September 10, 2015

San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108-2700
Attn: Wayne Chiu
sandiego@waterboards.ca.gov

Sent via email

Re: Environmental Groups Comments on Tentative Order R9-2015-0100; Receiving Water Limitations Alternative Compliance Pathway

Dear Wayne Chiu, Laurie Walsh, and Christina Arias:

Thank you for the opportunity to comment on Tentative Order R9-2015-0100 ("Tentative Order", "San Diego Order", or "TO"). San Diego Coastkeeper, Coastal Environmental Rights Foundation, and Surfrider Foundation San Diego Chapter ("Environmental Groups") are local non-profit organizations dedicated to the protection and restoration of regional waters and related environmental issues in San Diego. Our groups represent numerous San Diegans, act through community involvement, regulatory participation, and legal action to ensure the protection and restoration of our region's ocean, bays, and inland waters.

I. Introduction

Since the passage of the 2013 MS4 permit with our support, Environmental Groups have maintained the position that our regional stormwater permit is one that, if properly implemented with the appropriate resources and political will, could - and perhaps would - result in significant improvements to our waterways. We appreciate that the 2013 permit was born out of a more collaborate approach to permit development with broad stakeholder involvement. And while no single interest group received each and every provision it had hoped for, most recognize that the 2013 permit at least has the potential to realize significant water quality improvements.

The proposed draft language on alternative compliance for receiving water limitations ("safe harbor"), however, instead takes us in a very different direction than the one contemplated by the existing permit. The San Diego Regional Board's objective for the safe harbor development process was to come up with an, "ambitious, rigorous and transparent alternative compliance path," that would allow Copermittees, "to come into compliance with receiving water limitations".[1] Instead, adoption of the Tentative Order as written would result in a safe harbor

[1] *See* Public Workshop Agendas, April 28, 2015, May 21, 2015 and June 30, 2015; and Attachment 2 to TO No. R9-2015-0100, page F-61.

protection lacking guidance, objectivity, and accountability, that is inconsistent with Order WQ 2015-0075 (or "State Board's Order") and its findings, that violates the Clean Water Act and its governing regulations, and that would likely simply mimic the failed iterative approach.

Importantly, the State Board's Order provided specific guiding principles for other regions to follow when developing safe harbor provisions.[2] The State Board's Order repeatedly points out the acceptable justifications for and mechanisms through which a safe harbor provision would be allowable. The Tentative Order as drafted, however, ignores several of the principles (as discussed in more detail below) and it fails to adopt mechanisms that assure the process and outcomes of the State Board's Order and the Clean Water Act are met. As such, the TO is inconsistent with the State Board's Order. The San Diego Regional Board could cure this defect by instead looking to the guidance and mechanisms established in the State Board's Order, and in particular by adopting the Reasonable Assurance Analysis and Enhanced Watershed Management Plan (EWMP) approaches taken in the LA region. Combined, these approaches allow for the ambitious, rigorous, and transparent pathway to compliance, while providing for multi-benefit best management practices.

Furthermore, as drafted the proposed TO would violate the Clean Water Act. Specifically, the safe harbor provision – one that would excuse compliance with Water Quality Standards (WQS) in the Permit's Receiving Water Limitations (RWL) section - is illegal for several principal reasons: 1) the safe harbor violates anti-backsliding requirements; 2) without a more detailed accompanying analysis, the safe harbor violates state and federal antidegradation requirements; 3) the safe harbor violates CTR compliance deadlines; and 4) the Regional Board has thus far failed to make sufficient findings or provide evidence to support the inclusion of the safe harbor in the Tentative Order.

To avoid this result and for the reasons we have expressed to date in workshops, previous public comments to both the Regional Board and State Board, and below, Environmental Groups respectfully request the Regional Board reconsider the adoption of this draft language and strike the entire draft provision that would adopt a safe harbor, and instead require implementation of watershed management programs as one way to achieve, rather than demonstrate, compliance with RWLs and WQSs. Should the Board choose to adopt safe harbor language despite these concerns, we respectfully request the TO be made consistent with the State Board's Order through an amendment that includes the following: (1) the Reasonable Assurance Analysis guidance, modeling, and standards that were expressly approved by the State Board's Order and that are the lynchpin of the safe harbor approach, (2) a requirement that multi-benefit projects that incorporate pollutant removal and water supply augmentation as envisioned by the Los Angeles EWMPs be a necessary element of compliance BMPs, and (3) removal of the iterative process from the safe harbor scheme.

II. The Tentative Order As Drafted Is Inconsistent With The State Board's Order

The State Board makes their intentions very clear in their Order when they state, quite simply, "we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue

[2] Order WQO 2015-0075, pages 51-52.

significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations."[3]

The State Board's Order provided specific guidance principles for other regions to follow when developing safe harbor provisions.[4] Of particular relevance to the Tentative Order, the following principles are to apply to any region's safe harbor provisions:

1. The receiving water limitations provisions…should not deem good faith engagement in the iterative process to constitute such compliance.[5]
2. Permits should incorporate an ambitious, rigorous, and transparent alternative compliance path.[6]
3. The safe harbor should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.[7]
4. The safe harbor should have rigor and accountability.[8]

In upholding the LA Order's safe harbor scheme, the State Board affirmed in particular the Reasonable Assurance Analysis and multi-benefit requirements and incentives in the LA Order. With regard to the principles, the Board specifically stated that they, "direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward,"[9] and that, they, "expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons."[10] As discussed below the Tentative Order is inconsistent with the State Board's Order insofar as it fails to follow the principles listed above and provides no specific showing as to why a given principle is not appropriate for the San Diego MS4 permit.

a. The Tentative Order is Inconsistent with the State Board Order Because It Contains No Reasonable Assurance Analysis ("RAA"), Protocols, or Guidelines to Ensure the Copermittee's Analysis and Resulting Plans Will Actually Achieve RWLs and WQSs.

While Environmental Groups fully support the comments submitted on the LA Order and State Board Order by NRDC, LA Waterkeeper, and Heal the Bay regarding the deficiencies and illegalities of the LA Order, and we agree the L.A. Order is illegal, at the very least the State Board-approved Order contained a Reasonable Assurance Analysis (or "RAA") based on modeling, as well as associated guidelines and protocols under which watershed strategies and safe harbor analyses must be conducted. Together the RAA and guidelines and protocols add a considerable degree of objectivity, rigor, and accountability not present in the San Diego Tentative Order or 2013 MS4 permit. In fact, earlier San Diego draft language had contained

[3] Order WQO 2015-0075, at page 16.
[4] Order WQO 2015-0075, pages 51-52.
[5] Order WQO 2015-0075, page 51.
[6] Id, page 52.
[7] Id.
[8] Id.
[9] Id. At 51
[10] Id.

the word "model", but it has since been removed.[11] Besides lacking the guidance that exists in the L.A scenario, the Tentative Order before us requires no validation, peer review, or minimum data requirements, nor does it appear to consider such requirements necessary. In short, it offers no guidance or protocols whatsoever to Copermittees, the citizenry, the State, and Regional Board.[12] Despite its own claims in the Fact Sheet[13], the Tentative Order is not "transparent", nor is it "ambitious" or "rigorous", and it lacks "rigor and accountability" and is inconsistent with the State Board's Order.[14]

The State Board-approved LA permit scheme, on the other hand, includes the requirement to conduct a Reasonable Assurance Analysis ("RAA") for both WMPs and EWMPs. The relevant permit language describes:

> (5) Permittees shall conduct a Reasonable Assurance Analysis for each water body-pollutant combination addressed by the Watershed Management Program. A Reasonable Assurance Analysis (RAA) shall be quantitative and performed using an approved model in the public domain. Models to be considered for the RAA, without exclusion, are the Watershed Management Modeling System (WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the Structural BMP Prioritization and Analysis Tool (SBPAT). The RAA shall commence with assembly of all available, relevant subwatershed data collected within the last 10 years, including land use and pollutant loading data, establishment of quality assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and identification of the data set meeting the criteria for use in the analysis. Data on performance of watershed control measures needed as model input shall be drawn only from peer-reviewed sources. These data shall be statistically analyzed to determine the best estimate of performance and the confidence limits on that estimate for the pollutants to be evaluated. The objective of the RAA shall be to demonstrate the ability of Watershed Management Programs and EWMPs to ensure that Permittees' MS4 discharges achieve applicable water quality based effluent limitations and do not cause or contribute to exceedances of receiving water limitations.[15]

The guidelines issued by the LA Regional Board for conducting RAA's go on to discuss the rigor and transparency of the RAA requirements by highlighting the level of detail required in the RAA saying, "the RAA must be adequate to identify the required reduction for each water body-

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

[12] See Tentative Order Section B.3.c.1.(b)(i), which calls only for, "an analysis, with clearly stated assumptions".

[13] Attachment 2 to TO No. R9-2015-0100, page F-60.

[14] State Board required principles, Order WQO 2015-0075 at p. 51-52.

[15] Order No. R4-2012-0175 as amended by Order WQ 2015-0075, page 65.

pollutant combination at each compliance deadline and analyze the BMP scenario to achieve that deadline."[16]

The RAA in the LA Order and approved by the State Board is a "well-defined, transparent", detailed, pre-reviewed and approved modeling exercise, which includes minimum data point considerations and quality assurance criteria, and which taken together are intended to ensure that Copermittee's plans implement stormwater pollution control measures of the correct type, location, and size to achieve compliance with WQSs in receiving water bodies. The RAA, in fact, forms the bedrock for the plan development, and therefore for pollution control and compliance with the CWA for those Permittees that chose to develop such plans. As noted by the State Board in Order WQ 2015-0075 with respect to the LA MS4 permit,

> …the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP. Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines[17].

In stark contrast to the requirements of the State Board-approved LA Order, the San Diego Tentative Order calls only for, "an analysis, with clearly stated assumptions"[18]. The existing WQIPs in the San Diego permit contain no RAA or equivalent, and largely lack any of the objective criteria and guidelines that are present in the RAA.[19] The Tentative Order, then, is neither "well-defined" nor "transparent".[20]

What results from the TO is a completely subjective, ad-hoc process and review without standards or guidance. Importantly the lack of an RAA, standards, and guidance exists not only as related to the actual *development* of watershed plans that would receive full protection under the safe harbor (see above discussion on RAA), but also to staff, Board, and public *review* of those plans. When Board staff were questioned by Environmental Groups at the June 2015 workshop as to whether guidelines, protocols, or other criteria would be developed to dictate how such analyses would be conducted or reviewed, the response was that no such guidance would be developed. In essence, copermittees would be free to devise whatever type or kind of analysis they wish, and if such a plan was acceptable to the Board the safe harbor would apply.

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[16] Guidelines For Conducting Reasonable Assurance Analysis In A Watershed Management Program, Including An Enhanced Watershed Management Program; March 25, 2014; Prepared by Nguyen, Lai, Ridgeway, and Zhu for the Los Angeles Regional Water Quality Control Board, page 4.

[17] Order, at p.37.

[18] Tentative Order, p. 34, Section B.3.c.1.(b).(i).

[19] This issue was brought to light recently in the Regional Board's review of the final submitted WQIPs by Copermittees. The Board staff found most, if not all, WQIPs to be noncompliant with the permit. See: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/wqip/comments/SDWB.pdf last accessed August 17, 2015. Copermittees continue to complain the regulations governing WQIP development are unclear and subjective. The approved RAA methodology that is lacking from the San Diego permit and TO is meant to provide objectivity to the Board, the public, and the Copermittees.

[20] To further illustrate that lack of rigor and transparency in the TO, while the draft TO does include annual milestones that show progress towards a final numeric goal, such milestones "may consist of…other acceptable means." What these means are or might be is entirely lacking in transparency or clarity to both the public and the Copermittees.

Unfortunately the Tentative Order fails to require rigorous or transparent methods for either the regular WQIP or the safe harbor plans. As written, the existing San Diego permit and Tentative Order fail to include a rigorous, proven, pre-reviewed, approved test, and further fail to include accompanying guidelines or standards that provide for assurances of compliance. **The result is that the Tentative Order ignores not only the justifications used for developing and supporting the LA Order[21], but also ignores the language and mechanisms by which the LA Order will be implemented and that were expressly approved by the State Board.** In both of these ways the Tentative Order fails to realize the circumstances under which, and justification for, adoption of a safe harbor *might* even be appropriate in San Diego.

The Tentative Order would adopt a process without a performance standard and with no analysis or evidence in the record to demonstrate that implementing the devised plans will actually achieve compliance with WQSs. And while the Tentative Order Fact Sheet professes to incorporate each of the State Board's seven principles[22] the proposed safe harbor, which lacks any form of guidance[23], cannot under any imaginable circumstances be said to be "ambitious, rigorous, and transparent". [24]

These shortcomings are fatal to the Tentative Order's safe harbor inclusion into the San Diego MS4 permit. As such the language should be substantially revised based on comments made to date and herein, or removed altogether. While we acknowledge San Diego is not Los Angeles, the legal and factual basis upon which the LA Order was approved by the State Board very much dictates the acceptable circumstances under which San Diego's safe harbor language might pass muster under the State Board's Order.[25] As written the TO is inconsistent with the State Board's Order and guidelines.

b. The Tentative Order Is Inconsistent with the State Board's Order Because It Allows Good Faith Engagement and Implementation of the Iterative Process to Constitute as Compliance with Receiving Water Limitations

While the Fact Sheet claims that the seven principles included in Order WQ 2015-0075 have been incorporated into this Tentative Order, the Tentative Order fails to assure that "good faith engagement in the iterative process" will not deem a Copermittee in compliance and thus is inconsistent with the State Board's Order.[26] For instance, while the Tentative Order requires the monitoring and assessment program of the safe harbor to demonstrate only, "whether the implementation of the water quality improvement strategies are making progress towards

[21] See comments below, specifically sections III.A.(1)a.-c., for more on the failures of the TO to adequately justify a safe harbor be included in the San Diego MS4 permit.
[22] Attachment 2 to Tentative Order No. R9-2015-0100, page F-60.
[23] For an example of the type of guidance that would be required of any analysis, see Guidelines For Conducting Reasonable Assurance Analysis In A Watershed Management Program, Including An Enhanced Watershed Management Program; March 25, 2014; Prepared by Nguyen, Lai, Ridgeway, and Zhu for the Los Angeles Regional Water Quality Control Board.
[24] For similar reasons the safe harbor fails to incorporate Principle 7 of the State Board which requires "rigor and accountability", and a program that is "transparent". Without more, Environmental Groups and the public are left to guess what "acceptable rational" and "appropriate modifications" are.
[25] See Order WQO 2015-0075. "We expect the regional water boards to follow these principles", p. 51.
[26] Attachment 2 to Tentative Order, Page F-60.

achieving the numeric goals"[27], the TO language does not require achievement of those goals. In actuality, the approach proposed by the draft language mirrors the flawed iterative process from previous permits and will result in more delay and confusion.

While at first glance it might appear that the eventual achievement of WQS and RWL is required to be considered compliant with the safe harbor provision, upon further inspection it becomes clear that this is not the case. Section B.3.c.(1).(c). of the Tentative Order states that "The Copermittee is deemed in compliance during the term of this Order as long as…(a) The Copermittee is implementing the water quality improvement strategies with its jurisdiction developed pursuant to Provision B.3.b.(1) and in compliance with the schedules for implementing the strategies established…".[28] Section B.3.c.(2)(c) states, however, the Copermittee must submit annual report assessments that either, "support a conclusion that: 1) the Copermittee is in compliance with the annual milestones and dates for achievement…, **OR** 2) the Copermittee has provided acceptable rationale and recommends appropriate modifications."[29]

Taken together, it becomes clear that once Copermittees develop a plan that is acceptable to the Regional Board they need only continue to provide "acceptable rationale" and recommend "appropriate modifications" when they fail to implement strategies or achieve the goals set out in their plan, including WQS, RWLs, and perhaps even WQBELs. Such an approach is not "finite", as the State Board Order requires[30], and it fails to necessarily require "significant undertakings beyond the iterative process".

The State Board Order once again makes it clear that such an approach would not be acceptable when it states, "we…ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations."[31] The State Board Order discusses at length their position, as follows:

> We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.[32]

The Tentative Order language itself includes language clarifying that the safe harbor provisions and requirements are little more than a continuation of the, "iterative approach and adaptive management process" in addition to requiring nothing more than an "acceptable rationale and appropriate modifications" to continue receiving protections. With no standards as to what would be considered "acceptable rational" or "appropriate modifications", The Tentative Order

[27] Tentative Order No. R9-2015-0100, Section B.3.c.(1).(c).
[28] Tentative Order No. R9-2015-0100, Section B.3.c.(2)-(a).
[29] Tentative Order No. R9-2015-0100, Section B.3.c.(2)(c), emphasis added.
[30] Order WQO 2015-0075, page 16.
[31] Order WQO 2015-0075, page 10.
[32] Order WQO 2015-0075, page 33.

may require nothing more than a good faith engagement in what, on its face, is a continuing iterative process.[33] In fact, in several places the safe harbor makes it explicitly clear that it embraces the iterative process.[34]

We note that Board staff rejected a proposal by Environmental Groups to include language that would remove a Copermittee from safe harbor protection if annual milestones were not met for two years in a row.[35] Our proposed language would have helped ensure that Copermittees were not deemed in compliance simply for good faith engagement in the iterative process and that strict measurable requirements would continue to be met. The end goal of this suggested language was meant to ensure that if the best laid plans of the jurisdictions were not being implemented for one reason or another, the safe harbor would once again allow for citizen oversight and accountability as the Clean Water Act has always done. That proposal was ignored and instead language was included that would allow the safe harbor to be another version of the existing iterative process so long as a Copermittee who is not meeting its annual milestones (or RWLs, WQSs, or WQBELs) offers an "acceptable rationale and recommends appropriate modifications". This approach is both inconsistent with the State Board's Order and unlawful.[36]

c. The Tentative Order Is Inconsistent with the State Board's Order Because It Does Not Include Requirements for Multi-Benefit Projects or Stormwater Resource Projects

The State Board's Order is based, in part, on a fundamental shift in how stormwater pollution is addressed and the transition of stormwater from a nuisance to an asset (see discussion below in Section III.A.1.). This idea is embodied in the principle that any safe harbor, "should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply."[37]

There are, however, no provisions that encourage or require the inclusion or evaluation of multi-beneficial projects in the San Diego permit. In fact, Environmental Groups failed to find even a single reference to the world "multi-benefit" in the 2013 permit or the Tentative Order, and our review of the eight Water Quality Improvement Plans (WQIPs) found a near total lack of commitment to the development and incorporation of multi-benefit regional projects in the San Diego region. This may be, in part, because San Diego's WQIPs differ in at least one important way from LA's EWMPs. Specifically, the San Diego WQIPs do not require any evaluation of

[33] In several sections of the safe harbor the Board goes through great pains to note that the safe harbor embraces the iterative process.

[34] c(1)(b): "The analysis must be updates as part of the iterative approach and adaptive management process" and c(1)(c): "The specific monitoring and assessments must be updated as part of the iterative approach and adaptive management process".

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

[36] *See* comments in Section III below.

[37] Order WQO 2015-0075, p. 52.

collaboration on multi-benefit projects in our region to retain all non-storm water runoff or to retain all storm water runoff from the 85th percentile, 24-hour storm event. Where retention requirements are present in the San Diego permit they exist only for development or redevelopment projects over a certain size. Unlike in the LA Order, then, the San Diego permit does not require, or even incentivize, such multi-benefit evaluations or considerations for general compliance strategies.

Thus, while the Fact Sheet claims this safe harbor incorporates the seven principles of the State Board's Order, it fails to ensure that, "the strategies required to be included in the Water Quality Improvement Plans encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply."[38] As such, the TO is inconsistent with the State Board's Order.

d. The Draft Language As Written Would Allow for a Safe Harbor During Plan Review Periods

The San Diego Regional Board staff have made it clear that the Board will not allow a compliance option during plan review. However, the draft as written does exactly that in at least one instance Environmental Groups can think of. Specifically, the safe harbor would still apply between the period where a Copermittee (who is not complying with its annual milestones and dates for achievement) provides to the Regional Board under section (c) an "acceptable rationale" and recommends "appropriate modifications" to their plan, and the period of acceptance by the Regional Board (since section (d) requires express approval by the Board). The lag time between these two instances, which could potentially be as long as a permit cycle, would allow for a safe harbor during the non-attainment and non-acceptance period/during each plan review period. Such an instance would allow for a safe harbor even where the Copermittee was not fulfilling its obligations of its approved plan. To remedy this, section (c)(2) and section (d) should be removed, and strict compliance deadlines with the plan should be required.

III. If Adopted, the Tentative Order Would Be Illegal

As discussed in detail below, the draft language fails to comply with federal and state anti-degradation and anti-backsliding requirements, and allows illegal compliance schedules for the TMDL-based limitations necessary to implement the California Toxics Rule ("CTR").

A. The Draft Language Violates Anti-Backsliding Provisions

The Clean Water Act, through its anti-backsliding provisions, prohibits a permit from being renewed, reissued, or modified with effluent limitations less stringent than the comparable limitations in the previous permit.[39] Water quality based effluent limits in NPDES permits can be revised to be less stringent only where consistent with a TMDL properly incorporated into that

[38] Attachment 2 to Tentative Order R9-2015-0100.
[39] 33 U.S.C. § 1342(o)(1).

permit.[40] And any TMDL implementation must be consistent with the requirements for compliance schedules in NPDES permits.[41]

Federal regulations further require that "when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit."[42] The receiving water limitations in existing MS4 Permits have been required to be incorporated into permits across the state since 1999, and many MS4 permits have included this language for over a decade. Any attempt to now include safe harbors in those permits from the required receiving water limitations would violate anti-backsliding provisions.[43]

Quite simply stated, the draft language as proposed violates the anti-backsliding provisions of the Clean Water Act, and adoption of the safe harbor would be in violation of the law. Any arguments to the contrary or assertions of exceptions or exemptions to anti-backsliding provisions would fail in the context of the San Diego MS4 permit, as discussed in more detail below.

(1) State Board and Los Angeles Legal Justifications for LA Order Are Inapplicable to San Diego Region

The Tentative Order appears to rely exclusively on justifications offered by both the Los Angeles Regional Board and the State Water Board Order WQ 2015-0075 in seeking to include a safe harbor in the San Diego permit. As we did in our comments to the State Board on the LA Draft Order in oral comments on December 2014 and in written comments from January 2015, Environmental Groups finds the Tentative Order's use of information, justifications, and processes gained from permit development in LA (and a long overdue permit at that) and its seemingly wholesale extrapolation of that reasoning, interpretation, and justifications to our region unpersuasive. Below we explore the justifications put forth by the Board to demonstrate why they do not apply outside of the LA region and are why they are wholly inapplicable to San Diego[44].

As mentioned above, the application of a safe harbor that weakens the applicability of RWL language to the San Diego region would fail to meet minimum federal requirements and would constitute a violation of the Clean Water Act's anti-backsliding provisions. The Clean Water Act and associated Federal Regulations, specifically 40 CFR 122.44(l)(1), provide that except in a narrow set of enumerated circumstances, "when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit."

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[40] Id.

[41] See *In the Matter of Star-Kist Caribe, Inc.*, 1989 EPA App. LEXIS 38, at *7 (E.A.B. 1989); 33 U.S.C. § 1313(e)(3)(F); 40 C.F.R. § 122.47.)

[42] 40 C.F.R. 122.44(l)(1).

[43] *See* also United States Environmental Protection Agency Region III letter, "Backsliding is prohibited in NPDES permits. . . . Allowing additional time to complete a task that was required by the previous permit constitutes a less stringent condition and violates the prohibition against anti-backsliding." August 8, 2012.

[44] We should note that Environmental Groups join our sister organizations in Los Angeles in the assertion that the LA permit and Order have similar legal defects.

San Diego's justification for the safe harbor is the same justification used in the LA Order; namely that an exception to anti-backsliding exists.[45] Thus, we turn to the LA Order itself for justification. The LA Order, like this SD Tentative Order, makes slight mention of why the LA permit *may* not violate anti-backsliding[46], but then without discussing the justification in detail the orders simply state that justification isn't necessary because an exception allowing for backsliding exists.[47]

The Tentative Order itself appears to base the bulk of its acceptance that the safe harbor does not constitute backsliding on the LA Regional Board's Response to Comments document, wherein an argument was made that an exception to backsliding exists. The Order includes little analysis as to whether anti-backsliding actually applies (and importantly, the Order does not find that anti-backsliding provisions *do not* apply here), and instead focuses its attention on finding that an exception to backsliding exists in the case of the LA permit. The SD Tentative Order more or less mirrors this language and the related justifications.

The SD Tentative Order Fact Sheet states:

> The alternative compliance pathway option in Provision B.3.c. of this Order was informed by new information available to the Board from experience and knowledge gained through the Los Angeles Water Board's process of developing over 30 watershed-based TMDLs and implementing several TMDLs since the adoption of the previous permits. In particular, the Los Angeles Water Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions.[48]

It is clear, then, that the entire justification for claiming that an anti-backsliding exception applies to the SD Tentative Order is based upon the justifications listed in the LA Order and State Board Order, as we found no additional data or information presented in the SD Tentative Order or accompanying documents.

a. Water Board Rationales Fail to Support an Anti-Backsliding Exception in San Diego: "New Information", Paradigm Shift, Prioritization, and Lessons Learned

The LA Regional Board's Response to Comments upon which the State Board's justification hinges (and upon which San Diego's justification also relies), in turn, states that an exception exists, "if the circumstances on which the previous permit was based have materially and substantially changed since the time the previous permit was issued and would constitute cause

[45] Attachment 2 to Tentative Order No. R9-2015-011, page F-32.
[46] The Fact Sheet states, "although the non-applicability is less clear with respect to regulatory anti-backsliding provisions in 40 CFR 122.44(l)…" Id, p. F-32.
[47] Id.
[48] Attachment 2 to Tentative Order No. R9-2015-0100, page F-32.

for permit modification or revocation or reissuance under 40 CFR section 122.2. Like section 122.41(l), section 122.62 includes new information not available at the time the previous permit was issued as a cause for modification" (p. 51 of Response). The Response then goes on to justify an exception based largely upon the differences between the 2001 and 2012 permits in Los Angeles, a paradigm shift towards treating stormwater as an asset, and information gained during that lengthy 10-plus year time frame.

In stark contrast, no such large time gap between permits and no such large-scale paradigm shifts or information downloads have occurred between any two MS4 permits in San Diego. To its credit, the San Diego Regional Board has continually updated MS4 permits based upon lessons learned and the result has been a series of permits increasingly aimed at integrated water management approaches and watershed-wide planning. So while we disagree with the State Board Order and the LA Regional Board that an exception to anti-backsliding exists in LA based on those lessons learned and shifts in thinking, it is even more plain to us that the justification for any such exception clearly does not apply to San Diego.

To illustrate, the San Diego MS4 permits have since 2001 incorporated the RWL language of Order 99-05. In fact, the San Diego region has adopted several iterations of MS4 permits since 2001, including one in 2007 and another in 2013. Each of these has gradually evolved to include the paradigm shift included in Los Angeles' permit, as well as the lessons learned via the iterative process and its monitoring and assessment. Low impact development provisions have been included since 2007 in the San Diego permit[49], and on-site retention requirements[50], as well as incentives and direction towards onsite capture and use, already exist.[51] Further, San Diego's newest permit includes provisions for on-site capture and infiltration for development projects over a certain threshold.[52] In addition to the onsite capture and use provisions of those permits, watershed-wide planning efforts aimed at prioritization of waterbodies or pollutants also are already present in our permit.[53] Thus, the San Diego region has already adopted over time a series of permits that have gradually embraced and incorporated the paradigm shift and new information sited as the justification for the anti-backsliding exception.

The most recent San Diego 2013 MS4 permit also incorporates a framework to achieve RWLs in our region through the utilization of Water Quality Improvement Plans (WQIPs) and an adaptive management process[54]. Like the Los Angeles WMPs and EWMPs, WQIPs include prioritization of watershed conditions and pollutants[55], and contain numeric interim and final goals aimed at achieving RWLs[56]. Unlike the LA permit, however, our existing WQIPs do not require RAAs or any type of pre-reviewed modeling, nor do they require proof that the chosen actions and timeframes of the Copermittees will result in the attainment of RWLs and WQSs.

[49] Order No. R9-2007-0001, Section D.1.d.(4).
[50] Order No. R9-2007-0001, Section D.1.c.(2)., and Order No. R9-2015-001 Section E.3.a.(3)(h)
[51] Order No. R9-2015-0001 Section E.3.a.(3)(l).
[52] Order No. R9-2015-0001 Section E.3.c.(1).(a).
[53] Order No. R9-2015-0001 Section B.1.
[54] Id, Section B.
[55] Id, Section B.2.
[56] Id, Section B.3.

Importantly, the RWL provisions have remained in place throughout these processes and permitting schemes that included the paradigm shifts, watershed planning, and prioritization planning. Certainly the reasoning behind the LA exception - if applicable at all - is not applicable to San Diego, and any directive to include a safe harbor in an existing permit that already includes watershed-based planning and integrated water management would run afoul of the anti-backsliding provisions of the Clean Water Act. Quite simply, since the San Diego permit already incorporates the paradigm shift, already contains prioritization and plans for meeting RWL requirements, and has chosen *not* to have a safe harbor, any relaxing of the conditions of the permit would not be as stringent as our existing permit, and thus would constitute backsliding under the Clean Water Act.

b. Water Board Rationales Fail to Support an Anti-Backsliding Exception in San Diego: Multi-benefit Projects and Local Water Supply

To further illustrate the problem with relying solely on the justifications used for the LA MS4 permit, we note that one of the fundamental reasons both the State and LA Regional Board found this approach appropriate was the incorporation into the LA permit of multi-beneficial regional projects that capture and infiltrate the 85th percent storm.[57] Multi-benefit approaches that consider water supply benefits underlie a core justification for the shift in approaches in general, and for the safe harbor specifically.

The SD Tentative Order Fact Sheet recognizes this when it states part of its justification for an anti-backsliding exception:

> The alternative compliance pathway option in Provision B.3.c. of this Order was informed by new information available to the Board…In particular, the Los Angeles Water Board…recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions.[58]

In San Diego, however, the 85th percent storm capture requirement applies only to individual Priority Development Projects[59], and not to regional compliance or alternative compliance projects aimed at achieving WQSs or RWLs and benefitting local water supply. There are no requirements or incentives for regional multi-beneficial projects in the San Diego permit. In fact, Environmental Groups failed to find even a single reference to the world "multi-benefit" in the 2013 permit or the Tentative Order, and our review of the eight Water Quality Improvement Plans (WQIPs) found a near total lack of commitment to the development and incorporation of multi-benefit regional projects in the San Diego region. As such, while the Fact Sheet claims this safe harbor incorporates the seven principles of the State Board's Order, it completely fails to ensure that, "the strategies required to be included in the Water Quality Improvement Plans

[57] Order No. R4-2012-0175 as amended by Order WQ 2015-0075, Section VI.C.1.g.
[58] Attachment 2 to Tentative Order No. R9-2015-0100, page F-32.
[59] Order R9-2015-0001, Section E.3.c(.1)(a)

encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply."[60]

From a practical perspective relative to water supply benefits in stormwater management, the San Diego region differs in some important and substantial ways from its neighbor up north. First, while Los Angeles and other regions in Southern California generally have the ability to utilize groundwater basins for infiltration and groundwater aquifer recharge for local water supply production in a large-scale integrated water management fashion, the San Diego region does not have available to it the larger underground basins for such storage. While our region's permit may seek to incentivize and strive for more water supply from stormwater, it may very well be that solutions to our serious and continuing water quality issues come in the form of more traditional source and treatment control technologies that have been part of the repertoire of stormwater management for many years. Once again, the justification proposed for an anti-backsliding exception is simply not applicable to the San Diego region and its permitting scheme and history.[61]

c. Water Board Rationales Fail to Support an Anti-Backsliding Exception in San Diego: TMDL Incorporation into MS4 Permits and Lessons Learned

To an equally large degree the justification for an anti-backsliding exception is based on the development, monitoring, and analysis of 33 TMDLs in Los Angeles, coupled with a paradigm shift. In fact, in justifying the exception the LA Regional Board mentions the importance of its TMDLs toward the achievement of fishable and swimmable waters in LA when it says, "the majority of pollutants of concern from the Los Angeles County MS4 are addressed by the 33 TMDLs that are included in the Permit," (p. 37, Response to Comments), and it recognizes the prioritization of TMDLs as highest priority issues (p. 40, Response to Comments). The San Diego Tentative Order itself points to the experience in LA for its own justifications.[62]

In contrast to the LA region, however, the San Diego region has only a handful of TMDLs and the San Diego Regional Board remains much more reluctant to develop new TMDLs, choosing instead to look towards alternatives to TMDLs. Two instances where TMDL alternatives have been developed in just the last few years are in Oceanside's Loma Alta Slough (for nitrate impairment), and the Tijuana River Valley (for impairments of sedimentation and trash). In these instances, the San Diego Regional Board has chosen to utilize processes, avenues, or

[60] Attachment 2 to Tentative Order R9-2015-0100.

[61] Further, even if these approaches could be considered "new", it would still not justify backsliding. An improvement or development of new technology provides the Copermittee with *additional* options for meeting the requirements imposed on them by the prior permit and hence does not justify eliminating or delaying those requirements.

[62] "The alternative compliance pathway option in Provision B.3.c. of this Order was informed by new information available to the Board from experience and knowledge gained through the Los Angeles Water Board's process of developing over 30 watershed-based TMDLs and implementing several TMDLs since the adoption of the previous permits." Attachment 2 to Tentative Order No. R9-2015-0100, page F-32.

procedures that do not have the strict interim and final milestones and deadlines for achieving receiving water limitations and objectives that are found in TMDLs.[63]

Our own regional permit includes Water Quality Improvement Plans that aim to prioritize and address pollutants within the Region and those WQIPs contain interim and final measurable benchmarks to show progress of meeting the goals of achieving RWLs. Without the RWLs kept in place and with few TMDLs to fall back on, however, insufficient enforcement mechanisms would exist for citizens of our region if the WQIPs fail to meet the goals of the Clean Water Act. This regional variation in strict controls makes it all the more imperative that the RWLs be kept and no safe harbor provided. Arguments that, as the State Board makes, "TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region,"[64] ring hollow when regions outside of the LA region have so few TMDLs and the implementation of TMDLs can be measured in decades.

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

Without the definitive requirements of TMDLs, Environmental Groups and our members are left with just one way to measure whether our Copermittees are meeting, or will meet, the requirements of the CWA. That measure is the Clean Water Act itself, and the receiving water limitations provisions of the permits under the Act.

To date few, if any, third party lawsuits have been filed in San Diego for MS4 noncompliance. And yet while the new permits for LA and for San Diego region contain "carrots" to incentivize certain plans and programs aimed at meeting RWLs and WQSs, the San Diego permit has, to date, maintained the "stick" of possible enforcement actions when and where necessary to ensure RWLs will be achieved. Without TMDLs or other time-certain measures, it is vital to our success that third-party enforcement actions for RWL requirements not be precluded.

B. The Tentative Order Would Violate Anti-Degradation Requirements and the Anti-Degradation Findings Are Unsupported by the Evidence

The Tentative Order's anti-degradation analysis and findings are improper and lack basis.

(1) The Revised Draft Order's Anti-Degradation Analysis Fails to Comply with EPA Requirements and Lack Support in the Record

[63] While the Fact Sheet, in discussing anti-degradation, states that for water bodies listed on the State's CWA Section 303(d) List, the "San Diego Water Board has established TMDLs to address the impairments", Environmental Groups find this statement to be disingenuous. In actuality the San Diego Board has adopted only a handful of TMDLs and has failed to adopt TMDLs for two known impairments for which the TMDL process had already begun.

[64] Order WQ 2015-0075, page 26.

The Tentative Order claims "allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state."[65] However, the Regional Board has not undertaken the required analysis necessary to support such a finding.

EPA's Economic Guidance for Water Quality Standards Workbook[66] ("EPA Workbook") establishes a test to determine if there might be interference with an important social and economic development. The EPA Workbook outlines three steps involved in performing an economic impact analysis as part of an anti-degradation review: (1) verify the project's costs and calculate annual costs of the pollution control project; (2) determine if maintaining high-quality waters will interfere with development; and (3) determine if development is economically and socially important.[67] The EPA Workbook provides several worksheets for addressing these factors.[68] Yet neither the State Board nor the Regional Board have addressed these basic factors or completed the EPA worksheets – or provided any evidence even remotely resembling such an analysis – in reaching their conclusion.

As a result, the Revised Draft Order and the 2012 MS4 Permit are inconsistent with the procedures established by the EPA.

(2) The Tentative Order and 2013 MS4 Permit's Anti-Degradation Findings Are Flawed and Lack Basis

The Tentative Order must "set forth findings that bridge the analytical gap between the raw evidence and ultimate decision."[69] The Board's findings must provide "the analytic route [it] traveled from evidence to action" to satisfy this requirement, so as to allow the reviewing court to satisfy its duty to "compare the evidence and ultimate decision to 'the findings.'"[70] And mere recitation of legal requirements - as here - is not sufficient.[71] The Tentative Order as drafted does meet the requirements of law.

As noted above, the Tentative Order fails to follow the procedures and requirements outlined in the EPA Workbook. Rather than following EPA procedures, the Order proceeds to conduct an anti-degradation analysis that is unsupported by the evidence and is inadequate.

First, the Tentative Order lacks any evidence supporting the findings that any degradation of San Diego area waters will in fact "assist with maintaining instream flows that support beneficial uses, may spur the development of multiple benefit projects, and may be necessary for flood control, and public safety, as well as to accommodate development in the area."[72]

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[65] Attachment 2 to Tentative Order No. R9-2015-0100.
[66] U.S. Environmental Protection Agency, *Interim Economic Guidance for Water Quality Standards Workbook* (March 1995), available at http://water.epa.gov/scitech/swguidance/standards/economics/chaptr5.cfm
[67] *Id.* at 5-2
[68] *Id.* at Worksheets AA, AB, and O-Y.
[69] *See Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d, 506, 514-516.
[70] *Id.* at 515.
[71] *Id.* at 515, n.16.
[72] Attachment 2 to TO No. R9-2015-0100, page F-32.

Second, the Tentative Order's anti-degradation analysis is flawed and cannot support the finding that degradation of San Diego area waterbodies justified. The Order improperly omits from its anti-degradation analysis an evaluation of impacts on water quality from the discharge of *polluted* storm water regulated by the 2013 MS4 Permit.[73] The conclusion that discharge of storm water is to the maximum benefit of the people is therefore flawed. In fact, it is highly doubtful any discharges of *polluted* stormwater "can assist in maintaining instream flows that support beneficial uses" because, regardless of any contribution to instream flows, *polluted* stormwater, as shown by the record, uniformly degrades waterbodies' beneficial uses. Further, the anti-degradation findings improperly conclude that the alternative to allowing water quality degradation is "capturing all storm water from all storm events."[74] Capturing all storm water from all storm events is *not* the only alternative to ensure no degradation occurs as a result of *polluted* stormwater discharges. There may be other alternatives. The Tentative Order, however, improperly fails to mention, let alone analyze, other alternatives in its anti-degradation analysis. As a result, the anti-degradation findings lack basis.

Finally, the State Board Order expressly recognizes the important, if not paramount, role the LA TMDLs play in anti-degradation, stating, "where water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time."[75] They go on to state, "we expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region".[76] As discussed above, however, the San Diego region has far fewer TMDLs and has failed to develop TMDLs for several identified 303(d) impairments in the region for which TMDLs are proper.[77] Instead, the San Diego Board rely on the MS4 permit as a substitute to address impairments. Thus, when the Tentative Order copies verbatim the language of the State Board Order and states regarding impaired water bodies that, "many such water bodies are listed on the State's CWA Section 303(d) List and the San Diego Water Board has established TMDLs to address these impairment", it is not entirely incorrect.

For these reasons and the reasons provided in our comments to date, the Tentative Order fails to comply with anti-degradation requirements.

(3) The Draft Language and the 2013 MS4 Permit Illegally Authorize Compliance Schedules for California Toxics Rule ("CTR")-based TMDLs Beyond May 18, 2010.

The Tentative Order fails to recognize the requirements of the Inland Surface Water Plan, which prohibits compliance schedules for CTR-based TMDLs past May 18, 2010.[78] Since the WLAs

[73] *Id.*
[74] *Id.*
[75] WQO Order 2015-0075, p 25.
[76] WQO Order 2015-0075, p 26.
[77] See discussion infra, Section III.A.(1).(c).
[78] 40 C.F.R. 131.38(e)(8); *see also* California Toxics Rule Response to Comments Report, Volume 1 (December 1999), prepared by the U.S. Environmental Protection Agency, Response to Comment CTR-002-010b (explaining that compliance scheduled for CTR-based WQBELs may not exceed five years), available at http://water.epa.gov/lawsregs/rulesregs/ctr/upload/2009_03_26_standards_rules_ctr_responses.pdf.

for the metal TMDLs in the San Diego region are based on the CTR criteria, compliance schedules for these TMDLs are only authorized for a maximum of 10 years from the time the CTR criteria were first promulgated in 2001. Thus, no discharger can be given a compliance schedule to meet Permit provisions based on CTR criteria after May 18, 2010. As a result, to the extent the safe harbor provisions are characterized as compliance schedules for CTR pollutants, they are illegal.

IV. Conclusion

Environmental Groups appreciate the time and effort by Board staff in working with stakeholders to find acceptable solutions to ensuring discharges from MS4s do not cause or contribute to the violation of water quality standards. Despite that hard work, however, the Tentative Order as proposed is inconsistent with the State Board's Order and would violate the Clean Water Act for the reasons described above and in discussions and comments Environmental Groups have made to Board staff and the Board thus far.

The Regional Board could correct each of these fatal deficiencies in the draft TO language and the safe harbor by choosing to not adopt the proposed language and instead continue to require implementation of watershed management programs as one way to achieve, rather than demonstrate, compliance with RWLs and WQSs. Environmental Groups respectfully request the Regional Board remove the safe harbor language. Should the Board chose to adopt safe harbor language despite the TO's legal and practical deficiencies, we respectfully request the TO be made consistent with the State Board's Order through an amendment that includes the following requirements, at a minimum: (1) the Reasonable Assurance Analysis and EWMP guidance, modeling, and standards that were expressly approved by the State Board's Order and that are the lynchpin of the approved safe harbor approach, (2) regional multi-benefit projects be a necessary element of compliance BMPs, (3) language that automatically triggers an end to the safe harbor protections, as earlier proposed by Environmental Groups and referenced above, and (4) removal of the iterative process from the safe harbor scheme.

Thank you for the opportunity to comment.

Sincerely,

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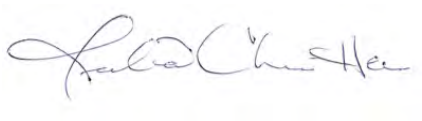

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