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9 STATE OF CALIFORNIA
10 STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of the Petition of San Francisco
12 Baykeeper for Review of Action by the California
13 Regional Water Quality Control Board, San
14 Francisco Bay Region, in Adopting Order No. R2-
15 2015-0049, Municipal Regional Stormwater
16 NPDES Permit - Municipalities and Flood
17 Management Agencies in Alameda County, Contra
18 Costa County, San Mateo County, Santa Clara
19 County, and the Cities of Fairfield, Suisun City, and
20 Vallejo and the Vallejo Sanitation and Flood
21 Control District in Solano County, NPDES Permit
22 No. CAS612008.

23 PETITION FOR REVIEW OF SAN
24 FRANCISCO BAY REGIONAL WATER
25 QUALITY CONTROL BOARD ACTION
26 ADOPTING ORDER NO. R2-2015-0049

1 Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the
2 California Code of Regulations, San Francisco Baykeeper (“Baykeeper” or “Petitioner”) hereby
3 petitions the State Water Resources Control Board (“State Board”) to review the final decision of the
4 California Regional Water Quality Control Board, San Francisco Bay Region (“Regional Board”) approving the Municipal Regional Stormwater NPDES Permit, Order No. R2-2015-0049, NPDES
5 Permit No. CAS612008 (the “2015 Permit” or “Permit”). The 2015 Permit regulates the discharge of
6 stormwater runoff from the municipal separate storm sewer systems (“MS4s”) and other designated
7 stormwater discharges from municipalities and flood management agencies in Alameda County, Contra
8 Costa County, San Mateo County, Santa Clara County, and the Cities of Fairfield, Suisun City, and
9 Vallejo and the Vallejo Sanitation and Flood Control District in Solano County (collectively, the
10 “Permittees”).

11
12 **1. Name, address, telephone number and email address of the petitioner.**

13 San Francisco Baykeeper
14 Attn: George Torgun, Managing Attorney
15 1736 Franklin Street, Suite 800
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19 **2. The specific action of the regional board which the state board is requested to review,**
20 **and a copy of any order or resolution of the regional board which is referred to in the**
21 **petition.**

22 Baykeeper seeks review of the Regional Board’s November 19, 2015 approval of the Municipal
23 Regional Stormwater NPDES Permit, Order No. R2-2015-0049, NPDES Permit No. CAS612008. A
24 copy of the Order is attached as Exhibit A.

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

26 The Regional Board approved the Permit at issue on November 19, 2015.
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2 **4. A full and complete statement of the reasons the action was inappropriate or improper.**

3 In approving the 2015 Permit, the Regional Board failed to act in accordance with relevant
4 governing law, including the Clean Water Act and State Board Order WQ 2015-0075, acted arbitrarily
5 and capriciously, without substantial evidence, and without adequate findings. Specifically, but without
6 limitation, the Regional Board:

- 7 A. Improperly adopted safe harbor provisions in Section C.1 of the Permit that excuse compliance
8 with the Permit’s Receiving Water Limitations and Discharge Prohibitions for specific pollutants
9 and receiving waters, in violation of the anti-backsliding requirements of the Federal Water
10 Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act” or “Act”) (*see* 33 U.S.C. §
11 1342(o); 40 C.F.R. 122.44(l));
- 12 B. Improperly adopted safe harbor provisions in Section C.1 of the Permit that excuse compliance
13 with the Permit’s Receiving Water Limitations and Discharge Prohibitions for specific pollutants
14 and receiving waters, in violation of the standards governing such provisions in State Board
15 Order WQ 2015-0075;
- 16 C. Failed to include monitoring provisions in Sections C.8 and C.10 of the Permit that “assure
17 compliance with permit limitations” or “yield data which are representative of the monitored
18 activity,” in violation of the Clean Water Act (*see* 40 C.F.R. §§ 122.44(i)(1), 122.48(b));
- 19 D. Acted arbitrarily and capriciously because the ultimate decision of adopting the Permit is not
20 supported by the findings, and the findings are not supported by the weight of the evidence in the
21 administrative record, resulting in an abuse of discretion. (Cal. Code Civ. Proc. § 1094.5.)
22 Stated another way, the Regional Board failed to “set forth findings to bridge the analytic gap
23 between the raw evidence and ultimate decision or order.” (*Topanga Assn. for a Scenic*
24 *Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

25 **5. The manner in which the petitioner is aggrieved.**

26 Petitioner San Francisco Baykeeper is a non-profit environmental organization dedicated to
27 protecting San Francisco Bay and surrounding tributaries and resources, including the Pacific coast, for
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1 the benefit of the Bay ecosystem and interdependent human communities. Baykeeper's members
2 directly benefit from these resources in the form of recreational swimming, fishing, surfing,
3 photography, bird watching, and boating, among other uses, each of which uses have been, are, and will
4 continue to be adversely impacted by the addition of pollutants to San Francisco Bay and its tributaries
5 from the subject Permittees. Petitioners' members are therefore aggrieved by the Regional Board's
6 failure to adequately control the discharge of municipal stormwater pollution, to prevent such pollution
7 from causing or contributing to violations of water quality standards, or to support the beneficial uses of
8 the receiving waters.

9 In particular, the Regional Board's failure to adequately control municipal stormwater runoff
10 through this Permit, or to ensure that the Permit's provisions meet the requirements of the Clean Water
11 Act, California Water Code, and implementing regulations, has enormous consequences for the region
12 and its residents. Receiving waters in the San Francisco Bay region continue to be impaired for a
13 variety of pollutants, and monitoring data shows that stormwater discharges contribute to certain
14 pollutants at levels that cause or contribute to such impairments. Urban stormwater runoff is one of the
15 largest sources of pollution in San Francisco Bay and its tributaries. Pollutants in stormwater can
16 adversely impact avian, aquatic, and plant life in receiving waters and can cause serious human health
17 impacts. For example, high mercury levels in the Bay make regular consumption of fish unsafe. PCBs
18 are toxic and persistent organic pollutants that cause adverse health effects to humans and wildlife,
19 including cancer, liver damage, skin irregularities, and impact child development. Trash pollution poses
20 a visual distraction and discourages recreation-based beneficial uses, and can cause serious problems for
21 wildlife, wildlife habitat, and human health by leaching contaminants and smothering benthic
22 communities. All of these documented facts demonstrate the continued negative impacts on
23 Baykeeper's members and the environment that result from the Regional Board's failure to adequately
24 control municipal stormwater pollution through the Permit.

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

26 Petitioner seeks an Order by the State Board that overturns the Regional Board's approval of the
27 Municipal Regional Stormwater NPDES Permit, Order R2-2015-0049, NPDES Permit No. CAS612008,
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1 and remands the matter to the Regional Board with specific direction to remedy each of its violations of
2 law as further described herein.

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

6 **A. INTRODUCTION**

7 This petition seeks review of the Regional Board’s approval of the Municipal Regional
8 Stormwater NPDES Permit, Order No. R2-2015-0049, NPDES Permit No. CAS612008, which regulates
9 the discharge of stormwater runoff from MS4s and other designated stormwater discharges from
10 municipalities and flood management agencies in Alameda County, Contra Costa County, San Mateo
11 County, Santa Clara County, and the Cities of Fairfield, Suisun City, and Vallejo and the Vallejo
12 Sanitation and Flood Control District in Solano County. Stormwater runoff is one of the most
13 significant sources of water pollution in the nation and has been recognized as a leading cause of
14 significant and cumulative harmful impacts to the water quality of San Francisco Bay. Unfortunately,
15 the Permit approved by the Regional Board governing such pollution from municipal sources is
16 unlawful for several reasons, including (1) the inclusion of “safe harbor” provisions that excuse
17 compliance with receiving water limitations and discharge prohibitions for several key pollutants of
18 concern, and (2) inadequate monitoring provisions that fail to assure compliance with Permit limitations.
19 These violations of the Clean Water Act and state law present compelling reasons for the State Board to
20 exercise its statutory duty to correct these deficiencies in order to protect the waters of the San Francisco
21 Bay region and public health.

22 **B. LEGAL BACKGROUND**

23 In 1972, Congress amended the Federal Water Pollution Control Act of 1948 to remedy the
24 historically unchecked degradation of the Nation’s waters. The primary goal of the Clean Water Act is
25 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33
26 U.S.C. § 1251(a).) The Act sought to achieve fishable and swimmable conditions, whenever possible,
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1 by 1983, and to eliminate the discharge of pollutants into navigable waters by 1985. (*Id.* § 1251(a)(1)-
2 (2).)

3 The Clean Water Act prohibits the discharge of any pollutant from a point source into a water of
4 the United States, except in compliance with the Act. (*Id.* §§ 1311(a), 1342.) The primary means for
5 implementing this prohibition is the National Pollution Discharge Elimination System (“NPDES”)
6 program. (*Id.* § 1342.) NPDES permits are issued by either the United States Environmental Protection
7 Agency (“EPA”) or by states, like California, that have obtained EPA approval. (*Id.* § 1342(b); 40
8 C.F.R. § 131.4.)

9 The NPDES permitting program employs a “dual-standard” framework: technology-based
10 requirements and water quality-focused requirements. Technology-based requirements are effluent
11 limitations based on specified levels of technology for reducing water pollution. (33 U.S.C. §
12 1311(b)(1)(A); *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132
13 Cal.App.4th 1313, 1320.) The technology-based standard applicable to municipal stormwater
14 dischargers requires that stormwater be controlled to the “maximum extent practicable.” (33 U.S.C. §
15 1342(p)(3)(B)(iii).) With respect to dry weather discharges, referred to as non-stormwater discharges,
16 the statutory requirement is to “effectively prohibit” all such discharges. (*Id.* § 1342(p)(3)(B)(ii).)

17 Congress supplemented technology-based effluent limitations with “water quality-based”
18 limitations “so that numerous point sources, despite individual compliance with effluent limitations, may
19 be further regulated to prevent water quality from falling below acceptable levels.” (*City of Burbank v.*
20 *State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 620.) These “water quality standards”
21 (“WQSs”) include maximum permissible pollutant levels that must be sufficiently stringent to protect
22 public health and enhance water quality, consistent with the uses for which the water bodies have been
23 designated. (33 U.S.C. § 1313(c)(2)(A).) WQSs are usually set by states pursuant to federal
24 requirements. (*Id.* § 1313(a)(1).) Achievement of WQSs is central to the objectives and goals of the
25 Clean Water Act. Like all NDPEs permits, MS4 permits must ensure that discharges from storm drains
26 do not cause or contribute to a violation of WQSs. (*Id.* §§ 1311(a), 1313, 1342(p).) Once effluent
27 limitations and other standards and conditions are established in an NDPEs permit, a renewed,
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1 resissued, or modified permit may not contain weaker standards except in limited circumstances. (*Id.* §
2 1342(o); 40 C.F.R. § 122.44(l).)

3 For impaired waters that do not meet WQSs through effluent limitations, states must establish
4 total maximum daily loads (“TMDLs”) which set a daily limit on the discharge of each pollutant
5 necessary to achieve WQSs. (*Id.* § 1313(d)(1).) The TMDL assigns a waste load allocation (“WLA”) to
6 each point source for which an NPDES permit is required. (*Communities for a Better Environment*, 132
7 Cal.App.4th at 1321.) “Once a TMDL is developed, effluent limitations in NPDES permits must be
8 consistent with the WLAs in the TMDL.” (*Id.* [citing 40 C.F.R. § 122.44(d)(1)(vii)(B)].)

9 The Clean Water Act places the responsibility of monitoring discharges to evaluate permit
10 compliance on the discharger to allow for efficient compliance determinations and to ease the burden on
11 the regulatory agency. (*Sierra Club v. Union Oil Co. of Cal.* (9th Cir. 1987) 813 F.2d 1480, 1491-92;
12 *see also City of Brentwood v. Central Valley Reg. Water Quality Control Bd.* (2004) 123 Cal.App.4th
13 714, 723 [explaining purpose and intent of Clean Water Act’s self-monitoring requirements].) The
14 permitting agency must adopt monitoring requirements in NPDES permits that will produce the
15 information necessary to make efficient compliance determinations. (*Sierra Club*, 813 F.2d at 1491-92;
16 *Natural Res. Def. Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1208-09 [discussing
17 the necessity and purpose of self-monitoring in context of municipal stormwater NPDES permits].) The
18 Clean Water Act’s implementing regulations set forth the monitoring requirements that must be in
19 NPDES permits. (*See* 40 C.F.R. §§ 122.44(i), 122.48.) Among these requirements is the express
20 mandate that NPDES permits include provisions “to assure compliance with permit limitations” through
21 the monitoring of the amount of pollutants discharged, the volume of effluent discharged from each
22 outfall, and “other measurements as appropriate.” (40 C.F.R. § 122.44(a)(1)(i)-(iii).)

23 **C. FACTUAL BACKGROUND**

24 In 2009, the Regional Board adopted an NPDES Permit regulating the MS4s in several Bay Area
25 cities and counties, combining six prior Phase I municipal stormwater NPDES permits into one region-
26 wide permit. (Regional Board Order R2-2009-0074, NPDES Permit No. CAS612008 [Oct. 14, 2009]
27 [the “2009 Permit”].) The 2009 Permit provided standards and requirements for municipal operations,
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1 new development and redevelopment, and industrial, commercial, and construction sites, among other
2 areas. It included provisions for pollutants in the region that had already established TMDLs, such as
3 mercury and polychlorinated biphenyls (“PCBs”), and also addressed other pollutants of concern (e.g.,
4 PBDEs, DDT, dieldrin, chlordane, and selenium) for which TMDLs were planned or in early stages of
5 development. The 2009 Permit established a water quality monitoring program that required sampling
6 during multiple wet weather events each year. (2009 Permit, Section C.8.)

7 The 2009 Permit further attempted to address the pervasive problem of trash pollution by setting
8 trash load reduction requirements, including a 40% reduction in trash loading by July 1, 2014 from a
9 yet-to-be established 2009 baseline, and requiring specific control actions to reduce trash loading from
10 MS4s. (2009 Permit, Section C.10.) The 2009 Permit did not contain trash monitoring provisions
11 sufficient to determine compliance with trash load reduction standards, but instead requested that
12 Permittees develop monitoring methods. In June 2012, the Regional Board rejected Permittees’
13 proposed baseline loading rate and trash tracking methods, and stated that implementation of this
14 proposal “will not attain the 40 percent trash load reduction level by July 2014.”¹ Despite this, the
15 Regional Board has issued no notices of violation for failure to meet the 2014 standard, failure to
16 develop baseline trash loading rates, or failure to develop adequate monitoring methods.

17 The 2009 Permit included Discharge Prohibitions that prohibited the discharge of non-
18 stormwater, trash, and other solid wastes into waters. (2009 Permit, Section A.) It also contained
19 Receiving Water Limitations that prohibited discharges that would create a condition of nuisance,
20 adversely affect beneficial uses, or “cause or contribute to a violation of any applicable water quality
21 standard for receiving waters.” (2009 Permit, Section B.) The Permittees were instructed to comply
22 with these Discharge Prohibitions and Receiving Water Limitations through implementation of the
23 control measures and other actions specified in the 2009 Permit. (2009 Permit, Section C.) However, if

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25 ¹ Letter from Bruce H. Wolfe (Regional Board Executive Officer) to the Municipal Regional
26 Stormwater NPDES Permit (Order R2-2009-0074) Permittees re: Water Board Staff Review of Trash
27 Plans and Reports (June 7, 2012), *available at*:
[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/MRP/09-04-
28 2012/Staff_Comments_TR.PDF](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/MRP/09-04-2012/Staff_Comments_TR.PDF).

1 exceedances of water quality standards persisted, notwithstanding these control measures, the Permittees
2 were directed to identify and implement additional best management practices (“BMPs”) “to prevent or
3 reduce the discharge of pollutants that are causing or contributing to the exceedance of the WQSs.”
4 (2009 Permit, Section C.1.a.)

5 On November 19, 2015, the Regional Board amended the 2009 Permit in Order No. R2-2015-
6 0049 (the “Permit” or “2015 Permit”). Similar to the 2009 Permit, the 2015 Permit included Discharge
7 Prohibitions and Receiving Water Limitations in Sections A and B, respectively. However, the 2015
8 Permit added “safe harbor” language stating that the Permittees would be in compliance with these
9 sections with regard to certain pollutants and receiving waters as long as they complied with the
10 “requirements and schedules” contained in other sections of the 2015 Permit, regardless of WQS
11 exceedances or violations of the discharge prohibitions. (2015 Permit, Section C.1.) Specifically, the
12 new language in the 2015 Permit provides that:

13 Compliance with Provisions C.9 through C.12 and C.14 of this Order, which prescribe
14 requirements and schedules for Permittees identified therein to manage their discharges
15 that may cause or contribute to violations of water quality standards (WQS) for
16 pesticides, trash, mercury, polychlorinated biphenyls (PCBs), and bacteria, shall
17 constitute compliance during the term of this Order with Receiving Water Limitations
18 B.1 and B.2 for the pollutants and the receiving waters identified in the provisions.
19 Compliance with Provision C.10, which prescribes requirements and schedules for
20 Permittees to manage their discharges of trash, shall also constitute compliance with
21 Discharge Prohibitions A.1 and A.2 during the term of this Order for discharges of trash.

22 (2015 Permit, Section C.1.)

23 The 2015 Permit also included an updated water quality monitoring section, but required no wet
24 weather or outfall sampling for any pollutants, with the exception of pesticides and toxicity monitoring.
25 (2015 Permit, Section C.8.) While the 2015 Permit provided additional provisions regarding receiving
26 water monitoring for trash, it essentially gives Permittees the entire permit term to determine how to
27 conduct such monitoring, with little guidance from the Regional Board or opportunities for input from
28 members of the public. (2015 Permit, Section C.10.b.v.)

1 **D. STANDARD OF REVIEW**

2 The State Board must exercise its independent judgment as to whether a Regional Board action
3 is reasonable. (*See Stinnes-Western Chemical Corp.*, State Board WQ Order No. 86-16 (1986).)
4 Specifically, the State Board’s review is equivalent to the standard a reviewing court would apply under
5 California Code of Civil Procedure Section 1094.5, which states that an “[a]buse of discretion is
6 established if the respondent has not proceeded in the manner required by law, the order or decision is
7 not supported by the findings, or the findings are not supported by the evidence.” (Cal. Civ. Proc. Code
8 § 1094.5(b); *see also Zuniga v. San Diego County Civil Serv. Comm’n* (2006) 137 Cal.App.4th 1255,
9 1258 [applying same statutory standard].) “Where it is claimed that the findings are not supported by
10 the evidence, . . . abuse of discretion is established if the court determines that the findings are not
11 supported by the weight of the evidence.” (Cal. Civ. Proc. Code § 1094.5(c).)

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

22 **E. ARGUMENT**

23 **1. The 2015 Permit Creates Illegal Safe Harbors in Violation of Federal Anti-**
24 **Backsliding Requirements and State Board Order WQ 2015-0075.**

25 Rather than maintaining the 2009 Permit’s Discharge Prohibitions and Receiving Water
26 Limitations, the 2015 Permit includes “safe harbor” language that exempts Permittees from complying
27 with these provisions for specific pollutants and receiving waters as long as Permittees comply with the
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1 “requirements and schedules” identified in the 2015 Permit. (2015 Permit, Section C.1.) These new
2 safe harbor provisions violate the anti-backsliding requirements of the Clean Water Act as well as the
3 State Board’s Order governing the inclusion of such provisions in MS4 Permits.

4 **a. The 2015 Permit’s Safe Harbors Violate Federal Anti-Backsliding**
5 **Requirements.**

6 The Clean Water Act and its implementing regulations prohibit backsliding, or the weakening of
7 permit terms, from a previous permit. In particular, Section 402(o)(1) of the Act provides that, for
8 effluent limitations based on a state standard, “a permit may not be renewed, reissued, or modified to
9 contain effluent limitations which are less stringent than the comparable effluent limitations in the
10 previous permit,” except in specified circumstances not present here. (33 U.S.C. § 1342(o)(1).)
11 Similarly, federal regulations require that “when a permit is renewed or reissued, interim effluent
12 limitations, standards or conditions must be at least as stringent as the final effluent limitations,
13 standards, or conditions in the previous permit. . . .” (40 C.F.R. § 122.44(l)(1).) By providing a safe
14 harbor that waives requirements to comply with Discharge Prohibitions and Receiving Water
15 Limitations, even where such standards are not being met, the 2015 Permit violates these requirements.

16 The Regional Board makes three arguments as to why the safe harbor provisions in the 2015
17 Permit do not violate anti-backsliding requirements. (2015 Permit, Fact Sheet, at A-16 – A17.)² First,
18 the Regional Board claims that the Receiving Water Limitations³ are not subject to statutory anti-
19 backsliding requirements because they “are imposed under section 402(p)(3)(B) of the Clean Water Act
20 rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or
21 (e).” (*Id.* at A-17.) While admitting that the applicability 40 C.F.R. § 122.44(l)(1) is “less clear,” the
22 Regional Board contends that the anti-backsliding regulations also do not apply, stating that “the
23 regulatory history suggests that USEPA’s intent was to establish the anti-backsliding regulations with
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26 ² Although without citation, this discussion largely duplicates findings by the State Board in Order WQ
27 2015-0075 at 22-23.

28 ³ The Regional Board does not make any argument that the Discharge Prohibitions in the 2015 Permit
are not covered by anti-backsliding provisions.

1 respect to evolving technology standards for traditional point sources.” (*Id.* [citing 44 Fed. Reg. 32,854,
2 32,864 (Jun. 7, 1979)].)

3 The Regional Board’s interpretation of the federal anti-backsliding requirements is incorrect.
4 While there may be some ambiguity in the statute regarding whether section 402(o) applies to municipal
5 NPDES permits adopted pursuant to section 402(p)(3)(B), implied exemptions to statutory provisions
6 are disfavored. (*See Morton v. Mancari* (1974) 417 U.S. 535, 549.) Given that section 301 of the Act
7 (governing effluent limitations) explicitly applies to NPDES permits issued pursuant to section 402, and
8 the broad definition of “effluent limitation” in section 502(11), there is little basis for finding that the
9 Receiving Water Limitations and Discharge Prohibitions in the 2015 Permit are not subject to the anti-
10 backsliding requirements in section 402(o). (33 U.S.C. §§ 1311(a) [“Except as in compliance with this
11 section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant
12 by any person shall be unlawful.”], 1362(11) [defining “effluent limitation” to mean “any restriction
13 established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical,
14 biological, and other constituents which are discharged from point sources into navigable waters”].) Not
15 surprisingly, EPA itself has previously applied the anti-backsliding requirements in Section 402(o) to
16 MS4 permits.⁴ (*See Env’t. Def. Ctr. v. U.S. EPA* (9th Cir. 2003) 344 F.3d 832, 875 [EPA’s interpretation
17 of Clean Water Act section 402 is entitled to deference].)

18 In any event, the Discharge Prohibitions and Receiving Water Limitations in the 2015 Permit
19 easily fit within the “standards” or “conditions” protected by the anti-backsliding requirements in EPA
20 regulations. (*See* 40 C.F.R. § 122.44(1)(1); EPA, NPDES Permit Writers’ Manual (Sept. 2010) at 7-4⁵

21 ⁴ *See* EPA, Fact Sheet, Reissuance of NPDES MS4 Permit No. DC0000221 (2011) at 31 [evaluating
22 backsliding in MS4 permit for District of Columbia], *available at*:
23 [http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/BD6B2DAA91E0A7885257A1B004EBCD7/\\$File/AR%20Document%201.1%20...39.13.pdf](http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/BD6B2DAA91E0A7885257A1B004EBCD7/$File/AR%20Document%201.1%20...39.13.pdf);

24 EPA, Comments on Specific Objection to Prince George’s County Phase I Municipal Separate Storm
25 Sewer (MS4) Permit MD0068284 (Nov. 29, 2012) at 3 [discussing EPA objections to draft MS4 permit
26 due to backsliding], *available at*:
27 http://www.mde.maryland.gov/programs/Water/StormwaterManagementProgram/SedimentandStormwaterHome/Documents/SHA%20MS4%20Basis%20for%20Final%20Determination%2009_30_2015.pdf.

28 ⁵ The EPA NPDES Permit Writers’ Manual is *available at*:
http://www3.epa.gov/npdes/pubs/pwm_2010.pdf.

1 [finding that “regulations at § 122.44(l)(1) restrict the relaxation of final effluent limitations and the
2 relaxation of standards or conditions contained in existing permits. Thus, this regulation, in effect,
3 addresses all types of backsliding not addressed in the CWA provisions (e.g., backsliding from
4 limitations derived from effluent guidelines, from new source performance standards, from existing
5 case-by-case limitations to new case-by-case limitations, and from conditions such as monitoring
6 requirements that are not effluent limitations].”) The Regional Board’s citation to an outdated version of
7 the anti-backsliding regulations, which predated the 1987 Clean Water Act Amendments and the
8 addition of section 402(o), is unjustified and does not provides support for its position. EPA amended
9 the anti-backsliding regulations following the passage of section 402(o), and in doing so, explicitly
10 stated that “the regulation at § 122.44(l)(1) restricts backsliding in cases not covered by the [1987 Clean
11 Water Act] amendments.” (54 Fed. Reg. 246, 251-52 (Jan. 4, 1989). Thus, the anti-backsliding
12 regulations apply to the Receiving Water Limitations and Discharge Prohibitions in the 2015 Permit.

13 Second, the Regional Board argues that even if the anti-backsliding provisions apply, no
14 violation has occurred because “the actual requirements in Provisions C.9 to C.12 and C.14 are as or
15 more stringent than the requirements in the previous permit.” (2015 Permit, Fact Sheet, at A-17.)
16 However, the Regional Board provides no factual or legal basis for its suggestion that the requirements
17 governing pesticides and toxicity, trash, mercury, and PCBs are any more stringent than those contained
18 in the 2009 Permit. Regardless, the Regional Board does not dispute the fact the compliance language
19 in Section C.1 of the 2015 Permit, which contains the new safe harbor provisions, is less stringent than
20 the previous permit.

21 Finally, the Regional Board argues that even if backsliding has occurred with regard to receiving
22 water limitations, “the exception to backsliding based on new information and changed circumstances
23 since the last permit applies.” (2015 Permit, Fact Sheet, at A-17 [citing 40 C.F.R. § 122.44(l)(1); 40
24 C.F.R. § 122.62(a)(2); 40 C.F.R. § 122.44(l)(2)(i)(B)(1)].) According to these regulations, such an
25 exception applies where “[i]nformation is available which was not available at the time of permit
26 issuance (other than revised regulations, guidance, or test methods) and which would have justified the
27 application of a less stringent effluent limitation at the time of permit issuance.” (40 C.F.R. §
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1 122.44(1)(2)(i)(B)(1).) However, the Regional Board fails to specify what new information it is
2 referring to, other than to vaguely state that “experience and knowledge gained through implementation
3 of actions required by the previous permit and results of source identification studies and control
4 measure effectiveness studies since the adoption of the previous permit.” (2015 Permit, Fact Sheet, at
5 A-17.) Of course, any time an NPDES permit is reissued after several years, “experience and
6 knowledge” should have been gained through implementation of the previous permit. However, such a
7 broad interpretation would render the anti-backsliding requirements meaningless, and the Regional
8 Board cites no authority for such an expansive reading of this exception.

9 In addition, the Regional Board fails to address the fact that Clean Water Act section 402(o)(3)
10 contains a safety clause that provides an absolute limitation on backsliding. This section prohibits the
11 relaxation of effluent limitations in all cases if the revised effluent limitations would result in a violation
12 of applicable effluent guidelines or water quality standards. (33 U.S.C. § 1342(o).) Similarly, the Act’s
13 implementing regulations provide that “[i]n no event may such a permit to discharge into waters be
14 renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such
15 limitation would result in a violation of a water quality standard under section 303 applicable to such
16 waters.” (40 C.F.R. § 122.44(1)(2)(ii).) Thus, even if one or more of the backsliding exceptions outlined
17 in the statute is applicable and met, section 402(o)(3) and the implementing regulations act as a floor and
18 restrict the extent to which effluent limitations may be relaxed. By excusing compliance with Receiving
19 Water Limitations, which prohibit discharges that cause or contribute to violations of water quality
20 standards, the 2015 Permit explicitly violates this safety clause and is unlawful.

21 **b. The 2015 Permit’s Safe Harbors Violate State Board Order WQ 2015-0075.**

22 In Order WQ 2015-0075, the State Board considered the legality of safe harbor provisions in the
23 MS4 permit for Los Angeles County and established several principals that must be followed for the
24 inclusion of an alternative compliance pathway. (State Board Order WQ 2015-0075 [“LA Order”], at
25 30-52.) In particular, the State Board evaluated the Los Angeles MS4 permit’s requirements to develop
26 and implement a watershed management program (“WMP”) or enhanced watershed management
27 program (“EWMP”) to achieve compliance with receiving water limitations, and the reasonable
28

1 assurance analysis (“RAA”) supporting the WMP/EWMP. The State Board found that such an approach
2 “is a clearly defined, implementable, and enforceable alternative” to achieving receiving water
3 limitations while remaining in compliance with the terms of the permit. (*Id.*) The State Board directed
4 other regional boards “to consider the WMP/EWMP approach to receiving water limitations
5 compliance,” and found that any regional differences “must nevertheless be guided by a few principles.”
6 (*Id.* at 51.) Of particular relevance here, the State Board required that:

7 1. The receiving water limitations provisions of Phase I MS4 permits should continue to
8 require compliance with water quality standards in the receiving water and should not
9 deem good faith engagement in the iterative process to constitute such compliance.

10 3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent
11 alternative compliance path that allows permittees appropriate time to come into
12 compliance with receiving water limitations without being in violation of the receiving
13 water limitations during full implementation of the compliance alternative.

14 7. The alternative compliance path should have rigor and accountability. Permittees
15 should be required, through a transparent process, to show that they have analyzed the
16 water quality issues in the watershed, prioritized those issues, and proposed appropriate
17 solutions. Permittees should be further required, again through a transparent process, to
18 monitor the results and return to their analysis to verify assumptions and update the
19 solutions.

20 (LA Order at 51-52.)

21 Here, the 2015 Permit contains nothing even remotely close to the rigor, accountability, or
22 transparency in the WMP/EWMP approach of the Los Angeles MS4 permit. The 2015 Permit provides
23 no objective criteria, specifications, or guidance, and requires no validation, peer-reviewed acceptable
24 modeling methods, or minimum data requirements, nor does it appear to even consider such
25 requirements necessary. As discussed in more detail below, the 2015 Permit does not require
26 monitoring or data collection that would be needed to support such an approach, in contrast to MS4
27 permits in the Los Angeles region, which requires rigorous receiving water and end-of-pipe monitoring.
28 In fact, the only language in the 2015 Permit remotely related to the WMP/EWMP process is the
requirement for Permittees to “submit in their 2020 Annual Report a reasonable assurance analysis to
demonstrate” specified reductions in mercury and PCBs by 2040 through the implementation of green
infrastructure projects. (2015 Permit, Sections C.11.c.iii, C.12.c.iii.)

1 Yet the Regional Board provides almost no detail or technical guidance to Permittees with regard
2 to how to conduct such modeling. In its Fact Sheet, the Regional Board simply states that:

3 [P]ermittees in the Bay Area can take advantage of related (reasonable assurance
4 analysis) efforts already underway in Southern California. The Los Angeles Regional
5 Water Board has produced a useful set of guidelines for conducting a Reasonable
6 Assurance Analysis (RAA) for the watershed management programs that are required
7 through their MS4 permits. These guidelines provide an excellent reference and starting
8 point for the RAA required through C.11/12.c in terms of the mechanics of the analysis,
9 BMP identification, critical condition selection, choice of models, model calibration
10 criteria, modeling inputs, and model outputs. The crucial feature of the Southern
11 California RAAs is that they must demonstrate with sufficient analytical rigor that the
suite of foreseeable control measures to reduce loads will result in compliance with final
WLAs. The RAA performed for PCBs and mercury for the San Francisco Bay Area will
be similar in many respects to the type of analysis described in the Southern California
guidance document, but they must also account for the local watershed characteristics as
well as what has been learned about the distribution, fate, and transport characteristics of
PCBs and mercury.

12 (2015 Permit, Fact Sheet, at A-109.) Simply referencing efforts in other regions that provide a “starting
13 point” for Permittees in the Bay Area hardly matches the rigor and accountability required by the LA
14 Order. In addition, the language in the 2015 Permit provides no mechanism for public review and
15 comment on this RAA process. (*See* LA Order at 37 [an “essential” component in ensuring that
16 “WMPs/EWMPs are in fact designed to achieve receiving water limitations” is that “the WMPs/EWMPs
17 are subject to a public review and comment period”].) Furthermore, despite the fact that Permittees are
18 not required to submit an RAA until the end of the permit term, the 2015 Permit excuses compliance
19 with Discharge Prohibitions and Receiving Water Limitations throughout the 5-year term of the Permit
20 simply for engaging in the process. (*See* LA Order at 49 [finding that “‘safe harbor’ in the planning
21 phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to
22 approval and implementation and is structured with clear, enforceable provisions”].)

23 The safe harbor provisions are even more egregious with regard to the trash load reduction
24 requirements in Section C.10 of the 2015 Permit, which do not fall under an adopted TMDL wasteload
25 allocation or implementation plan. Under Section C.10, Permittees are required to use visual
26 assessments and mapping along roadways to categorize areas into Very High, High, Moderate, and Low
27 trash generation areas, and then implement trash control actions to reduce trash generation rates and
28

1 achieve the specified percentage reductions. The 2015 Permit contains no specified monitoring
2 requirements for determining trash load reductions or whether management actions translate into trash
3 reductions in receiving waters, many of which are 303(d) listed for trash impairment. This scheme
4 provides a subjective, ad-hoc process with none of the technical rigor or objective standards of the
5 WMP/WEMP approach, and no opportunity for public review or comment on whether Permittees are
6 actually achieving the required trash load reductions. Yet simply complying with the “requirements and
7 schedules” in Section C.10 excuses Permittees from compliance with the Receiving Water Limitations
8 and Discharge Prohibitions related to trash. (2015 Permit, Section C.1.)

9 In sum, the safe harbor provisions in the 2015 Permit are inconsistent with the requirements of
10 State Board Order WQ 2015-0075 and must be removed from the Permit.

11 **2. The 2015 Permit Fails to Include Monitoring Sufficient to Determine Compliance.**

12 The Clean Water Act and its implementing regulations require that a permitting agency include
13 monitoring provisions in NPDES permits that are adequate to demonstrate whether dischargers actually
14 comply with the terms of the permit. (*See* 33 U.S.C. § 1342(a)(2); 40 C.F.R. §§ 122.41(j)(1),
15 122.44(i)(1), 122.48(b); *see also* Water Code § 13383.5.) As recently explained by the Ninth Circuit
16 Court of Appeals in a challenge to an MS4 permit, “an NPDES Permit is unlawful if a permittee is not
17 required to effectively monitor its permit compliance.” (*County of Los Angeles*, 725 F.3d at 1207; *see*
18 *also Natural Res. Def. Council v. U.S. EPA* (2d Cir. 2015) 804 F.3d 149, 175-76 [finding that NPDES
19 permit for vessel discharges violated Clean Water Act because it did not “contain a mechanism to
20 evaluate compliance” with effluent limitations].) In particular, NPDES permits must include provisions
21 “to assure compliance with permit limitations” through the monitoring of the amount of pollutants
22 discharged, the volume of effluent discharged from each outfall, and “other measurements as
23 appropriate.” (40 C.F.R. § 122.44(a)(1)(i)-(iii).)

24 Here, the 2015 Permit’s monitoring requirements are insufficient to determine compliance with
25 the Permit’s Discharge Prohibitions and Receiving Water Limitations. The Water Quality Monitoring
26 section of the 2015 Permit requires no stormwater outfall, end-of-pipe, or wet weather monitoring for
27 any pollutant, with the exception of one annual “wet weather” sample from each county for pesticides
28

1 and toxicity monitoring. (2015 Permit, Section C.8; *see id.* Section C.8.g.iii [“Wet Weather Pesticide
2 and Toxicity Monitoring”].) Given this lack of data, it will be impossible to evaluate whether any
3 individual Permittee, or the Permittees collectively, are in compliance with the 2015 Permit. For
4 example, without any representative data of stormwater discharges from the Permittees’ MS4s, there
5 will be no way to determine whether such discharges are causing or contributing to a violation of any
6 applicable water quality standard for receiving waters (Receiving Water Limitation B.2), or are resulting
7 in the discharge of non-stormwater or trash into surface waters (Discharge Prohibitions A.1 and A.2).
8 The 2015 Permit contrasts with current MS4 permits in the Los Angeles, Santa Ana, and San Diego
9 regions, which require monitoring for an exhaustive list of pollutants in both receiving water and at
10 stormwater outfalls, during storm events, by all Permittees.

11 In the Fact Sheet for the 2015 Permit, the Regional Board attempts to justify the 2015 Permit’s
12 lack of end-of-pipe monitoring by stating that the National Research Council (“NRC”) and EPA believe
13 that “MS4 end-of-pipe monitoring produces data of limited usefulness.” (2015 Permit, Fact Sheet, at A-
14 72 – A-73.) However, the NRC report cited for this conclusion does not support such findings. Rather,
15 as the NRC concluded with regard to MS4 stormwater monitoring, “[s]tormwater management would
16 benefit most substantially from a well-balanced monitoring program that encompasses chemical,
17 biological, and physical parameters *from outfalls to receiving waters.*”⁶ Not surprisingly, EPA has often
18 supported outfall as well as in-stream monitoring requirements in MS4 permits in California and
19 elsewhere.⁷

20 ⁶ NRC, *Urban Stormwater Management in the United States* (2009), at 7, *available at*:
21 <http://www.nap.edu/catalog/12465/urban-stormwater-management-in-the-united-states> (emphasis
22 added).

23 ⁷ *See, e.g.*, EPA, Comments on Draft MS4 Permit for Los Angeles County (NPDES Permit No.
24 CAS004001) (Jul. 23, 2012) at 5 [“we support instream as well as outfall monitoring since they both
25 may provide useful information”]; EPA, Comments on Draft MS4 Permit for the City of Long Beach
26 (Permit No. CAS004003) (Jan. 15, 2014) at 1 [“we support the monitoring program (Attachment E),
27 particularly the requirement for outfall monitoring in addition to instream monitoring since this will help
28 identify which outfalls may be contributing to exceedances of WLAs or receiving water limitations”];
EPA, Comments on Draft MS4 Permit for Orange County (Permit No. CAS618030) (Jan. 20, 2014) at 6
[recommending sufficient sampling at representative “MS4 outfalls” to “allow a compliance
determination with each applicable WLA”], *available at*:

1 The 2015 Permit also includes a separate receiving water monitoring section for trash discharges.
2 (2015 Permit, Section C.10.b.v.) However, this section provides Permittees almost the entire length of
3 the Permit term to “develop receiving water monitoring tools and protocols,” and only requires that
4 Permittees submit “a final report by July 1, 2020 on the proposed trash receiving water monitoring
5 program.” (*Id.*) Actual sampling of receiving waters for trash discharges to evaluate whether or not
6 control actions are actually reducing trash from the MS4 or complying with the Receiving Water
7 Limitations and Discharge Prohibitions is nowhere required.⁸

8 In sum, the 2015 Permit does not include monitoring provisions sufficient to determine
9 compliance with permit terms or yield data which are representative of the monitored activity, and
10 therefore must be remanded to the Regional Board to address such deficiencies.

11 **3. The Regional Board’s Decision to Adopt the 2015 Permit, Including its Safe Harbor**
12 **and Monitoring Provisions, Is Not Supported by the Findings or the Evidence in the**
13 **Administrative Record.**

14 The Regional Board’s approval of the 2015 Permit violates long-established requirements for
15 agency decision-making. The Regional Board’s findings fail to show the Board’s mode of analysis to
16 “bridge the analytic gap between the raw evidence and [the] ultimate decision or order.” (*See Topanga*
17 *Ass’n for a Scenic Cmty*, 11 Cal.3d at 515.) Moreover, the Regional Board’s final decision lacks
18 evidentiary support in the record. The absence of adequate findings or evidence renders the Regional
19 Board’s decision unlawful. (*See Cal. Civ. Proc. Code § 1094.5(b)*; *see also Zuniga*, 137 Cal. App. 4th at
20 1258.)

21 The 2015 Permit’s discussion of anti-backsliding requirements exemplifies the Regional Board’s
22 lack of sufficient analysis. Baykeeper raised significant legal and factual arguments before the Regional
23 Board, both in written and oral comments, to show that the new safe harbors in the 2015 Permit violate
24 federal anti-backsliding requirements. In response, the Regional Board simply repeated (incompletely)

25 http://www.waterboards.ca.gov/sandiego/board_info/agendas/2015/Nov/Item11/2015-1118_Item11_SupDoc10_USEPALetters.pdf.

26 ⁸ The 2015 Permit’s monitoring provisions for trash are also inconsistent with Monitoring and Reporting
27 requirements in State Board Resolution No. 2015-0019, the Final Trash Provisions of the Water Quality
28 Control Plan for Inland Surface Waters, Enclosed Bay, and Estuaries of California (“Trash Amendments”). (*See Trash Amendments*, Appendix E, at E-7 – E-8.)

1 the legal conclusions in State Board Order WQ 2015-0075, then stated, without any legal or factual
2 basis, that the requirements in the 2015 Permit “are as or more stringent than the requirements in the
3 previous permit.” (2015 Permit, Fact Sheet, at A-16 – A-17.) The Regional Board also stated that “the
4 exception to backsliding based on new information and changed circumstances since the last permit
5 applies,” without identifying what new information would justify applying such an exception from these
6 explicit statutory requirements. (*Id.* at A-17.) Such bare conclusions are impermissible to support the
7 decision to adopt the safe harbor language in Section C.1. (*See American Funeral Concepts-American
8 Cremation Soc’y v. Board of Funeral Directors and Embalmers* (1982) 136 Cal.App.3d 303, 309
9 [“administrative findings set forth solely in the language of the applicable legislation are insufficient”].)

10 Baykeeper also raised significant legal and factual arguments before the Regional Board to
11 demonstrate the safe harbors incorporated in the 2015 Permit violate State Board Order WQ 2015-0075.
12 While the Regional Board attempted in the Fact Sheet to address the principles articulated by the State
13 Board, it again responded with conclusory statements that have no basis in the Permit language itself.
14 (*See* 2015 Permit, Fact Sheet, at A-24 – A-26.) For example, the Regional Board claims that the 2015
15 Permit requirements “are ambitious and rigorous because they will require Permittees to fully commit to
16 and implement challenging but achievable tasks to ultimately meet water quality objectives,” and thus
17 “appl[y] principles 1, 2, and 3” of the State Board Order. (*Id.* at A-25.) Yet nowhere does the Regional
18 Board actually discuss how the 2015 Permit provisions compare to the WMP/EWMP approach, or even
19 mention how it is transparent, such as by including opportunities for public review and comment. (*See*
20 State Board Order WQ 2015-0075 at 37-39, 51-52.) Nor does the Regional Board ever make a specific
21 showing that the application of a given principle is not appropriate for the region. (*See id.* at 51.)

22 As discussed above in Section E.2, the Regional Board’s stated rationale for not including
23 monitoring provisions sufficient to determine compliance with the 2015 Permit, including a failure to
24 require any outfall monitoring or wet weather sampling for most pollutants, is unsupported and lacks
25 evidentiary support in the record. For all of these reasons, the Regional Board’s decision to adopt the
26 2015 Permit was unlawful.

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

2 A true and correct copy of this Petition was sent to the Regional Board and the dischargers by
3 email and first class U.S. mail on December 18, 2015. (See Proof of Service, attached hereto.)

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

6 Petitioner has previously raised and presented all the issues addressed in this Petition by
7 comment letters submitted to the Regional Board on March 9, 2015 and July 10, 2015, and in oral
8 testimony at Regional Board workshops and public hearings on June 10, 2015, July 8, 2015, and
9 November 18, 2015. Petitioner also presented power point slides to the Regional Board during its oral
10 testimony on November 18, 2015, which followed the Regional Board's release of substantial revisions
11 to the Permit on October 16, 2015, November 10, 2015, and at the November 18, 2015 public hearing.
12 However, Petitioners and other members of the public were not permitted to submit written comments
13 on these revisions.

14 Respectfully submitted,

15 
16

17 _____
18 George Torgun
19 Attorney for Petitioner
20 San Francisco Baykeeper

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is 1736 Franklin St., Suite 800, Oakland, California 94612.

On December 18, 2015, I served the **PETITION FOR REVIEW OF SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD ACTION ADOPTING ORDER NO. R2-2015-0049** on the following interested parties by placing a true copy thereof without attachments in the United States mail enclosed in a sealed envelope with postage prepaid to the addresses listed below, and by email with attachments to the email addresses listed below:

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I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed at Oakland, California on December 18, 2015.



George Torgun