dorado County Comment Letter, November 30, 2011 p. 2.) El
14 Dorado County alone forecasts that its implementation of the Permit requirements will cost
15 approximately \$2,000,000 *per year* for administration, excluding the capital costs of water quality
16 protection and improvement actions. The Regional Board offered a rather cavalier response to
17 those financial concerns, suggesting that if “compliance with the Permit is compromised due to
18 cost, then the Board may exercise its enforcement discretion.” (Regional Board Response #4 to
19 El Dorado County’s Comment dated November 30, 2011.) While the Regional Board criticized
20 El Dorado County’s cost forecast, the Regional Board’s own Fact Sheet for the Permit states that
21 the monitoring and reporting requirements of the Permit may cost more than \$1,000,000 per year.
22 (Permit, Attachment A, p. 8-9.) Even though the Petitioners acknowledge the possibility that the
23 Regional Board might in the future exercise its prosecutorial discretion not to enforce Permit
24 requirements that are infeasible to meet, that is not much comfort. The Petitioners respectfully
25 submit that the Permit should be modified to provide more flexibility on how to achieve
26 compliance and to defer compliance deadlines for TMDL-related requirements.

1 As described in comments to the Regional Board during development of the Permit,
2 historical sources of external funding, such as grants and general fund dollars, may not be
3 available to the Petitioners as they attempt to comply with the Permit's extensive implementation
4 requirements. (County of El Dorado letter, Sept. 15, p. 1.) Without a strong and continuing
5 funding commitment from federal and state funding partners, the Petitioners will not be able to
6 meet the established TMDL load reduction milestones or perform all of the assessments,
7 monitoring, inspections and reporting required by under the Permit. (Placer County letter, Sept.
8 15, p. 3.) The Permit recognizes that fewer grants are available as of November 2011 because
9 economic conditions have negatively impacted government budgets. (Permit, pp. 9-10.) Despite
10 acknowledging that the Petitioners face reduced funding, the Permit imposes extensive
11 implementation requirements on the Petitioners, casually stating: "Permittees will need to
12 effectively prioritize infrastructure and operations expenditures to maximize pollutant load
13 reductions with available funding." (Permit, p. 10.) Unfortunately, simply "prioritizing
14 expenditures" will not provide the funding necessary for the Petitioners to implement the Permit's
15 mandatory requirements. Petitioners already must stretch their public funds across a broad range
16 of priorities, including public health and safety priorities like police and fire protection.

17 The City of South Lake Tahoe explained to the Regional Board that: "While federal and
18 state funding for water quality projects continue to decrease, the current trend of increasing
19 regulatory burden is not sustainable." (City of South Lake Tahoe November 30 Comment Letter,
20 p. 1.) Placer County explained that: "Successful TMDL implementation at Lake Tahoe will
21 necessitate a strong and continuing commitment from our Federal and State funding partners,
22 including additional flexibility to support non-capital aspects of implementation strategies" and
23 that "[w]ithout such support, local Permittees will not be able to meet established TMDL load
24 reduction milestones." (Placer County Comment Letter, September 15, 2011, p. 3.) It is
25 important to note that the aforementioned implementation costs are only for administration of the
26 Permit requirements. Capital costs will increase the compliance cost of the Permit to the
27 Petitioners by tens of millions of dollars. The implementation schedule established by the Permit
28

1 requirements must be adjusted to provide reasonable and attainable schedules and mandates that
2 acknowledge the Petitioners' fiscal realities. Although the estimated timeframe to achieve the
3 TMDL-required load reductions and meet the numeric transparency objective is 65 years, the
4 Permit requires immediate expenditures on infrastructure and monitoring compliance tasks and
5 deliverables. (Permit, pp. 12-31 generally; Permit p. 30-31, Table of Required Submittals.) The
6 Basin Plan Amendment, adopts the TMDL schedule, recognizes that "[f]unding constraints may
7 affect the pace of certain implementation actions." (Basin Plan Amendment, p. 15.) The Basin
8 Plan Amendment further declares that "[s]hould funding and implementation constraints impact
9 the ability to meet load reduction milestones the Regional Board will consider amending the
10 implementation and load reduction schedules." (*Id.*) Despite that, the Regional Board failed to
11 acknowledge or incorporate flexibility in the Permit requirements relating to TMDL
12 implementation. As suggested in the Petitioners' comments on the Permit, the Regional Board
13 should analyze the results that could realistically be obtained (at lower expenditure levels), and
14 should revise the Permit accordingly, so that pollutant control could still proceed, in the event of
15 financial hardship. (County of El Dorado Letter, Nov. 30, Attachment, p.11.)

16 Petitioners request that the State Board remand the Permit back to the Regional Board
17 with direction to revise the Permit to allow for flexibility in the implementation of the increased
18 monitoring and TMDL reduction requirements. Petitioners should not be subject to enforcement
19 action for non-compliance when it is more than reasonably foreseeable that they will not have the
20 funding necessary to meet all of the Permit's significantly increased monitoring and TMDL
21 reduction requirements.

22 **3. The Regional Board Failed To Justify The Permit's Extensive Monitoring**
23 **And Reporting Requirements**

24 The Permit imposes detailed and costly monitoring and reporting requirements on the
25 Petitioners, without providing evidence that the costs of these requirements bear a reasonable
26 relationship to the expected benefits. (Permit, Attachment C.) The Regional Board
27 acknowledged in its response to submitted comments that Water Code Section 13267 requires
28 that the burden of such monitoring and reporting, including costs, "bear a reasonable relationship

1 to the need for the report and the benefits to be obtained from the reports.” (Water Code §
2 13267(b); Regional Board Response to Keep Tahoe Blue Letter, Sept. 15, Response 4 & 5 [citing
3 Water Code Section 13267].) Section 13267 also requires the Regional Board to provide “a
4 written explanation with regard to the need for the reports, and shall identify the evidence that
5 supports requiring [the Permittee] to provide the reports.” In its response to comments, the
6 Regional Board stated that the costs associated with requiring more monitoring and reporting than
7 proposed under the draft permit “cannot be justified as required by California Water Code Section
8 13267.” (Regional Board Response to Keep Tahoe Blue Letter, Sept. 15, Response 4.) Although
9 the Regional Board recognized that requiring *more* monitoring and reporting would be improper,
10 it failed to adequately justify the monitoring and reporting requirements that *are* imposed in the
11 Permit.

12 “The Lake Clarity Crediting Program relies on numeric modeling tools to provide
13 estimates of average annual pollutant loading and of water quality benefit associated with various
14 management strategies.” (Permit, Attachment A, p. 8.) According to the Regional Board, a series
15 of condition assessment methods [monitoring] were developed to “link on-the-ground field
16 conditions to model input variables to determine whether actual treatment facility and roadway
17 conditions are consistent with modeled assumptions.” (*Ibid.*) “If field conditions are consistent
18 with modeled variables, then it is more likely that actual pollutant loading is consistent with
19 modeled pollutant load estimates.” (*Ibid.*) In essence, the Regional Board is requiring the
20 Petitioners to monitor real conditions to confirm the results of modeling. This Board should limit
21 the monitoring requirements set forth in the Permit so as not to require Petitioners to double their
22 efforts and expenditures in order to ensure compliance.

23 Comments submitted to the Regional Board during development of the Permit suggested
24 that the Permit “does not provide an adequate justification for the stated monitoring
25 requirements.” (U.C. Davis Tahoe Environmental Research Center Letter, Sept. 16, p. 2.) As
26 recommended in the comments, the Permit should be amended to explain why a particular
27 monitoring design was selected, how the monitoring information will be used and how the
28

1 monitoring requirements will ensure that the TMDL objectives are being met. (See U.C. Davis
2 Tahoe Environmental Research Center Letter, Sept. 16, p. 2.) Water Code section 13267 requires
3 clarification regarding the need for the increased monitoring and reports and also requires
4 evidence be shown supporting requirements for increased monitoring and reports.

5 According to the Regional Board, “[b]y emphasizing field condition assessments, the
6 Permit requires the [Petitioners] to focus limited staff resources on gathering meaningful
7 information to verify model estimate parameters.” (Permit Attachment A, p. 8.) In reality, the
8 Permit does not “focus” limited staff resources on information gathering, it instead places a
9 variety of demands on very limited staff and economic resources, including but not limited to the
10 performance of condition assessments, site inspections, monitoring and reporting.

11 **4. It Is Unnecessary And Unjust To Require That Petitioners Be Solely**
12 **Responsible For Collecting The Data Necessary To Confirm The Various**
13 **Modeling Programs**

14 Under the Permit, the Petitioners are solely responsible for collecting the data necessary to
15 confirm the accuracy of the modeling programs developed by the Regional Board. As described
16 in the Permit, “[v]erification of field conditions and water quality monitoring are needed to ensure
17 that on-the-ground, measured variables are in line with model input parameters and that measured
18 pollutant loading is consistent with modeled estimates.” (Permit, p. 10.) Petitioners recognize
19 the need for data collection and reporting, but the Regional Board acted inappropriately by
20 adopting a Permit that makes the Petitioners solely responsible for performing these necessary
21 tasks. As explained in a comment letter to the Regional Board, the “time and costs associated
22 with the monitoring and reporting, in addition to the TMDL modeling requirements, are
23 unreasonable and will greatly reduce the ability of the local agencies to actually complete projects
24 and maintenance that will reduce pollutant loads.” (City of South Lake Tahoe Letter, Nov. 30, p.
25 1, para. 3; Nichols Consulting Engineers Letter, Nov. 29, comment 9.)

26 It would be more appropriate for some portion of the Permit’s monitoring requirements to
27 be “conducted by the science community and regulatory agencies.” (Nichols Consulting
28 Engineers Letter, Nov. 29, comment 10.) In particular, the Permit’s assessment, monitoring and

1 reporting requirements which seek to validate modeling and sampling tools created for TMDL
2 implementation should not be, and does not need to be, the sole responsibility of the Petitioners.
3 (See U.C. Davis Tahoe Environmental Research Center Comment Letter, September 16, 2011, p.
4 1, [“The technical advances that the TMDL science/technical team were able to make in
5 understanding pollutant sources, quantifying numeric targets for load reduction, and providing
6 input on pollutant load reduction opportunities are important cornerstones for the Tahoe TMDL
7 that was recently signed. Board staff and the science team were able to work hand-in-hand to
8 make this TMDL one of the most technically comprehensive programs on record.”].) Likewise,
9 the Regional Board “has devoted time and resources to develop detailed tools and protocols to
10 quantify, track, and account for pollutant loads associated with urban runoff.” (Permit,
11 Attachment A, p.4.) Yet, notwithstanding the technical advances and resources devoted by these
12 entities, the Permit unjustly and unfairly requires Petitioners be solely fiscally responsible for its
13 implementation. The Regional Board and the science community are already technically
14 prepared to conduct monitoring under the Permit. Petitioners request this Board remand the
15 Permit back to the Regional Board with direction to revise the Permit to provide for monitoring
16 by the Regional Board or other capable entities in order to lessen the financial burden on the
17 Petitioners.

18 **C. THE CLARITY CREDITING PROGRAM IS INHERENTLY FLAWED**
19 **BECAUSE IT FAILS TO IDENTIFY THE LOAD REDUCTIONS**
20 **ATTRIBUTABLE TO THE PETITIONERS’ ACTIONS**

21 The Clarity Crediting Program, as outlined in the Permit, relies on actual data collected by
22 the Petitioners to determine the number of credits a Permittee should receive. As described in the
23 Permit, “[a]ctual conditions, as determined by field inspection findings, are compared to expected
24 conditions to determine the appropriate credit award.” (Permit, Attachment C, p. 4.) “In some
25 instances, partial credit may be awarded when actual conditions are worse than expected.” (*Id.*)
26 An inherent problem in relying on such data is that water quality within the Permit area is
27 influenced by a multitude of factors, including, but not limited to, on one hand actions taken by
28 the Petitioners to achieve the required load reductions and, alternatively, pollutants entering
Petitioners’ jurisdictions and catchments from other entities within the LTHU not covered by the

1 Permit. In other words, pollutant load reductions attributable to actions taken by the Petitioners
2 may be offset or negated by other sources of pollutants over which Petitioners have no control.

3 The Permit states that the Clarity Crediting Program, which is “the first of its kind in the
4 nation,” makes use of “cutting-edge numeric modeling and field inspection methods to estimate
5 water quality benefits and link modeled estimates to actual on-the-ground conditions.” (Permit,
6 Attachment A, p. 5.) According to the Permit, “[d]ocumenting and reporting pollutant load
7 reductions at select catchment outlets will help verify that the jurisdictions cumulative pollutant
8 control actions are effective and confirm credit awards are warranted.” (Permit, Attachment C, p.
9 8.) Petitioners are concerned that after expending valuable resources to take actions to reduce
10 pollutant loads and monitor on-the-ground conditions, the monitoring results will not accurately
11 reflect their efforts; that they will not be awarded the appropriate number of credits, and will be
12 subject to enforcement actions. The Clarity Crediting Program assumes that the Petitioners can
13 control all factors influencing water quality in their jurisdictions and holds each Permittee solely
14 responsible for improving water quality within their jurisdiction. The Program oversimplifies the
15 complex hydrologic and hydraulic realities of the Tahoe Basin.

16 **D. THE PERMIT’S DETAILED AND EXTENSIVE REQUIREMENTS**
17 **ARE MORE STRINGENT THAN THOSE REQUIRED UNDER**
18 **FEDERAL LAW AND THE REGIONAL BOARD FAILED TO**
19 **PERFORM THE COMPLETE ANALYSIS REQUIRED BY STATE**
20 **LAW**

21 While the Regional Board has the authority to impose requirements in a waste discharge
22 permit that are more stringent than those required under federal law, before doing so, the
23 Regional Board must perform the analysis required by California law. (33 U.S.C. § 1370; 40
24 C.F.R. §§ 122.4, 124.1; Water Code §§ 13372 – 13374, 13377.) In this case, the Regional Board
25 failed to undertake this required analysis.

26 Where the Regional Board imposes discharge permit requirements going beyond the
27 minimum requirements of the federal Clean Water Act, the Regional Board must comply with
28 Water Code sections 13263 and 13241 by taking into account “economic considerations” before
imposing the new discharge restrictions. (*City of Burbank v. State Water Resources Control*

1 *Board* (2005) 35 Cal. 4th 613, 627.) That is consistent with the Regional Board's overall
2 obligation to consider cost and act reasonably under Water Code sections 13000 and 13001.
3 Here, the new Permit requirements that the Regional Board has imposed go far beyond any
4 federal requirements, yet the Regional Board failed to consider economic impacts of all the new
5 compliance obligations, as required by Water Code sections 13263 and 13241. As a result, the
6 new Permit requirements relating to costly TMDL implementation may not be imposed.

7 Federal law establishes a framework for regulating water quality, requiring states to
8 develop water quality standards and authorizing states to develop and carry out discharge permit
9 programs that help achieve those standards. Thus, for example, the federal Clean Water Act, 33
10 U.S.C. 1342(p)(iii), requires Permits for municipal stormwater discharges "to require controls to
11 reduce the discharge of pollutants to the maximum extent practicable, including management
12 practices, control techniques and system, design and engineering methods and such other
13 provisions as the Administrator or the State determines appropriate for the control of such
14 pollutants." (Emphasis added.) But just because federal law requires development of state water
15 quality standards and authorizes states to administer discharge permit programs to help achieve
16 such standards does not mean that all state standards and related discharge permit requirements
17 are "federal." (See *City of Burbank*, supra, 35 Cal. 4th 613 [describing state role and discretion to
18 regulate water quality within federal framework establishing minimum requirements].)

19 The United States has not promulgated any minimum water quality standard or criteria for
20 the "transparency" of Lake Tahoe. The Permit cites none, and there is no federal mandate for
21 California to adopt a water quality standard, or objective, for Lake Tahoe transparency.¹

22
23 ¹ Federal water quality standards do not address deep water transparency in Lake Tahoe,
24 and instead are generally directed at assuring "protection of public health, public water supplies,
25 agricultural and industrial uses, and the protection and propagation of a balanced population of
26 shellfish, fish and wildlife, and allow recreational activities in and on the water." (33 U.S.C.
27 §1312(a).) Further, while federal Antidegradation Policy as set forth in 40 CFR 131.12, requires
28 States to comply with federal Antidegradation Policy, it only requires minimum standards be a
part of that policy. (40 C.F.R. 131.12(a), requiring that (1) "existing instream water uses and the
level of water quality necessary to protect the existing uses shall be maintained and protected;"
(2) that the "State assure that all cost-effective and reasonable best management practices for
nonpoint sources control;" and (3) where high quality waters constitute an outstanding National
resource, . . . that water quality shall be maintained and protected." By setting a Lake Tahoe
transparency objective in the first instance, and imposing permit requirements to help *improve* the

1 California's adoption of a Lake Tahoe transparency objective was a discretionary state policy
2 decision, and the state has followed up on that exercise of discretion by developing a TMDL to
3 help achieve the transparency objective, which the state is now seeking to carry out through new
4 discharge Permit requirements. While the federal Clean Water Act creates an overall structure for
5 regulating water quality, California has pursued the Lake Tahoe transparency objective at the
6 state's discretion. That means Permit requirements imposed to help achieve the Lake Tahoe
7 transparency objective by way of the new TMDL are state requirements exceeding the minimum
8 requirements of the federal Clean Water Act.

9 State law also limits the extent to which discharge permits may burden local entities with
10 discharge requirements exceeding federal requirements. Pursuant to Section 13263 of the Water
11 Code, a regional board prescribes requirements to regulate water discharges and to implement
12 "any relevant water quality control plans that have been adopted." The requirements imposed in
13 the waste discharge permit "shall take into consideration the beneficial uses to be protected, the
14 water quality objectives reasonably required for that purpose, other waste discharges, the need to
15 prevent nuisance, and *the provisions of Section 13241.*" (Water Code § 13263(a), emphasis
16 added.)

17 Water Code Section 13241 provides:

18 Each regional board shall establish such water quality
19 objectives in water quality control plans as in its judgment
20 will ensure the reasonable protection of beneficial uses and
21 the prevention of nuisance; however, it is recognized that it
22 may be possible for the quality of water to be changed to
23 some degree without unreasonably affecting beneficial uses.
24 Factors to be considered by a regional board in establishing
25 water quality objectives shall include, but not necessarily be
26 limited to, all of the following:

- 24 (a) Past, present, and probable future beneficial uses of
25 water.
- 26 (b) Environmental characteristics of the hydrographic
27 unit under consideration, including the quality of
28 water available thereto.

28 Lake's existing transparency, the Permit goes beyond any applicable federal requirements.

1 (c) Water quality conditions that could reasonably be
2 achieved through the coordinated control of all factors
3 which affect water quality in the area.

4 (d) *Economic considerations.*

5 (e) The need for developing housing within the region.

6 (f) The need to develop and use recycled water.

7 (Emphasis added.)

8 Water Code section 13267 provides that analysis and findings required by Water Code
9 section 13241 apply to issuance of discharge permits. The Permit acknowledges that the
10 requirements contained in the Permit "may be more specific or detailed than those enumerated in
11 federal regulations . . . or in U.S. EPA guidance[,] but states that "the requirements have been
12 designed to implement and be consistent with federal statutory mandates . . . and the related
13 federal regulations." (Permit, p. 8.) However, the Permit goes far beyond federal Clean Water
14 Act water quality requirements.

15 The requirement in the federal Clean Water Act to reduce pollutants to the "maximum
16 extent practicable" provides a minimum level of water quality protection. (Lahontan Board Order
17 No. 6-00-82, section 11(d).) The heightened monitoring and TMDL reduction requirements are
18 more stringent than those contemplated by the federal Clean Water Act because water
19 transparency has been adopted as a water quality objective by the Regional Board, not by the
20 United States. The Regional Board's bare assertion that the Permit seeks to implement federal
21 law is incorrect and insufficient to exempt the Regional Board from providing the analysis and
22 findings required by Water Code Section 13241 with respect to the economic impact of the new
23 Permit's requirements.

24 As shown in the series of written comments that the Petitioners submitted to the Regional
25 Board, the monitoring and TMDL reductions required by the Permit will require funding that the
26 Petitioners "simply do not have." The Regional Board failed to take economic considerations
27 into account when adopting the onerous new requirements and programs in violation of Water
28 Code section 13241. Petitioners request that the State Board remand the Permit back to the
Regional Board with direction to analyze the economic consequences of the new compliance
obligations and to revise the Permit to reduce or avoid those consequences by providing more

1 flexible compliance options and deferring compliance deadlines for TMDL-related requirements.
2 Requiring each Petitioner to expend, without assurance of grants or other funding, upwards of
3 \$2,000,000 per year administering Permit compliance activities, plus the additional capital cost of
4 implementing water quality protection and enhancement actions, to improve the clarity of Lake
5 Tahoe is imprudent and will not be efficacious under current real world economic conditions. If
6 the Regional Board had completed the required section 13241 analysis, Petitioners submit that it
7 would have made Permit revisions providing more flexibility in compliance options and deferring
8 compliance for the Permit's TMDL-related requirements.

9 **E. THE PERMIT'S IMPLEMENTATION REQUIREMENTS AND**
10 **SCHEDULE REPRESENT ILLEGAL UNFUNDED MANDATES TO**
11 **THE PETITIONERS**

12 The Petitioners have been, and remain, committed to reducing pollutant loadings to Lake Tahoe.
13 To that end, they participated in the development of the clarity TMDL and the Permit. However,
14 the increased monitoring and TMDL reductions now being mandated by the new Permit represent
15 markedly new and more burdensome requirements compared to the previously issued permits.
16 Specific examples of unfunded state mandates appear in the new Permit's Pollutant Load
17 Reduction Monitoring Requirements and Water Quality Monitoring Requirements, including
18 implementation of Catchment Credit Schedules, Condition Assessments, Condition Assessment
19 Method Alternatives, Assessment of Impacts Influencing Baseline Pollutant Loads, Catchment
20 Scale Runoff Water Quality Monitoring, and Best Management Practice Effectiveness
21 Monitoring. These new unfunded state Permit mandates are further described in Exhibit A to this
22 Statement of Points and Authorities. The new Permit requirements originate from state law
23 making "transparency" a state water quality objective for Lake Tahoe. To achieve that state-law
24 objective, the new Permit applies a recent Basin Plan Amendment. That Basin Plan Amendment
25 applies a new Lake Tahoe transparency TMDL. (Permit, p. 3.) Importantly, the Regional Board
26 is also seeking compliance with the Lake Tahoe Clarity Crediting Program, which also endeavors
27 to implement the new Lake Tahoe TMDL. The Lake Tahoe Clarity Crediting Program came into
28 effect as a new program in September 2011 and was characterized "as the primary mechanism to
track pollutant load reduction needs established by the Lake Tahoe TMDL." (California Regional

1 Water Quality Control Board Lahontan Region Meeting of October 14 and 15, 2009, South Lake
2 Tahoe, Executive Officer's Report, p. 8, available at
3 http://www.waterboards.ca.gov/lahontan/board_info/agenda/2009/oct/item2.pdf.) The Regional
4 Board's actions in requiring new, more extensive and costly monitoring and TMDL reductions,
5 and in implementing the new Lake Tahoe Clarity Crediting Program, represent unfunded
6 mandates levied on the Petitioners.

7 Unfunded mandates are prohibited by Article XIII B, section 6, of the California
8 Constitution. "whenever the Legislature or any state agency mandates a new program or higher
9 level of service on any local government, the state shall provide a subvention of funds to
10 reimburse such local government for the costs of such program or increased level of service. . . ."
11 The California Supreme Court has held that under the language of section 6, unfunded mandates
12 are those "programs that carry out the governmental function of providing services to the public,
13 or laws which, to implement a state policy, impose unique requirements on local governments
14 and do not apply generally to all residents and entities in the state." (*County of Los Angeles v.*
15 *State of California* (1987) 43 Cal.3d 46, 56.) The mandates required here meet both prongs of
16 that test.

17 First, regulating California's water quality is a governmental function – carried out by the
18 State Board and the regional boards (Water Code § 13000 et seq.) compliance with the Permit is
19 compulsory; the Water Boards are tasked with enforcement of the Permit. (Water Code § 174.)
20 Second, the requirements imposed on the Petitioners are unique because the specific monitoring
21 and load reductions are imposed only on these three public entities; the Permit does not apply
22 generally to all residents and entities in the state. No other entity must comply with these Permit
23 requirements.

24 A leading case instructive as to the application of the State Constitutional prohibition on
25 unfunded state mandates is the *County of Los Angeles* case. In that case, the Supreme Court
26 found that an increase in worker's compensation insurance benefits did not require state
27 subvention because the costs incurred by local agencies were only an incidental impact of laws
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1 that applied generally to all state residents and entities, governmental and private businesses.
2 (*County of Los Angeles, supra*, 43 Cal.3d. at 61.) The facts herein are distinguished from those
3 found in the case *County of Los Angeles v. State of California* for the reasons set forth above and
4 are more similar to those set forth in *Carmel Valley Fire Protection District v. State of California*
5 (1987) 190 Cal.App.3d 521, where an executive order required that county firefighters be
6 provided with protective clothing and safety equipment. (*Carmel Valley Fire Protection District,*
7 *supra*, 190 Cal.App.3d at 537-538.) The court found that because the increased safety equipment
8 was designed to result in more effective fire protection, it was intended to produce a higher level
9 of service to the public.

10 The requirements of increased monitoring, TMDL reductions, and the Program to
11 implement those actions in the Permit were enacted to produce more effective pollution controls
12 and increased transparency in Lake Tahoe. These mandates are clearly intended to produce a
13 higher level of service to the public and the transparency-related requirements of the new Permit
14 represent a new program for which the Petitioners cannot be held to implementation without
15 funding.

16 In response to comments raising the unfunded states mandate problem, the Regional
17 Board claimed that the State Constitutional prohibition on unfunded mandates does not apply to
18 federally mandated requirements and that the Permit is the result of federal mandates (Permit, p.
19 5.) that claim to take into account that the federal mandate exception does not apply where the
20 state mandated requirements exceed federal law requirements. (Cal. Gov. Code 17556(c).)

21 In one response to the unfunded mandate issue, the Regional Board states that:

22 the Permittees have requested permit coverage in lieu of
23 compliance with the complete prohibition against the discharge of
24 pollutants contained in federal Clean Water Act section 301,
25 subdivision (a) (33 U.S.C. § 1311(a)). To the extent that the local
26 agencies have voluntarily availed themselves of the permit, the program
27 is not a state mandate. (Accord *County of San Diego v. State of*
28 *California* (1997) 15 Cal.4th 68, 107-108.) The local agencies'
voluntary decision to file a report of waste discharge proposing a
program based permit is a voluntary decision not subject to subvention.
(See *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d
832, 845-848.)

(Permit, p. 6.)

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2 However, the Petitioners' Permit activities were not undertaken at the Petitioners' option
3 or discretion. First, Petitioners, as municipal separate storm sewer systems dischargers, were
4 required by law to submit an NPDES permit application for point source discharges to a water of
5 the United States. (33 U.S.C. § 1342.) The Regional Board required the Petitioners file a Report
6 of Waste Discharge to seek a new permit after the expiration of the 2005 NPDES Permit;
7 submitting the Report was not discretionary. (See the Updated Waste Discharge Requirements
8 and National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water/Urban
9 Runoff Discharges From El Dorado County, Placer County, and the City of South Lake Tahoe,
10 Order No. R6T-2005-0026 ("2005 Permit"), p. 36.)

11 Under the Clean Water Act, any person who discharges pollutants to a water of the U.S.
12 is required to apply for a permit authorizing them to do so. (33 U.S.C. § 1342.) Further, the
13 Petitioners were required under California law to file a report of discharge under Water Code
14 section 13260. The failure to do so is unlawful and subject to an enforcement action. (Cal. Water
15 Code section 13376.)

16 The Regional Board misapplies both the *County of San Diego and Environmental Defense*
17 *Center* and the *Environmental Defense Center* cases they cite in the Permit. First, in the case
18 *County of San Diego v. State of California* (1997) 15 Cal.4th 68, the Supreme Court addressed
19 unfunded mandates as it pertained to two specific health care programs that the County claimed
20 were unfunded mandates, one mandatory and one voluntary that transferred responsibility for
21 providing health care for medically indigent adults and the indigent respectively from the State to
22 the County. The Court found that the mandated program transferring medical care to medically
23 indigent persons ("MIP") from Medi-Cal to the County without full reimbursement was an
24 unfunded mandate; the County had no choice to provide care to the MIP under a ruling in a
25 related class action. (*Id.*, at 98.) However, the Court also held that participation in the California
26 Healthcare for the Indigent Program ("CHIP") was voluntary because the Legislature
27 appropriated funds for counties *participating* in the program; and the State would provide "CHIP
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1 payments upon *application* of the county. . . .” (*Id.* at 107.) Here, the Regional Board attempts to
2 liken the NPDES permitting process to the voluntary participation process outlined under the
3 CHIP, however, where a permit is required by a statutory scheme, the process is by no means
4 voluntary. It is “unlawful for any person to discharge a pollutant without obtaining a permit and
5 complying with its terms.” (*EPA v. State Water Resources Control Board* (1976) 426 U.S. 200,
6 203; 33 U.S.C. §1311(a); see *Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977)
7 568 F.2d 1369, 1375.) Because the Petitioners are required to obtain an NPDES permit and
8 comply with its terms as a condition of discharges of storm water, the facts are in line with to the
9 mandatory duty the *County of San Diego* was under in providing health care to MIP.

10 The *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d 832 is also of no
11 assistance to the Regional Board in proving that participation in the NPDES permitting program
12 is voluntary. In that case, building industry plaintiffs brought suit against the U.S. Environmental
13 Protection Agency’s requirement that discharges from small municipal storm sewers and
14 construction sites be subject to NPDES permitting requirements. (*Id.*, at 846.) The ruling
15 involved whether the federal government could force States to implement federal regulatory
16 programs. (*Id.*, at 847.) While the Ninth Circuit found that such could not be accomplished
17 through coercion, it also recognized that compliance with the regulatory programs was
18 mandatory, in one form or the other – either through the federal program or through State
19 implementation of the program. (*Id.*, at 847-848.) Here, the Petitioners are required to participate
20 in the NPDES permitting process under the Clean Water Act and further, were required under the
21 2005 Permit to submit Reports of Waste Discharge in order to obtain the newly passed Permit;
22 thus their participation in the program was not voluntary.

23 Next the Permit attempts to argue against the issue that the new requirements under the
24 Permit represent an unfunded mandate argument by stating:

25 [t]he Permittees’ obligations under this Permit are similar to, and
26 in many respects less stringent than, the obligations of
27 nongovernmental dischargers who are issued NPDES permits for
28 storm water discharges. With a few inapplicable exceptions, the
Clean Water Act regulates the discharge of pollutants from point
sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the

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discharge of waste (Water Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding that comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].) (Permit, p. 5.)

However, the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances ... owned or operated by a State, city, town, borough, county, parish, district, association, or other public body" Thus, only a public entity is required to implement the requirements in and MS4 NPDES Permit. The regulatory scheme is only applicable to municipal separate storm sewer systems, with no similar requirement on nongovernmental dischargers. Thus the heightened requirements and the newly adopted Lake Clarity Crediting Program represent unfunded mandates conflicting with the California Constitution.

IV. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the State Board remand the Permit back to the Regional Board with direction to revise the Permit to provide more flexible compliance options and to defer compliance timelines for the Permit's new TMDL-related requirements.

DATED: January 5, 2012

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

By 

Eric N. Robinson
Attorneys for Petitioners CITY OF SOUTH LAKE
TAHOE, COUNTY OF PLACER AND COUNTY
OF EL DORADO

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PROOF OF SERVICE

I, Terri Whitman, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On January 5, 2012, served a copy of the within document(s):

**STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION
BY CITY OF SOUTH LAKE TAHOE, COUNTY OF PLACER AND COUNTY OF
EL DORADO FOR REVIEW OF CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD LAHONTAN REGION ORDER NO. R6T-2011-0101**

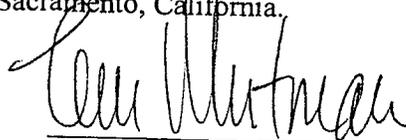
- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

See Attached Service List

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 that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 5, 2012, at Sacramento, California.



Terri Whitman

1 *In Re: the Petition of City of South Lake Tahoe, County of Placer, County of El Dorado*
2 *Waste Discharge Requirements Order No. R6T-2011-0101 (NPDES No. CAG616001)*

3 SERVICE LIST

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