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11  
12 **STATE OF CALIFORNIA**  
13 **STATE WATER RESOURCES CONTROL BOARD**  
14

15 In the Matter of the Petition of Sierra Club  
16 Tahoe Area Group, and California Sportfishing  
17 Protection Alliance, for Review of Action by  
18 the Lahontan Regional Water Quality Control  
19 Board in Adopting the NPDES Permit and  
20 exemption to the Basin Plan

PETITION FOR REVIEW OF LAHONTAN  
REGIONAL WATER QUALITY CONTROL  
BOARD ACTION ADOPTING NPDES  
PERMIT AND EXEMPTION TO BASIN  
PLAN; REQUEST FOR STAY

1 Sierra Club Tahoe Area Group, and California Sportfishing Protection Alliance  
2 (“Petitioners”) hereby petition the State Water Resources Control Board in accordance with  
3 Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code  
4 of Regulations:

5 **1. Name, address, telephone number and email address of the petitioners.**

6 Sierra Club Tahoe Area Group

7 Tobi Tyler, Tahoe Area Group Vice Chair

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12 Bill Jennings Chairman Executive Director

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16 **2. The specific action of the regional board which the state board is requested to**  
17 **review, and a copy of any order or resolution of the regional board which is referred**  
18 **to in the petition.**

19 Petitioners seek review of the Lahontan Regional Water Quality Control Board’s  
20 (“Lahontan Regional Board” or “Regional Board” or “Board”) final decision to adopt a National  
21 Pollution Discharge Elimination System (“NPDES”) permit for the Tahoe Keys Property Owners  
22 Association (“TKPOA”), an exemption to the aquatic pesticide discharge prohibition in the Water  
23 Quality Control Plan (“Basin Plan”) for the Lahontan Region, and certification of the final  
24 environmental impact report (“EIR”) and the mitigation monitoring and reporting program  
25 (collectively, hereafter the “Herbicide Project”)(attached hereto as Exhibits 1-3).

26 **3. The date on which the Regional Board acted.**

27 The Regional Board approved the Herbicide Project on January 13, 2022.

1           **4. A full and complete statement of the reasons the action was inappropriate or**  
2           **improper.**

3           The Regional Board’s decision to approve the Herbicide Project and allow pesticide use  
4 in the Tahoe Keys was improper because it violated the Basin Plan, the California Environmental  
5 Quality Act (“CEQA”), and the Clean Water Act (“CWA”). Pesticide use in the Tahoe Keys has  
6 been banned under the Basin Plan, subject to narrow exemption criteria that have not been met  
7 here. The Basin Plan exemption is based on an EIR that includes an impermissibly narrow project  
8 description, and omits discussion of reasonably foreseeable consequences, in violation of CEQA.  
9 The final decision does not comply with the CWA because the NPDES permit has inadequate  
10 monitoring, which will degrade outstanding national resource waters (“ONRW”) and fails to  
11 ensure monitoring sufficient to determine whether the discharge complies with the NPDES permit.  
12 These issues were presented to the Regional Board by Sierra Club, California Sportfishing  
13 Protection Alliance, and others, prior to the Regional Board’s approval of the Project (*see*,  
14 Exhibits 4-9, attached hereto, for an excerpt of comments presented).

14           ***A. Background***

15           TKPOA applied to the Regional Board for an NPDES permit and a Basin Plan exemption  
16 to conduct the Tahoe Keys Lagoons Aquatic Weed Control Methods Test (“CMT”) using aquatic  
17 herbicides in conjunction with non-chemical treatment methods. The purpose of the CMT project  
18 is to test chemical and non-chemical methods that could reduce and control the abundant growth  
19 of target aquatic weeds in the Tahoe Keys Lagoons. After an initial study under CEQA was  
20 performed in 2017, a determination to conduct a full CEQA analysis was made. TKPOA then  
21 withdrew its initial application and submitted a second individual NPDES application and Basin  
22 Plan exemption in July 2018.

23           There were extensive comments to the Draft EIR and a two-day long hearing after the  
24 Final EIR was released. Despite clear violations to the Basin Plan, CEQA, and the Clean Water  
25 Act, The Board approved both the NPDES permit and the Basin Plan exemption—along with the  
26 underlying final EIR and mitigation monitoring and reporting program.

26           ***B. The Herbicide Project Violates the Basin Plan***

27           The Regional Board’s decision to permit pesticide use in the Tahoe Keys to test controls  
28 of aquatic invasive species (“AIS”) violates the Basin Plan Pesticide Prohibition Exceptions. The

1 nature of the project itself, to test herbicides and non-chemical methods simultaneously, does not  
2 fall within the letter or intent of the Basin Plan Pesticide Prohibition Exceptions. In addition, there  
3 is no substantial evidence that the non-chemical methods are infeasible. Finally, the nature of the  
4 test itself makes future repeat pesticide applications foreseeable and likely, and establishes a  
5 dangerous precedent for future project applications.

6 1. The Basin Plan exemption criteria do not permit this herbicide test.

7 The Pesticide Prohibition Exception lists mandatory criteria that must be satisfied before  
8 any pesticide application to waters can be permitted. For “projects that are neither emergencies  
9 nor time sensitive,” such as this, the Basin Plan exemption lists seven (7) mandatory criteria.

10 Criterion 1 requires a

11 Demonstration that non-chemical measures were evaluated and found  
12 inappropriate/ ineffective to achieve the project goals. (Alternatives to  
13 pesticide use must be thoroughly evaluated and implemented when feasible  
14 (as defined in CEQA Guideline 15364: "Feasible" means capable of being  
accomplished in a successful manner within a reasonable period of time,  
taking into account economic, environmental, legal, social, and technological  
factors.)

15 The staff report and draft findings claim that using non-chemical methods alone would be  
16 infeasible to meet the project goals. However, the Regional Board based this incorrect conclusion  
17 on an unduly narrow project goal to “[e]valuate the effectiveness of multiple AIP treatment  
18 methodologies, including chemical and non-chemical methodologies and combinations of  
19 both . . .” (Exemption Staff Report, Pg 2-44, Exhibit 3). The Staff Report contends that,

20 In order to compare the effectiveness of the different AIP treatment  
21 methodologies with minimal variability in testing conditions, it is important  
22 that all AIP treatment methodologies being considered for future use be  
23 evaluated at the same time in the same or very similar environment. That is  
why both chemical and non-chemical treatment methodologies identified in  
the CMT project need to be evaluated concurrently. Failing to do so, will fail  
to meet the project’s goals...

24 (Exemption Staff Report, Pg 2-48, Exhibit 3). Having a project component that *per se* requires  
25 use of pesticides for testing violates the Basin Plan, because it would always render alternatives  
26 without pesticides infeasible to achieving that goal, making the exemption criteria requirement to  
27 use feasible alternatives meaningless. This narrow interpretation of the project goal is simply

1 incorrect. The Regional Board, when amending the Basin Plan, plainly did not intend for Lake  
2 Tahoe to be a testing ground for pesticide use.

3         Instead, under this first exemption criterion, “project goals” must be understood to mean  
4 the goal of controlling AIS, not the goal of testing herbicides. This interpretation finds support in  
5 other provisions. For example, exemption criterion 3 requires the minimum chemical application  
6 necessary for “effective treatment.” Criterion 6 also supports an interpretation of project goals to  
7 mean the goal of controlling AIS because it refers to “the treatment goals,” showing that the only  
8 intent for the exemption was treatment, not testing.

9         During public comment at the hearing on the Project, three former Regional Board staff  
10 all commented in agreement, that the exemption criteria had not been satisfied, and that the intent  
11 of the Basin Plan amendment was not to *test* herbicide use where non-chemical methods were  
12 potentially feasible. Harold Singer, the former Regional Board Executive Office who oversaw the  
13 Basin Plan amendment adding the exemption criteria; Laurie Kemper, the former Assistant  
14 Executive Officer during that time; and Bruce Warden, former staff who worked on the Basin  
15 Plan amendment and oversaw the TKPOA WDR; each commented that the exemption criteria  
16 had not been satisfied. Indeed, the 2011 staff report for the Basin Plan amendment exemption  
17 clearly states that “[t]he proposed pesticide waste discharge prohibitions allows the Water Board  
18 to grant an exemption to the prohibition. . . [to] apply aquatic pesticides to surface waters *for*  
19 *purposes of controlling AIS,*” not for simply testing whether or how herbicides work. (2011 Staff  
20 Rpt. at 10 [emphasis added], Exhibit 10). Testing herbicides to see if they work and using  
21 herbicides when all other methods are infeasible are two completely different actions.

22         Similarly, the 2011 staff report to the Basin Plan Prohibition exemption says that “[w]here  
23 it can be demonstrated that pesticide use is the *only feasible alternative to control AIS,* impacts  
24 within the treatment area may be justified . . .” (2011 Staff Rpt. at 10 [emphasis added], Exhibit  
25 10). This has not been established here. The CMT project would apply the herbicides at lower  
26 than the recommended rate (Proposed NPDES Permit, Pg 2-323, Exhibit 3), and it is therefore  
27 unknown even if the proposed herbicide use would effectively treat AIS. The mere fact that CMT  
28 is testing herbicides is evidence that it has not been established herbicides are the “only feasible

1 alternative” to control AIS. There is no evidence in the exemption adoption record that the Board  
2 intended Tahoe to be a testing ground for pesticides.<sup>1</sup>

3 Further, as quoted above in the Exemption Staff Report, “it is important that all AIP  
4 treatment methodologies being considered for future use be evaluated at the same time in the  
5 same or very similar environment.” (Exemption Staff Report, Pg 2-48, Exhibit 3). However, this  
6 is not the case here. The herbicides will be used along the shoreline and around the piers, while  
7 the UV will be tested in the deeper centers of the lagoons. By testing the treatment methodologies  
8 in different environments, the Herbicide Project will not collect useful test results from the non-  
9 chemical methods, undermining the ostensible project purposes itself, and all but guaranteeing  
10 that future herbicide applications will be proposed and approved.

11 2. There is no substantial evidence that non-chemical methods are infeasible.

12 There is no substantial evidence that the non-chemical methods are infeasible. However,  
13 there is evidence supporting that the non-chemical methods are feasible. This means that under  
14 the Basin Plan, the non-chemical alternatives to pesticides should be implemented first. Instead,  
15 the Board approved the CMT project proposing to test chemical methods first, and compare them  
16 to non-chemical methods, violating the Basin Plan—concluding that the non-chemical methods  
17 alone are infeasible. (Response to Comments, Pg 2-518, Exhibit 3).

18 Infeasibility findings must be supported by substantial evidence in the record of the  
19 agency's proceedings. Pub Res Code § 21081.5; 14 CCR § 15091(b). For CEQA, "substantial  
20 evidence" is "enough relevant information and reasonable inferences that a fair argument can be  
21 made to support a conclusion, even though other conclusions might also be reached.” *Save*  
22 *Panoche Valley v. San Benito Cty.*, 217 Cal. App. 4th 503, 514 (2013) (citing CEQA Guidelines,  
23 §15384, subd. (a)). Substantial evidence may include facts, reasonable assumptions predicated  
24 upon facts, and expert opinion supported by facts. *Sierra Club v. Cty. of Napa*, 121 Cal. App. 4th  
25 1490, 1503 (2004) (citing *San Franciscans v. City & County of San Francisco*, 102 Cal.App.4th

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27 <sup>1</sup> The Basin Plan exemption adoption record is available at:  
28 [https://www.waterboards.ca.gov/lahontan/water\\_issues/programs/basin\\_plan/pesticidebpa.shtml](https://www.waterboards.ca.gov/lahontan/water_issues/programs/basin_plan/pesticidebpa.shtml)

1 656 (2002)). Substantial evidence does not include arguments, speculation, unsubstantiated  
2 opinion, or clearly erroneous evidence. *Id.*

3 The information and inferences the Board bases its infeasibility finding on fall short of  
4 supporting a reasonable conclusion. It is undisputed that all evidence in the record indicates that  
5 UV light and laminar flow aeration (“LFA”) have been effective in the times and places used.  
6 (Draft EIR, Pg 2-19, 2-22). The Regional Board speculates, without any evidence, that the scale  
7 of the Tahoe Keys *may* render UV and LFA infeasible, when compared to the scales at which  
8 these non-chemical methods have previously been tested. TKPOA’s LFA installation actually had  
9 promising results—increased dissolved oxygen levels and diminished muck layers in sediment.  
10 (Draft EIR, Pg 3.3.4-43). When analyzing the efficiency of bottom barriers, however, the  
11 evidence is skewed by the fact that TKPOA left installation and removal to the individual  
12 homeowners rather than being responsible itself—but for this deficiency, there is no evidence that  
13 barriers are infeasible. (Draft EIR, pg 2-39). These studies show that the Board has not sufficiently  
14 shown that the infeasibility finding of non-chemical methods alone is supported by reliable facts  
15 or reasonable assumptions predicated upon facts. (Exemption Staff Report, 2-47 to 2-48, Exhibit  
16 3).

17 Indeed, the EIR itself includes a Project alternative relying solely on non-chemical  
18 methods (Alternative 1) as a potentially feasible alternative. *See* 14 Cal. Code Regs § 15126.6(a).  
19 Not only does the EIR consider the non-chemical method to be potentially feasible, the EIR deems  
20 Alternative 1 to be the *environmentally superior* alternative, when compared to the proposal to  
21 use herbicide treatments. These factors strongly undermine and contradict the Regional Board’s  
22 conclusion that non-chemical methods are infeasible, where the EIR has already determined a  
23 non-chemical alternative to be potentially feasible, *and environmentally superior* to the Herbicide  
24 Project. The Regional Board’s failure to rely on substantial evidence when it rejected non-  
25 chemical methods as infeasible violated the Basin Plan and CEQA. *Cf., Laurel Heights*  
26 *Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 404-6 (1988) (agency must explain  
27 in meaningful detail facts supporting a decision that an alternative is infeasible).

28 Further, testing the chemical and non-chemical methods as part of the same project will  
taint the testing results, and fail to provide data regarding the effectiveness of non-chemical  
methods, alone. Indeed, contrary to the Basin Plan, the Herbicide Project would apply and test

1 chemical treatment methods *first*, in conflict with the Basin Plan’s requirement to implement  
2 feasible non-chemical methods first. Worse still, any and all data gathered regarding the non-  
3 chemical methods being tested will be predicated on use of herbicides first, thus failing to provide  
4 any information about non-chemical methods alone, and virtually ensuring that future projects  
5 rely on herbicide treatment. Moreover, there are no performance standards for the non-chemical  
6 methods. For example, no information has been provided on the UV system that indicates how  
7 its effectiveness will be evaluated.

8 There is no rush to use pesticides because this project is neither time sensitive nor an  
9 emergency. Consistent with the Basin Plan, non-chemical methods must be employed before  
10 pesticides are discharged into the Tahoe Keys. The Herbicide Project directly contradicts the letter  
11 and spirit of the Basin Plan’s limited exemption for pesticide applications to waters, and the only  
12 evidence in the record regarding the non-chemical methods being employed shows that they work.  
13 Petitioners respectfully request the State Water Board remands this matter to the Regional Board  
14 with direction to implement the EIR Alternative 1.

### 14 ***C. The Herbicide Project Approval Violates CEQA***

15 The Regional Board’s approval of the Herbicide Project should be reversed and remanded  
16 to the Regional Board due to violations of CEQA. First, the Herbicide Project is based on an  
17 unduly narrow project description that impeded any meaningful consideration of project  
18 alternatives that would reduce or avoid the Project’s adverse environmental effects. Second, the  
19 EIR does not include any analysis about the reasonably foreseeable repeat use of pesticides in  
20 future years. For each of these failures to proceed in a manner required by law, and the Project  
21 should be sent back to the Regional Board.

#### 21 **i. Unduly Narrow Project Description**

22 The Herbicide Project description *requires* the use of chemical methods, which  
23 automatically prohibits the use of non-chemical methods. Project objectives should not be so  
24 narrowly defined that they preclude consideration of reasonable alternatives for achieving the  
25 project's underlying purpose; here, ostensibly to control aquatic invasive species. A lead agency  
26 may not give a project's purpose an artificially narrow definition. *North Coast Rivers Alliance v.*  
27 *Kawamura*, 243 Cal.App.4th 647, 668 (2015). For example, in *North Coast Rivers Alliance*, the  
28 agency’s project objective called for “eradication,” of pests, leaving out of the EIR an analysis of



1 pest “control” as a reasonable alternative to the eradication program. *Id.* Because the project  
2 description was artificially narrow, the EIR left out the pest “control” alternatives, to which the  
3 court found reasonable and consequently violated CEQA. Similarly, the Herbicide Project is  
4 based upon a project objective *to use herbicides* that impermissibly disqualifies reasonable  
5 alternatives, including the otherwise feasible environmentally superior alternative. Therefore, the  
6 Herbicide Project description violates CEQA because it maintains an unduly narrow project  
7 objective that precludes non-chemical methods from achieving the true project goal of controlling  
8 invasive weeds.

9 ii. The EIR Fails to Analyze Reasonably Foreseeable Consequences

10 Repeated use of pesticides is a reasonably foreseeable effect of the Herbicide Project,  
11 since the project itself fails to gather evidence regarding the efficacy of non-chemical treatment  
12 methods alone, and fails to address any of the underlying conditions that have caused the weed  
13 infestation problem, such that the weeds will continue to grow year after year. (Sierra Club  
14 NPDES Permit Comment, Pg 2, Exhibit 4; Sierra Club Draft EIR Comment, Pg 10, Exhibit 5).  
15 An EIR must include reasonably foreseeable consequences that will result from a project’s  
16 approval. 14 CCR §§15126, 15378; *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.*  
17 47 Cal. 3d 376, 396 (1988). Failure to disclose and analyze reasonably foreseeable consequences  
18 violates CEQA. *Id.* The *Laurel Heights* court established a two-pronged test to apply in  
19 determining whether consequences are reasonably foreseeable:

20 We hold that an EIR must include an analysis of the environmental effects of  
21 future expansion or other action if: (1) it is a reasonably foreseeable  
22 consequence of the initial project; and (2) the future expansion or action will  
23 be significant in that it will likely change the scope or nature of the initial  
24 project or its environmental effects.

25 Applying this test, the Court in *Laurel Heights*, found that the University’s occupancy of  
26 an entire building was a reasonably foreseeable consequence that would likely change the scope  
27 or nature of the proposed initial project and its environmental effect. The University planned to  
28 move its school of pharmacy science research units to a portion of an office building in a  
residential neighborhood. Despite the University’s argument to the contrary, evidence in the  
record indicated that the University intended to occupy the entire building once another agency's

1 lease in the building expired. Therefore, the EIR should have discussed and analyzed the  
2 consequence of occupying the entire building.

3 Similarly, repeated pesticide use in the Tahoe Keys is a reasonably foreseeable  
4 consequence that will likely change the scope or nature of the proposed initial project and its  
5 environmental effect. The Herbicide Project approval plans to administer a one-time use of  
6 herbicides followed by non-chemical methods. Despite TKPOAs argument to the contrary,  
7 evidence in the record indicates that the CMT project fails to address the root causes of weed  
8 growth—excessive nutrients in the sediments and flowing into the warm, stagnant lagoon waters  
9 from surrounding homes of the Tahoe Keys—making a long-term weed removal solution  
10 necessary. (Sierra Club NPDES Permit Comment, Pg 2, Exhibit 4; Sierra Club Draft EIR  
11 Comment, Pg 10, Exhibit 5). The CMT project’s focus is on removing the weeds that are currently  
12 there, rather than stopping weeds from growing altogether. Therefore, the weeds will continue to  
13 grow, and if TKPOA finds the pesticides to work, then the use of pesticides may very well be  
14 used routinely in the ONRW of the Tahoe Keys. Repeat pesticide use will likely change the scope  
15 or nature of the proposed initial project and its environmental effect. Therefore, the EIR should  
16 have discussed and analyzed recurring pesticide applications.

17 Further, failure to review a foreseeable extension of a temporary project violates CEQA.  
18 In *City of Santee v. County of San Diego*, the court applied the *Laurel Heights* test in its review  
19 of an EIR for proposed construction of temporary jail facilities. *City of Santee v County of San*  
20 *Diego*, 214 Cal.App.3d 1438, 1440 (1989). Based on evidence in the record indicating a  
21 reasonable possibility that the temporary jail would remain in operation longer than the county  
22 had projected, the court found the EIR's project description deficient. *Id.* Similarly, the Tahoe  
23 Keys matter is framed as a pilot project but could just as easily become something permanent  
24 based on the CMT results, rendering repeated chemical applications likely and essentially  
25 proposed. The CMT is a test project to see which methods are successful at addressing the weed  
26 infestation in the Tahoe Keys. Successful methods can potentially be used again in the future—  
27 meaning that future year pesticide applications are clearly contemplated. And as discussed in the  
28 previous paragraph, repeat use of pesticides will likely be found necessary since the root causes  
of the weed growth are not being dealt with.

1 The final EIR is inadequate and violates CEQA because it is based on a narrow project  
2 objective that precludes reasonable alternatives and the reasonably foreseeable consequence of  
3 recurring pesticide use is not analyzed. Because the Basin plan exemptions rests on the  
4 certification of this defunct EIR, it should not have been approved.

5 ***D. The Final Decision Violates the Clean Water Act***

6 The final decision violates the Clean Water Act because the NPDES permit fails to require  
7 adequate monitoring to determine whether the Herbicide Project complies with the permit limits.  
8 40 C.F.R. §§ 122.41(j)(1) (“Samples and measurements taken for the purpose of monitoring shall  
9 be representative of the monitored activity”), 122.48(b) (“All permits shall specify . . . Required  
10 monitoring including type, intervals, and frequency sufficient to yield data which are  
11 representative of the monitored activity”). Additionally, the monitoring is inadequate to ensure  
12 that there is no discharge into an ONRW. 40 C.F.R. § 131.12(a)(3).

- 13 i. The NPDES permit fails to require monitoring sufficient to determine  
14 whether the project complies with permit limits.

15 The NPDES permit fails to require proper monitoring for permit limits because sampling  
16 is untimely and too limited testing. First, sampling does not start until a week following  
17 application of the herbicides. The Permit requires sampling to commence one week after an  
18 herbicide application and to demonstrate compliance within 21 days within the treatment area.  
19 (Proposed NPDES Permit, Pg 2-66, Exhibit 3). This sampling schedule will not capture  
20 exceedances of the Receiving Water Limitations for the specified herbicides for one to three  
21 weeks. The monitoring thus fails to capture the Herbicide Project’s effects. This is a clear  
22 allowance to exceed permit Limitations for a specified period.

23 There is limited testing to assure water quality is compliant. The Basin Plan requires that  
24 the permittee verify compliance with receiving water limits and water quality objectives.  
25 However, the number of parameters monitored does not include all the Water Quality Objectives  
26 (WQOs) in the Basin Plan. Many of the WQOs in Chapter 3 of the Basin Plan for all waters and  
27 for Lake Tahoe are not tested. Sampling of electrical conductivity, toxicity (acute and chronic),  
28 total nitrogen, total dissolved solids (TDS) and chlorophyll a (for the algal growth potential  
WQO) is not required in the draft permit. Sampling of these parameters and all of the WQOs  
listed in the Basin Plan should be required for verification that beneficial uses are protected (Sierra

1 Club NPDES Permit Comment, Pg 12, Exhibit 4.) Therefore, compliance with the NPDES permit  
2 requirement regarding the water quality objectives which apply to surface waters cannot be met:

3           The discharge to receiving waters of residual aquatic herbicides, Rhodamine  
4           WT and lanthanum-modified clay must not cause a violation of water quality  
5           objectives for the surface waters of the South Tahoe Hydrologic Area and the  
6           Tahoe Lake Body Hydrologic Area...

7 (Proposed NPDES Permit, Pg 2-66, Exhibit 3.) Even the State Board’s Pesticide General Permit  
8 requires sampling of more parameters like electrical conductivity, to provide more  
9 representative data of the monitored activity. The current parameters are not sufficient to ensure  
10 compliance with the NPDES permit and antidegradation of the ONRW.

11           ii.       The Monitoring fails to Ensure no discharge to ONRW.

12           The monitoring program is required to but fails to ensure that the ONRW of the Tahoe  
13 Keys is not degraded. Any degradation of ONRW is prohibited. 40 CFR §131.12(a)(3). As  
14 described in the preamble to the Water Quality Standards Regulation, “States may allow some  
15 limited activities which result in temporary and short-term changes in water quality,” but EPA  
16 guidance explains that such changes in water quality should not impact existing uses or alter the  
17 essential character or special use that makes the water an ONRW. The EPA guidance discusses  
18 acceptable short-term projects, such as building a road in a park with temporary construction  
19 effects. The intentional and direct application of herbicides to ONRW is nothing like the short-  
20 term effects contemplated by EPA’s guidance. The Herbicide Project is a test project to see which  
21 methods are successful. (January Meeting, Pg 2-3, Exhibit 3). Successful methods have the  
22 potential to be used again in the future—meaning that future year pesticide applications are clearly  
23 contemplated. (January Meeting, Pg 2-3, Exhibit 3). As explained above, pesticide use does not  
24 solve the issue of weed growth so its perpetual use will be required if this method is found  
25 successful. (Sierra Club NPDES Permit Comment, Pg 2, Exhibit 4; Sierra Club Draft EIR  
26 Comment, Pg 10, Exhibit 5, Sierra Club Power Point, Slide 9, Exhibit 9). Further, pesticide  
27 residues can last at least (6) months. (Proposed NPDES Permit, Pg 2-170, Exhibit 3). Pesticide  
28 use combined with the already present nutrients contributing to aquatic weed infestations and  
harmful algal bloom outbreaks will only perpetuate the problem—creating long-term negative  
effects to the water quality of the ONRW that does not qualify for any short-term ONRW anti-  
degradation exemption.

1 The approved mitigation monitoring and reporting program contains inadequate  
 2 monitoring to ensure the ONRW is in turn not degraded. The sampling locations are insufficient  
 3 to enable a scientifically valid evaluation of each method’s effectiveness. The Statewide General  
 4 Permit requires the event monitoring samples be collected “immediately outside the treatment  
 5 areas.” Here, however, only one monitoring location, far from the treatment area, is required in  
 6 the receiving water between two (2) herbicide treatment areas in the lagoons. (Proposed NPDES  
 7 Permit, Pg 2-103, Exhibit 3.) The Regional Board responded to comments in its final EIR  
 8 explaining that drift of herbicides to receiving waters is expected to be minimal and below  
 9 acceptable levels. (Response to Comments, Pg 2-339, Exhibit 3). However, without additional  
 10 sampling closer to the treatment area, there is no way to confirm that.

11 The sampling frequency is inadequate to evaluate method effectiveness. Only one sample  
 12 is required from each monitoring location. (Response to Comments, Pg 2-441, Exhibit 3). This is  
 13 not frequent enough to ensure that the ONRW is not degraded. The very few sampling sites and  
 14 low frequency of sampling does not ensure that herbicides won’t reach Lake Tahoe or a drinking  
 15 water supply intake.

16 The discharge limitation should be non-detect since it is a requirement to prevent any  
 17 discharge from entering Lake Tahoe. This is based on Section A, Receiving Water Limitations,  
 18 and Section C, Aquatic Pesticide Application Plan, (Proposed NPDES Permit, Pg 2-66, 2-71,  
 19 Exhibit 3). Table 4 under Section A states that the discharge must not cause an exceedance of the  
 20 following limitations in the receiving waters:

**A. Receiving Water Limitations - Surface Waters**

The discharge must not cause any of the following:

1. An exceedance of the following limitations in the receiving waters:

**Table 4. Receiving Water Limitations**

Parameter	Units	Instantaneous Maximum Limit	Basis
Endothall*	µg/l	100	Drinking Water MCL
Triclopyr*	µg/l	400	USEPA Drinking Water Dietary Exposure Limit
Rhodamine WT	µg/l	10	National Sanitation Foundation (NSF) Standard 60

\* Measured as the concentration of the acid form of the active ingredient.

26 Further, under section C, subsection 3(d)(ii), the NPDES permit states that:  
 27  
 28

1 The BMP plan must include the following BMPs at the minimum. . .

2 d. Plans to prevent aquatic herbicide migration to receiving waters  
3 adjacent to the main lagoon west channel entrance to Lake Tahoe and  
4 Pope Marsh downstream of Lake Tallac during treatment events.  
Minimum containment BMPs must include. . .

5 ii. Prior to applying herbicides, double turbidity curtains (two  
6 turbidity curtains) must be installed in the locations identified on  
7 the Treatment Areas, Barrier Locations, and Main Lagoon  
8 Monitoring Locations map in Attachment C to prevent herbicide  
9 migration from the Tahoe Keys Lagoons to Lake Tahoe. If  
10 turbidity curtain locations are revised in response to revised  
treatment area locations reported per VI.C.4, above, the  
Discharger must reflect such revised barrier locations on the map  
submitted per VI.C.4.

11 Despite these requirements, the discharge of herbicides to Tahoe at the MCL is not  
12 addressed.

13 The very purpose of “testing” aquatic pesticides in the Herbicide Project is to determine  
14 whether they should be used again in the future. Monitoring of a project designed to test control  
15 methods for potential future use on Tier 3 ONRW should be monitored much more intensively.  
16 The monitoring program relies mainly on qualitative visual assessments and does not define a  
17 process by which the methods can confidently be applied in the future. This monitoring  
18 program is simply inadequate to prevent degradation of the Tahoe Keys, in violation of the Clean  
19 Water Act.

## 20 **5. Stay Request**

21 Petitioners request a stay of the Herbicide Project pending review of the merits of this  
22 petition. For the reasons stated in this petition, there is sufficient evidence demonstrating  
23 Petitioners need for a stay. Please find the attached declaration of Tobi Tyler (Exhibit 11).

24 A. There will be substantial harm to the petitioners and the public interest if a  
25 stay is not granted.

26 If a stay is not granted, pesticide use in the Tahoe Keys will commence sometime in the  
27 spring of this year. Keeping Lake Tahoe pesticide free is paramount, but the Herbicide Project  
28 will promote current and future herbicide use, while failing to impose stringent monitoring  
sufficient to ensure pesticides do no degrade Lake Tahoe. These effects will substantially harm

1 Petitioners and the public who live in and around, and use and enjoy, the Lake Tahoe Basin, for  
2 recreational, education, economic, scientific, ecological, and aesthetic pursuits. Any potential  
3 degradation to this ONRW must be prevented.

4 The record demonstrates that aquatic herbicides require repeated applications because the  
5 herbicides fail to completely kill the weeds, particularly their seeds and roots. Thus, repeated  
6 herbicide use will be required and inevitably will lead to herbicide use throughout the lake.  
7 Moreover, the Regional Board's decision creates a harmful precedent of permitting applications  
8 of herbicides in Lake Tahoe. Petitioners rely on the protections afforded under the Basin Plan to  
9 keep the Tahoe Keys chemical free. While the Basin plan does have pesticide prohibition  
10 exceptions, there are safeguards in place to ensure pesticides are only used when non-chemical  
11 methods are found infeasible. The Regional Board's approval of pesticide use in the Tahoe Keys  
12 completely disregards the measures in place that safekeep the chemical free Tahoe Keys. The  
13 nature of the test itself relies upon application of herbicides, making future repeat pesticide  
14 applications foreseeable and likely, and establishes a dangerous precedent for future project  
15 applications.

16 Therefore, there will be substantial harm to Petitioners and to the public interest if the stay  
17 is not granted: degradation to the ONRW, continual weed infestation, and a harmful precedent  
18 permitting pesticide use.

19 B. There will be no substantial harm to other interested persons and to the public  
20 interest if a stay is granted.

21 Granting the stay will not make the weed infestation in the Tahoe Keys any worse. While  
22 Petitioners acknowledge that TKPOA had delayed far too long in remedying the nuisance  
23 conditions it has caused, the EIR makes clear that non-chemical Alternative 1 is feasible, is the  
24 environmentally superior alternative, and should be implemented. Given the project schedule to  
25 commence this spring, granting of a stay now permits enough time for Regional Board to update  
26 the final decision and implement non-chemical methods first without causing significant delay.

27 C. There are substantial questions of fact or law regarding the disputed action.

28 For the reasons outlined in this petition, there are substantial questions of fact and law  
regarding to the disputed action. The Herbicide Project approval plainly violates the Basin Plan  
pesticide discharge prohibition. Under the Basin Plan and CEQA, feasible non-chemical methods

1 can and should be implemented first but have been improperly excluded due to an unduly narrow  
2 project description. Without implementing non-chemical methods first, and without treating the  
3 underlying causes of the weed infestation, the future ongoing pesticide use is reasonably  
4 foreseeable, but was not disclosed or analyzed. Finally, project monitoring will not avoid  
5 potentially significant adverse effects, or ensure compliance with water quality standards  
6 protecting ONRW. For each of these reasons, as discussed more fully, above, this Petition raises  
7 substantial issues of fact and law that necessitate a stay of the Herbicide Project pending further  
8 review.

9 For each of the reasons detailed above, Petitioners requests that the State Board stay the  
10 Regional Water Board's action while pending review of the merits of the petition. Additionally,  
11 petitioners request expedited review of the final decision to the extent feasible.

12 **5. The manner in which the petitioners are aggrieved.**

13 Petitioner Sierra Club Tahoe Area Group is a non-profit environmental organization  
14 dedicated to protecting the natural environment and resources of the Lake Tahoe basin and  
15 Truckee River drainage. Petitioner's members live in and around the Lake Tahoe Basin and the  
16 greater Truckee River region, and use and enjoy, the Lake Tahoe Basin, for recreational,  
17 education, economic, scientific, ecological, and aesthetic pursuits.

18 Petitioner California Sportfishing Protection Alliance is a non-profit public benefit  
19 corporation dedicated to the preservation, protection, and defense of the environment, wildlife,  
20 and natural resources of California waters. Members of CSPA reside in California and use and  
21 enjoy California's numerous rivers, including the Lake Tahoe Basin, for recreational, educational,  
22 scientific, conservation, aesthetic, and spiritual purposes.

23 Petitioners' members are therefore aggrieved by the Regional Board's action approving  
24 the NPDES permit and Basin plan exemption because it fails to protect the water quality in the  
25 region.

26 **6. The specific action by the state or regional board which petitioner requests.**

27 Petitioners seek a stay to the Regional Board's action pending review of the merits of the  
28 petition. Petitioners further request that the project approvals be vacated, and that the matter be  
remanded to the Regional Board with direction that the proposed project description does not  
satisfy the Basin Plan pesticide exemption criteria, that the Regional Board has not shown non-



1 chemical methods to be infeasible, that the environmentally superior alternative should be  
2 adopted, that the EIR does not comply with CEQA, and that the NPDES permit fails to satisfy  
3 Clean Water Act requirements, each as more fully discussed in Section IV, above.

4 **7. A statement of points and authorities in support of legal issues raised in the**  
5 **petition, including citations to documents or the transcript of the regional board**  
6 **hearing if it is available.**

7 Petitioners' arguments and points of authority are thoroughly and adequately established  
8 above. (*See supra* at section IV.) The Regional Board has prejudicially abused its discretion by  
9 approving the NPDES permit and Basin Plan exemption. Water Code § 13320; Code Civ.  
10 Procedure § 1094.5(c). The Regional Board's approval of pesticide use was rendered in violation  
11 of the Basin Plan, CEQA and the CWA.

12 Petitioners further reserve the right to submit supplemental briefing on arguments made  
13 and on issues raised by this Petition. Lastly, Petitioners will gladly respond to any additional  
14 questions the State Board may have regarding the issues in this Petition.

15 **8. The petition has been sent to the appropriate regional board and to the discharger.**


16 A true and correct copy of this Petition, with exhibits, was sent to Mike Plaziak, Executive  
17 Officer, and Robert Tucker, Regulatory Unit Chief, at the Regional Board and to Dave Peterson,  
18 President, at the Tahoe Keys Property Owners Association by U.S. mail on February 14, 2022, to  
19 2501 Lake Tahoe Blvd. South Lake Tahoe, CA 96150 and 356 Ala Wai Blvd South Lake Tahoe,  
20 CA 96150, respectively.

21 **9. The substantive issues or objections raised in the petition were raised before the**  
22 **regional board.**

23 Petitioners, as well as other members of the public, previously raised and presented all the  
24 issues addressed in this Petition through correspondence with the Regional Board. (*See, e.g.,*  
25 Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 7, Exhibit 8, Exhibit 9).

26 Date: February 14, 2022

27 Respectfully submitted,

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\_\_\_\_\_  
Jason R. Flanders  
AQUA TERRA AERIS LAW GROUP  
Attorneys for Petitioners  
Sierra Club, Tahoe Area Group  
California Sportfishing Protection Alliance