

RESPONSE OF THE RIVERSIDE COUNTY COPERMITTEES TO PETITIONS SEEKING REVIEW OF SAN DIEGO WATER BOARD ORDER NO. R9-2015-0100

The following is the response of the Riverside County Flood Control and Water Conservation District, the County of Riverside, and the Cities of Murrieta, Temecula and Wildomar (collectively, the “Riverside County Copermittees”) to Petitions for Review filed by various parties concerning Order No. R9-2015-0100, adopted by the San Diego Water Board on November 18, 2015 (the “Order”). The Riverside County Copermittees operate municipal separate storm sewer systems (“MS4”) that discharge into the Santa Margarita River watershed, which is covered by the Order.

Preliminary Statement

The Riverside County Copermittees strongly support what this Board and the San Diego Water Board have appropriately termed a “statewide paradigm shift”¹ in stormwater management. Prior to this Board’s adoption of Order WQ 2015-0075 (the “State Board Order”), affirming the Los Angeles County MS4 permit, Order No. R4-2012-0175, MS4 operators in California lacked a clear path to compliance with applicable water quality requirements.

Unlike industrial or commercial dischargers, MS4 operators must manage significant volumes of stormwater and urban runoff to protect lives and property from flooding. Unlike industrial or commercial dischargers, MS4 operators face the technological challenge of addressing widely varying quantities and qualities of stormwater and urban runoff with only a limited ability to control their sources. This variability in stormwater and consequential runoff is particularly true in the Santa Margarita River watershed, where most of the annual rainfall occurs in a few short winter months, sometimes with short and substantial bursts of rainfall.

Though charged by this Board with taking steps through the “iterative process” to ensure that discharges from their MS4s did not cause or contribute to the exceedance of water quality standards in receiving waters,² MS4 operators were provided no protection from enforcement or civil litigation if receiving water limits were found to have been exceeded. This enforcement threat was clearly set forth by the August 2011 decision of the United States Court of Appeals for the Ninth Circuit in *NRDC v. County of Los Angeles*.³

This Board recognized these challenges when it adopted Order WQ 2015-0075. The Board expressly acknowledged the difficulties of immediate compliance by an MS4 operator facing receiving water limitations requirements which “may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the . . . limitations, especially for wet weather discharges.”⁴

¹ Responses to Comments Report on Tentative Order No. R9-2015-0100, November 10, 2015 (“RTC”), at 39.

² State Board Order No. 99-05.

³ 673 F.3d 880 (9th Cir. 2011), *rev’d on other grounds* sub nom. *Los Angeles County Flood Control Dist. v. NRDC*, __ U.S. __, 133 S.Ct. 710 (2013).

⁴ State Board Order at 15.

In response to those challenges, this Board has taken the position that “MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.”⁵

The San Diego Water Board has fashioned an alternative compliance pathway which, building on the Water Quality Improvement Plan (WQIP) provisions first adopted in Order No. R9-2013-0001, is generally consistent with the State Board Order and does not represent, as petitioners San Diego Coastkeeper and the Coastal Environmental Rights Foundation (non-governmental organizations or NGOs) allege, impermissible “backsliding” in violation of the Clean Water Act (CWA).

While the Riverside County Copermittees support this alternative compliance option, the Copermittees (along with fellow copermittees) further submit that the San Diego Water Board erred in not following the lead of every other water board which has considered alternative compliance by providing compliance status while the copermittees are preparing their WQIPs.⁶ We also share the concerns of Orange County and the Orange County Flood Control District regarding the ability of the San Diego Water Board to issue a regional permit to municipalities and local agencies in three counties.

Finally, the Riverside County Copermittees submit that the time to prepare the WQIP should be lengthened to allow for a more robust stakeholder review process, a position which is set out in our Petition for Review and Statement of Authorities.⁷

Responses to Petitions for Review

A. Response to NGO Petition

The NGOs raise four principal arguments: (a) that the San Diego Water Board’s provision of an alternative compliance option represents impermissible “backsliding” under the CWA and implementing regulations; (b) that the Order unlawfully fails to incorporate waste load allocations consistent with applicable TMDLs; (c) that the Order fails to comply with the State Board Order with respect to alternative compliance; and (d) that the Order is not supported by findings or evidence in the administrative record.⁸

Before addressing those arguments, the Riverside County Copermittees note that in their petition for review, the NGOs focus on events and regulatory issues exclusive to San Diego County. Nowhere in their petition or accompanying memorandum of points and authorities do

⁵ *Id.* at 16.

⁶ See Petition for Review filed by the Riverside County Copermittees (A-2456(i)) (“Petition”) at 5-7 and accompanying Statement of Points and Authorities (“Statement”) at 5-13.

⁷ See Petition at 7-10; Statement at 13-20.

⁸ Because no TMDLs presently apply to the Santa Margarita river watershed, the Riverside County Copermittees will not comment on the NGO’s second argument, beyond noting that the San Diego Water Board adequately responded to that argument during the administrative proceedings. See RTC at 20.

the NGOs allege either an interest in Riverside County waters or any impact on their members from activities in Riverside County.⁹ The NGOs nowhere allege any injury by their members with respect to activities in Riverside County.

As explained in more detail in responses filed concurrently herewith by, among other petitioners, the Orange County and the Orange County Flood Control District, these failures must lead to the conclusion that the NGOs lack standing to challenge the Order as it applies to the Riverside County Copermittees or to Riverside County waters even if those waters can be said to be part of a larger “ecosystem.” See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992) (rejecting novel claim of “ecosystem nexus” as a basis for standing by environmental group).

Notwithstanding the NGOs’ failure to allege such interest or injury, the Riverside County Copermittees address their allegations below.

1. The Order’s Alternative Compliance Provision Does Not Represent “Backsliding”

The NGOs’ argument that providing an alternative compliance path constitutes illegal “backsliding” has already been rebutted by this Board in the precedential State Board Order.¹⁰ Nevertheless, the NGOs continue to argue that the adoption of what they term a “safe harbor” “violates the CWA’s anti-backsliding requirements and other federal and state regulations, and render the [Order] unlawful.”¹¹

a. The Approach of the San Diego Water Board Has Not Been to Require Strict Compliance with Water Quality Standards

A necessary premise for the NGOs’ anti-backsliding argument, that previous San Diego Water Board MS4 permits required strict compliance with water quality standards,¹² is not apparent in the history of Santa Margarita River watershed MS4 permits. While the San Diego Water Board indicated that copermittees were liable for violations of water quality standards, the Board also stated multiple times in the administrative record of the prior 2010 Riverside County permit that the permit did not require strict compliance with such standards.

In the San Diego Water Board’s response to comments on the proposed 2010 Riverside County MS4 permit (Order No. R9-2010-0016 (“2010 Order”)),¹³ Water Board staff stated: “Where the Copermittees have implemented the minimum programmatic actions yet their

⁹ See NGO Petition for Review, Section 5, which alleges only harms to the interests of NGO members in San Diego County waters. See also NGO Memorandum of Points and Authorities in Support (“NGO Memorandum”), which in discussing previous permits, only mentions those applicable to San Diego County dischargers.

¹⁰ State Board Order at 18-23.

¹¹ NGO Memorandum at 14.

¹² *Id.* at 6 (“MS4 permits must ensure that discharges from storm sewers do not cause or contribute to a violation of water quality standards.”)

¹³ This permit was not mentioned in the NGO Petition or Memorandum.

discharges continue to violate water quality standards, the Copermitees must modify their programs and implement additional actions that are not specified within the Tentative Order to achieve water quality standards. *The Tentative Order does not require strict compliance with water quality standards.*¹⁴ Addressing a comment that the permit exceeded the federal maximum extent practicable (“MEP”) standard, the Water Board replied that “in the Tentative Order, the San Diego Water Board *has chosen not to exercise its discretion to go beyond MEP and require strict compliance with water quality standards.*”¹⁵

The Water Board also emphasized that that the 2010 Order did not require the copermitees to meet numeric effluent limitations: “The NPDES requirements for non-governmental dischargers typically include numeric effluent limitations for a discharge so it will not cause or contribute to a condition of pollution in the receiving waters. Any excursion above these numeric effluent limitations in the discharge is a violation of the permit. Compliance is achieved when the numeric effluent limitations are met. *The NPDES requirements in the MS4 Permit do not include such effluent limitations, but allows compliance through iterative implementation of BMPs and improving storm water management programs, which is less stringent. Compliance means improving BMPs and storm water and non-storm water management programs when water quality is not adequately protected.*”¹⁶

Under the former permit, compliance with water quality standards was somehow to be obtained through an iterative process, a process since determined by this Board to be “ineffective” to attain water quality goals.¹⁷ The carefully worked out, transparent WQIP compliance process in the Order (following this Board’s guidance) represents not a retreat, but an advance in the effort to attain water quality standards. Instead of an ambiguous and undirected process, the current Order requires analysis of priority water quality goals and the provision of clear schedules and monitoring that is designed to measure, refine and improve efforts to attain water quality standards in receiving waters impacted by MS4 discharges. The process set forth in the Order for attaining water quality is a major step forward, not backsliding.

b. The Order Neither Violates CWA Nor Regulatory Anti-Backsliding Provisions

The NGOs argue that the Order violates Section 402(o) of the CWA and 40 C.F.R. § 122.44(l).¹⁸ This Board has already addressed that argument in the State Board Order, finding that Section 402(o) does not in fact apply to effluent limitations that either were not derived from an effluent limitation guideline originally established on best professional judgment or were

¹⁴ San Diego Water Board, Response to Comments, October 13, 2010, Response to Comment # 207, at 134 (Exhibit A to Request for Official Notice (Second), filed herewith) (emphasis supplied).

¹⁵ *Id.*, Response to Comment # 208, at 135 (emphasis supplied).

¹⁶ *Id.*, Response to Comment # 79, at 37 (emphasis supplied).

¹⁷ See State Board Order at 14.

¹⁸ See NGO Memorandum at 14-16. The NGOs attack this reasoning in the State Board Order as a “narrow construction” of the CWA. *Id.* at 15-16 n.26.

established pursuant to CWA sections 301(b)(1)(C) or 303(d)-(e).¹⁹ With regard to 40 C.F.R. § 122.44(l), the Board found that there was “ample regulatory history to demonstrate USEPA’s intent in establish the anti-backsliding policy and regulations with respect to evolving technology standards for *traditional point sources*.”²⁰ Given that this regulation was adopted in 1979, eight years before Congress enacted CWA Section 402(p) to incorporate MS4s into the NPDES permit system, it is clear that section 122.44(l) does not apply to MS4 permits.

More fundamentally, this Board held in the State Board Order that “all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, *regardless of the particular storm water permitting history of that region*.”²¹ This determination must inform any discussion of the validity of the NGOs’ backsliding argument, which attempts to distinguish the situation faced by the Los Angeles Water Board in adopting the Los Angeles County MS4 permit from that faced by the San Diego Water Board in adopting the Order.²²

c. Exceptions to the “Anti-Backsliding” Provisions Apply to the Order

In the State Board Order, this Board determined that, even assuming anti-backsliding provisions applied to the granting of an alternative compliance pathway, there were adequate facts to support various exceptions to these provisions.²³ The NGOs continue to argue that the exceptions do not apply, even with regard to the Los Angeles County permit upheld in the State Board Order.²⁴ Given that this Board already rejected those arguments,²⁵ and has specifically found that the information gleaned from the Los Angeles County permit should inform the work of all regional water boards, the Board should similarly reject the NGOs’ arguments here.

Moreover, with respect to the Order, the San Diego Water Board found facts supporting exceptions to the anti-backsliding provisions. The Board noted, for example, the new information disclosed by the development and implementation of the Fourth Term MS4 permits and the TMDL for Indicator Bacteria Project I.²⁶ The Board also pointed to the watershed management approach which, in the words of the board, “required regional action” and a

¹⁹ State Board Order at 19-20 (emphasis supplied). With respect to CWA section 303(d)(4), cited in the NGO Memorandum at 16-17, the San Diego Water Board found that it did not apply to bar the alternative compliance option. RTC at 39. In fact, NGO petitioners did not even argue that this statute applied when they challenged the Los Angeles County MS4 permit. State Board Order at 20 n.67.

²⁰ *Id.* at 20 (emphasis supplied).

²¹ *Id.* at 22 n.74 (emphasis supplied).

²² See NGO Memorandum at 22-25.

²³ State Board Order at 21-23.

²⁴ NGO Memorandum at 17-25.

²⁵ Arguments such as set forth in *id.* at 19, discussing the 2012 Los Angeles County permit upheld in the State Board Order.

²⁶ See RTC at 40.

“consistent set of permit requirements for all of the Copermittees and to promote the efficiencies gained from collective action in jurisdictional runoff management.”²⁷

The NGOs argue that watershed planning elements were required in prior permits for San Diego County copermittees and thus the San Diego Water Board’s “claim . . . that it has only now suddenly gained a ‘recognition that a watershed management approach required regional action’ or that a safe harbor was necessary to implement such action is patently false.”²⁸

In fact, the Order represents a dramatically new approach to watershed management, one which utilizes the WQIP process to identify and achieve outcomes, and not simply require “tracking numbers of actions and reporting” as was the case in earlier permits.²⁹ As the Fact Sheet observes, the “most significant difference” in the Order is that the copermittees “will have significant control in how to implement the jurisdictional runoff management programs to best utilize their available resources in addressing a specific set of priorities effectively, instead of trying to address all the water quality priorities ineffectively.”³⁰ In other words, the San Diego Water Board recognized that attempting to simultaneously address all water quality priorities (the approach dictated by a requirement for strict attainment of all water quality standards) is simply not achievable.

As the San Diego Water Board found, the watershed management approach in the Order is new and it reflects the experience of the copermittees and the Water Board staff under the former permits.³¹ This experience dictated the analytical and flexible WQIP approach originally contained in Order No. R9-2013-0100 and which guides the alternative compliance pathway now in the Order.³²

The NGOs next assert that the Order fails to include “any action” based on a finding in the State Board Order that “in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset” and criticize the lack of a requirement for multi-benefit projects.³³ Several responses are in order. First, while this Board’s statement regarding storm water reflects recognition of its benefits as well as the encouragement of storm water capture and reuse, it is not a mandate. As the NGOs themselves note, “the San Diego region differs in some important and substantial ways from its neighbors up

²⁷ *Id.* at 38.

²⁸ NGO Memorandum at 21.

²⁹ *See* Order Fact Sheet at F-15. Section V of the Fact Sheet (pages F-15 to F-17) generally describes the new approach followed by the San Diego Water Board.

³⁰ *Id.* at F-16.

³¹ *See* RTC at 40.

³² Moreover, the San Diego Water Board specifically rejected the NGO’s argument that the experiences of the Los Angeles Water Board “are somehow ‘unique’ to the Los Angeles Region.” The Water Board stated that the permitting history in the Los Angeles Region “is still consistent with the San Diego Water Board’s experience with storm water permitting over the last decade.” RTC at 38.

³³ NGO Memorandum at 22-23 (quoting State Board Order at 21).

north” because it lacks large underground basins for stormwater storage.³⁴ Second, as pointed out by the San Diego Water Board, the WQIP provisions of the Order (through which the alternative compliance process is implemented) require assessment of strategies to rehabilitate channels and habitat.³⁵ The Water Board also noted that multi-benefit and stormwater resource projects can be part of the Jurisdictional Runoff Management Program required by Order Provisions E.c.(3) and E.5.e.³⁶ Third, while the NGOs state that eight WQIPs submitted by San Diego County municipalities for eight watersheds reflected “a near total lack of commitment to the development and incorporation of multi-benefit regional water supply projects,”³⁷ the Riverside County Copermittees understand that these WQIPs were not in fact submitted to seek alternative compliance under Order Provision B.3c, and thus are not relevant to their argument.

The NGOs next contend that because the San Diego Water Board has adopted fewer Total Maximum Daily Loads (TMDLs) than the Los Angeles Water Board, the adoption of TMDLs in the Los Angeles region cannot be used as justification for alternative compliance in the San Diego region.³⁸ Again, this Board addressed this issue in the State Board Order, when it held that the Los Angeles Water Board’s experience in the TMDL development process could inform other regional water boards.³⁹ That process simply illustrates the difficulty faced in attaining water quality standards in receiving waters impacted by stormwater and urban runoff flows and supports the rationale for a thought-out, transparent, and effective path to compliance.

The NGOs’ final “anti-backsliding” argument relates to CWA Section 402(o)(3), which petitioners assert “provides an absolute limitation on backsliding.”⁴⁰ This specific argument already has been rejected by this Board in the State Board Order, when it found that the anti-backsliding provisions of CWA Section 402(o)(1) did not apply to the alternative compliance pathway provisions in the Los Angeles County permit.⁴¹ Since CWA Section 402(o)(3) specifically refers to a “permit with respect to which paragraph (1) applies,” it is not applicable to the alternative compliance pathway in the Order.

2. The Alternative Compliance Pathway Set Forth in the Order Does Not Violate the State Board Order, as Alleged by the NGOs

The NGOs argue that the Order’s alternative compliance pathway “violates” the State Board Order because the San Diego Water Board did not require that copermittees perform a “Reasonable Assurance Analysis” or require “objective guidelines” to ensure that the WQIP will “actually achieve” receiving waters limitations requirements.⁴²

³⁴ *Id.* at 22 n.39.

³⁵ *See* RTC at 36.

³⁶ *Id.* at 37.

³⁷ *Id.* at 23.

³⁸ NGO Memorandum at 23-25.

³⁹ *See also* footnote 32, above.

⁴⁰ *Id.* at 25.

⁴¹ *See* State Board Order at 19 and nn. 65 and 66.

⁴² NGO Memorandum at 28.

As will be discussed in Section B, the Riverside County Copermittees (along with other copermittees) believe that the alternative compliance pathway in the Order is inconsistent with the State Board Order to the extent that it does not include an interim compliance provision affording coverage under the alternative compliance process while copermittees are developing their WQIPs. Nonetheless, the Riverside County Copermittees submit that in all other respects, the alternative compliance pathway set forth in the Order complies with this Board’s guidance in the State Board Order.⁴³

The NGOs compare the Order’s requirements for alternative compliance with those in the LA County permit and its required Reasonable Assurance Analysis (RAA), arguing that the former “contains no requirement to conduct modeling or any equivalent assessment [to the RAA], and lacks any of the criteria and requirements identified by the State Board.”⁴⁴ As an initial matter, the State Board Order does not require performance of an RAA or similar modeling. The San Diego Water Board further addressed these complaints in their response to comments on the Order, stating that the approach in the Order is actually more “well defined” and “transparent” than that urged by the NGOs.⁴⁵ The Water Board noted, for example, that an RAA requires computer modeling, which in turn relies on various assumptions in developing its equations: “Many of the variables in the equations will be based on assumptions, and members of the public may not know or understand how those variables may impact the results.”⁴⁶ By contrast, the alternative compliance pathway in the Order requires “an analysis with ‘clearly stated assumptions’ which must go through a public participation process that allows the public to review and provide comments on the analysis methodology and the assumptions included in the analysis.”⁴⁷

While the alternative compliance pathway process in the Order provides more flexibility than the comparable process in the Los Angeles County MS4 permit, that process still is consistent with the requirements of the State Board Order, since the copermittees must provide the public (and the San Diego Water Board) with their analysis methodology and the assumptions included in the analysis that implementation of water quality improvement strategies will achieve final numeric goals.⁴⁸ In fact, the Riverside County Copermittees have retained a consultant to compare the various methodologies and to solicit public comments on them before the choice of methodology is made. This transparency is key to the approach of the San Diego Water Board, which provides greater opportunity for stakeholders (including the NGOs) to be involved in all aspects of WQIP development.

As the San Diego Water Board set forth in the Order’s Fact Sheet, a copermittee utilizing the alternative compliance pathway must first develop a “comprehensive set of numeric goals and schedules that will demonstrate” that the receiving water limitation and other requirements

⁴³ State Board Order at 51-52.

⁴⁴ NGO Memorandum at 30.

⁴⁵ RTC at 35.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Order Provision B.3.c.(1)(b)(i).

of the Order “will be achieved in a specified period of time.”⁴⁹ These goals and schedules, and other aspects of the alternative compliance effort, are subject to public review and San Diego Water Board approval.⁵⁰ Moreover, the copermittees are further required to specify annual milestones to be achieved each year, expressed as metrics “which are expected to build upon previous milestones and lead to the achievement of the final numeric goals.”⁵¹

Additionally, the copermittees must conduct an analysis demonstrating that implementation of water quality strategies identified under Order Provision B.3.b. will achieve the numeric goals within established schedules.⁵² The analysis must “reasonably” and “quantitatively” demonstrate that the strategies can achieve the goals within the schedule.⁵³ This is exactly the kind of rigor required by this Board in the State Board Order.

The NGOs further allege that the alternative compliance pathway in the Order “allows the type of endless compliance loop that has been disallowed in California MS4 permits for over a decade.”⁵⁴ This complaint ignores the process adopted by the San Diego Water Board.⁵⁵ First, as noted, the Order requires the identification and development of numeric goals and schedules to achieve water quality standards within some specified time period. Second, the copermittees are required to set and meet annual milestones to be achieved each year, ensuring that real progress is continued to be made toward the ultimate goals.

Given the complexity of this task and that over time “more data and information are collected during implementation” of the WQIP,⁵⁶ the San Diego Water Board has allowed the copermittees the flexibility to recommend modifications to numeric goals, water quality improvement strategies and schedules.⁵⁷ Such recommendations are required to be made in a Water Quality Improvement Plan Annual Report and require any modifications to be approved by the San Diego Water Board. This closely vetted, analytics-heavy approach is an effort at making true progress and eventual goal attainment, and is not the “compliance loop” alleged by the NGOs, nor does it bear any resemblance to the former “iterative process.”

⁴⁹ Order Fact Sheet at F-60.

⁵⁰ The Order establishes a Water Quality Improvement Consultation Panel in which stakeholders are able to review and comment upon elements of the WQIP. The Panel must include as Panel members a representative of the San Diego Water Board, a representative of the environmental NGO community and a representative of the development community. Order Provision F.1.a.

⁵¹ *Id.*

⁵² Order Provision B.3.b.(3); Fact Sheet at F-60.

⁵³ Fact Sheet at F-61.

⁵⁴ NGO Memorandum at 31.

⁵⁵ The NGOs also argue that the Order is inconsistent with the State Board Order because it does not include regional multi-benefit capture and water supply projects. NGO Memorandum at 33-34. This argument has already been made, and addressed. See discussion above.

⁵⁶ Order Fact Sheet at F-61.

⁵⁷ Order Provision B.3.c.(1)(b).

3. There are Adequate Findings and Evidence in the Administrative Record to Support the San Diego Water Board's Provision of an Alternative Compliance Pathway

Finally, although the NGOs argue that the San Diego Water Board “failed to make any findings whatsoever to demonstrate that the required principles identified in the State Board Order and omitted from the [Order] are not appropriate for the region or Permit,”⁵⁸ this argument ignores the analysis (cited above) set forth in the Fact Sheet, the Responses to Comments and in testimony at the adoption hearing.⁵⁹ The requirements in Provision B.3.c of the Order, combined with the other required elements of the WQIP process, affords an alternative compliance pathway that is congruent with the seven principles identified by this Board in the State Board Order (with the exception of the provision of interim compliance). The San Diego Water Board has adequately explained its rationale for the adoption of the alternative compliance pathway, and how that pathway is in accord with this Board’s guidance.

4. Conclusion

What the NGOs essentially argue for in their petition is a return to the discredited past, where the absence of clear goals or a strategy to attain compliance with those goals hampered the ability to make progress on water quality, to the copermittees’ and water boards’ mutual frustration. The threat of enforcement was no spur to those efforts, but only caused the copermittees to see the water boards as potential adversaries instead of as partners.

The alternative compliance pathway in the Order, and comparable provisions in MS4 permits across the state, represents the future, the “paradigm shift” noted by this Board and the San Diego Water Board. This is a shift toward identification of goals, measurement of the progress toward reaching the goals, correction where required and, eventual attainment.

The alternative compliance pathway set forth in the Order is no proverbial “walk in the park.” It requires much of the copermittees in terms not only of planning and staff time but also of public outreach. The cost of this effort is daunting (as is the cost of the entire WQIP development process), and is of real concern to the copermittees. Any failure to comply with time schedules and requirements of the process may cause the copermittees to lose compliance status. Terming this process a “safe harbor,” as the NGOs do, is frankly inappropriate.

We respectfully ask this Board to reject the arguments set forth in the NGO Petition for Review and Statement of Authorities and to uphold the alternative compliance pathway.

B. Response to Copermittee Petitions

Ten petitions for review of the Order have been filed by various copermittees in addition to the petition filed by the Riverside County Copermittees. Those ten petitions raise several

⁵⁸ NGO Memorandum at 34.

⁵⁹ Order Fact Sheet at F-59-F-60. The Riverside County Copermittees do not yet have a copy of the San Diego Water Board’s official transcript of the hearing, and respectfully reserve the right to provide citations to that transcript when it is made part of the administrative record.

meritorious arguments, which we request this Board to seriously consider. Because we anticipate that other petitioners will be addressing those arguments, the Riverside County Copermittees will briefly address two specific issues raised in these petitions.

1. The Order Should Provide for Interim Compliance for Copermittees While They Are Preparing WQIPs

The Petition submitted by the County of Orange and the Orange County Flood Control District (“OC Petition”)⁶⁰ (and by all other copermittee petitions) challenge the Order for its failure to provide interim compliance status for the copermittees while they are proceeding in good faith to develop their WQIPs required for alternative compliance. Such status is being provided by the two other water boards, Los Angeles and San Francisco Bay, which have included alternative compliance pathways in their MS4 permits.⁶¹

The Riverside County Copermittees believe that interim compliance is essential to meet the requirements of this Board’s seven principles for alternative compliance pathways set forth in the State Board Order. Moreover, the Riverside County Copermittees note that principle number 3 expects every water board to incorporate an alternative compliance path that “allows permittees appropriate time to come into compliance . . . during full implementation of the compliance alternative.” When read with other portions of the State Board Order, we interpret this principle to mean that alternative compliance should apply during the WQIP planning and development period. The time for compliance should commence from the start of the WQIP process, not its culmination probably more than two years in the future.

In addition to the arguments set forth in the OC Petition,⁶² at the hearing to adopt the Order, the Riverside County Copermittees suggested possible conditions in exchange for providing for interim compliance status, such as a commitment to dates for certain WQIP development tasks. The copermittees are open to other mutually agreed upon conditions. We look forward to working with this Board and other stakeholders on such conditions.

2. The Authority of the San Diego Water Board to Issue a Regional Permit

Another important issue raised by the copermittees relates to the authority of the San Diego Water Board to issue a regional permit covering copermittees in three separate counties and multiple different watersheds, with differing geologic, socioeconomic and hydrologic conditions.

The OC Petition⁶³ raises a number of points relating to the factual separation of the watersheds and geographical areas covered under the Order. The Riverside County

⁶⁰ Number A-2456(d).

⁶¹ See Exhibits A-C to Riverside County Copermittees’ Request for Official Notice previously filed herein. Moreover, the Central Valley Water Board has released a draft MS4 permit also providing for interim compliance. Please see Tentative Order No. R5-2016-XXXX, Provision V.C.9 (Exhibit B to Request for Official Notice (Second)).

⁶² OC Petition for Review at 5; Memorandum of Points & Authorities In Support of Petition for Review (“OC Memorandum”) at 2-15.

⁶³ OC Memorandum at 15-23.

Copermittees also wish to draw the Board's attention to the analysis of the statutory and regulatory provisions concerning regional permits contained in pages 3-10 of its Statement of Points and Authorities filed with its Petition for Review on Order No. R9-2013-0001, which is on file with the Board.⁶⁴ That analysis demonstrated that, absent a voluntary act by the copermittees to join a regional permit, the San Diego Water Board lacked legal authority to require the copermittees to enter into a regional permit.

The Riverside County Copermittees appreciate this opportunity to provide their views concerning the petitions filed regarding the Order. We look forward to further addressing the issues raised by the petitions and the Board's questions.

⁶⁴ File Number A-2254(j).