

December 17, 2015

State Water Resources Control Board
Office of Chief Counsel
Adrianna M. Crawl
P.O. Box 100
Sacramento, CA 95812-0100
waterqualitypetitions@waterboards.ca.gov

Sent via electronic mail

RE: PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100

Dear Ms. Adrianna M. Crawl:

In accordance with Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations, San Diego Coastkeeper and Coastal Environmental Rights Foundation (“Petitioners”) hereby file the attached PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100 with the State Water Resources Control Board (“State Board”) for review of the final decision of the California Regional Water Quality Control Board for the San Diego Region (“Regional Board”) in adopting the National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region; Order No. R9-2013-001, as Amended by Order Nos. R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266 (“2013 Permit”). The Regional Board adopted the final order in this matter on November 18, 2015.

An electronic copy of both the Order No. R9-2015-0100 and Attachments, and a conformed copy of Order R9-2013-0001 and Attachments, are available from the San Diego Water Board website at: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/rsd_stormwater.shtml. If you would like to receive a hard copy of either the Order or a conformed copy of R9-2013-0001, please contact me at (619-758-7743) or matt@sdcoastkeeper.org.

Sincerely,



Matt O'Malley
Legal & Policy Director

Enclosures:

PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY
CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100 with
Attachments

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION
FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
ACTION OF ADOPTING ORDER NO. R9-2015-0100 with Attachments

cc:

Distribution list below via U.S. Mail

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Orange County MS4 Copermittees

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12 Encinitas, CA 92024
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14 Attorneys for COASTAL ENVIRONMENTAL RIGHTS FOUNDATION

15 STATE OF CALIFORNIA
16 STATE WATER RESOURCES CONTROL BOARD

17 In the Matter of the Petition of San Diego)
18 Coastkeeper and Coastal Environmental Rights)
19 Foundation, for Review of Action by the)
20 California Regional Water Quality Control)
21 Board, San Diego Region, in Adopting the)
22 National Pollutant Discharge Elimination System)
23 (NPDES) Permit and Waste Discharge)
24 Requirements for Discharges from the Municipal)
25 Separate Storm Sewer Systems (MS4s) Draining)
26 the Watersheds Within the San Diego Region;)
27 Order No. R9-2013-001, as Amended by Order)
28 Nos. R9-2015-0001 and R9-2015-0100; NPDES)
No. CAS0109266)

PETITION FOR REVIEW OF SAN
DIEGO REGIONAL WATER
QUALITY CONTROL BOARD
ACTION OF ADOPTING ORDER
NO. R9-2015-0100

1 In accordance with Section 13320 of the California Water Code and Section 2050 of Title
2 23 of the California Code of Regulations, San Diego Coastkeeper and Coastal Environmental
3 Rights Foundation (“Petitioners”) hereby petitions the State Water Resources Control Board
4 (“State Board”) to review the final decision of the California Regional Water Quality Control
5 Board for the San Diego Region (“Regional Board”) in adopting the National Pollutant Discharge
6 Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the
7 Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego
8 Region; Order No. R9-2013-001, as Amended by Order Nos. R9-2015-0001 and R9-2015-0100;
9 NPDES No. CAS0109266 (“2013 Permit”). The Regional Board adopted the final order in this
10 matter on November 18, 2015.

11 The 2013 Permit regulates stormwater discharges from municipal separate storm sewer
12 systems (“MS4s”) and other designated stormwater discharges within defined portions of San
13 Diego County, Orange County, and Riverside County. The City of San Diego, the County of San
14 Diego, and 37 other entities, including incorporated cities, unincorporated counties, the San Diego
15 Unified Port District, and the San Diego County Regional Airport Authority, are Permittees.

16 The Permittees occupy an area encompassing Laguna Beach and Mission Viejo to the west,
17 Murietta to the east, and southward through San Diego County to the Mexico border. The areas
18 covered by the 2013 Permit include the vast majority of drainage infrastructure within
19 incorporated and unincorporated areas in every watershed within the San Diego Region.

20 In May 2013, the Regional Board adopted Order No. R9-2013-0001, which granted a
21 National Pollutant Discharge Elimination System (“NPDES”) municipal stormwater permit for
22 urban runoff discharges within the portions of the County of San Diego and 37 cities, districts, or
23 authorities within the San Diego region. The Regional Board amended Order R9-2013-001 in
24 February 2015, and then again in November 2015 by adopting Orders No. R9-2015-0001 and R9-
25 2015-0100 respectively.

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28 ///

1 1. NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS OF THE
2 PETITIONERS:

3 San Diego Coastkeeper
4 2825 Dewey Road, Suite 200
5 San Diego, CA 92106
6 Attention: Matt O'Malley, Esq. (matt@sdcoastkeeper.org)
7 (619) 758-7743

8 Coastal Environmental Rights Foundation
9 1140 South Coast Highway 101
10 Encinitas, CA, 92024
11 Telephone: 760-942-8505
12 E-mail: marco@cerf.org
13 Attention: Marco A. Gonzalez

14 2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE
15 STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR
16 RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE
17 PETITION:

18 Petitioners seek review of the Regional Board's November 18, 2015 adoption of the
19 National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge
20 Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining
21 the Watersheds Within the San Diego Region; Order No. R9-2013-001, as Amended by Order
22 Nos. R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266. A copy of the Order is
23 available from the San Diego Water Board website at:

24 http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/rsd_stormwater.shtml

25 3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT
26 OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

27 November 18, 2015.

28 4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR
FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

In approving the Permit, the Regional Board failed to act in accordance with relevant governing law, acted arbitrarily and capriciously, without substantial evidence, and without adequate findings. Specifically, but without limitation, the Regional Board:

- 1 A. Failed to make sufficient findings “to bridge the analytical gap between the
2 raw evidence and ultimate decision”—approval of the Permit. (*Topanga*
3 *Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d
4 506, 515.) The Board acted arbitrarily and capriciously because the ultimate
5 decision of adopting the Permit is not supported by the findings and the
6 findings are not supported by the weight of the evidence in the
7 administrative record, thus resulting in an abuse of discretion. (Cal. Code
8 Civ. Proc. § 1094.5.)
- 9 B. Failed to adequately respond to factually and legally specific comments
10 from public interest organizations concerning significant matters at issue,
11 such as the Permit’s incorporation of safe harbor provisions and its
12 noncompliance with state and federal anti-backsliding regulations, and the
13 Permit’s failure to comply with State Board Order WQO 2015-0075
14 requirements for safe harbors.
- 15 C. Improperly adopted safe harbor provisions that excuse compliance with the
16 2007 and Original 2013 Permit’s Receiving Water Limitations provisions in
17 some circumstances, in violation of federal anti-backsliding regulations
18 under 33 U.S.C. § 402(o) and 40 C.F.R. § 122.44(l).
- 19 D. Improperly adopted safe harbor provisions that violate requirements for
20 incorporation of total maximum daily loads (“TMDLs”) in to National
21 Pollution Discharge Elimination System permits.
- 22 E. Failed to adequately require in the Permit that certain interim and final
23 Waste Load Allocations (“WLAs”) established by applicable Total
24 Maximum Daily Loads (“TMDLs”) are enforceable permit effluent
25 limitations. (40 C.F.R. § 122.44(d)(1)(vii)(B).)
- 26 F. Improperly adopted safe harbor provisions that violate State Board Order
27 WQ 2015-0075 requirements for inclusion of safe harbor provisions in
28 regions outside Los Angeles County.

1 G. Improperly adopted safe harbor provisions that violate State Board Order
2 WQO 2015-0075 requirements for making a specific showing that
3 application of given principles is not appropriate for region-specific or
4 permit-specific reasons.
5

6 5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED:

7 Petitioners are non-profit, environmental organizations that have a direct interest in
8 protecting the quality of San Diego County’s aquatic health and resources, including San Diego
9 Bay, the San Diego River, the Pacific Ocean, and other San Diego area waters, as well as the
10 health of beachgoers and other users.

11 San Diego Coastkeeper (“Coastkeeper”) is a non-profit organization dedicated to the
12 preservation, protection, and defense of the rivers, creeks and coastal waters of San Diego County
13 from all sources of pollution and degradation. Coastkeeper represents members who live and/or
14 recreate in and around the San Diego area.

15 Coastal Environmental Rights Foundation (“CERF”) is an environmental organization
16 dedicated to the protection and enhancement of coastal natural resources and the quality of life for
17 coastal residents, including the coastline and lagoons in and around San Diego County. CERF
18 engages in community activism, and participates in governmental hearings for the past, present,
19 and future environmental impacts on the oceans and beaches. Members of CERF live in areas of
20 the Regional Board’s jurisdiction that are impacted by the Amended 2013 Permit’s environmental
21 effects.

22 Petitioners’ members recreate in and around the waters to which the Amended 2013 Permit
23 regulates discharges of stormwater runoff and are impacted by pollution in stormwater runoff and
24 its resulting health impacts, and by beach closures which restrict the ability of residents and
25 visitors in San Diego County to use the beach and local waters for recreation and other purposes.
26 In particular, Petitioners’ members directly benefit from San Diego County waters in the form of
27 recreational swimming, surfing, diving, photography, birdwatching, fishing, scientific study, and
28 boating. Petitioners’ members are aggrieved by the Amended 2013 Permit’s inadequacy to control

1 polluted urban stormwater runoff or support the beneficial uses of the receiving waters in
2 accordance with the Clean Water Act.

3 The Regional Board's failure to adequately control urban stormwater runoff through the
4 Amended 2013 Permit, or to assure that the Amended 2013 Permit's provisions meet the
5 requirements of the Clean Water Act and assure that pollution in stormwater discharges will not
6 degrade the region's waters, has enormous consequences for San Diego County residents and
7 Petitioners' members. Urban stormwater runoff is one of the largest sources of pollution to the
8 coastal and other receiving waters of the nation, and is a particularly severe problem in the San
9 Diego region. Waters discharged from municipal storm drains carry bacteria, metals, and other
10 pollutants at unsafe levels to rivers, lakes, and beaches in San Diego County. This pollution has
11 damaging effects on both human health and aquatic ecosystems, causing increased rates of human
12 illness and resulting in an economic loss of tens to hundreds of millions of dollars every year from
13 public health impacts alone. The pollutants also adversely impact aquatic animals and plant life in
14 receiving waters.

15 Receiving waters in the Permittees' jurisdiction continue to be impaired for a variety of
16 pollutants, and monitoring data show that stormwater discharges continue to contain pollutants at
17 levels that can cause or contribute to these impairments.

18 Urban development increases impervious land cover and exacerbates problems of
19 stormwater volume, rate, and pollutant loading. Consequently, San Diego County's high rate of
20 urbanization and persistent water quality problems demand that the most effective stormwater
21 management tools be required. The Amended 2013 Permit, however, often lacks clear,
22 enforceable standards, and weakens provisions that were required by the previous 2007 San Diego
23 County MS4 permit, as well as the Original 2013 permit, which prohibit discharges of stormwater
24 from causing or contributing to violations of water quality standards.

25 All of these documented facts demonstrate the considerable negative impact on Petitioners'
26 members and the environment that continues today as a result of the Regional Board's inadequate
27 efforts to control stormwater pollution through the Amended 2013 Permit.

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1 6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH
2 PETITIONERS REQUEST:

3 Petitioners seek an Order by the State Board that:

4 Overturns the illegal provisions of the National Pollutant Discharge Elimination
5 System (NPDES) Permit and Waste Discharge Requirements for Discharges from
6 the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds
7 Within the San Diego Region; Order No. R9-2013-001, as Amended by Order Nos.
8 R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266.

9 Or, alternatively, remands the matter to the Regional Board with specific direction
10 to the Board to remedy each of its violations of law as further described herein.

11 7. A STATEMENT IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

12 See, Section 4, above. Petitioners have enclosed a separate Memorandum of Points and
13 Authorities in support of this Petition.

14 8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE
15 REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT THE PETITIONERS:

16 A true and correct copy of this petition was delivered by electronic mail to the Regional
17 Board Executive Officer David Gibson on December 17, 2015. A true and correct copy of this
18 petition was also mailed via First Class mail on December 17, 2015 to the Regional Board and the
19 Permittees.

20 9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN
21 THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD OR AN
22 EXPLANATION OF WHY THE PETITIONERS WERE NOT REQUIRED OR WERE
23 UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE
24 THE REGIONAL BOARD.

25 All of the substantive issues and objections raised herein were presented to the Regional
26 Board during the period for public comment on the draft Permit, including during public comment
27 periods during the original 2013 adoption, the February 2015 amendments, and the November
28 2015 amendments. Petitioners submitted written comments on January 11, 2013 and September
10, 2015. Petitioners presented testimony before the Regional Board during public hearings on

1 April 10 and 11, 2013, May 8, 2013, as well as subsequent amendment hearings on February 11,
2 2015, and November 18, 2015.

3
4 Respectfully submitted via electronic mail,

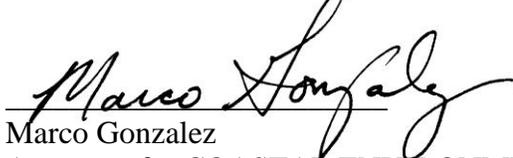
5
6 Dated: December 17, 2015

7 SAN DIEGO COASTKEEPER

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11 COAST LAW GROUP LLP

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14 Marco Gonzalez
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16 FOUNDATION
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PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1140 S. Coast Highway 101, Encinitas CA 92024.

On December 17, 2015 I served the within document described as **PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100** on the following interested parties in said action by placing a true copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid, addressed as follows:

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8 Executed on December 17, 2015, at San Diego, California.

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13
14 In the Matter of the Petition of San Diego) MEMORANDUM OF POINTS AND
Coastkeeper and Coastal Environmental Rights) AUTHORITIES IN SUPPORT OF
15 Foundation, for Review of Action by the) PETITION FOR REVIEW OF SAN
California Regional Water Quality Control) DIEGO REGIONAL WATER
16 Board, San Diego Region, in Adopting an Order) QUALITY CONTROL BOARD
Amending the National Pollutant Discharge) ACTION OF ADOPTING ORDER
17 Elimination System (NPDES) Permit and Waste) NO. R9-2015-0100
18 Discharge Requirements for Discharges from the)
Municipal Separate Storm Sewer Systems)
19 (MS4s) Draining the Watersheds Within the San)
20 Diego Region; Order No. R9-2013-0001, as)
Amended by Order Nos. R9-2015-0001 and R9-)
21 2015-0100; NPDES No. CAS0109266)

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1 **I. INTRODUCTION**

2 This petition seeks review of a pollution discharge permit that is both unlawful and
3 inadequate to protect the region’s waters or the public health. The San Diego Regional Water
4 Quality Control Board’s (“Regional Board” or “Board”) Amended 2013 permit for San Diego
5 County municipal separate storm sewer systems (“MS4s”)¹ is an unfortunate step backwards in
6 efforts to improve water quality. The Amended 2013 Permit, and the process the Regional Board
7 followed in adopting it, were both flawed, and impermissibly weaken or “backslide” from the
8 requirements of the 2007² and Originally adopted 2013 San Diego MS4 permits.³ The critical—
9 but by no means only—flaw of the Amended 2013 Permit is that it abandons requirements to
10 comply with both narrative and numeric water quality standards in receiving waters as a means of
11 protecting water quality. For the reasons discussed below, Petitioners respectfully request that the
12 State Water Resources Control Board (“State Board”) overturn these unlawful provisions of the
13 Amended 2013 Permit, or remand the matter to the Regional Board with specific direction to
14 remedy the provisions of the Amended 2013 Permit that violate state and federal law and fail to
15 comply with State Board Order WQ 2015-0075.⁴

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18 ¹ National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge
19 Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining
20 the Watersheds Within the San Diego Region; Order No. R9-2013-001, as Amended by Order
21 Nos. R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266 (“Amended 2013 Permit”).

22 ² Waste Discharge Requirements for Discharges of Urban Runoff From The Municipal Separate
23 Storm Sewer Systems (Ms4s) Draining The Watersheds Of The County Of San Diego, The
24 Incorporated Cities Of San Diego County, The San Diego Unified Port District, And The San
25 Diego County Regional Airport Authority; Order No. R9-2007-0001; NPDES NO. CAS0108758
26 (“2007 Permit”).

27 ³ National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge
28 Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining
the Watersheds Within the San Diego Region; Order No. R9-2013-0001, NPDES No.
CAS0109266 (“Original 2013 Permit”).

⁴ *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste
Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within
the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the
City of Long Beach MS4*, State Board Order No. WQ 2015-0075 (June 16, 2014) (“Order WQ
2015-0075”).

1 The Amended 2013 Permit is unlawful due to its inclusion of safe harbors from
2 provisions—required by the 2007 and Original 2013 Permit—that require that discharges comply
3 with Water Quality Standards. The safe harbors, provisions that excuse compliance with Water
4 Quality Standards in the Permit’s Receiving Water Limitations section, are illegal for four
5 principal reasons: 1) the safe harbors violate federal anti-backsliding requirements; 2) the safe
6 harbors violate requirements for incorporation of total maximum daily loads (“TMDLs”) into
7 National Pollutant Discharge Elimination System permits; 3) the safe harbor provisions violate
8 State Board Order WQ 2015-0075 requirements for inclusion of safe harbor provisions in regions
9 outside Los Angeles County; and, 4) the Regional Board failed to make sufficient findings or
10 provide evidence in the record to support the inclusion of the safe harbors in the Amended 2013
11 Permit.

12 These violations of law present compelling reasons for the State Board to exercise its
13 statutory duty to correct the unlawful actions of the Regional Board. These corrections are
14 seriously needed to protect the waters of San Diego County and the public health.

15 **A. Factual Background**

16 **1. Monitoring demonstrates that the San Diego County MS4s discharge 17 pollution to receiving waters**

18 The stormwater systems regulated by the 2013 Permit discharge bacteria, metals, and other
19 pollutants at unsafe levels to rivers, lakes, and beaches in San Diego County. This pollution
20 causes increased rates of human illness, harm to the environment, and economic losses from public
21 health impacts. As the Regional Board itself acknowledges:

- 22 • “Storm water and non-storm water discharges from the MS4s contain pollutants that
23 cause or threaten to cause a violation of surface water quality standards” (Amended
24 2013 Permit, at 3, Finding 8);
- 25 • “The most common pollutants in runoff discharged from the MS4s include total
26 suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy
27 metals...nutrients...and trash. As operators of the MS4s, the Copermittees cannot
28 passively receive and discharge pollutants from third parties. By providing free and
open access to an MS4 that conveys discharges to waters of the U.S., the operator
essentially accepts responsibility for discharges into the MS4 that it does not prohibit

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or otherwise control. These discharges may cause or contribute to a condition of pollutions or a violation of water quality standards.” (*Id.* at 4, Finding 12); and

- “The Copermittees’ water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for runoff-related pollutants and various watershed monitoring stations. Persistent toxicity has also been observed at several watershed monitoring stations. In addition, bioassessments data indicate that the majority of the monitored receiving waters have Poor to Very Poor Index of Biological Integrity (IBI) ratings. These findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in the San Diego Region. Non-storm water discharges from the MS4s have been shown to contribute significant levels of pollutants and flow...and contribute significantly to exceedances of applicable receiving water quality objectives.” (*Id.* at 5, Finding 14);

The pollutants that impair the region’s waters come in large part from the MS4s subject to the permit at issue. Monitoring data from mass emission stations in area streams and rivers demonstrate that the MS4s persistently cause or contribute to violations of Water Quality Standards and cleanup targets (total maximum daily loads or “TMDLs”) in San Diego area water bodies.

2. Controlling stormwater pollution provides numerous economic and public health benefits, while stormwater pollution creates many harms

Controlling pollution from MS4 systems has far-reaching economic and social benefits for the region. As the Regional Board has found, “the benefits of the municipal stormwater management programs are expected to considerably exceed their costs.” (Fact Sheet, at F-23.) For example, the Amended 2013 Permit Fact Sheet points to a study conducted by the University of Southern California and University of California, Los Angeles that assessed the costs and benefits of MS4 permit compliance in Los Angeles County. (*Id.*) The study found that implementing non-structural systems would cost \$2.8 billion but provide \$5.6 billion in benefits. If structural systems were determined to be needed, the study found that total costs would be \$5.7 to \$7.4 billion, while benefits could reach \$18 billion. (*Id.*) Further, costs of program implementation are anticipated to be borne over many years, reducing any burden of the permittees. (*Id.*)

1 **B. Legal Background**

2 In 1972, Congress enacted the Clean Water Act (“CWA”) to “restore and maintain the
3 chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. § 1251(a); see
4 also, *NRDC v. U.S.E.P.A.*, 859 F.2d 156, 198 (D.C. Cir. 1988); *NRDC v. Costle*, 568 F.2d 1369,
5 1373 (D.C. Cir. 1977); *American Frozen Foods Inst. v. Train*, 539 F. 2d 107, 124 (D.C. Cir.
6 1976).) The Act sought to eliminate the discharge of pollutants into navigable waters by 1985, and
7 to achieve fishable and swimmable conditions, wherever possible, by 1983. (33 U.S.C. §
8 1251(a)(1)-(2).) Courts have consistently recognized that the CWA is a tough law—“strong
9 medicine.” (*Texas Municipal Power Agency v. U.S. EPA* (5th Cir. 1988) 836 F.2d 1482, 1488.)⁵

10 Overall, the Act prohibits the discharge of any pollutant from a point source into a water of
11 the United States except as in compliance with the Act. (33 U.S.C. §§ 1311(a), 1342.) “Point
12 source” is defined to mean any discrete “conveyance,” such as a pipe or channel, (33 U.S.C. §
13 1362(14)), and thus includes MS4s, which are elaborate networks of such conveyances. (33
14 U.S.C. §§ 1342(p), 1362(14).)⁶ A point source, such as an MS4, can comply with the CWA by
15 obtaining a discharge permit under the National Pollutant Discharge Elimination System
16 (“NPDES”) program. (33 U.S.C. § 1342(b), (p).)

17 The CWA requires each state to adopt Water Quality Standards (“WQSs”) for all waters
18 within its boundaries and submit them to the U.S. Environmental Protection Agency (“EPA”) for
19 approval. (33 U.S.C. §§ 1311(b)(1)(C), 1313.) WQSs include maximum permissible pollutant
20 levels that must be sufficiently stringent to protect public health and enhance water quality,
21 consistent with the uses for which the water bodies have been designated. (33 U.S.C. §

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23 ⁵ “The [Clean Water Act] is strong medicine. . . . Congress explicitly recognized that reduction of
24 the amount of effluents—not merely their dilution or dispersion—is the goal of the [Act].” (*Texas
Municipal Power Agency*, 836 F.2d at 1488.)

25 ⁶ The discharge of pollutants from an MS4, often called “polluted runoff” or “urban runoff,” is a
26 two-part problem. It includes what is often referred to as non-stormwater discharges—typically,
27 landscape irrigation flows, washwater, and other flows not related to precipitation carrying
28 herbicides, bacteria, metals, used motor oil, and other pollutants. And it includes urban
stormwater—which is basically what it sounds like—storm flows that contain pollutants from the
urban environment. (*See* 33 U.S.C. § 1342(p)(3)(B)(ii)-(iii).)

1 1313(c)(2)(A.) WQSs provide the reference point “to prevent water quality from falling below
2 acceptable levels.” (*PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology* (1994) 511
3 U.S. 700, 704 [quotation omitted].) States also must identify as impaired any water bodies that fail
4 to meet water quality standards. (33 U.S.C. § 1313(d).)

5 For impaired waters, states must establish TMDLs, which set a daily limit on the discharge
6 of each pollutant necessary to achieve water quality standards. (*Id.* § 1313(d)(1).) The TMDL
7 “assigns a **waste load allocation (WLA)** to each point source, which is that portion of the TMDL’s
8 total pollutant load, which is allocated to a point source for which a NPDES permit is required.”
9 (*Communities for a Better Env’t v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313,
10 1321 (emphasis in original).) Critically, federal law requires that “once a TMDL is developed,
11 effluent limitations in NPDES permits must be consistent with the WLA’s in the TMDL.” (*Id.*, at
12 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B).)

13 Like other NPDES permits, MS4 permits must ensure that discharges from storm sewers do
14 not cause or contribute to a violation of water quality standards. (33 U.S.C. § 1311(a); 1313;
15 1341(a); 1342(p).)⁷ Renewal permits—like the Amended 2013 Permit, at issue—may not contain
16 weaker standards than those contained in the previous permit, except under limited circumstances.
17 (33 U.S.C. § 1342(o); 40 C.F.R. § 122.44(l).) Federal and state law additionally require
18 implementation of an antidegradation policy that mandates that existing water quality in navigable
19 waters be maintained unless degradation is justified by specific findings. (See, 40 C.F.R. §
20 131.12(a)(1).)

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22 ⁷ See, e.g., State Board Order No. WQ 99-05, *Own Motion to Review the Petition of*
23 *Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03*; In
24 addition, permits for discharges from municipal storm sewers “shall require controls to reduce the
25 discharge of pollutants to the maximum extent practicable . . . and such other provisions as the
26 Administrator or the State determines appropriate for the control of such pollutants. (33 U.S.C.
27 § 1342(p)(3)(B)(iii).) This language in section 1342(p) has been held by California courts to grant
28 “the EPA (and/or a state approved to issue the NPDES permit) . . . the discretion to impose
‘appropriate’ water pollution controls in addition to those that come within the definition of
‘maximum extent practicable.’” (*Building Industry Ass’n of San Diego County v. State Water*
Resources Control Bd. (2004) 124 Cal.App.4th 866, 883 (citing *Defenders of Wildlife v. Browner*
(9th Cir. 1999) 191 F.3d 1159, at 1165–1167).)

1 **1. The 2001, 2007, and Original 2013 San Diego County MS4 Permits**

2 In 2007, the Regional Board adopted an NPDES permit for MS4s in San Diego County,⁸
3 which was intended to address the harm caused by pollutants conveyed via storm drains to surface
4 waters in the San Diego area. The permit regulated the City of San Diego, the County of San
5 Diego, and 19 other entities in San Diego County, including incorporated cities, the San Diego
6 Unified Port District, and the San Diego County Regional Airport Authority. In 2013 the Regional
7 Board adopted an NPDES permit for MS4s in the San Diego region, which expanded the regulated
8 entities to defined cities, flood control districts, and unincorporated portions of Orange and
9 Riverside counties, bringing the total number of regulated entities to 39.

10 Importantly, the 2007 Permit contained Receiving Water Limitations (“RWLs”), which
11 required permittees to comply with water quality standards. For example, the 2007 Permit
12 required, in part, that “discharges from MS4s that cause or contribute to the violation of water
13 quality standards (designated beneficial uses and water quality objectives developed to protect
14 beneficial uses) are prohibited.” (2007 Permit, at Section A.3.)⁹ The Amended 2013 Permit and
15 Original 2013 permits included similar prohibitions.¹⁰ Both the 2007 and Original 2013 Permits
16 directed the Permittees to implement control measures and other actions if discharges violate water
17 quality standards. (2007 Permit at Section A.3.a.; 2013 Permit at Section A.4). As part of an
18 “iterative process,” under the 2007 Permit, if exceedances of water quality standards persisted,
19 notwithstanding control measures, the permit directed that Permittees “shall assure compliance” by
20 preparing a compliance report that identifies the violations and adopting more stringent pollution
21 control measures to correct them. (2007 Permit, at Section A.3.a.).

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23 ⁸ “2007 Permit” – this was the third such permit issued by the Regional Board to San Diego
24 County and local municipalities. Prior permits were adopted in 1990 and 2001.

25 ⁹ Finding E. of the 2007 Permit states, “The RWL in this Order require compliance with water
26 quality standards,” and, “Compliance with receiving water limits based on applicable water quality
27 standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of
28 water quality standards and the creation of conditions of pollution.”

¹⁰ The 2013 Permit’s RWL provision reads, in part, “Discharges from MS4s must not cause or
contribute to the violation of water quality standards in any receiving waters...” (2013 Permit, at
Section II.A.2.a).

1 Complying with the 2007 and Original 2013 Permits’ iterative process assisted Permittees
2 in meeting water quality goals, but did not excuse violations of water quality standards. An earlier
3 MS4 permit for Orange County, approved by the State Board, had included language stating “the
4 permittees will not be in violation of [receiving water limitations] so long as they are in
5 compliance with [the iterative process set forth in the permit].”¹¹ EPA objected to that provision,
6 (which MS4 permits for Vallejo and Riverside County had additionally adopted), as a “safe
7 harbor,” meaning the provision deemed the permittees in compliance with the permit regardless of
8 whether Water Quality Standards were then met. In response, the State Board directed the
9 Regional Boards to include receiving water limitations language devised by EPA, without a safe
10 harbor provision, into all future MS4 permits.¹² The San Diego Regional Board followed this clear
11 directive in the 2007 and Original 2013 Permits.¹³

12 When Los Angeles County and 43 cities challenged a 2001 Los Angeles Regional Water
13 Quality Control Board (“Los Angeles Regional Board”) MS4 permit containing similar receiving
14 water limitation language (without a safe harbor) to the San Diego Permits in state court, the court
15 ruled that the Regional Board “included Parts 2.1 and 2.2,” the requirements to meet water quality
16 standards, “in the Permit without a ‘safe harbor.’” (*Id.*)¹⁴ The Los Angeles Regional Board
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19 ¹¹ See, State Board Order No. WQ 98-01, *Own Motion to Review the Petition of Environmental*
20 *Health Coalition to Review Waste Discharge Requirements Order No. 96-03*, at 6-7.

21 ¹² See, State Board WQ Order 99-05.

22 ¹³ Prior to 2007, the Regional Board adopted an MS4 Permit for San Diego (Order No. 2001-01,
23 “2001 Permit”), that similarly followed the EPA requirements and prohibited discharges that
24 caused or contributed to a violation of water quality standards. (See, 2001 Permit, at Section C.)
25 The 2001 San Diego Permit’s receiving water limitations prohibitions were challenged in state
26 court by the Building Industry Association of San Diego County. The RWLs were ultimately
27 upheld by the California Court of Appeals (*Building Industry Assn. of San Diego Cty. v. State*
28 *Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 881-83.. Requirements to meet water
quality standards have therefore been in place in the region for well over a decade.

¹⁴ See, *In re L.A. County Mun. Storm Water Permit Litigation.*, No. BS 080548 at 4-7 (L.A. Super.
Ct. Mar. 24, 2005) (“*L.A. County Mun. Stormwater*”). The court noted that, “the Regional Board
acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a ‘safe harbor,’
whether or not compliance therewith requires efforts that exceed the ‘MEP’ standard.” (*In re L.A.*
County Mun. Stormwater, at 7.) But regardless of this authority, as described above, the Court

1 supported this interpretation: “the plain meaning of these provisions is clear: they prohibit
2 discharges that cause or contribute to a ‘violation of Water Quality Standards’ [or water quality
3 objectives] or to a condition of nuisance.” As the Los Angeles Regional Water Quality Control
4 Board put simply, “[t]he Regional Board’s position . . . is that the Permit cannot be read to excuse
5 exceedances of water quality standards.”¹⁵ Finally, the Ninth Circuit confirmed the state court’s
6 interpretation of the Los Angeles 2001 MS4 Permit’s Receiving Water Limitations, holding that
7 “no such ‘safe harbor’ is present in this Permit. . . . [there is] no textual support for the proposition
8 that compliance with certain provisions shall forgive non-compliance with the discharge
9 prohibitions.”¹⁶ The 2001, 2007, and Original 2013 San Diego permits all contained similar, if not
10 identical, receiving water limitation language to the 2001 Los Angeles MS4 Permit.

11 **2. The 2012 Los Angeles County Permit and State Board Order WQ 2015-0075**

12 In 2012 the Los Angeles Regional Board adopted an MS4 Permit for Los Angeles County¹⁷
13 that contains many of the same provisions as the previous 2001 Los Angeles MS4 permit,
14 including the prohibition against discharges that cause or contribute to violations of water quality
15 standards. However, unlike the 2001 permit, the 2012 Los Angeles Permit contains safe harbors
16 that excuse compliance with that prohibition as long as permittees are developing and
17 implementing a “watershed management plan” (“WMP”) or “enhanced watershed management
18 plan” (“EWMP”). Under a WMP, a permittee is required to identify water quality priorities, select
19 watershed control measures to be implemented, and establish compliance schedules for addressing
20 water quality priorities. (2012 Los Angeles Permit, at VI.C.5.) For an EWMP, a permittee must,

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23 found that “the terms of the Permit taken, as a whole, constitute the Regional Board’s definition of
24 MEP, including, but not limited to, the challenged Permit Provisions.” (*Id.* at 7-8.)

25 ¹⁵ Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region,
26 in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed
27 Feb. 5, 2010), at 9; *see also, id.* at 4.

28 ¹⁶ *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 897.

¹⁷ Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges
Within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from
the City of Long Beach MS4, Los Angeles Regional Water Quality Control Board Order R4-2012-
0175 (“2012 Los Angeles Permit”).

1 where feasible within a given watershed, retain all stormwater runoff from the 85th percentile, 24-
2 hour storm event for the drainage areas tributary to the projects. (*Id.* at VI.C.1.g.) Permittees must
3 conduct a “reasonable assurance analysis,” (“RAA”), including a quantitative modeling analysis,
4 to assess whether the programs will result in discharges that achieve water quality based effluent
5 limitations and RWLs in the permit. (*Id.* at VI.C.1.g.; VI.C.5.b.iv(5).)

6 Numerous cities and environmental groups challenged this permit on various grounds,
7 including, as environmental groups contend, that the safe harbors violated requirements of both
8 state and federal law and that the RAA process was insufficient to determine compliance with the
9 permit’s Receiving Water Limitations. With some modifications to the permit and its
10 accompanying fact sheet, the State Board upheld the 2012 Los Angeles Permit, including the
11 challenged safe harbor provisions.¹⁸ The State Board Order has been challenged by several
12 Environmental Groups and Cities in California State Court.¹⁹

13 **3. The 2015 amendments to the 2013 San Diego MS4 Permit**

14 On November 18, 2015, the Regional Board amended the Original 2013 MS4 permit for
15 San Diego County. Similar to the prior 2007 Permit and the Original 2013 Permit, the Amended
16 2013 Permit states that, “Discharges from MS4s must not cause or contribute to the violation of
17 water quality standards in any receiving waters.” (Amended 2013 Permit, at Section A.2.a.)²⁰
18 Rather than maintaining the 2007 and Original 2013 Permits’ strict prohibition against discharges
19 that cause or contribute to an exceedance of WQs, however, the Permit instead grants permittees
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22 ¹⁸ See, Order WQ 2015-0075.

23 ¹⁹ See, e.g., Verified Petition for Writ of Mandate in *Natural Resources Defense Council, Inc. et al.*
24 *v. State Water Resources Control Board, et al.*, filed in California Superior Court for Los Angeles
25 County (July 24, 2015).

26 ²⁰ The Permit defines “Receiving Water Limitations” as: “Waste discharge requirements issued by
27 the San Diego Water Board typically include both: (1) “Effluent Limitations” (or “Discharge
28 Limitations”) that specify the technology-based or water-quality-based effluent limitations; and (2)
“Receiving Water Limitations” that specify the water quality objectives in the Basin Plan as well
as any other limitations necessary to attain those objectives. In summary, the “Receiving Water
Limitations” provision is the provision used to implement the requirements of the CWA section
402(p)(3)(B).” (Permit, at Attachment A, C-9.)

1 an alternative compliance option which triggers application of a safe harbor, rendering the
2 limitations inoperative in certain circumstances.

3 In both the Original and Amended 2013 Permits, dischargers are required to develop Water
4 Quality Improvement Plans ("WQIPs"). (Amended 2013, at Section II.B.) These programs in
5 many aspects allow a permittee to draft their own permit requirements, conditions, and schedules
6 for compliance. Under a WQIP, a permittee is required to identify water quality priorities (*id.* at
7 II.B.2.a and c.), identify MS4 sources of pollutants and stressors (*id.* at II.B.2.d), set goals to be
8 achieved (*id.* at II.B.3.a.), select watershed strategies to be implemented, (*id.* at II.B.3.), and
9 establish compliance schedules for addressing water quality priorities. (*id.* at II.B.3.(2)).

10 The 2015 amendments to the 2013 permit include a provision that allows permittees the
11 option to set additional goals and perform an additional "analysis," which, if the permittee follows,
12 grants them a safe harbor. But the Permit's instructions only vaguely require the permittees to
13 assess whether the programs will result in discharges that achieve water quality based effluent
14 limitations and RWLs in the Amended 2013 permit. (*id.* at II.B.3.c.(1)-(2)). The Permit does not
15 specify any requirement as to the type, style, or rigor of the analysis to be completed, stating only:
16 "The analysis, with clearly stated assumptions included in the analysis, must quantitatively
17 demonstrate that the implementation of the water quality improvement strategies required under
18 Provision B.3.b will achieve the final numeric goals within the schedules developed pursuant to
19 Provisions of the [WQIPs]." (*Id.* at II.B.3.(c)(1)(b)(i).) Although it is a goal of these programs to
20 ensure that stormwater discharges do not cause or contribute to exceedances of RWLs, (see, e.g.,
21 *id.* at II.B.3.), and that TMDL WLAs are achieved, it is not a requirement that the programs
22 achieve these results in fact. If they participate in WQIP and perform the safe harbor analysis,
23 permittees are instead given a safe harbor from the prohibition on violations of RWLs or, in some
24 cases, of TMDL limits.

25 More specifically, after approval of a Permittee's WQIP and separate safe harbor analysis
26 by the Regional Board or the Board's Executive Officer, a safe harbor removes liability for a
27 violation of all RWLs if the WQIP and additional alternative compliance analysis addresses that
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1 pollutant/waterbody combination, regardless of whether or not compliance with the RWL is
2 actually achieved:

3 Each Copermittee that voluntarily completes the requirements of Provision
4 B.3.c.(1) is deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2.a, and
5 A.3.b for the pollutants and conditions for which numeric goals are developed
6 when...accepted by the San Diego Water Board. (Amended 2013 Permit, at
7 II.B.3.c.(2))

8 The safe harbors include relief from RWL compliance after a plan is submitted to and
9 approved by the Regional Board, and when the specific RWL (or combination of water quality
10 standard and waterbody) at issue is already addressed by a TMDL.²¹ Effectively, like the 2012
11 Los Angeles Permit's WMPs and EWMPs, WQIPs include prioritization of watershed conditions
12 and pollutants,²² and contain numeric interim and final goals aimed at achieving RWLs.²³
13 Unfortunately like the 2012 Los Angeles Permit, permittees are granted a safe harbor for
14 participating in the specified program. And unfortunately unlike the Los Angeles Permit, the
15 Amended 2013 Permit's WQIPs do not require an RAA to be completed or any type of modeling
16 or detailed analysis, nor do they require proof that the chosen actions and timeframes of the
17 permittees will result in the attainment of RWLs and WQSs.

18 **II. STANDARD OF REVIEW**

19 The State Board must exercise its independent judgment as to whether a Regional Board
20 action is reasonable. (See, *Stinnes-Western Chemical Corp.*, State Board WQ Order No. 86-16
21 (1986).) Specifically, the State Board's review is equivalent to the standard a reviewing court
22 would apply under California Code of Civil Procedure Section 1094.5, (*id.*), which states "[a]buse
23 of discretion is established if the respondent has not proceeded in the manner required by law, the
24 order or decision is not supported by the findings, or the findings are not supported by the
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26 ²¹ In this last case, in some circumstances the Amended 2013 Permit also provides a safe harbor
27 for compliance with either interim or final TMDL limits, or both.

28 ²² *Id.*, Section B.2.

28 ²³ *Id.*, Section B.3.

1 evidence.” (Cal. Civ. Proc. Code § 1094.5(b); see also, *Zuniga v. San Diego County Civil Serv.*
2 *Comm’n* (2006) 137 Cal.App.4th 1255, 1258 (applying same statutory standard).) “Where it is
3 claimed that the findings are not supported by the evidence, . . . abuse of discretion is established if
4 the court determines that the findings are not supported by the weight of the evidence.” (Cal. Civ.
5 Proc. Code § 1094.5(c).)

6 The administrative decision must be accompanied by findings that allow the court
7 reviewing the order or decision to “bridge the analytic gap between the raw evidence and ultimate
8 decision or order.” (*Topanga Ass’n for a Scenic Cmty. v. County of San Diego* (1974) 11 Cal.3d
9 506, 515.) This requirement “serves to conduce the administrative body to draw legally relevant
10 sub-conclusions supportive of its ultimate decision . . . to facilitate orderly analysis and minimize
11 the likelihood that the agency will randomly leap from evidence to conclusions.” (*Id.* at 516.)
12 “Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming
13 explorations; it would have to grope through the record to determine whether some combination of
14 credible evidentiary items which supported some line of factual and legal conclusions supported
15 the ultimate order or decision of the agency.” (*Id.* at 516, n.15.)

17 **III. ARGUMENT**

18 **A. The Amended 2013 Permit Creates Illegal Safe Harbors that Exempt Compliance** 19 **with Receiving Water Limitations in Some Circumstances, in Violation of Federal** 20 **Anti-Backsliding Requirements**

21 Rather than maintaining the 2007 Permit’s (and Original 2013 Permit’s) prohibitions
22 against discharges that cause or contribute to an exceedance of water quality standards, the
23 Amended 2013 Permit creates safe harbors that exempt compliance with the Receiving Water
24 Limitations for Permittees that have an approved WQIP and safe harbor analysis.²⁴ These safe
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26 ²⁴ The Ninth Circuit defined a “safe harbor” as “the proposition that compliance with certain
27 provisions shall forgive non-compliance with the discharge prohibitions.” (*Natural Resources*
28 *Defense Council, Inc. v. County of San Diego* (9th Cir. 2011) 673 F.3d 880, 897 (cert. granted on
other grounds).) The State Board additionally uses the term to describe conditions in the 2012 Los

1 harbors violate the CWA’s anti-backsliding requirements and other federal and state regulations,
2 and render the Amended 2013 Permit unlawful.

3 The Clean Water Act and federal regulations prohibit backsliding, or weakening of permit
4 terms, from the previous permit. Section 402(o)(1) of the Clean Water Act requires that, for
5 effluent limitations based on a state standard, “a permit may not be renewed, reissued, or modified
6 to contain effluent limitations which are less stringent than the comparable effluent limitations in
7 the previous permit,” except in circumstances not present here. (33 U.S.C. § 1342(o)(1).)
8 Similarly, federal regulations require that “when a permit is renewed or reissued, interim effluent
9 limitations, standards or conditions must be at least as stringent as the final effluent limitations,
10 standards, or conditions in the previous permit. . . .” (40 C.F.R. § 122.44(l)(1).) The Amended
11 2013 Permit flatly violates these federal requirements.

12 Specifically, the Amended 2013 Permit creates safe harbors by deeming a Permittee to be
13 in compliance with the Permit’s RWLs (which were required by the 2001, 2007, and Original 2013
14 Permits), if they develop a WQIP and perform a safe harbor analysis. If a Permittee meets the
15 program requirements for a WQIP and its safe harbor analysis is approved by the Regional Board
16 or Executive Officer, it *legally* complies with the Amended 2013 Permit’s RWLs, regardless of
17 whether the RWLs are *actually* achieved; under this scheme, the Amended 2013 Permit’s
18 Receiving Water Limitations are *not* operative. The safe harbors violate federal and state law.

19 **1. The safe harbors render the Receiving Water Limitations less stringent than in**
20 **the 2007 or Original 2013 Permits**

21 The Permit allows a Permittee participating in a WQIP and that receives approval of its
22 analysis to comply with Receiving Water Limitations, even if a Permittee’s discharges actually
23 cause or contribute to an exceedance of the Receiving Water Limitations, including violations of
24 Water Quality Standards. By contrast, the 2007 and Original 2013 Permits required compliance
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28 Angeles Permit. (See, e.g., State Board Order No. WQ 2015-0075, at 49.) As stated above, the
Amended 2013 Permit unfortunately establishes just such a program.

1 with WQSs. Thus, the Amended 2013 Permit excuses discharges of pollution and violations of
2 WQSs that the 2007 Permit (and Original 2013 Permit) prohibited.

3 **2. The Receiving Water Limitations cannot be weakened unless consistent with**
4 **1313(d)(4) or 402(o)**

5 Section 402(o) of the Clean Water Act (33 U.S.C. § 1342(o)), generally prohibits
6 relaxation of, among other things, an effluent limitation “necessary to meet water quality standards
7 . . . schedules of compliance, established pursuant to any State law or regulations . . . or any other
8 Federal law or regulation, or required to implement any applicable water quality standard
9 established pursuant to” the CWA. (See, 33 U.S.C. § 1342(o)(1); 33 U.S.C. § 1311(b)(1)(C).)²⁵
10 Although a permit may contain less stringent requirements if the change is consistent with the
11 requirements of 33 U.S.C. § 1313(d)(4) or the enumerated exceptions in section 402(o)(2), the safe
12 harbors in the Amended 2013 Permit satisfy none of these conditions.

13 ***a. The Receiving Water Limitations Are Covered by Anti-Backsliding***
14 ***Requirements as “Effluent Limitations” and “Standards or Conditions” of***
15 ***the 2007 Permit***

16 The Clean Water Act defines the term “effluent limitation” broadly, as “any restriction
17 established by a State or the Administrator on quantities, rates, and concentrations of chemical,
18 physical, biological, and other constituents which are discharged from point sources. . . .” (33
19 U.S.C. § 1362(11).) By prohibiting the “discharge” of any pollutant in quantities sufficient to
20 cause or contribute to an exceedance of Receiving Water Limitations, the RWLs easily fit within
21 this sweeping definition.²⁶ (See also, *NRDC v. U.S.E.P.A.* (D.C. Cir. 1981) 656 F.2d 768, 775-76

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23 ²⁵ We note that EPA has recognized that providing additional time for compliance for a provision
24 required by the previous permit violates anti-backsliding requirements. (Letter from Jon M.
25 Capacasa, Director Water Protection Division, EPA Region III to Jay Sakai, Maryland Department
26 of the Environment, re: Specific Objection to Prince George’s County Phase I Municipal Separate
27 Storm Sewer System (MS4) Permit MD0068284, at 3. The additional time allotted by the new
28 Permit to achieve compliance with RWLs, required in the 2007 and Original 2013 Permits, for
Permittees who have conducted some sort of analysis of their WQIPs, constitutes a less stringent
limitation.

²⁶ The State Board states that “section 402(o) prohibits relaxing effluent limitations imposed
pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e). The receiving water

1 (as a practical matter the limitation restricted the discharge of pollution and consequently was an
2 effluent limitation), *NRDC v. U.S.E.P.A.* (D.C. Cir. 1982) 673 F.2d 400, 403 (33 U.S.C. §
3 502(11) “defines ‘effluent limitation’ as ‘any restriction’, not just numeric limitations”).)

4 In addition, the RWLs constitute “standards” or “conditions” protected by anti-backsliding
5 requirements under 40 C.F.R. § 122.44(l). EPA’s anti-backsliding regulations require that
6 “effluent limitations, *standards or conditions* must be at least as stringent as the final effluent
7 limitations, *standards, or conditions* in the previous permit. . . .” (40 C.F.R. § 122.44(l)(1)
8 (emphasis added).) These requirements apply to permit conditions, rather than permit limitations,
9 even where the conditions are based on water quality considerations. Thus, even if section 402(o)
10 were inapplicable, which it is not, the prohibition on anti-backsliding contained in 40 CFR
11 122.44(l) applies to the RWLs as conditions. Because in either case the Amended 2013 Permit
12 weakens the Receiving Water Limitations as compared with the 2007 (and Original 2013 Permits),
13 it violates anti-backsliding requirements. In addition, as discussed below, the exemptions and
14 exceptions to anti-backsliding do not apply here.

15 ***b. The safe harbors do not qualify under section 1313(d)(4) as exceptions to***
16 ***the anti-backsliding rule***

17 Section 1313(d)(4) restricts what effluent limitations may be revised in a renewal permit.
18 First, where water quality standards are not being attained (see 33 U.S.C. § 1313(d)(4)(A)), a less
19 stringent effluent limitation based on a TMDL or other WLA is allowed in a renewal permit only if
20 “the cumulative effect of all such revised effluent limitations based on such total maximum daily
21 load or waste load allocation will assure the attainment of such water quality standard,” or if the
22 designated use is removed. (33 U.S.C. § 1313(d)(4)(A).) Second, for waters that are meeting
23 applicable water quality standards, (under 33 U.S.C. § 1313(d)(4)(B)), a limitation based on a
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26 limitations provisions in the 2001 Los Angeles MS4 Order were not established based on either
27 section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.
28 The receiving water limitations provisions in MS4 permits are imposed under section
402(p)(3)(B). . . .” (State Board Order WQ 2015-0075, at 19-20.) Petitioners disagree with this
narrow construction of the Act.

1 TMDL or Water Quality Standard may only be weakened if it is consistent with the applicable
2 state antidegradation policy. (33 U.S.C. § 1342(o)(1).)

3 Neither of these conditions has been met. First, for waters that are failing to meet WQSs,
4 the Amended 2013 Permit fails to demonstrate that the revised standards will assure WQSs will be
5 attained. Second, where waters are currently attaining WQSs, the Permit fails to provide required
6 analysis consistent with the state’s antidegradation policy.²⁷ These allowances violate the anti-
7 backsliding requirements once a WQIP and accompanying safe harbor alternative compliance
8 option analysis has been approved, and during the plan’s implementation.

9 ***c. The safe harbors do not qualify under section 402(o)(2) of the CWA or 40***
10 ***C.F.R. § 122.44(l) as exceptions to the anti-backsliding rule***

11 Although section 402(o)(2) lists a series of exceptions to the otherwise applicable anti-
12 backsliding requirements, none applies to this permit. The law’s exemptions include:

13 (A) material and substantial alterations or additions to the permitted facility
14 occurred after permit issuance which justify the application of a less stringent
15 effluent limitation; (B)(i) information is available which was not available at the
16 time of permit issuance . . . and which would have justified the application of a less
17 stringent effluent limitation at the time of permit issuance; or (ii) the Administrator
18 determines that technical mistakes or mistaken interpretations of law were made in
19 issuing the permit under section (a)(1)(B) of this section; (C) a less stringent
20 effluent limitation is necessary because of events over which the permittee has no
21 control and for which there is no reasonably available remedy; (D) the permittee
22 has received a permit modification under [various other sections] of this title; or (E)
23 the permittee has installed the treatment facilities required to meet the effluent
24 limitations in the previous permit and has properly operated and maintained the

22 ²⁷ We note as well that any action by a Regional Board, including permit issuance, that would
23 result in lower water quality—either in high quality or impaired waters—must be analyzed to
24 ensure consistency with state and federal antidegradation policy. Further, because a receiving
25 water can be considered high quality for one beneficial use, and impaired for others, the analysis
26 must be conducted pollutant by pollutant, and beneficial use by beneficial use. (*See, Asociacion*
27 *de Gente Unida for El Agua v. Central Valley Regional Board* (2012) (210 Cal.App.4th 1255) [149
28 Cal.Rptr.3d 132, 142; 144] (citing “St. Water Res. Control Bd., Guidance Memorandum (Feb. 16,
1995)); 40 CFR 131.12(a)(1); State Board Resolution 68-16; *see also In the Matter of the Petition*
of Rimmon C. Fay, State Board Order No. WQ 86-17 at 16-19 (November 20, 1986).) At no point
was this required analysis performed by the Regional Board, and so the Amended 2013 Permit
violates both state and federal policy.

1 facilities but has nevertheless been unable to achieve the previous effluent
2 limitations. . . .
3 (33 U.S.C. § 1342(o)(2).) 40 C.F.R. § 122.44(l)(2)(i) lists a similar set of exceptions for
4 applicability of anti-backsliding requirements.²⁸ In neither case do any of these exceptions apply
5 to the adoption of the Amended or Original 2013 Permit.

6 The State Board has claimed broadly, referring to safe harbor provisions developed for the
7 2012 Los Angeles Permit, that:

8 The Los Angeles Water Board makes a compelling argument . . . that the
9 development of 33 watershed-based TMDLs adopted since 2001, the inclusion and
10 implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and
11 the TMDL-specific and general monitoring and analysis during implementation,
12 have made new information available to the Los Angeles Water Board that
13 fundamentally shaped the [alternative compliance mechanism] of the Los Angeles
14 MS4 Order. The Los Angeles Water Board states that the new information resulted
15 in a new understanding that “time to plan, design, fund, operate and maintain [best
16 management practices (BMPs)] is necessary to attain water quality improvements,
and these BMPs are best implemented on a watershed scale.” The Los Angeles
Water Board further points out that, in terms of water supply, there has been a
paradigm shift in the last decade from viewing storm water as a liability to viewing
it as a regional asset, and that the Los Angeles MS4 Order was drafted to
incorporate this new paradigm into its structure.²⁹

17 The State Board additionally states, broadly applying the specific conditions of the Los Angeles
18 MS4 system and Permit to California more generally, that:

19 the more than a decade of implementation of storm water requirements, as well as
20 the development and implementation of TMDL requirements, since 2001, has, as a
21 whole, fundamentally reshaped our understanding of the physical and time scale on
22 which such measures must be implemented to bring MS4s into compliance with

23 ²⁸ 40 C.F.R. § 122.44(l)(1) additionally states that “when a permit is renewed or reissued, interim
24 effluent limitations, standards, or conditions must be at least as stringent as the final effluent
25 limitations, standards, or conditions in the previous permit (unless the circumstances on which the
26 previous permit was based have materially and substantially changed since the time the permit was
27 issued and would constitute cause for permit modification or revocation and reissuance under §
28 122.62.” 40 C.F.R. § 122.62 identifies “new information” that was “not available at the time of
permit issuance and would have justifies the application of different conditions at the time of
issuance” as cause for modification.

²⁹ State Board Order No. WQ 2015-0075, at 21.

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receiving water limitations. Further, we find that all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, regardless of the particular storm water permitting history of that region.³⁰

Yet none of the information on which the Los Angeles Regional Board and State Board rely to justify backsliding the 2012 Los Angeles Permit, or to grant broad authority to other Regional Boards to backslide in their permits, is in fact “new.” In particular, as raised by environmental groups challenging the 2012 Los Angeles Permit, watershed management approaches to the control of stormwater and implementation of TMDLs had been thoroughly contemplated prior to the adoption of the 2001 Los Angeles Permit.³¹ The “justification” by the State Board fails to qualify as an exception to the Clean Water Act’s anti-backsliding requirements.

Nor does it withstand scrutiny when applied to the circumstances of the San Diego Region. The San Diego Regional Board, citing Order WQ 2015-0075, makes a similar claim to the Los Angeles Regional Board and State Board regarding “new” information and “changed” circumstances as support for backsliding in the Revised Response to Comments for the Amended 2013 Permit:

Under 40 C.F.R section 122.44(l), anti-backsliding provision[s] do not apply if the circumstances on which the previous permit was based have materially and substantially changed since the time the previous permit was issued and would constitute cause for permit modification or revocation or reissuance under 40 CFR section 122.62. Section 122.62 in turn states that new information not available at the time the previous permit was issued is cause for modification. . . .

To the extent that the permitting history in Los Angeles may be considered “unique” in any way, it is still consistent with the San Diego Water Board’s experience with storm water permitting over the last decade. The transition to a Regional MS4 Permit in the Fifth Term Permit was driven, in part, by a growing recognition that a watershed management approach required regional action. In the [Amended 2013 Permit], the San Diego Water Board seeks to provide a consistent set of permit requirements for all of the Copermitees and to promote the efficiencies gained from collective action in jurisdictional runoff management.³²

³⁰ State Board Order No. WQ 2015-0075, at 22 n.74.

³¹ *Id.* at 21-22.

³² Regional Board, Revised Response to Comments Report (November 10, 2015, at 38.

1 However, the conditions alluded to for Los Angeles in the Amended 2013 Permit, which fail to
2 support backsliding in that Region, are almost wholly lacking for the San Diego Region³³—a
3 circumstance that led the U.S. EPA to caution that while State Board “WQ Order [2015-0075]
4 directs all Regional Boards to consider the approach in the LA MS4 permit, [the Order] does not
5 require its use. We believe it would be premature and inappropriate to require the LA MS4 permit
6 approach throughout the State.”³⁴

7 Further, the San Diego Regional Board was well aware of the benefits of watershed or
8 collective action even before the adoption of the Previous San Diego Permits. As described in
9 detail below, there have been no substantial and material changes in the San Diego region since the
10 2007 (or Original 2013) Permit. The only material and substantial change that has taken place is
11 that the Regional Board has granted permittees in the Region an ill-conceived safe harbor.³⁵ The
12 anti-backsliding requirements of section 402(o) and 44 C.F.R. section 122.44(l) prohibit the
13 adoption of safe harbors in the Amended 2013 Permit.

14 *i. Watershed, regional, and collective action are not new*
15 *approaches in MS4 Permitting for the San Diego Region*

16 The watershed management approach to stormwater control is not new but was known to
17 the Regional Board not only at the time the 2007 Permit was adopted, but when the 2001 Permit
18 was adopted as well. For example, under the header “Land Use Planning on a Watershed Scale,”
19 the 2001 Permit states clearly:

20 Because urban runoff does not recognize political boundaries, “watershed-based”
21 land use planning (pursued collaboratively by neighboring local governments) can
22 greatly enhance the protection of shared natural water resources. Such planning
23 enables multiple jurisdictions to work together to plan for both development and

24 ³³ Let alone the fact that the 11-year gap offered as validation for backsliding in the Los Angeles
25 Region is completely absent in the permitting history here.

26 ³⁴ EPA letter to SWRCB, January 2015. David Smith, Manager.

27 ³⁵ To the extent that backsliding in this instance may apply not only to the 2007 San Diego Permit,
28 but the RWLs and terms adopted for the Original 2013 Permit, justification for backsliding is all
the more lacking—there have been no material changes since the adoption of the Original 2013
Permit.

1 resource conservation that can be environmentally as well as economically
2 sustainable.

3 (2001 Permit, at 7.) The Order even *required* permittees to collaboratively develop Watershed
4 Urban Runoff Management plans to be implemented mandating that:

5 Each Copermittee shall collaborate with other Copermittees within its watershed(s)
6 . . . to identify and mitigate the highest priority water quality issues/pollutants in the
7 watershed(s). . . . Each Copermittee shall collaborate with all other Copermittees
8 discharging urban runoff into the same watershed to develop and implement a
9 Watershed Urban Runoff Management Program (Watershed URMP) for the
10 respective watershed.

11 (*Id.* at 42.) Not only did the 2007 Permit require the permittees to “implement its Watershed
12 URMP document, as the document was developed and amended to comply with the requirements
13 of [the 2001 Permit],” but it required the permittees to update their existing Watershed URMPs
14 specifically to “prevent urban runoff discharges from the MS4 from causing or contributing to a
15 violation of water quality standards”—which the Regional Board now claims as an entirely new
16 paradigm that warrants backsliding from the previous Permit’s RWL requirements.

17 Notably, the 2007 Permit’s Watershed URMP provisions required permittees, among other
18 conditions, to develop both a “Watershed Water Quality Assessment” and a “Watershed Strategy”
19 to “abate the sources and reduce the discharge of pollutants causing the high priority water quality
20 problems.” Moreover, the Regional Board even extended the reach of watershed based planning in
21 the 2007 Permit, requiring the permittees to develop a *Regional* Urban Runoff Management
22 Program.³⁶ Any claim by the Regional Board that it has only now suddenly gained a “recognition
23 that a watershed management approach required regional action” or that a safe harbor was
24 necessary to implement such action is patently false; the Previous San Diego permits already
25 incorporated this paradigm shift, and already contained watershed plans and prioritization for
26 meeting RWL requirements. It provides no justification for violating the CWA’s anti-backsliding
27 requirements.

28 ³⁶ *Id.* at 50 (the Regional Plan similarly required the permittees to prevent urban runoff discharges
from the MS4 from causing or contributing to a violation of water quality standards

1 capture and retention requirements within the San Diego permit apply to *individual* Priority
2 Development Projects for development or redevelopment,⁴⁰ and not to *regional* compliance or
3 WQIP development requirements aimed at achieving WQSs or RWLs that could benefit local
4 water supplies.

5 In fact, during a review of eight recently submitted WQIPs by San Diego permittees,
6 Petitioners found a near total lack of commitment to the development and incorporation of multi-
7 benefit regional water supply projects in the San Diego region.⁴¹ As such, while the Fact Sheet
8 claims an exception to anti-backsliding exists due to the recognition of, “the potential for
9 municipal storm water to benefit water supply,” the lack of any substantive requirements, or action
10 at all in the permit that would result in such benefits completely undermines the claim’s
11 legitimacy. Thus, even if we were to agree that this “recognition” regarding water supplies
12 provided justification for an exception to anti-backsliding requirements the permit, which we do
13 not, it is inapplicable as an exception here.

14 ***iii. The Amended 2013 Permit incorporates only one region-wide TMDL***
15 ***and a handful of TMDLs aimed at individual water bodies.***

16 The State Board and Los Angeles Regional Board’s claimed justification for an exception
17 to anti-backsliding requirements appears also to have been heavily based on the development,
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20 in local aquifers, availability of groundwater recharge, and degraded water quality,” and,
21 “groundwater supplies are less plentiful in the San Diego region than in some other areas of
22 California...” (San Diego County Water Authority website, at:

23 <http://www.sdcwa.org/groundwater>, last accessed November 23, 2015).

24 ⁴⁰ Order R9-2015-0001, Section E.3.c.(1)(a). Of note, the 2007 San Diego Permit included
25 requirements for development projects to use Low Impact Development (“LID”) “BMPs where
26 feasible which maximize infiltration, provide retention, slow runoff, minimize impervious
27 footprint, direct runoff from impervious areas into landscaping, and construct impervious surfaces
28 to minimum widths necessary,” (Order No. 2007-0001, at D.1.), so this approach cannot be
considered “new” information justifying an exception to anti-backsliding requirements either.

⁴¹ See: September 10, 2015 letter from Environmental Groups: “*Re: Environmental Groups*
Comments on Tentative Order R9-2015-0100; Receiving Water Limitations Alternative
Compliance Pathway”, at pp. 13-14. Found at:

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0909_ENV_Environmental_Groups.pdf. Last accessed December 16, 2015.

1 monitoring, and analysis of 33 TMDLs developed in the Los Angeles region. As the Fact Sheet
2 for the 2012 Los Angeles Permit States, “The watershed management . . . provisions of this Order
3 were informed by new information available to the Board from experience and knowledge gained
4 through the process of developing 33 watershed-based TMDLs and implementing several of the
5 TMDLs since the adoption of the [2001 Los Angeles] Permit.”⁴² Both the State Board and Los
6 Angeles Board emphasize the role that TMDLs will play in achieving RWLs through the Los
7 Angeles Permit’s watershed program provisions, as the State Board concludes:

8 We expect that the Los Angeles MS4 Order’s TMDL requirements and receiving
9 water limitations . . . will be the means for achieving water quality standards for the
10 majority of degraded water bodies in the region”

11 (State Board Order WQ 2015-0075, p. 26). The Los Angeles Regional Board stated even more
12 directly that “the majority of pollutants of concern from the LA County MS4 are addressed by the
13 33 TMDLs that are included in the Permit”⁴³ and expressly recognized “implementation of
14 TMDLs as the highest priority” of the Permit.⁴⁴

15 The San Diego Regional Board relies on the Los Angeles Regional Board’s experience to
16 justify their own inclusion of a safe harbor in the Amended 2013 Permit, stating that the Amended
17 2013 Permit’s safe harbor provision:

18 qualifies for an exception to backsliding as based on new information. The
19 alternative compliance pathway option . . . was informed by new information
20 available to the Board from experience and knowledge storm water permitting at
21 the Regional Water Boards in the last ten years . . . in particular, the Los Angeles
22 Water Board’s process of developing over 30 water-shed based TMDLs. . . (Fact
23 Sheet at p. F-32).

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25 ⁴² 2012 Los Angeles Permit Fact Sheet, at F-21. *See also* Order WQ 2015-0075, at 21.

26 ⁴³ Los Angeles Regional Board, *In re Petitions Challenging 2012 Los Angeles Municipal Separate*
27 *Storm Sewer System MS4 Permit (Order No. R4-2012-0175): Los Angeles Water Board Response*
28 *to Petitions*, October 15, 2013, at 37.

⁴⁴ *Id.* at 40.

1 But the San Diego Regional Board can point to only a single region-wide TMDL, for bacteria, it
2 has passed since its last permit, and the Region itself has only six water body-specific TMDLs in
3 total.

4 Nor does the Regional board appear committed to following this path laid out in Los
5 Angeles County, eschewing development of TMDLs in favor of alternative schemes, such as
6 recently for Oceanside’s Loma Alta Slough (for biostimulatory substances) and the Tijuana River
7 Valley (for impairments of sedimentation and trash). These alternative processes, however, lack
8 the strict interim and final milestones and deadlines for achieving RWLs and objectives that are
9 found in TMDLs,⁴⁵ and the Regional Board’s claims of “new information” ring hollow when the
10 San Diego Region has so few TMDLs to substantiate the claim. The Regional Board’s
11 justification for an exception to the CWA’s anti-backsliding requirements must fail, and if
12 anything, the lack of strict controls and accountability in addressing water quality impairments for
13 the Region only makes it more imperative that the Permit’s RWLs remain operative.

14 **d. The Safe Harbors Violate Section 402(o)(3)’s Prohibition Against**
15 **Changes that Would Result in a Violation of Applicable Water Quality**
16 **Standards**

17 Even if the Amended 2013 Permit’s safe harbors complied with the above anti-backsliding
18 requirements, which they do not, they would still be unlawful under section 402(o)(3), which
19 provides an absolute limitation on backsliding. Section 402(o)(3) requires that in no event shall a
20 permit “be renewed, reissued, or modified to contain a less stringent effluent limitation if the
21 implementation of such limitation would result in a violation of a water quality standard” under
22 U.S.C. § 1313. (33 U.S.C. § 1342(o)(3).) Thus, even if one of the claimed backsliding exceptions
23 is applicable here, CWA section 402(o)(3) acts as a floor and restricts the extent to which effluent
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25 ⁴⁵ While the Fact Sheet states that for water bodies listed on the State’s CWA Section 303(d) List,
26 the “San Diego Water Board has established TMDLs to address the impairments,” Environmental
27 Groups find this statement to be disingenuous. In actuality the San Diego Board has adopted few
28 TMDLs and has in fact failed to adopt TMDLs for two known impairments for which the TMDL
process had already begun.

1 limitations may be relaxed. The Amended 2013 Permit, by explicitly excusing violations of
2 Receiving Water Limitations which prohibit discharges that cause or contribute to a violation of
3 WQSs, fails to meet this federally mandated minimum level of protection.⁴⁶

4 **B. The Permit Unlawfully Fails to Incorporate Waste-Load Allocations Consistent**
5 **With Applicable TMDLs**

6 The Clean Water Act relies on TMDLs to restore water bodies that fail to meet water
7 quality standards. TMDLs establish a clear and scientifically-driven pathway towards protecting
8 beneficial issues for public health and aquatic life. The CWA and its implementing regulations
9 require that NPDES permits are consistent with the assumptions and requirements of TMDL
10 WLAs. (40 C.F.R. § 122.44(d)(1)(vii)(B).) Consistent with EPA regulations, the MS4-related
11 WLAs for TMDLs adopted in the San Diego Region must be properly reflected in the MS4 Permit.

12 Although all permit terms must be consistent with the assumptions and requirements of
13 WLAs established in TMDLs, (40 C.F.R. § 122.44(d)(1)(vii)(B)), the Amended 2013 Permit
14 inexplicably excuses compliance with interim WLAs and may eliminate final WLAs. By
15 providing this alternative means of demonstrating compliance, the Regional Board thus creates a
16 safe harbor from interim and final TMDL requirements and incorporates a provision that is
17 inconsistent with the WLAs. Under this regime, there is no assurance that actual final TMDL
18 limits, established to achieve WQSs and protect beneficial uses, will ever be met in waterbodies
19 throughout San Diego County.⁴⁷

21 ⁴⁶ Similar to Section 402(o)(3) of the Clean Water Act, 40 C.F.R. section 122.44(1)(ii) states:
22 “(ii) Limitations. In no event may a permit with respect to which paragraph (1)(2) of this section
23 applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent
24 than required by effluent guidelines in effect at the time the permit is renewed, reissued, or
25 modified. In no event may such a permit to discharge into waters be renewed, issued, or modified
26 to contain a less stringent effluent limitation if the implementation of such limitation would result
27 in a violation of a water quality standard under section 303 applicable to such waters.”

28 ⁴⁷ Finally with respect to time allowances, the appropriate way for our region, which lacks the suite
of TMDLs present in LA to address RWL issues, is through the MS4 permit and Time Schedule or
other Orders that include strict interim and final milestones for compliance rather than an excuse
from RWLs.

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C. The Amended 2013 Permit, as Drafted, Violates State Board Order WQ 2015-0075

Even if we were to accept the rationale and directives of State Board Order No. WQ 2015-0075 allowing for safe harbors to be incorporated into MS4 permits, the Amended 2013 Permit fails entirely to carry out those directives. From the start the State Board makes clear its intentions when it states that MS4 permits should “incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.”⁴⁸ The Amended 2013 Permit is neither well-defined, transparent, nor finite.

Order WQ 2015-0075 establishes specific requirements for regions outside of Los Angeles to follow should they choose to develop and adopt safe harbor provisions, stating explicitly that “[w]e expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.”⁴⁹ Of particular relevance to the Amended 2013 Permit, the State Board identifies the following principles applicable to any region's use of safe harbor provisions:

- Good faith engagement in the iterative process cannot constitute compliance with receiving water limitations.⁵⁰
- Should a region choose to adopt safe harbors in permits, the permit must include an ambitious, rigorous, and transparent alternative compliance pathway.⁵¹
- Multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply must be included as a permit requirement.⁵²
- The safe harbor must have rigor and accountability.⁵³

⁴⁸ State Board Order WQ 2015-0075, at page 16.

⁴⁹ *Id.*, pages 51-52.

⁵⁰ *Id.*, page 51.

⁵¹ *Id.*, page 52.

⁵² *Id.*

⁵³ *Id.*

- Full compliance with TMDLs is required for RWL compliance.⁵⁴

As discussed below, the Amended 2013 Permit is inconsistent with the State Board's Order insofar as it fails to follow the principles listed above or to provide any specific showing as to why the principles are not appropriate for the San Diego MS4 permit.⁵⁵

1. The Amended 2013 Permit violates Order WQ 2015-0075 because it does not contain a Reasonable Assurance Analysis or objective guidelines to ensure the permittee's analysis and resulting plan will actually achieve Receiving Water Limitations

Petitioners support the comments submitted on the 2012 Los Angeles Permit and State Board Order WQ 2015-0075 by NRDC, Los Angeles Waterkeeper, and Heal the Bay regarding the deficiencies and illegalities of the 2012 Los Angeles Permit, and agree that that permit and its inclusion of safe harbors is illegal. But to the extent that the State Board has endorsed the alternative compliance mechanism of the 2012 Los Angeles Permit, the Amended 2013 Permit is plainly deficient for its lack of a RAA or requirement for an equivalent process based on modeling that includes objective criteria, guidelines, and protocols under which watershed strategies and safe harbor analyses must be conducted.

The RAA process for permittees electing to undertake a WMP or EWMP under the 2012 Los Angeles Permit requires that:

(5) Permittees shall conduct a Reasonable Assurance Analysis for each water body pollutant combination addressed by the Watershed Management Program. A Reasonable Assurance Analysis (RAA) shall be quantitative and performed using an approved model in the public domain. Models to be considered for the RAA, without exclusion, are the Watershed Management Modeling System (WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the Structural BMP

⁵⁴ *Id.*

⁵⁵ In this regard, the San Diego Regional Board appears to have interpreted the State Board's statement that it "direct[s] all regional water boards to consider the [Los Angeles Permit's alternative compliance] approach to receiving water limitations compliance when issuing Phase I MS4 Permits going forward," (State Board Order WQ 2015-0075, at 51), and to "follow these principles" unless making a specific showing of their infeasibility, to mean "implement an alternative compliance scheme, or make a specific showing of why it is inappropriate for your region."

1 Prioritization and Analysis Tool (SBPAT). The RAA shall commence with
2 assembly of all available, relevant subwatershed data collected within the last 10
3 years, including land use and pollutant loading data, establishment of quality
4 assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and
5 identification of the data set meeting the criteria for use in the analysis. Data on
6 performance of watershed control measures needed as model input shall be drawn
7 only from peer-reviewed sources. These data shall be statistically analyzed to
8 determine the best estimate of performance and the confidence limits on that
9 estimate for the pollutants to be evaluated. The objective of the RAA shall be to
10 demonstrate the ability of Watershed Management Programs and EWMPs to ensure
11 that Permittees' MS4 discharges achieve applicable water quality based effluent
12 limitations and do not cause or contribute to exceedances of receiving water
13 limitations.⁵⁶

9 With respect to this RAA process, the State Board found that:

10 the requirement for a reasonable assurance analysis in particular is designed to
11 ensure that Permittees are choosing appropriate controls and milestones for the
12 WMP/EWMP. Competent use of the reasonable assurance analysis should
13 facilitate achievement of final compliance within the specified deadlines.⁵⁷

13 Despite this finding, however, the State Board nevertheless raised concerns over the adequacy of
14 the RAA to drive long term progress toward achieving RWLs or TMDL objectives for the region,
15 stating,

16 Given the limitations inherent in models, as well as the potential incentive to choose
17 the lowest effort and cost level predicted by the model to achieve receiving water
18 limitations, we are concerned that reliance on one initial reasonable assurance
19 analysis is insufficient to ensure that in the long term WMPs/EWMPs will achieve
20 relevant water quality goals.

19 (*Id.* at 38-39.) As a result, the State Board added a provision to amend the Los Angeles Permit to
20 require updates to the RAA, "including potentially considering whether the model itself and its
21 assumptions require updating." (*Id.* at 39).

23
24 ⁵⁶ Order No. R4-2012-0175 as amended by Order WQ 2015-0075, page 65. The guidelines issued
25 by the LA Regional Board for conducting RAA's go on to require that "the RAA must be adequate
26 to identify the required reduction for each water body-pollutant combination at each compliance
27 deadline and analyze the BMP scenario to achieve that deadline." (Guidelines For Conducting
28 Reasonable Assurance Analysis In A Watershed Management Program, Including An Enhanced
Watershed Management Program; March 25, 2014; Prepared by Nguyen, Lai, Ridgeway, and Zhu
for the Los Angeles Regional Water Quality Control Board, page 4).

⁵⁷ State Board Order WQ 2015-0075, at 37.

1 In stark contrast to the requirements of the 2012 Los Angeles Permit’s RAA process and
2 State Board required modification, in order to receive protection under the safe harbor scheme
3 contained in the Amended 2013 Permit, a permittee is only required to perform a vaguely termed
4 “analysis, with clearly stated assumptions.” (Amended 2013 permit, at Section B.3.c.1.(b).(i).)
5 The Amended 2013 Permit contains no requirement to conduct modeling or any equivalent
6 assessment to the 2012 Los Angeles Permit’s RAA, and lacks any of the criteria and requirements
7 identified by the State Board.⁵⁸ Inexplicably, the Regional Board removed earlier draft language
8 for the Amended 2013 Permit that had contained the word “model,” prior to adopting the final
9 Order.⁵⁹ The Amended 2013 permit requires no validation, peer reviewed or pre-reviewed
10 acceptable modeling methods, or minimum data requirements. In short, it requires no objective
11 guidance or protocols whatsoever.

12 Highlighting these concerns over the lack of detail in the Amended 2013 Permit’s safe
13 harbor analysis process, the EPA has commented that the Amended 2013 Permit’s safe harbor
14 provisions:

15 **provide only limited direction** concerning the Regional Board’s specific technical,
16 analytical, and planning expectations that must be met by permittees pursuing this
alternative compliance pathway.⁶⁰

17 On its face, the Amended 2013 Permit contains insufficient objectives, criteria, and guidance to
18 meet the criteria required by the State Board in Order or to ensure that RWLs for the region will be
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20 ⁵⁸ Even the permittees themselves have complained that the regulations governing WQIP
21 development are unclear and subjective. The above issue was brought to light recently in the
22 Regional Board’s review of the final submitted WQIPs by permittees; Regional Board staff
ultimately found most, if not all, originally submitted WQIPs to be noncompliant with the permit.
See:

23 [http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/wqip/comments/
24 SDWB.pdf](http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/wqip/comments/SDWB.pdf) last accessed December 16, 2015.

25 ⁵⁹ Language from May 2015 Draft, found at
[http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-
26 0514_Revised_Draft_RWL.pdf](http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0514_Revised_Draft_RWL.pdf). While the May 2015 language itself was also inconsistent with
the State Board Order for failure to include RAAs and other guidance, it did at the very least
27 mention modeling as the acceptable methodology.

28 ⁶⁰ EPA email to Laurie Walsh, Regional Board, November 16, 2015, from David Smith, EPA,
Manager NPDES Permits Section. Emphasis added.

1 met. Instead, what results from the Amended 2013 Permit is a subjective, ad-hoc process and
2 review without objective standards or guidance. Lacking any semblance of detail or clarity with
3 respect to obligations of the permittees, the Amended 2013 Permit is not “rigorous,” “well-
4 defined,” or “transparent,” and is inconsistent with the State Board’s Order.⁶¹

5 Importantly the lack of an RAA, standards, and guidance exists not only as related to the
6 actual *development* of watershed plans that would receive full protection under the safe harbor (see
7 above discussion on RAA), but also to staff, Board, and public *review* of those plans. The result is
8 that Copermittees are now free to devise whatever type or kind of analysis they wish, and if such a
9 plan is acceptable to the Board (based on unarticulated standards) the safe harbor would apply.

10 These shortcomings are fatal to the Amended 2013 Permit’s safe harbor provisions.

11 **2. The Amended 2013 Permit violates the State Board’s Order because it**
12 **allows good faith engagement and implementation of the iterative process**
13 **to constitute compliance with Receiving Water Limitations**

14 While the Fact Sheet claims that the principles included in Order WQ 2015-0075 have been
15 incorporated into the Amended 2013 Permit, the Amended 2013 Permit fails to assure that “good
16 faith engagement in the iterative process” will not deem a permittee in compliance and thus is
17 inconsistent with the State Board’s Order. (Fact Sheet at page F-59). Instead, the Amended 2013
18 Permit allows the type of endless compliance loop that has been disallowed in California MS4
19 permits for over a decade.

20 State Board Order WQ 2015-0075 once again makes it clear that such an approach would
21 not be acceptable when it states, “we...ultimately disagree with Permittee Petitioners that
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24 ⁶¹ We further note that while the Permit includes requirements for a “public participation process
25 which allows the public to review and provide comments on the analysis methodology utilized and
26 the assumptions included in the analysis,” (Amended 2103 Permit, at Section B.3.c.1.(b)(ii)), the
27 public, and in particular the small water-quality-focused environmental NGO community in San
28 Diego, possess neither the resources nor capacity to appropriately engage in and/or review such
sweeping plans as currently envisioned by the Amended 2013 Permit throughout our vast region.
And even if they did, the lack of clear requirements for any analysis to be conducted would render
the public participation effectively meaningless.

1 implementation of the iterative process does or should constitute compliance with receiving water
2 limitations.”⁶² The State Board Order discusses the issue at length, as follows:

3 We can support an alternative approach to compliance with receiving water
4 limitations only to the extent that that approach requires clear and concrete
5 milestones and deadlines toward achievement of receiving water limitations and a
6 rigorous and transparent process to ensure that those milestones and deadlines are in
7 fact met. Conversely, we cannot accept a process that leads to a continuous loop of
iterative WMP/EWMP implementation without ultimate achievement of receiving
water limitations.⁶³

8 The Amended 2013 permit expressly authorizes protection for a good faith engagement in what,
9 on its face, is a continuing iterative process. Importantly, in several places the safe harbor
10 provisions make it explicitly clear that it *embraces* the iterative process.⁶⁴

11 Specifically, the Amended 2013 Permit requires the monitoring and assessment program of
12 the safe harbor to demonstrate only, “whether the implementation of the water quality
13 improvement strategies are making progress towards achieving the numeric goals,”⁶⁵ but the
14 Permit does not then require actual achievement of those goals. Section B.3.c.(2).(a). of the
15 Amended 2013 permit states that, “the Copermittee is deemed in compliance during the term of
16 this Order as long as...(a) The Copermittee is implementing the water quality improvement
17 strategies with its jurisdiction developed pursuant to Provision B.3.b.(1) and in compliance with
18 the schedules for implementing the strategies established....” (Section B.3.c.(2)(a).) However,
19 Section B.3.c.(2)(c) of the Permit renders this standard meaningless, stating that the Copermittee
20 must submit annual report assessments that either, “support a conclusion that: 1) the Copermittee
21 is in compliance with the annual milestones and dates for achievement..., **OR** 2) the Copermittee
22 has provided acceptable rationale and recommends appropriate modifications.” (Section
23 B.3.c.(2)(c)., *emphasis added*). Taken together, it becomes clear that once permittees develop a

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25 ⁶² Order WQ 2015-0075, page 10.

26 ⁶³ Order WQ 2015-0075, page 33.

27 ⁶⁴ Section B.3.c(1)(b)(iv): “The analysis must be updates as part of the iterative approach and
adaptive management process” and B.3.c(1)(c): “The specific monitoring and assessments must be
updated as part of the iterative approach and adaptive management process.”

28 ⁶⁵ Amended 2013 Permit No. R9-2015-0100, Section B.3.c.(1).(c).

1 plan that is acceptable to the Regional Board they need only continue to provide an “acceptable
2 rationale” and recommend “appropriate modifications” when they fail to implement strategies or
3 actually achieve the goals set out in their plan, including requirements to meet WQS, RWLs, and
4 potentially TMDL WLAs. Such an approach is not “finite,” as the State Board Order requires,⁶⁶
5 and fails to necessarily require “significant undertakings beyond the iterative process.” In practical
6 effect, the approach proposed by the draft language mirrors the flawed iterative process from
7 previous permits and will result in more delay and confusion. It violates the Clean Water Act and
8 prior State Board Orders.

9 To this end, we note that Regional Board staff rejected a proposal by Environmental
10 Groups to include language that would remove a permittee from safe harbor protection if annual
11 milestones were not met for two years in a row.⁶⁷

12 **3. The Amended 2013 Permit is inconsistent with the State Board’s Order**
13 **because it does not include regional multi-benefit capture and water supply**
14 **projects**

15 As stated above, the State Board’s Order is based, in part, on a fundamental shift in how
16 stormwater pollution is addressed and the transition of stormwater from a nuisance to an asset.
17 This idea is embodied in the State Board Order principle that any safe harbor provision must,
18 “encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and
19 support a local sustainable water supply.”⁶⁸

20 As discussed above, however, the Amended 2013 Permit does not include provisions that
21 encourage or require the inclusion or evaluation of multi-beneficial water supply compliance
22 projects in the Amended 2013 permit. Thus, while the Fact Sheet claims this safe harbor

23 ⁶⁶ Order WQ 2015-0075, page 16.

24 ⁶⁷ The relevant language read, “Failure to comply with and to achieve the numeric goals,
25 schedules, strategies, and/or dates under B3c(1)(a)(i)-(v) for any two consecutive reporting periods
26 will automatically result in that Copermittee’s forfeiture of RWL Alternative Compliance status.”
27 From SD Coastkeeper’s proposed amendments, available at:
28 http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0603_Enviro_RWL_Proposed_Revisions.pdf. Last accessed August 6, 2015.

⁶⁸ Order WQ 2015-0075, p. 52.

1 incorporates the seven principles of the State Board’s Order,⁶⁹ it fails to ensure that, “the strategies
2 required to be included in the Water Quality Improvement Plans encourage multi-benefit regional
3 projects that capture, infiltrate, and reuse storm water and support a local sustainable water
4 supply.” (Fact Sheet p. F-60). As such, the Amended 2013 Permit is inconsistent with the State
5 Board’s Order.

6 **4. The Amended 2013 Permit Excuses TMDL Compliance**

7 The State Board Order specifically equated full compliance with the requirements of a
8 TMDL with full compliance with the receiving water limitations for that water body-pollutant
9 combination.⁷⁰ As explained above, the Amended 2013 Permit impermissibly excuses compliance
10 with TMDLs and interim WLAs and may eliminate final WLAs. Moreover, the San Diego
11 Regional Board has only one single region-wide TMDL, and the Region itself has only six water
12 body-specific TMDLs in total. Therefore, the Amended 2013 Permit is inconsistent with the State
13 Board’s Order on this basis as well.

14 **5. The Amended 2013 Permit Fails to Make a Specific Showing That** 15 **Application Of Given Principles in WQ 2015-0075 are not Appropriate for** 16 **Region-Specific or Permit-Specific Reasons In San Diego**

17 Finally, the Amended 2013 Permit is inconsistent with State Board Order No. WQ 2015-
18 0075 for failing to make any findings whatsoever to demonstrate that the required principles
19 identified in the State Board Order and omitted from the Amended 2013 Permit are not appropriate
20 for the region or Permit. The State Board should remand the Permit back to the Regional Board,
21 or better, overturn the Regional Board’s decision to adopt the Amended 2013 Permit entirely.

22 **D. The Decision to Adopt the 2012 Permit, Including its Safe Harbor Provisions, is** 23 **not Supported by the Findings or the Evidence in the Administrative Record**

24 The Regional Board’s approval of the 2015 amendments to the 2013 Permit violates long-
25 established requirements for agency decision-making. The Regional Board’s findings fail to show

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27 ⁶⁹ Amended Order No. R9-2015-0100 Attachment F, pages F59-F60.

28 ⁷⁰ Order WQ 2015-0075, p. 52.

1 the Board’s mode of analysis to “bridge the analytic gap between the raw evidence and [the]
2 ultimate decision or order.” (*See, Topanga Ass’n for a Scenic Cmty*, 11 Cal.3d at 515.) Moreover,
3 in critical aspects the Regional Board’s final decision lacks evidentiary support in the record. The
4 absence of adequate findings or evidence renders the Regional Board’s decision unlawful. (*See*,
5 Cal. Civ. Proc. Code § 1094.5(b); *see also, Zuniga*, 137 Cal. App. 4th at 1258.)

6 The Amended 2013 Permit’s discussion of anti-backsliding requirements exemplifies the
7 Regional Board’s lack of sufficient analysis. San Diego Coastkeeper raised significant legal and
8 factual argument before the Regional Board to demonstrate that the safe harbors incorporated in
9 the Amended 2013 Permit violate federal anti-backsliding requirements.⁷¹ In response, the
10 Amended 2013 Permit merely repeats (incompletely) the legal requirements for anti-backsliding,
11 then leaps to the conclusory statement that, “All effluent limitations in this Order are at least as
12 stringent as the effluent limitations in the previous permit,” (Amended 2013 Permit, at 8, Finding
13 25). The fact sheet similarly, cursorily concludes that, “the alternative compliance pathway
14 option...qualifies for an exception to backsliding as based on new information.” (Amended 2013
15 Permit Fact Sheet, p. F-32). However, bare conclusions are impermissible. (*See, American*
16 *Funeral Concepts-American Cremation Soc’y*, 136 Cal.App.3d at 309 (“administrative findings set
17 forth solely in the language of the applicable legislation are insufficient”).)

18 Coastkeeper additionally raised significant legal and factual argument before the Regional
19 Board to demonstrate the safe harbors incorporated in the Amended 2013 Permit violate State
20 Board Order No. WQ 2015-0075. These arguments have not been adequately addressed in the
21 Fact Sheet or in the Revised Response to Comments but instead, like with the anti-backsliding
22 justifications, justifications leap to a conclusory statement that the State Board-approved 2012 Los
23 Angeles permit mechanism is actually less well defined and transparent than the San Diego

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26 ⁷¹ See: September 10, 2015 letter from Environmental Groups: “*Re: Environmental Groups*
27 *Comments on Tentative Order R9-2015-0100; Receiving Water Limitations Alternative*
28 *Compliance Pathway*”, found at:
http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0909_ENV_Environmental_Groups.pdf. Last accessed December 16, 2015.

1 scheme because the Los Angeles method is limited to one or two models without ongoing public
2 oversight.⁷²

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4 **IV. CONCLUSION**

5 For all the foregoing reasons, the instant Petition for Review should be GRANTED.

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7 Respectfully submitted,

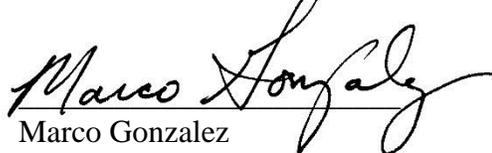
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9 Dated: December 17, 2015

SAN DIEGO COASTKEEPER

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⁷² See Revised Responses to Comments Received on Tentative Order No. R9-2015-0100, pages
28 35-36.

1 **PROOF OF SERVICE**

2
3 I am employed in the County of San Diego, State of California. I am over the age of 18
4 and not a party to the within action. My business address is: 1140 S. Coast Highway 101,
5 Encinitas CA 92024.

6 On December 17, 2015 I served the within document described as **MEMORANDUM OF**
7 **POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF SAN**
8 **DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING**
9 **ORDER NO. R9-2015-0100** on the following interested parties in said action by placing a true
10 copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid,
11 addressed as follows:

12
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I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

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

Executed on December 17, 2015, at San Diego, California.



Sara Kent

1 **PROOF OF SERVICE**

2 I am employed in the County of San Diego, State of California. I am over the age of 18
3 and not a party to the within action. My business address is: 1140 S. Coast Highway 101,
4 Encinitas CA 92024.

5 On December 17, 2015 I served the within documents described as **PETITION FOR**
6 **REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION**
7 **OF ADOPTING ORDER NO. R9-2015-0100** and **MEMORANDUM OF POINTS AND**
8 **AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF SAN DIEGO**
9 **REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER**
10 **NO. R9-2015-0100** on the following interested parties in said action as follows:

11
12 State Water Resources Control Board
13 Office of Chief Counsel
14 Adrianna M. Crowl
15 P.O. Box 100
16 Sacramento, CA 95812-0100
17 waterqualitypetitions@waterboards.ca.gov

18 (BY ELECTRONIC MAIL) I sent such document via electronic mail to the
19 address(es) noted above.

20 (BY OVERNIGHT DELIVERY) I placed such documents into an express delivery
21 envelope for service on the next business day.

22 I am "readily familiar" with the firm's practice of collection and processing
23 correspondence for mailing. It is deposited with U.S. postal service on that same day in the
24 ordinary course of business.

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

27 Executed on December 17, 2015, at San Diego, California.

28

Sara Kent