December 17, 2015

State Water Resources Control Board
Office of Chief Counsel
Adrianna M. Crowl
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. Crowl:

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 (“Petitioner”) 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

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San Diego Regional Water Quality Control Board  
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In the Matter of the Petition of San Diego Coastkeeper and Coastal Environmental Rights Foundation, for Review of Action by the California Regional Water Quality Control Board, San Diego Region, 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

PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100
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 petitions the State Water Resources Control Board (“State Board”) to review 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.

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

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

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

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

San Diego Coastkeeper
2825 Dewey Road, Suite 200
San Diego, CA 92106
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(619) 758-7743

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

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

Petitioners seek review of the Regional Board’s November 18, 2015 adoption of 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. A copy of the Order is available from the San Diego Water Board website at:


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

November 18, 2015.

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:
A. Failed to make sufficient findings “to bridge the analytical gap between the raw evidence and ultimate decision”—approval of the Permit. (Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515.) The Board acted arbitrarily and capriciously because the ultimate decision of adopting the Permit is not supported by the findings and the findings are not supported by the weight of the evidence in the administrative record, thus resulting in an abuse of discretion. (Cal. Code Civ. Proc. § 1094.5.)

B. Failed to adequately respond to factually and legally specific comments from public interest organizations concerning significant matters at issue, such as the Permit’s incorporation of safe harbor provisions and its noncompliance with state and federal anti-backsliding regulations, and the Permit’s failure to comply with State Board Order WQO 2015-0075 requirements for safe harbors.

C. Improperly adopted safe harbor provisions that excuse compliance with the 2007 and Original 2013 Permit’s Receiving Water Limitations provisions in some circumstances, in violation of federal anti-backsliding regulations under 33 U.S.C. § 402(o) and 40 C.F.R. § 122.44(l).

D. Improperly adopted safe harbor provisions that violate requirements for incorporation of total maximum daily loads (“TMDLs”) in to National Pollution Discharge Elimination System permits.

E. Failed to adequately require in the Permit that certain interim and final Waste Load Allocations (“WLAs”) established by applicable Total Maximum Daily Loads (“TMDLs”) are enforceable permit effluent limitations. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

F. Improperly adopted safe harbor provisions that violate State Board Order WQ 2015-0075 requirements for inclusion of safe harbor provisions in regions outside Los Angeles County.
G. Improperly adopted safe harbor provisions that violate State Board Order WQO 2015-0075 requirements for making a specific showing that application of given principles is not appropriate for region-specific or permit-specific reasons.

5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED:

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

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

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

Petitioners’ members recreate in and around the waters to which the Amended 2013 Permit regulates discharges of stormwater runoff and are impacted by pollution in stormwater runoff and its resulting health impacts, and by beach closures which restrict the ability of residents and visitors in San Diego County to use the beach and local waters for recreation and other purposes. In particular, Petitioners’ members directly benefit from San Diego County waters in the form of recreational swimming, surfing, diving, photography, birdwatching, fishing, scientific study, and boating. Petitioners’ members are aggrieved by the Amended 2013 Permit’s inadequacy to control
polluted urban stormwater runoff or support the beneficial uses of the receiving waters in accordance with the Clean Water Act.

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

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

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

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

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

Petitioners seek an Order by the State Board that:

Overturns the illegal provisions of 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.

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

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

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

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

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

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

All of the substantive issues and objections raised herein were presented to the Regional Board during the period for public comment on the draft Permit, including during public comment periods during the original 2013 adoption, the February 2015 amendments, and the November 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
April 10 and 11, 2013, May 8, 2013, as well as subsequent amendment hearings on February 11, 2015, and November 18, 2015.

Respectfully submitted via electronic mail,

Dated: December 17, 2015

SAN DIEGO COASTKEEPER

Matt O’Malley
Attorney for SAN DIEGO COASTKEEPER

COAST LAW GROUP LLP

Marco Gonzalez
Attorneys for COASTAL ENVIRONMENTAL RIGHTS FOUNDATION
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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Executed on December 17, 2015, at San Diego, California.

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of San Diego Coastkeeper and Coastal Environmental Rights Foundation, for Review of Action by the California Regional Water Quality Control Board, San Diego Region, in Adopting an Order Amending 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. R9-2013-0001, as Amended by Order Nos. R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266

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
I. INTRODUCTION

This petition seeks review of a pollution discharge permit that is both unlawful and inadequate to protect the region’s waters or the public health. The San Diego Regional Water Quality Control Board’s (“Regional Board” or “Board”) Amended 2013 permit for San Diego County municipal separate storm sewer systems (“MS4s”) is an unfortunate step backwards in efforts to improve water quality. The Amended 2013 Permit, and the process the Regional Board followed in adopting it, were both flawed, and impermissibly weaken or “backslide” from the requirements of the 2007 and Originally adopted 2013 San Diego MS4 permits. The critical—but by no means only—flaw of the Amended 2013 Permit is that it abandons requirements to comply with both narrative and numeric water quality standards in receiving waters as a means of protecting water quality. For the reasons discussed below, Petitioners respectfully request that the State Water Resources Control Board (“State Board”) overturn these unlawful provisions of the Amended 2013 Permit, or remand the matter to the Regional Board with specific direction to remedy the provisions of the Amended 2013 Permit that violate state and federal law and fail to comply with State Board Order WQ 2015-0075.

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3 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. R9-2013-0001, 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”).
The Amended 2013 Permit is unlawful due to its inclusion of safe harbors from provisions—required by the 2007 and Original 2013 Permit—that require that discharges comply with Water Quality Standards. The safe harbors, provisions that excuse compliance with Water Quality Standards in the Permit’s Receiving Water Limitations section, are illegal for four principal reasons: 1) the safe harbors violate federal anti-backsliding requirements; 2) the safe harbors violate requirements for incorporation of total maximum daily loads (“TMDLs”) into National Pollutant Discharge Elimination System permits; 3) the safe harbor provisions violate State Board Order WQ 2015-0075 requirements for inclusion of safe harbor provisions in regions outside Los Angeles County; and, 4) the Regional Board failed to make sufficient findings or provide evidence in the record to support the inclusion of the safe harbors in the Amended 2013 Permit.

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

A. Factual Background

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

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

- “Storm water and non-storm water discharges from the MS4s contain pollutants that cause or threaten to cause a violation of surface water quality standards” (Amended 2013 Permit, at 3, Finding 8);

- “The most common pollutants in runoff discharged from the MS4s include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals…nutrients…and trash. As operators of the MS4s, the Copermittees cannot 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
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.)*
B. Legal Background

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

Overall, the Act prohibits the discharge of any pollutant from a point source into a water of the United States except as in compliance with the Act. (33 U.S.C. §§ 1311(a), 1342.) “Point source” is defined to mean any discrete “conveyance,” such as a pipe or channel, (33 U.S.C. § 1362(14)), and thus includes MS4s, which are elaborate networks of such conveyances. (33 U.S.C. §§ 1342(p), 1362(14)).

A point source, such as an MS4, can comply with the CWA by obtaining a discharge permit under the National Pollutant Discharge Elimination System (“NPDES”) program. (33 U.S.C. § 1342(b), (p).)

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

5 “The [Clean Water Act] is strong medicine. . . . Congress explicitly recognized that reduction of 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.)

6 The discharge of pollutants from an MS4, often called “polluted runoff” or “urban runoff,” is a two-part problem. It includes what is often referred to as non-stormwater discharges—typically, landscape irrigation flows, washwater, and other flows not related to precipitation carrying 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).)
1313(c)(2)(A).) WQSs provide the reference point “to prevent water quality from falling below
acceptable levels.” (PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology (1994) 511
U.S. 700, 704 [quotation omitted].) States also must identify as impaired any water bodies that fail
to meet water quality standards. (33 U.S.C. § 1313(d).)

For impaired waters, states must establish TMDLs, which set a daily limit on the discharge
of each pollutant necessary to achieve water quality standards. (Id. § 1313(d)(1).) The TMDL
“assigns a waste load allocation (WLA) to each point source, which is that portion of the TMDL’s
total pollutant load, which is allocated to a point source for which a NPDES permit is required.”
1321 (emphasis in original).) Critically, federal law requires that “once a TMDL is developed,
effluent limitations in NPDES permits must be consistent with the WLA’s in the TMDL.” (Id., at
1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B)).)

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

7 See, e.g., State Board Order No. WQ 99-05, Own Motion to Review the Petition of
Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03; In
addition, permits for discharges from municipal storm sewers “shall require controls to reduce the
discharge of pollutants to the maximum extent practicable . . . and such other provisions as the
Administrator or the State determines appropriate for the control of such pollutants. (33 U.S.C.
§ 1342(p)(3)(B)(iii).) This language in section 1342(p) has been held by California courts to grant
“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
(9th Cir. 1999) 191 F.3d 1159, at 1165–1167).)

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

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

8 “2007 Permit” – this was the third such permit issued by the Regional Board to San Diego County and local municipalities. Prior permits were adopted in 1990 and 2001.
9 Finding E. of the 2007 Permit states, “The RWL in this Order require compliance with water quality standards,” and, “Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of 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).
Complying with the 2007 and Original 2013 Permits’ iterative process assisted Permittees in meeting water quality goals, but did not excuse violations of water quality standards. An earlier MS4 permit for Orange County, approved by the State Board, had included language stating “the permittees will not be in violation of [receiving water limitations] so long as they are in compliance with [the iterative process set forth in the permit].”\textsuperscript{11} EPA objected to that provision, (which MS4 permits for Vallejo and Riverside County had additionally adopted), as a “safe harbor,” meaning the provision deemed the permittees in compliance with the permit regardless of whether Water Quality Standards were then met. In response, the State Board directed the Regional Boards to include receiving water limitations language devised by EPA, without a safe harbor provision, into all future MS4 permits.\textsuperscript{12} The San Diego Regional Board followed this clear directive in the 2007 and Original 2013 Permits.\textsuperscript{13}

When Los Angeles County and 43 cities challenged a 2001 Los Angeles Regional Water Quality Control Board (“Los Angeles Regional Board”) MS4 permit containing similar receiving water limitation language (without a safe harbor) to the San Diego Permits in state court, the court ruled that the Regional Board “included Parts 2.1 and 2.2,” the requirements to meet water quality standards, “in the Permit without a ‘safe harbor.’” (\textit{Id.})\textsuperscript{14} The Los Angeles Regional Board

\textsuperscript{11} See, State Board Order No. WQ 98-01, \textit{Own Motion to Review the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03}, at 6-7.

\textsuperscript{12} See, State Board WQ Order 99-05.

\textsuperscript{13} Prior to 2007, the Regional Board adopted an MS4 Permit for San Diego (Order No. 2001-01, “2001 Permit”), that similarly followed the EPA requirements and prohibited discharges that caused or contributed to a violation of water quality standards. (See, 2001 Permit, at Section C.) The 2001 San Diego Permit’s receiving water limitations prohibitions were challenged in state court by the Building Industry Association of San Diego County. The RWLs were ultimately upheld by the California Court of Appeals (\textit{Building Industry Assn. of San Diego Cty. v. State 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.

\textsuperscript{14} See, \textit{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.” (\textit{In re L.A. County Mun. Stormwater}, at 7.) But regardless of this authority, as described above, the Court
supported this interpretation: “the plain meaning of these provisions is clear: they prohibit
discharges that cause or contribute to a ‘violation of Water Quality Standards’ [or water quality
objectives] or to a condition of nuisance.” As the Los Angeles Regional Water Quality Control
Board put simply, “[t]he Regional Board’s position . . . is that the Permit cannot be read to excuse
exceedances of water quality standards.” 15 Finally, the Ninth Circuit confirmed the state court’s
interpretation of the Los Angeles 2001 MS4 Permit’s Receiving Water Limitations, holding that
“no such ‘safe harbor’ is present in this Permit. . . . [there is] no textual support for the proposition
that compliance with certain provisions shall forgive non-compliance with the discharge
prohibitions.” 16 The 2001, 2007, and Original 2013 San Diego permits all contained similar, if not
identical, receiving water limitation language to the 2001 Los Angeles MS4 Permit.

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

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

15 Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region,
in Santa Monica Baykeeper v. City of Malibu No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed
Feb. 5, 2010), at 9; see also, id. at 4.
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”).
where feasible within a given watershed, retain all stormwater runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects. (Id. at VI.C.1.g.) Permittees must conduct a “reasonable assurance analysis,” (“RAA”), including a quantitative modeling analysis, to assess whether the programs will result in discharges that achieve water quality based effluent limitations and RWLs in the permit. (Id. at VI.C.1.g.; VI.C.5.b.iv(5).)

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

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

On November 18, 2015, the Regional Board amended the Original 2013 MS4 permit for San Diego County. Similar to the prior 2007 Permit and the Original 2013 Permit, the Amended 2013 Permit states that, “Discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters.” (Amended 2013 Permit, at Section A.2.a.)20

Rather than maintaining the 2007 and Original 2013 Permits’ strict prohibition against discharges that cause or contribute to an exceedance of WQSs, however, the Permit instead grants permittees

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18 See, Order WQ 2015-0075.
20 The Permit defines “Receiving Water Limitations” as: “Waste discharge requirements issued by the San Diego Water Board typically include both: (1) “Effluent Limitations” (or “Discharge 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.)
an alternative compliance option which triggers application of a safe harbor, rendering the
limitations inoperative in certain circumstances.

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

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

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

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

The safe harbors include relief from RWL compliance after a plan is submitted to and approved by the Regional Board, and when the specific RWL (or combination of water quality standard and waterbody) at issue is already addressed by a TMDL. Effectively, like the 2012 Los Angeles Permit’s WMPs and EWMPs, WQIPs include prioritization of watershed conditions and pollutants, and contain numeric interim and final goals aimed at achieving RWLs.

Unfortunately like the 2012 Los Angeles Permit, permittees are granted a safe harbor for participating in the specified program. And unfortunately unlike the Los Angeles Permit, the Amended 2013 Permit’s WQIPs do not require an RAA to be completed or any type of modeling or detailed analysis, nor do they require proof that the chosen actions and timeframes of the permittees will result in the attainment of RWLs and WQSs.

II. STANDARD OF REVIEW

The State Board must exercise its independent judgment as to whether a Regional Board action is reasonable. (See, Stinnes-Western Chemical Corp., State Board WQ Order No. 86-16 (1986).) Specifically, the State Board’s review is equivalent to the standard a reviewing court would apply under California Code of Civil Procedure Section 1094.5, (id.), which states “[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the

21 In this last case, in some circumstances the Amended 2013 Permit also provides a safe harbor for compliance with either interim or final TMDL limits, or both.
22 Id., Section B.2.
23 Id., Section B.3.
evidence.” (Cal. Civ. Proc. Code § 1094.5(b); see also, Zuniga v. San Diego County Civil Serv.
Comm’n (2006) 137 Cal.App.4th 1255, 1258 (applying same statutory standard.) “Where it is
claimed that the findings are not supported by the evidence, . . . abuse of discretion is established if
the court determines that the findings are not supported by the weight of the evidence.” (Cal. Civ.
Proc. Code § 1094.5(c).)

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

III. ARGUMENT

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

Rather than maintaining the 2007 Permit’s (and Original 2013 Permit’s) prohibitions
against discharges that cause or contribute to an exceedance of water quality standards, the
Amended 2013 Permit creates safe harbors that exempt compliance with the Receiving Water
Limitations for Permittees that have an approved WQIP and safe harbor analysis.24 These safe

24 The Ninth Circuit defined a “safe harbor” as “the proposition that compliance with certain
provisions shall forgive non-compliance with the discharge prohibitions.” (Natural Resources
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
harbors violate the CWA’s anti-backsliding requirements and other federal and state regulations, and render the Amended 2013 Permit unlawful.

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

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

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

The Permit allows a Permittee participating in a WQIP and that receives approval of its analysis to comply with Receiving Water Limitations, even if a Permittee’s discharges actually cause or contribute to an exceedance of the Receiving Water Limitations, including violations of Water Quality Standards. By contrast, the 2007 and Original 2013 Permits required compliance 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.
with WQSs. Thus, the Amended 2013 Permit excuses discharges of pollution and violations of WQSs that the 2007 Permit (and Original 2013 Permit) prohibited.

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

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

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

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

25 We note that EPA has recognized that providing additional time for compliance for a provision required by the previous permit violates anti-backsliding requirements. (Letter from Jon M. Capacasa, Director Water Protection Division, EPA Region III to Jay Sakai, Maryland Department of the Environment, re: Specific Objection to Prince George’s County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068284, at 3. The additional time allotted by the new 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
(as a practical matter the limitation restricted the discharge of pollution and consequently was an effluent limitation), *NRDC v. U.S.E.P.A.* (D.C. Cir. 1982) 673 F.2d 400, 403 (33 U.S.C. § 502(11) “defines ‘effluent limitation’ as ‘any restriction, not just numeric limitations’.”).

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

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

Section 1313(d)(4) restricts what effluent limitations may be revised in a renewal permit. First, where water quality standards are not being attained (see 33 U.S.C. § 1313(d)(4)(A)), a less stringent effluent limitation based on a TMDL or other WLA is allowed in a renewal permit only if “the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard,” or if the designated use is removed. (33. U.S.C. § 1313(d)(4)(A).) Second, for waters that are meeting applicable water quality standards, (under 33 U.S.C. § 1313(d)(4)(B)), a limitation based on a limitations provisions in the 2001 Los Angeles MS4 Order were not established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable. 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.
TMDL or Water Quality Standard may only be weakened if it is consistent with the applicable state antidegradation policy. (33 U.S.C. § 1342(o)(1).)

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

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

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

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

27 We note as well that any action by a Regional Board, including permit issuance, that would result in lower water quality—either in high quality or impaired waters—must be analyzed to ensure consistency with state and federal antidegradation policy. Further, because a receiving water can be considered high quality for one beneficial use, and impaired for others, the analysis must be conducted pollutant by pollutant, and beneficial use by beneficial use. (See, Asociacion de Gente Unida for El Agua v. Central Valley Regional Board (2012) (210 Cal.App.4th 1255) [149 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 Rimm on 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.
facilities but has nevertheless been unable to achieve the previous effluent limitations. . .

(33 U.S.C. § 1342(o)(2).) 40 C.F.R. § 122.44(l)(2)(i) lists a similar set of exceptions for applicability of anti-backsliding requirements. In neither case do any of these exceptions apply to the adoption of the Amended or Original 2013 Permit.

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

The Los Angeles Water Board makes a compelling argument . . . that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the [alternative compliance mechanism] of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that “time to plan, design, fund, operate and maintain [best 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.

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

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

28 40 C.F.R. § 122.44(l)(1) additionally states that “when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 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.
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 Copermittees 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.)
However, the conditions alluded to for Los Angeles in the Amended 2013 Permit, which fail to support backsliding in that Region, are almost wholly lacking for the San Diego Region—a circumstance that led the U.S. EPA to caution that while State Board “WQ Order [2015-0075] directs all Regional Boards to consider the approach in the LA MS4 permit, [the Order] does not require its use. We believe it would be premature and inappropriate to require the LA MS4 permit approach throughout the State.”

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

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

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

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

33 Let alone the fact that the 11-year gap offered as validation for backsliding in the Los Angeles Region is completely absent in the permitting history here.
34 EPA letter to SWRCB, January 2015. David Smith, Manager.
35 To the extent that backsliding in this instance may apply not only to the 2007 San Diego Permit, 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.
resource conservation that can be environmentally as well as economically sustainable.

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

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

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

Notably, the 2007 Permit’s Watershed URMP provisions required permittees, among other conditions, to develop both a “Watershed Water Quality Assessment” and a “Watershed Strategy” to “abate the sources and reduce the discharge of pollutants causing the high priority water quality problems.” Moreover, the Regional Board even extended the reach of watershed based planning in the 2007 Permit, requiring the permittees to develop a Regional Urban Runoff Management Program.36 Any claim by the Regional Board that it has only now suddenly gained a “recognition that a watershed management approach required regional action” or that a safe harbor was necessary to implement such action is patently false; the Previous San Diego permits already incorporated this paradigm shift, and already contained watershed plans and prioritization for meeting RWL requirements. It provides no justification for violating the CWA’s anti-backsliding requirements.
ii. **Recognition of stormwater as a resource in support of multi-benefit projects and local water supply augmentation does not justify backsliding in the San Diego Regional Permit**

One of the fundamental reasons both the State Board and Los Angeles Regional Board claim support for incorporation of a safe harbor into MS4 permits is 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.” (State Board Order WQ 2015-0075, at 21.) Unfortunately, while claiming a similar rationale, the Amended 2013 Permit fails to actually include any action based on this supposed finding.

While it does not provide valid grounds for backsliding, the 2012 Los Angeles Permit does, at least in part, incorporate, requirements to “consider” opportunities for water supply augmentation and to develop projects that capture and infiltrate the 85th percentile, 24-hour storm on a watershed basis. The Amended 2013 permit Fact Sheet acknowledges this approach in its justification for an anti-backsliding exception:

The alternative compliance pathway option in Provision B.3.c. of this Order was informed by new information available to the Board…In particular, the Los Angeles Water Board…recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (Fact Sheet p. F-32).

But even making this claim, the Amended 2013 permit then fails to provide any mechanism, either by mandate or incentive, for quantitatively-based, regional water supply projects that capture and retain stormwater runoff to augment local water supply. The only

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37 Further, even if these approaches could be considered “new,” they would still not justify backsliding. An improvement or development of new technology provides the permittees with additional options for meeting the requirements imposed on them by the prior permit and hence does not justify eliminating or delaying those requirements.

38 Order No. R4-2012-0175 as amended by Order WQ 2015-0075, Section VI.C.1.g.

39 In this regard, the San Diego region differs in some important and substantial ways from its neighbors up north. First, while Los Angeles and other regions in Southern California generally have the ability to utilize groundwater basins for infiltration and groundwater aquifer recharge for local water supply production in a large-scale integrated water management fashion, the San Diego region does not have available to it the larger underground basins for such storage. (See, e.g., “Groundwater production…is limited by a number of elements, including lack of storage capacity
capture and retention requirements within the San Diego permit apply to individual Priority Development Projects for development or redevelopment,\textsuperscript{40} and not to regional compliance or WQIP development requirements aimed at achieving WQSs or RWLs that could benefit local water supplies.

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

\textit{iii. The Amended 2013 Permit incorporates only one region-wide TMDL and a handful of TMDLs aimed at individual water bodies.}

The State Board and Los Angeles Regional Board’s claimed justification for an exception to anti-backsliding requirements appears also to have been heavily based on the development, in local aquifers, availability of groundwater recharge, and degraded water quality,” and, “groundwater supplies are less plentiful in the San Diego region than in some other areas of California…” (San Diego County Water Authority website, at: http://www.sdcwa.org/groundwater, last accessed November 23, 2015).

\textsuperscript{40} Order R9-2015-0001, Section E.3.c(.1)(a). Of note, the 2007 San Diego Permit included requirements for development projects to use Low Impact Development (“LID”) “BMPs where feasible which maximize infiltration, provide retention, slow runoff, minimize impervious footprint, direct runoff from impervious areas into landscaping, and construct impervious surfaces 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.

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

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

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

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

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

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42 2012 Los Angeles Permit Fact Sheet, at F-21. See also Order WQ 2015-0075, at 21.
44 Id. at 40.
But the San Diego Regional Board can point to only a single region-wide TMDL, for bacteria, it has passed since its last permit, and the Region itself has only six water body-specific TMDLs in total.

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

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

Even if the Amended 2013 Permit’s safe harbors complied with the above anti-backsliding requirements, which they do not, they would still be unlawful under section 402(o)(3), which provides an absolute limitation on backsliding. Section 402(o)(3) requires that in no event shall a permit “be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard” under 33 U.S.C. § 1313. (33 U.S.C. § 1342(o)(3).) Thus, even if one of the claimed backsliding exceptions is applicable here, CWA section 402(o)(3) acts as a floor and restricts the extent to which effluent

45 While the Fact Sheet states that for water bodies listed on the State’s CWA Section 303(d) List, the “San Diego Water Board has established TMDLs to address the impairments,” Environmental Groups find this statement to be disingenuous. In actuality the San Diego Board has adopted few TMDLs and has in fact failed to adopt TMDLs for two known impairments for which the TMDL process had already begun.
limitations may be relaxed. The Amended 2013 Permit, by explicitly excusing violations of Receiving Water Limitations which prohibit discharges that cause or contribute to a violation of WQSs, fails to meet this federally mandated minimum level of protection.  

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

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

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

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

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.
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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{54} Id.

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

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

\begin{quote}
the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP. Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.\textsuperscript{57}
\end{quote}

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

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

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

\begin{itemize}
\item \textsuperscript{56} Order No. R4-2012-0175 as amended by Order WQ 2015-0075, page 65. The guidelines issued by the LA Regional Board for conducting RAA’s go on to require that “the RAA must be adequate to identify the required reduction for each water body-pollutant combination at each compliance deadline and analyze the BMP scenario to achieve that deadline.” (Guidelines For Conducting 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).
\item \textsuperscript{57} State Board Order WQ 2015-0075, at 37.
\end{itemize}
In stark contrast to the requirements of the 2012 Los Angeles Permit’s RAA process and State Board required modification, in order to receive protection under the safe harbor scheme contained in the Amended 2013 Permit, a permittee is only required to perform a vaguely termed “analysis, with clearly stated assumptions.” (Amended 2013 permit, at Section B.3.c.1.(b).(i).) The Amended 2013 Permit contains no requirement to conduct modeling or any equivalent assessment to the 2012 Los Angeles Permit’s RAA, and lacks any of the criteria and requirements identified by the State Board. Inexplicably, the Regional Board removed earlier draft language for the Amended 2013 Permit that had contained the word “model,” prior to adopting the final Order. The Amended 2013 permit requires no validation, peer reviewed or pre-reviewed acceptable modeling methods, or minimum data requirements. In short, it requires no objective guidance or protocols whatsoever.

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

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

On its face, the Amended 2013 Permit contains insufficient objectives, criteria, and guidance to meet the criteria required by the State Board in Order or to ensure that RWLs for the region will be

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58 Even the permittees themselves have complained that the regulations governing WQIP development are unclear and subjective. The above issue was brought to light recently in the 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: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/wqip/comments/SDWB.pdf last accessed December 16, 2015.

59 Language from May 2015 Draft, found at 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 mention modeling as the acceptable methodology.

60 EPA email to Laurie Walsh, Regional Board, November 16, 2015, from David Smith, EPA, Manager NPDES Permits Section. Emphasis added.
met. Instead, what results from the Amended 2013 Permit is a subjective, ad-hoc process and review without objective standards or guidance. Lacking any semblance of detail or clarity with respect to obligations of the permittees, the Amended 2013 Permit is not “rigorous,” “well-defined,” or “transparent,” and is inconsistent with the State Board’s Order.⁶¹

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

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

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

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

State Board Order WQ 2015-0075 once again makes it clear that such an approach would not be acceptable when it states, “we…ultimately disagree with Permittee Petitioners that

⁶¹ We further note that while the Permit includes requirements for a “public participation process which allows the public to review and provide comments on the analysis methodology utilized and the assumptions included in the analysis,” (Amended 2103 Permit, at Section B.3.c.1.(b)(ii)), the public, and in particular the small water-quality-focused environmental NGO community in San 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.
implementation of the iterative process does or should constitute compliance with receiving water limitations." The State Board Order discusses the issue at length, as follows:

We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in 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

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

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

63 Order WQ 2015-0075, page 33.
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.”
plan that is acceptable to the Regional Board they need only continue to provide an “acceptable rationale” and recommend “appropriate modifications” when they fail to implement strategies or actually achieve the goals set out in their plan, including requirements to meet WQS, RWLs, and potentially TMDL WLAs. Such an approach is not “finite,” as the State Board Order requires, and fails to necessarily require “significant undertakings beyond the iterative process.” In practical effect, the approach proposed by the draft language mirrors the flawed iterative process from previous permits and will result in more delay and confusion. It violates the Clean Water Act and prior State Board Orders.

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

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

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

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

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66 Order WQ 2015-0075, page 16.
67 The relevant language read, “Failure to comply with and to achieve the numeric goals, schedules, strategies, and/or dates under B3c(1)(a)(i)-(v) for any two consecutive reporting periods will automatically result in that Copermittee’s forfeiture of RWL Alternative Compliance status.” From SD Coastkeeper’s proposed amendments, available at: 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.
incorporates the seven principles of the State Board’s Order, it fails to ensure that, “the strategies required to be included in the Water Quality Improvement Plans encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.” (Fact Sheet p. F-60). As such, the Amended 2013 Permit is inconsistent with the State Board’s Order.

4. The Amended 2013 Permit Excuses TMDL Compliance

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

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

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

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

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

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70 Order WQ 2015-0075, p. 52.
the Board’s mode of analysis to “bridge the analytic gap between the raw evidence and [the] ultimate decision or order.” (See, Topanga Ass’n for a Scenic Cnty, 11 Cal.3d at 515.) Moreover, in critical aspects the Regional Board’s final decision lacks evidentiary support in the record. The absence of adequate findings or evidence renders the Regional Board’s decision unlawful. (See, Cal. Civ. Proc. Code § 1094.5(b); see also, Zuniga, 137 Cal. App. 4th at 1258.)

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

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

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scheme because the Los Angeles method is limited to one or two models without ongoing public oversight.\textsuperscript{72}

**IV. CONCLUSION**

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

Respectfully submitted,

Dated: December 17, 2015

SAN DIEGO COASTKEEPER

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\textsuperscript{72} See Revised Responses to Comments Received on Tentative Order No. R9-2015-0100, pages 35-36.
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 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 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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Executed on December 17, 2015, at San Diego, California.

Sara Kent
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 documents described as PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100 and 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 on the following interested parties in said action as follows:

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