

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
4 the California Regional Water Quality Control Board, San Francisco Bay Region (“Regional
5 Board”) approving the Municipal Regional Stormwater NPDES Permit, Order No. R2-2022-0018,
6 NPDES Permit No. CAS612008 (the “2022 Permit” or “Permit”). The 2022 Permit regulates the
7 discharge of stormwater runoff from the municipal separate storm sewer systems (“MS4s”) and
8 other designated stormwater discharges from municipalities and flood management agencies in
9 Alameda County, Contra Costa County, San Mateo County, Santa Clara County, and the Cities of
10 Fairfield, Suisun City, and Vallejo and the Vallejo Flood & Wastewater District in Solano County
11 (collectively, the “Permittees”).
12

13 **1. NAME, ADDRESS, TELEPHONE NUMBER AND EMAIL ADDRESS OF THE**
14 **PETITIONER.**

15 San Francisco Baykeeper

16 Attn: Eric Buescher, Senior Staff Attorney

17
18 1736 Franklin Street, Suite 800

19 Oakland, CA 94612

20 Phone: 510-735-9700

21 Email: eric@baykeeper.org
22

23 **2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE**
24 **BOARD IS REQUESTED TO REVIEW, AND A COPY OF ANY ORDER OR**
25 **RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE**
26 **PETITION.**

26 Baykeeper seeks review of the Regional Board’s May 11, 2022 approval of the Municipal
27 Regional Stormwater NPDES Permit, Order No. R2-2022-0018, NPDES Permit No. CAS612008.
28

1 A copy of the Order is attached as Exhibit A.

2
3 **3. THE DATE ON WHICH THE REGIONAL BOARD ACTED.**

4 The Regional Board approved the Permit at issue on May 11, 2022.

5
6 **4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION WAS**
7 **INAPPROPRIATE OR IMPROPER.**

8 In approving the 2022 Permit, the Regional Board failed to act in accordance with relevant
9 governing law, including the Clean Water Act and State Board Orders WQ 2015-0075 and WQ
10 2020-0038, acted arbitrarily and capriciously, without substantial evidence, and without adequate
11 findings. Specifically, but without limitation, the Regional Board:

- 12
13 1. Improperly adopted safe harbor provisions in Section C.1 of the Permit that excuse
14 compliance with the Permit’s Receiving Water Limitations and Discharge Prohibitions for
15 specific pollutants and receiving waters, in violation of the standards governing such
16 provisions in State Board Orders WQ 2015-0075 and WQ 2020-0038;
- 17 2. Included monitoring provisions in Section C.8 of the Permit that “assure compliance with
18 permit limitations” or “yield data which are representative of the monitored activity,” in
19 compliance with the Clean Water Act only to the extent each monitoring location
20 determines compliance by all upstream municipal dischargers. *See* 40 C.F.R. §§
21 122.44(i)(1), 122.48(b); *Natural Res. Def. Council v. County of Los Angeles* (9th Cir.
22 2013) 725 F.3d 1194, 1208-09. Moreover, the monitoring program cannot support the safe
23 harbors of the Permit, and are contrary to State Board policy. *See* State Board Orders WQ
24 2015-0075 and WQ 2020-0038;
- 25 3. Acted arbitrarily and capriciously because the ultimate decision of adopting the Permit is
26 not supported by the findings, and the findings are not supported by the weight of the
27 evidence in the administrative record, resulting in an abuse of discretion. Cal. Code Civ.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Proc. § 1094.5. Stated another way, the Regional Board failed to “set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.” *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED.

Petitioner San Francisco Baykeeper is a non-profit public benefit corporation organized under the laws of the State of California and comprised of approximately 3,500 members who live and/or recreate in and around the San Francisco Bay Area. Baykeeper’s mission is to defend San Francisco Bay from the biggest threats and hold polluters and government agencies accountable to create healthier communities and help wildlife thrive. Its team of scientists and lawyers investigate pollution via aerial and on-the-water patrols, strengthen regulations through science and policy advocacy, and enforce environmental laws on behalf of the public. Baykeeper’s members directly benefit from the Bay Area’s public trust resources in the form of recreational swimming, fishing, surfing, photography, bird watching, and boating, among other uses, each of which uses have been, are, and will continue to be adversely impacted by the addition of pollutants to San Francisco Bay and its tributaries from the subject Permittees. Petitioner’s members are therefore aggrieved by the Regional Board’s failure to adequately control the discharge of municipal stormwater pollution, to prevent such pollution from causing or contributing to violations of water quality standards, or to support the beneficial uses of the receiving waters.

In particular, the Regional Board’s failure to adequately control municipal stormwater runoff through this Permit, or to ensure that the Permit’s provisions meet the requirements of the Clean Water Act, California Water Code, and implementing regulations, has enormous consequences for the region and its residents. Receiving waters in the San Francisco Bay region continue to be impaired for a variety of pollutants, and monitoring data shows that stormwater discharges

1 contribute to certain pollutants at levels that cause or contribute to such impairments. Urban
2 stormwater runoff is one of the largest sources of pollution in San Francisco Bay and its
3 tributaries. Pollutants in stormwater can adversely impact avian, aquatic, and plant life in
4 receiving waters and can cause serious human health impacts. For example, high concentrations
5 of fecal indicator bacteria document the presence of human and animal waste at Bay Area creeks
6 and beaches, posing serious health risks to the public. High mercury levels in the Bay make
7 regular consumption of fish unsafe. PCBs are toxic and persistent organic pollutants that cause
8 adverse health effects to humans and wildlife, including cancer, liver damage, skin irregularities,
9 and impact child development. Trash pollution poses a visual distraction and discourages
10 recreation-based beneficial uses, and can cause serious problems for wildlife, wildlife habitat, and
11 human health by leaching contaminants and smothering benthic communities. Bacteria pollution
12 adversely impacts recreational beneficial uses. All of these documented facts demonstrate the
13 continued negative impacts on Baykeeper’s members and the environment that result from the
14 Regional Board’s failure to adequately control municipal stormwater pollution through the
15 Permit.
16

17 **6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**
18 **PETITIONER REQUESTS.**

19 Petitioner seeks an Order by the State Board that overturns the Regional Board’s approval of the
20 Municipal Regional Stormwater NPDES Permit, Order R2-2022-0018, NPDES Permit No.
21 CAS612008, and remands the matter to the Regional Board with specific direction to remedy
22 each of its violations of law as further described herein.
23

24 Petitioners further seek a stay of Order R2-2022-0018, NPDES Permit No. CAS 612008 pending
25 resolution of this Petition. *See* Request for Stay, filed concurrently.
26

27 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES**
28 **RAISED IN THE PETITION, INCLUDING CITATIONS TO DOCUMENTS OR THE**
TRANSCRIPT OF THE REGIONAL BOARD HEARING IF IT IS AVAILABLE.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. INTRODUCTION

This petition seeks review of the Regional Board’s approval of the Municipal Regional Stormwater NPDES Permit, Order No. R2-2022-0018, NPDES Permit No. CAS612008, which regulates the discharge of stormwater runoff from MS4s and other designated stormwater discharges from municipalities and flood management agencies in Alameda County, Contra Costa County, San Mateo County, Santa Clara County, and parts of Solano County. Stormwater runoff is one of the most significant sources of water pollution in the nation and has been recognized as a leading cause of significant and cumulative harmful impacts to the water quality of San Francisco Bay. Unfortunately, the Permit approved by the Regional Board governing such pollution from municipal sources is unlawful for several reasons, including: 1) the inclusion of “safe harbor” provisions that excuse compliance with receiving water limitations and discharge prohibitions for several key pollutants of concern without meeting the requirements for such safe harbors set out in State Board precedential orders, and 2) inadequate monitoring provisions that fail to assure compliance with Permit limitations by municipal permittees, or to provide the effectiveness evaluation required by the State Board for inclusion of safe harbors. These violations of the Clean Water Act and state law present compelling reasons for the State Board to exercise its statutory duty to correct these deficiencies to protect the waters of the San Francisco Bay region and public health.

B. LEGAL BACKGROUND

1. Safe Harbors in MS4 Permit

The State Board has issued two orders defining the acceptable parameters for alternative compliance approaches, specifically safe harbor provisions, in Phase I municipal separate storm sewer system permits (“MS4 Permits”): *Waste Discharge Requirements and National Pollutant Discharge Elimination System Permit for the Municipal Separate Storm Sewer System (MS4) For the Coastal Watersheds of Los Angeles and Ventura Counties*; Permit No. CAS004004, Order No.

1 R4-2012-0175 (“State Board Order WQ 2015-0075”); and *In the Matter of Review of Approval of*
2 *Watershed Management Programs and an Enhanced Watershed Management Program Submitted*
3 *Pursuant to Los Angeles Regional Water Quality Control Board Order R4-2012-0175* (“State
4 Board Order WQ 2020-0038”). These State Board Orders are precedential and apply to reissued
5 Phase 1 MS4 Permits throughout California.¹

6
7 Any MS4 Permit incorporating a safe harbor, such as the 2022 Permit, must comply with the
8 baseline requirements for safe harbor provisions for alternative compliance paths in MS4 Permits
9 provided in State Board Orders WQ 2015-0075 and WQ 2020-0038. At a minimum, safe harbor
10 provisions must be *well-defined, transparent, and finite*, allowing permittees willing to pursue
11 significant undertakings beyond the iterative process to be deemed in compliance with receiving
12 water limitations. State Board Order 2015-0075 at 76.

13
14 The State Board has expressly instructed the Regional Boards to consider the Los Angeles County
15 MS4 Permit’s safe harbor approach to receiving water limitations compliance for all MS4 permits
16 issued after 2015, and provided the following principles, in pertinent part:

17
18
19
20
21 ¹ State of California State Water Resources Control Board, Order WQ 2015-0075, *In the Matter*
22 *of Review of Order No. R4-2012-0175, NPDES Permit No. CA004001, Waste Discharge*
23 *Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal*
24 *Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long*
25 *Beach MS4* at 51-52; State of California State Water Resources Control Board, Order WQ 2020-
26 0038, *In the Matter of Review of Approval of Watershed Management Programs and an Enhanced*
27 *Watershed Management Program Submitted Pursuant to Los Angeles Regional Water Quality*
28 *Control Board Order R4-2012-0175* at 163-64 (“[W]e expect other permits and plans that utilize
alternative compliance approaches consistent with our Order WQ 2015-0075 will often share
similar features. For that reason, the principles discussed above will have precedential value
outside of the Los Angeles region in some circumstances.”).

- 1 1. *The Phase 1 MS4 permits should incorporate an ambitious, rigorous, and*
2 *transparent alternative compliance path that allows permittees appropriate time to*
3 *come into compliance with receiving water limitations without being in violation of*
4 *the receiving water limitations during full implementation of the compliance*
5 *alternative.*
- 6 2. *The alternative compliance path should encourage watershed-based approaches,*
7 *address multiple contaminants, and incorporate TMDL requirements.*
- 8 3. *The alternative compliance path should encourage the use of green infrastructure*
9 *and the adoption of low impact development principles.*
- 10 4. *The alternative compliance path should encourage multi-benefit regional projects*
11 *that capture, infiltrate, and reuse storm water and support a local sustainable water*
12 *supply.*

13
14 Perhaps most importantly here, the State Board Order requires:

15
16 7. *The alternative compliance should have rigor and accountability. Permittees*
17 *should be required, through a transparent process, to show that they have analyzed*
18 *the water quality issues in the watershed, prioritized those issues, and proposed*
19 *appropriate solutions. Permittees should be further required, again through a*
20 *transparent process, to monitor the results and return to their analysis to verify*
21 *assumptions and update the solutions. Permittees should be required to conduct*
22 *this type of adaptive management on their own initiative without waiting for*
23 *direction from the regional water board.*

24
25 State Board Order WQ 2015-0075 at 51-52; *accord id.* at 77-78. Alternatively, the Regional Board
26 can make a specific showing that application of a given principle is not appropriate for region-
27 specific or permit-specific reasons. *Id.* at 51; *accord id.* at 78; *see also* State Board Order WQ
28 2020- 0038 at 163.

1 In 2020, the State Board reviewed the adequacy of the alternative compliance plans developed in
2 Los Angeles County, the watershed management programs (“WMPs”) and enhanced watershed
3 management programs (“EWMPs”). The State Board found the WMPs and EWMPs reviewed to
4 be inadequate, and set out additional requirements to meet the rigor, accountability, and
5 transparency mandated in its prior precedential order. The State Board ordered the Regional Board
6 to require permittees to “gather relevant, available data for use in the development of the
7 alternative compliance plan” and “explain how that data was used or why it was not used and,
8 conversely, what to do when pertinent data is not available.” State Board Order 2020-0038 at 163-
9 64. The State Board summarized these requirements as follows:

- 11 *1. An explanation for how information in the source assessment was used.*
- 12 *2. Identification of unavailable, needed information and the assumption(s) being*
13 *made to substitute for that information with enforceable commitments to acquiring*
14 *the information and deadlines for incorporating it into the WMP. This applies not*
15 *just to source assessments but to the WMPs generally.*
- 16 *3. Identification of relevant, available data not used in the [Reasonable Assurance*
17 *Analysis] and an explanation of why it was disregarded.*
- 18 *4. A section or sections clearly detailing the basis for any limiting- pollutant*
19 *approach. [Permittees] must consider, at minimum, the pollutants’ similarity of*
20 *fate and transport mechanisms or explain why the differences in fate and transport*
21 *are irrelevant, and whether the limiting pollutants and the other pollutants to be*
22 *addressed are addressable via the types of control measures proposed in the WMP*
23 *within the same timeline already contemplated as part of the WMP.*
- 24 *5. A table that identifies each limiting-pollutant grouping and the water body or*
25 *bodies addressed.*

26
27 *Id.* at 75.
28

1 Further, the State Board required alternative compliance plans to include “regular, clearly
2 presented, enforceable, non-contingent milestones and deadlines” and to require “Permittees to
3 demonstrate actual compliance with milestones and deadlines not generated through reliance on
4 the relevant permit’s required analytical process.” *Id.* at 164. Minimum scheduling requirements
5 for alternative compliance plans identified by the State Board include the following:

6
7 *3. For watershed priorities related to addressing exceedances of receiving water*
8 *limitations not otherwise addressed by the Order’s TMDL provisions:*

- 9
10 *1. Milestones based on measurable criteria or indicators, to be achieved in the*
11 *receiving water and/or MS4 discharges,*
12 *2. A schedule with dates for achieving the milestones, and*
13 *3. A final date for achieving the receiving water limitations as soon as possible.*

14 *Id.* at 76-77.

15
16 **2. Anti-Degradation Analysis**

17
18 State and Federal anti-degradation requirements mandate that NPDES permits must ensure that
19 high water quality be maintained, unless degradation is justified based on specific findings, and
20 that in no case may impaired waters be further degraded. Federal anti-degradation policy
21 completely prohibits further degradation of impaired waters (i.e., waters that do not meet water
22 quality standards). 40 C.F.R. § 131.12(a)(1). The anti-degradation policy also prohibits actions
23 that degrade high-quality waters (i.e., waters that meet or exceed water quality standards) except
24 under specific circumstances. 40 C.F.R. § 131.12(a)(2)(ii). The federal policy is incorporated into
25 Porter-Cologne and is directly enforceable under state law. *See* Cal. Water Code. § 13372(a).
26 California also has its own anti-degradation policy that includes additional requirements. In 1968,
27
28

1 the State Board adopted Resolution No. 68-16, *Statement of Policy with Respect to Maintaining*
2 *High Quality Waters in California* (“Resolution No. 68-16”).

3
4 In 1990, the State Board issued Administrative Procedures Update 90-004, *Antidegradation*
5 *Policy Implementation for NPDES Permitting* (July 2, 1990) (“APU”). The APU provides: “To
6 implement the antidegradation policy, the Regional Boards must consider the need to include a
7 finding that specifies that water quality degradation is permissible when balanced against benefit
8 to the public of the activity in question.” *Id.* at 1. The APU clarifies this analysis must be made
9 when issuing, reissuing, amending, or revising a NPDES permit. *Id.* The findings should
10 explicitly state that the Regional Board considered anti-degradation in accordance with 40 C.F.R.
11 § 131.12 and Resolution No. 68-16 and finds that permitted discharges are consistent with those
12 requirements. *Id.* If the Regional Board finds that lowering of water quality is consistent with the
13 federal and state anti-degradation policies, then the findings should indicate: 1) the pollutant that
14 will lower water quality; 2) the socioeconomic and public benefits that result from lowered water
15 quality; and 3) the beneficial uses that will be affected. *Id.*

17 **3. Monitoring Program**

18
19 The Clean Water Act places the responsibility of monitoring discharges to evaluate permit
20 compliance on each discharger to allow for efficient compliance determinations and to ease the
21 burden on the regulatory agency. *Sierra Club v. Union Oil Co. of Cal.* (9th Cir. 1987) 813 F.2d
22 1480, 1491-92; *see also City of Brentwood v. Central Valley Reg. Water Quality Control Bd.*
23 (2004) 123 Cal.App.4th 714, 723 (explaining purpose and intent of Clean Water Act’s self-
24 monitoring requirements). The permitting agency must adopt monitoring requirements in NPDES
25 permits that will produce the information necessary to make efficient compliance determinations.
26 *Sierra Club*, 813 F.2d at 1491-92; *Natural Res. Def. Council v. County of Los Angeles* (9th Cir.
27 2013) 725 F.3d 1194, 1208-09 (“*County of Los Angeles*”) (discussing the necessity and purpose
28 of self-monitoring in context of municipal stormwater NPDES permits). The Clean Water Act’s

1 implementing regulations set forth the monitoring requirements that must be in NPDES permits.
2 *See* 40 C.F.R. §§ 122.44(i), 122.48. Among these requirements is the express mandate that
3 NPDES permits include provisions “to assure compliance with permit limitations” through the
4 monitoring of the amount of pollutants discharged, the volume of effluent discharged from each
5 outfall, and “other measurements as appropriate.” 40 C.F.R. § 122.44(a)(1)(i)-(iii).

6
7 The State Board has confirmed the centrality of monitoring in MS4 Permits, particularly in the
8 context of safe harbor provisions. Where MS4 Permits include safe harbors, monitoring must be:
9 1) sufficient to evaluate program implementation; 2) sufficient to determine progress towards
10 compliance with water quality standards; and 3) sufficient to evaluate whether a discharger is
11 causing or contributing to water quality standard exceedances. State Board Order WQ 2015-0075
12 at 39; 69-70.

13 14 **C. FACTUAL BACKGROUND**

15 **1. The 2015 Permit**

16
17 In 2015, the Regional Board reissued and adopted an NPDES Permit regulating the MS4s in
18 several Bay Area cities and counties (Order R2-2015-0049, NPDES Permit No. CAS612008)
19 (“2015 Permit”). The 2015 Permit included Discharge Prohibitions that prohibited the discharge
20 of non-stormwater, trash, and other solid wastes into waters. 2015 Permit, Section A. It also
21 contained Receiving Water Limitations that prohibited discharges that would create a condition of
22 nuisance, adversely affect beneficial uses, or “cause or contribute to a violation of any applicable
23 water quality standard for receiving waters.” 2015 Permit, Section B. Rather than require strict
24 compliance with the Discharge Prohibitions and Receiving Water Limitations in Sections A and
25 B, respectively, the 2015 Permit included “safe harbor” language stating that the Permittees
26 would be in compliance with these sections with regard to certain pollutants and receiving waters
27 as long as they complied with the “requirements and schedules” contained in other sections of the
28

1 2015 Permit, regardless of water quality standard exceedances or violations of the discharge
2 prohibitions. 2015 Permit, Section C.1.

3
4 The 2015 Permit also included water quality monitoring requirements, but required no wet
5 weather or outfall sampling for any pollutants, with the exception of pesticides and toxicity
6 monitoring. 2015 Permit, Section C.8.

7 **2. The 2022 Permit**

8
9 In 2022, the Regional Board again reissued and adopted the 2022 Permit, the next iteration of
10 municipal stormwater regulations in the Bay Area. The 2022 Permit contains the same Discharge
11 Prohibitions and Receiving Water Limitations previously required in the 2015 Permit. 2022
12 Permit, Sections A and B. It also contains safe harbor language stating Permittees would be
13 deemed in compliance as long as they complied with “requirements and schedules” contained in
14 other sections of the 2022 Permit:

15
16 *Compliance with Provisions C.9 through C.12, C.14, C.18 (pertaining to the*
17 *Pescadero-Butano Sediment TMDL), and C.19.c-f of this Order, which prescribe*
18 *requirements and schedules for Permittees identified therein to manage their*
19 *discharges that may cause or contribute to violations of water quality standards*
20 *(WQS) for pesticides, trash, mercury, polychlorinated biphenyls (PCBs), bacteria,*
21 *sediment, diazinon and chlorpyrifos, and methylmercury, shall constitute*
22 *compliance during the term of this Order with Receiving Water Limitations B.1 and*
23 *B.2 for the pollutants and the receiving waters identified in the provisions.*
24 *Compliance with Provision C.10 which prescribes requirements and schedules for*
25 *Permittees to manage their discharges of trash, shall also constitute compliance*
26 *with Discharge Prohibitions A.1 and A.2 during the term of this Order for*
27 *discharges of trash.*
28

1 2022 Permit, Section C.1. Most of the Permit sections under the safe harbor language in Section
2 C.1 implement adopted total daily maximum load (“TMDL”) wasteload allocations or Water
3 Quality Improvement Plan requirements, with the exceptions of Section C.10, implementing the
4 statewide Trash Amendments, and Section C.14.a, which addresses bacteria exceedances in
5 Mountain View and Sunnyvale that are not regulated by a TMDL. 2022 Permit Fact Sheet at A-
6 99-101. The addition of Mountain View and Sunnyvale in Section C.14.a is new to safe harbor in
7 the 2022 Permit.

8
9 The 2022 Permit includes an updated monitoring program. 2022 Permit at C.8-5 to C.8-16. The
10 monitoring requirements include limited outfall sampling on a county-wide basis for trash, 2022
11 Permit, at C.8-10, with optional stormwater sampling at MS4 discharge points for all other
12 pollutants. 2022 Permit at C.8-15-16. The 2022 Permit focuses on instream sampling, 2022
13 Permit C.8-15-21, and assert the instream monitoring is intended to assess compliance with
14 Receiving Water Limitations. 2022 Permit at C.8-18; 16. (“Monitoring in receiving waters to
15 assess compliance with RWLs.”) The Regional Board defended the Permit’s lack of outfall
16 sampling based on three “drawbacks”: 1) Permittee monitoring capacity is finite; 2) the value of
17 outfall sampling data is uncertain; and 3) outfall sampling data “will tell you what is already
18 understood.” 2022 Permit, Response to Comments at 39. It further elaborated on the third
19 drawback as follows: “[T]he results are likely to show that the stormwater flowing out of the
20 outfalls contain pollutants like pesticides, PCBs, mercury, [contaminant of emerging concern],
21 trash and other urban contaminants. We know this already.” 2022 Permit, Response to Comments
22 at 39.

23 24 **D. STANDARD OF REVIEW**

25
26 The State Board must exercise its independent judgment as to whether a Regional Board action is
27 reasonable. *See Stinnes-Western Chemical Corp.*, State Board WQ Order No. 86-16 (1986).
28 Specifically, the State Board’s review is equivalent to the standard a reviewing court would apply

1 under California Code of Civil Procedure Section 1094.5, which states that an “[a]buse of
2 discretion is established if the respondent has not proceeded in the manner required by law, the
3 order or decision is not supported by the findings, or the findings are not supported by the
4 evidence.” Cal. Civ. Proc. Code § 1094.5(b); *see also* *Zuniga v. San Diego County Civil Serv.*
5 *Comm’n* (2006) 137 Cal.App.4th 1255, 1258 (“*Zuniga*”) (applying same statutory standard).
6 “Where it is claimed that the findings are not supported by the evidence, . . . abuse of discretion is
7 established if the court determines that the findings are not supported by the weight of the
8 evidence.” Cal. Civ. Proc. Code § 1094.5(c).

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

20 **E. ARGUMENT**

21 22 **1. The 2022 Permit Creates Illegal Safe Harbors in Violation of State Board Orders** 23 **WO 2015-0075 and WO 2020-0038.**

24 Responding to data collected by San Francisco Baykeeper documenting 1) receiving waters in
25 Stevens Creek, Calabazas Creek, and Sunnyvale East Channel/Guadalupe Slough do not meet
26 water quality standards for bacteria; and 2) MS4 discharges from the cities of Mountain View and
27 Sunnyvale cause or contribute to those exceedances, the 2022 Permit added a safe harbor for
28

1 bacteria exceedances for those two cities. 2022 Permit at C.1; C.14.a. Mountain View and
2 Sunnyvale are deemed in compliance with the receiving water limitations and prohibitions of the
3 2022 Permit so long as they implement the C.14.a program set out in the Permit. *Id.*

4
5 State Board Order WQ 2015-0075 established several principals that must be followed for the
6 inclusion of an alternative compliance pathway. State Board Order WQ 2015-0075 at 30-52. The
7 State Board evaluated the Los Angeles area MS4 permit’s requirements to develop and implement
8 a watershed management program (“WMP”) or enhanced watershed management program
9 (“EWMP”) to achieve compliance with receiving water limitations, and the reasonable assurance
10 analysis (“RAA”) supporting the WMP/EWMP. The State Board found that such an approach “is
11 a clearly defined, implementable, and enforceable alternative” to achieving receiving water
12 limitations while remaining in compliance with the terms of the permit. *Id.* The State Board
13 directed other regional boards “to consider the WMP/EWMP approach to receiving water
14 limitations compliance,” and found that any regional differences “must nevertheless be guided by
15 a few principles.” *Id.* at 51. The State Board required that:

16
17 *4. The Phase I MS4 permits should incorporate an ambitious, rigorous, and*
18 *transparent alternative compliance path that allows permittees appropriate time*
19 *to come into compliance with receiving water limitations without being in*
20 *violation of the receiving water limitations during full implementation of the*
21 *compliance alternative.*

22 *7. The alternative compliance path should have rigor and accountability.*
23 *Permittees should be required, through a transparent process, to show that they*
24 *have analyzed the water quality issues in the watershed, prioritized those issues,*
25 *and proposed appropriate solutions. Permittees should be further required, again*
26 *through a transparent process, to monitor the results and return to their analysis*
27 *to verify assumptions and update the solutions.*
28

1 State Board Order WQ 2015-0075 at 51-52.

2
3 The bacteria safe harbor provisions of the 2022 Permit do not meet the rigor, accountability, or
4 transparency required by State Board Order WQ 2015-0075. The 2022 Permit provides no
5 objective criteria, specifications, or guidance, and requires no validation, peer-reviewed
6 acceptable modeling methods, or in fact any monitoring at all, to ensure that the program to
7 address bacteria will achieve water quality standard compliance. The bacteria program requires
8 source control measures only, with no consideration of infiltration, retention, diversion, or other
9 methods of addressing bacteria pollution once it has entered the MS4 but before discharge to
10 receiving waters. 2022 Permit at C.14.a. No RAA for program effectiveness in achieving water
11 quality standard compliance is required, and given the lack of modeling and the vague program
12 requirements, it is unclear how a RAA could be completed. Finally, the 2022 Permit provides no
13 mechanism for public review and comment regarding the implementation of the C.14.a program,
14 or progress towards water quality standard compliance. *See* State Board Order WQ 2015-0075 at
15 37 (an “essential” component in ensuring that “WMPs/EWMPs are in fact designed to achieve
16 receiving water limitations” is that “the WMPs/EWMPs are subject to a public review and
17 comment period”).

18
19 **2. The 2022 Permit Violates State and Federal Anti-degradation Requirements**

20
21 The 2022 Permit concedes that the safe harbors “may allow limited degradation of high-quality
22 water bodies by MS4 discharges.” 2022 Permit, Fact Sheet at A-61. As such, the Regional Board
23 was required to conduct an antidegradation analysis in the 2022 Permit to justify the adoption of
24 the safe harbors, in a manner that complies with federal and state antidegradation policies and
25 “bridge[s] the analytic gap between the evidence, the findings and the [Regional Board’s] ultimate
26 decision.” *See* State Board Order WQ 2015-0075 at 4–6, 14. The State Board reviews the
27 antidegradation analysis in the 2022 Permit to determine whether the 2022 Permit “implemented
28 the antidegradation policy in the manner required by law.” *Asociacion de Gente Unida por el*

1 *Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1268
2 (“*Agua*”) (citing *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12).

3
4 If a Regional Board determines that “a discharge [authorized under the 2022 Permit] will degrade
5 high quality water,” the Regional Board may only allow the resulting degradation if it makes
6 findings establishing that such degradation “(1) will be consistent with maximum benefit to the
7 people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such
8 water, and (3) will not result in water quality less than that prescribed in state policies.” State
9 Board Order WQ 2015-0075 at 11 (internal quotation marks omitted) (quoting *Agua, supra*, 210
10 Cal.App.4th at p. 1278). Moreover, the Water Board “must consider the need to include a finding
11 that specifies that water quality degradation is permissible when balanced against benefit to the
12 public of the activity in question,” while indicating in its analysis “[t]he socioeconomic and
13 public benefits that will result from lowered water quality.” *Ibid.* (internal quotation marks
14 omitted) (quoting APU at 1).

15
16
17 The Regional Board justifies the continued degradation of Bay Area creeks and beaches via a
18 four-step analysis in the 2022 Permit. First, the Regional Board argues that the safe harbor
19 programs are designed to eventually end degradation through cost-effective structural controls.
20 2022 Permit, Fact Sheet at A-61. Second, the Regional Board asserts that permittees need the
21 safe harbors—which “deem” permittees in compliance with water quality standards while
22 participating in compliance programs—as an incentive to implement multi-benefit pollution
23 control measures. *Id.* at A-68-69. Third, the Regional Board argues that requiring immediate
24 compliance is “unrealistic”, and as to bacteria impossible, because stormwater treatment or
25 retention systems cannot be installed based on land availability and utilities constraints; and more
26 fundamentally because those measures cannot reduce pollutants sufficient to meet bacteria water
27 quality standards. *Id.* at A-74-75. And fourth, the Regional Board balances the “significant
28

1 environmental, public health, and economic costs” resulting from ongoing stormwater pollution
2 against the future benefits of WMP implementation, ultimately concluding that insulating
3 polluters while they implement WMPs is “necessary to accommodate important economic or
4 social development.” *Id.* at A-61.

5
6 The second and third steps of the Regional Board’s antidegradation analysis contains the critical
7 findings supporting the adoption of the safe harbors in the 2022 Permit—that the safe harbors
8 “incentivize” multi-benefit projects, and that compliance with bacteria water quality standards is
9 impossible using current Best Management Practices (“BMPs”) technology. (2022 Permit, Fact
10 Sheet at A-68; A-75.) Yet, the 2022 Permit contains no evidentiary support to underlie these
11 findings. The assertion relating to safe harbors “incentivizing” multi-benefit projects is without
12 analysis or citation. And the extraordinary statement that retention, infiltration, and or treatment
13 BMPs cannot meet bacteria water quality standards is supported only by citation to a 2014 study
14 of pathogens in urban stormwater systems, and a 2020 summary of treatment system
15 performance. *Id.* at A-75. The Fact Sheet, or any other part of the 2022 Permit, fail to consider
16 the extensive WMP/EWMP modeling efforts, or the RAA supporting the BMPs design,
17 feasibility, and implementation undertaken in the Los Angeles area—and specifically the
18 conclusions of those WMP/EWMPs that compliance with bacteria standards *is reasonably*
19 *assured* using the contemplated mix of green infrastructure and multi-benefit projects described
20 in those programs. *See e.g.,*

21
22 [https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/waters](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/los_angeles/upper_losangeles/20160127/UpperLARiver_mainbody_revEWMP_Jan2016.pdf)
23 [hed_management/los_angeles/upper_losangeles/20160127/UpperLARiver_mainbody_revEWMP](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/los_angeles/upper_losangeles/20160127/UpperLARiver_mainbody_revEWMP_Jan2016.pdf)
24 [_Jan2016.pdf](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/los_angeles/upper_losangeles/20160127/UpperLARiver_mainbody_revEWMP_Jan2016.pdf)

25 And the 2022 Permit fails to consider the analysis conducted for the Los Angeles program,
26 despite having been directed by the State Board to do so. State Board Order WQ 2015-0075 at
27 51-52.

1
2 The 2022 Permit fails to build the requisite analytical bridge between the evidence, the findings
3 and the Regional Board’s ultimate decision to adopt the safe harbors in the 2022 Permit, in
4 violation of federal and state antidegradation policies.

5
6 **3. The 2022 Permit Monitoring Requires Clarification, and Cannot Support Safe Harbors.**

7
8 The Clean Water Act and its implementing regulations require that a permitting agency include
9 monitoring provisions in NPDES permits that are adequate to demonstrate whether dischargers
10 actually comply with the terms of the permit. *See* 33 U.S.C. § 1342(a)(2); 40 C.F.R. §§
11 122.41(j)(1), 122.44(i)(1), 122.48(b); *see also* Water Code § 13383.5. As recently explained by
12 the Ninth Circuit, “an NPDES Permit is unlawful if a permittee is not required to effectively
13 monitor its permit compliance.” *County of Los Angeles*, 725 F.3d at 1207; *see also Natural Res.*
14 *Def. Council v. U.S. Env’t Prot. Agency* (2d Cir. 2022) 804 F.3d 149, 175-76 (finding that
15 NPDES permit for vessel discharges violated Clean Water Act because it did not “contain a
16 mechanism to evaluate compliance” with effluent limitations). In particular, NPDES permits must
17 include provisions “to assure compliance with permit limitations” through the monitoring of the
18 amount of pollutants discharged, the volume of effluent discharged from each outfall, and “other
19 measurements as appropriate.” 40 C.F.R. § 122.44(a)(1)(i)-(iii). The State Board has confirmed
20 the centrality of monitoring in MS4 Permits, particularly in the context of safe harbor provisions.
21 MS4 Permit monitoring must be: 1) sufficient to evaluate program implementation; 2) sufficient
22 to determine progress towards water quality standards compliance; and 3) sufficient to evaluate
23 permit compliance, and specifically whether a discharger is causing or contributing to water
24 quality standard exceedances. State Board Order WQ 2015-0075 at 69-70.

25
26 The 2022 Permit includes an updated monitoring program. 2022 Permit at C.8-5 to C.8-16.
27 However, rather than requiring end of pipe sampling from a representative outfall from each
28

1 permittee (as is required by all other MS4 permits for major urban areas in California), instead the
2 permit requires limited outfall sampling on a county-wide basis for trash, 2022 Permit at C.8-10,
3 with stormwater sampling at MS4 discharge points an option, but not a requirement, for all other
4 pollutants. 2022 Permit at C.8-15-16. The 2022 Permit focuses on instream sampling. 2022
5 Permit at C.8-15-21. No point of compliance is set out in the permit, and no methodology for
6 using sampling data for making compliance determinations is described. Yet, the 2022 Permit
7 asserts that the monitoring is to assess compliance with Receiving Water Limitations. 2022
8 Permit at C.8-18; 16. (“Monitoring in receiving waters to assess compliance with RWLs.”)
9

10 Moreover, the Regional Board expressly rejected the utility of outfall sampling. The Regional
11 Board defended the Permit’s lack of outfall sampling based on three “drawbacks”: 1) Permittee
12 monitoring capacity is finite; 2) the value of outfall sampling data is uncertain; and 3) outfall
13 sampling data “will tell you what is already understood.” 2022 Permit, Response to Comments at
14 39. It further elaborated on the third drawback as follows: “[T]he results are likely to show that
15 the stormwater flowing out of the outfalls contain pollutants like pesticides, PCBs, mercury,
16 [contaminant of emerging concern], trash and other urban contaminants. We know this already.”
17 2022 Permit, Response to Comments at 39.
18

19 Consistent with *County of Los Angeles*, 725 F.3d 1194, the RWLs Assessment monitoring,
20 collected at four instream locations annually in each county, will be determinative of compliance
21 for all upstream cities contributing stormwater to that sampling location. *County of Los Angeles* at
22 1205-1207. While this application meets the minimum requirements of the Clean Water Act, it is
23 inconsistent with the guidance provided by the State Board. State Board Order WQ 2015-0075 at
24 67-68 (“Generally, in the context of MS4 Permits, we do not sanction joint responsibility to the
25 extent that that joint responsibility would require each permittee to take full responsibility for
26 addressing violations, regardless of whether, and to what extent, each permittee contributed to the
27 violation.”) Further, because the sampling is regional, and not specific to any Permittee, the
28

1 monitoring fails to provide data to evaluate any Permittee’s program implementation, or progress
2 towards water quality standards compliance—part of the robust analysis required to support safe
3 harbors. *Id.* at 69-70.

4
5 Finally, the Regional Board’s rejection of outfall sampling is contrary to the State Board’s policy
6 to avoid blanket liability in MS4 Permits. State Board Order WQ 2015-0075 at 67-68. The
7 Regional Board asserts it knows that stormwater outfall sampling will show concentrations of
8 pollutants regulated under the 2022 Permit, and concludes that outfall sampling is thus
9 unnecessary. 2022 Permit, Response to Comments at 39. But this assertion fails to get at the true
10 question at hand: is the amount of pollution discharged from an individual Permittee’s MS4
11 causing or contributing to exceedances of water quality standards? In order to determine an
12 individual Permittee’s compliance with Receiving Water Limitation B.2, Permittees must sample
13 both instream, to determine whether water quality standards are being exceeded in receiving
14 waters, and from outfalls, to determine whether an individual Permittee is causing or contributing
15 to the exceedance of water quality standards in receiving waters. Individual Permittee compliance
16 with Receiving Water Limitation B.2 cannot be determined without outfall sampling.

17
18 **4. The Regional Board’s Decision to Adopt the 2022 Permit, Including its Safe Harbor
19 and Monitoring Provisions, Is Not Supported by the Findings or the Evidence in the
20 Administrative Record.**

21 The Regional Board’s approval of the 2022 Permit violates long-established requirements for
22 agency decision-making. The Regional Board’s findings fail to show the Regional Board’s mode
23 of analysis to “bridge the analytic gap between the raw evidence and [the] ultimate decision or
24 order.” *See Topanga*, 11 Cal.3d at 515. Moreover, the Regional Board’s final decision lacks
25 evidentiary support in the record. The absence of adequate findings or evidence renders the
26 Regional Board’s decision unlawful. *See* Cal. Civ. Proc. Code § 1094.5(b); *see also Zuniga*, 137
27 Cal.App.4th at 1258.

1 **8. THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD**
2 **AND TO THE DISCHARGER.**

3 A true and correct copy of this Petition was sent to the Regional Board and the dischargers by
4 email and first class U.S. mail on June 10, 2022. (See Proof of Service, attached hereto.)

5 **9. THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE**
6 **RAISED BEFORE THE REGIONAL BOARD.**

7 Petitioner has previously raised and presented all the issues addressed in this Petition by comment
8 letters submitted to the Regional Board on April 8, 2021 and November 16, 2021, and in oral
9 testimony at Regional Board workshops and public hearings on October 12, 2021 and October 13,
10 2021, and May 11, 2022. Petitioner also presented power point slides to the Regional Board
11 during its oral testimony on May 11, 2022, which followed the Regional Board's release of
12 substantial revisions to the Permit on April 26, 2022, May 4, 2022, May 6, 2022, and at the May
13 11, 2022 public hearing. However, Petitioner and other members of the public were not permitted
14 to submit written comments on these revisions.
15

16 Respectfully submitted,
17

18 

19
20 Eric J. Buescher

21 Attorney for Petitioner San Francisco Baykeeper
22
23
24
25
26
27
28