

May 12, 2016

State Water Resources Control Board  
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**SWRCB/OCC FILE A-2455 (a thru m)**  
**WRITTEN RESPONSE TO PETITIONS FOR REVIEW**

Dear Mr. Mallory-Jones:

This is in response to the State Water Resources Control Board ("State Board") March 15, 2016 letter in the above matter which invited written responses within 30 days from the San Francisco Bay Regional Water Quality Control Board ("Regional Board") and other interested persons to Petitions for Review ("Petitions") filed concerning the adoption by the Regional Board on November 18/19, 2016 of the Municipal Regional Stormwater Permit for the San Francisco Bay Area, Order No. R2-2015-0049 (the "MRP Order"). This filing deadline was extended by the State Board letter of April 11, 2016. This written response is submitted on behalf of the Alameda Countywide Clean Water Program (the "Program"), an interested person in this matter.<sup>1</sup> The Program has authorized me to file these comments.

We appreciate the opportunity to submit comments on these important Petitions. While some of our Program Permittees have raised discrete issues in their Petitions that will be the subject of the State Board's review in this matter, overall, the Program *strongly supports* the Regional Board's efforts to protect our local creeks and waters of the San Francisco Bay in a cost-effective manner

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<sup>1</sup> The Alameda Countywide Clean Water Program is composed of 17 cities and county entities in Alameda County including the Cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County (for the unincorporated area), Alameda County Flood Control and Water Conservation District and Zone 7 of the Alameda County Flood Control and Water Conservation District (collectively, "Program Permittees"). These entities each have jurisdiction over and/or maintenance responsibility for their respective municipal separate storm drain systems and/or watercourses in Alameda County.

from the potentially detrimental impacts of stormwater runoff from new development, redevelopment projects and other urban runoff sources. In the many years and months prior to the November 18/19, 2015 adoption of the MRP Order, the Program and our member agencies have worked very closely in cooperation with Regional Board staff in a collaborative effort to address San Francisco Bay Area municipal stormwater issues and to narrow the areas of disagreement on the requirements and provisions of the MRP Order.

### **Support for Permittee Petitions**

We are fully supportive of the MRP Order Permittee Petitions for review concerning the discrete issues raised in their Petitions, especially the Petitions of the nine member agency petitioners in Alameda County. Our Permittee Petitioners are the Cities of Alameda, Union City, Albany, Newark, Hayward, Dublin, Berkeley, San Leandro, and the County of Alameda. We have a few brief comments on the issues they have raised, but will largely defer to the effective and detailed arguments and evidence set forth in those petitions for review

First, we concur in the objections raised by the permittee petitioners to the lack of full public participation in parts of the workshop and hearing process that was conducted by the Regional Board on June 10, July 8, and November 18/19, 2015. This relates to the recusals by two Regional Board members from participation, the statements by Regional Board members on July 8 and November 18 of their tentative conclusions prior to receiving public testimony, staff submittal of late additional revisions to the MRP Order at the November 18 hearing, submittal of further revisions by the Regional Board Chair at the November 18 hearing, and the lengthy deliberations conducted out of public view in closed session just prior to adoption of the MRP Order. This also resulted in inappropriate last-minute changes to the Provision C.10 Trash Load Reduction visual assessment and receiving water monitoring requirements. The procedural deficiencies impacted the fairness and transparency of the public hearing process to which our member agencies are entitled.

Second, we strongly support the arguments of our member agency petitioners and other co-permittee petitioners that the limitations for mercury (Provision C.11) and PCBs (Provision C.12) load reductions should be Numeric Action Levels (NALs) and not Numeric Effluent Levels (NELs). The State Board has specifically declined to urge regional boards to use NELs in all MS4 permits,<sup>2</sup> and has embraced the use of NALs. Inclusion of NELs in the MRP Order resulted in part from the lack of full and legally required public participation, from inaccurate statements by Regional Board staff and legal counsel at the hearings, and from other procedural deficiencies more fully described by permittee petitioners and other co-permittee petitioners.

In addition to these significant shortcomings in the permit adoption process, the record lacks evidence that compliance with NELs for mercury and PCBs is practicable. There was an absence of appropriate factual justification concerning how the specific NELs for mercury and PCBs were calculated, allocated, or determined to be technically feasible and economically achievable. Permittees provided considerable testimony at the hearing to the contrary. Moreover, in general, the varying and periodic nature of stormwater discharges makes the use of NELs questionable without substantial justification. The record further lacks a factual basis for how the numeric

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<sup>2</sup> State Board Order No. WQ 2015-0075, p. 58-59.

values of the NELs were actually calculated. Many Permittees at the hearings testified to the likely significant shortfall in their ability to meet the NELs. The Regional Board staff expressed their preference at the hearing to avoid having to specify additional required actions that would be required on their part for NALs, and then expending the additional effort necessary to oversee and enforce them if “bad actors” emerge among the permittees. This does not provide a sufficient basis for including NELs and not NALs.<sup>3</sup>

The main focus of our comments is on issues raised by the San Francisco Baykeeper (“Baykeeper”) petition for review.

### **San Francisco Baykeeper Petition**

We strongly oppose and take issue with the contentions raised in the Baykeeper Petition and urge the State Board to reject those contentions.<sup>4</sup> Baykeeper’s Petition lacks legal or factual support. Additionally, Baykeeper fails to recognize or acknowledge the extensive efforts and accomplishments made by the San Francisco Bay Area municipalities, especially those in connection with the most recent permit to maintain and improve stormwater quality and urban runoff in the San Francisco Bay Region. Considerable demonstrated progress has been made by the MRP Order permittees, and the new MRP Order has challenged permittees to meet significantly more exacting standards in the path forward.

#### **I. Background Comment on Baykeeper Petition**

To begin, Baykeeper’s Legal Background section of their Petition mischaracterizes the correct application of water quality standards (WQS) to municipal stormwater dischargers (“MS4s”). Specifically, Baykeeper argues “Like all NPDES permits, MS4s *must* ensure that discharges from storm drains do not cause or contribute to a violation of water quality standards.” (Baykeeper petition, p.5, lines 25-26). In other words, Baykeeper contends that all MS4 permits must require compliance with WQS.

Not so. Long established law provides that within the context of NPDES permits, the Clean Water Act (CWA) does not strictly impose WQS requirements on MS4s. For numerous reasons the CWA treats stormwater differently from other NPDES discharges.

The CWA requires permits for MS4s to “require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” (33 U.S.C. § 1342(p)(3)(iii).) In establishing this requirement, Congress intentionally exempted MS4 discharges from strict compliance with WQS. (*Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999).) While MS4s are required to meet a technology-based standard for reducing pollutants in discharges to the maximum extent practicable (“MEP”), the water quality based effluent

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<sup>3</sup> We specifically concur with the well-reasoned discussion in the Santa Clara Valley Urban Runoff Pollution Prevention Program Petition for Review dated December 15, 2015 as to this issue, pp. 11&12.

<sup>4</sup> The Program also endorses the California Stormwater Quality Association’s written responses with regard to the Baykeeper Petition.

limitations in Section 301 of the CWA do not apply to MS4 permits. Rather, the permitting agency, i.e., the State Water Board and the regional water quality control boards (“Water Boards”), have the discretion and authority to impose requirements to meet WQS. (33 U.S.C. § 1342(p); *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).) In accordance with this federal scheme, therefore, only the WQSs imposed by the Water Boards apply to MS4 dischargers.

The State Board correctly cited the legal standard in Order No. WQ 2015-0075, p.10. It is simply incorrect for Baykeeper to state that MS4 permits *must* automatically impose WQS compliance requirements. Instead, the Water Boards have the discretion to develop permitting programs and schemes that do not require strict compliance with WQS.

Water Boards have historically exercised this discretion by imposing permit provisions to control discharges so as not to cause or contribute to exceedances of WQS in receiving waters in numerous water quality orders. MS4 compliance with WQS is to be achieved over time, through an iterative approach whereby exceedances of WQS trigger a process of improvements. The iterative process allows for a logical, science-based, and progressive management process to achieve WQS, and is a mechanism for improving water quality while promoting adaptive management and continuous improvement. Contrary to Baykeeper’s contention and pursuant to Congress’s design, the State Board and the regional board have discretion relating to how compliance with WQS is imposed and achieved.

**II. Adoption of Alternative Compliance Pathways for the MRP Order’s Receiving Water Limitations (“RWLs”) and Discharge Prohibitions is not in Violation of Anti-Backsliding Requirements and Complies with Federal Law.**

Baykeeper argues that the so called “safe harbor” provisions (“alternative compliance pathways”) violate federal Anti-Backsliding requirements.<sup>5</sup> We disagree. The Regional Board also disagreed with this argument in their adoption of the MRP as set forth in the MRP Order. Notably, the Baykeeper anti-backsliding argument is similar to arguments the State Board rejected in the precedent order, State Board Order No. 2015-0075. In that proceeding, environmental petitioners argued that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represented a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order and was contrary to federal Anti-Backsliding Requirements.

The State Board rejected Anti-Backsliding arguments in the Los Angeles matter. Baykeeper’s arguments should be rejected here for similar reasons.

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<sup>5</sup> We do not use of the term “safe harbor” and instead use the more accurate and descriptive terminology “alternative compliance pathways” to characterize permittee alternative compliance with WQS. This term, reflects the resource intensive efforts made by MS4 permittees to implement and assure compliance with provisions of the MRP Order.

**A. Clean Water Act Anti-Backsliding Provisions Do Not Apply to Discharge Prohibitions and RWLs**

As the State Board stated in the Los Angeles Regional Board Order, the Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(l). The CWA's statutory prohibition against backsliding applies only under a narrow set of criteria specified in CWA section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline. The provisions of the Regional Board MRP Order are not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed pursuant to CWA sections 301(b)(1)(C) or 303(d) or (e). The RWLs and Discharge Prohibitions in the MRP Order are not established based on either section 301(b)(1)(C) or section 303(d) or (e). Statutory Anti-Backsliding Requirements do not apply.

In the MRP Order, Discharge Prohibitions and the RWLs provisions were adopted by the Regional Board within the discretion afforded to them in section 402(p) of the CWA – a provision that is *not* listed in section 402(o)(1). The Discharge Prohibitions and RWLs are not effluent limitations. It follows that section 402(o) expressly does not apply to the Discharge Prohibitions and RWLs adopted by the Regional Board within its discretion under section 402(p). The State Water Board accurately characterized the CWA statutory Anti-Backsliding Provisions in Order WQ 2015-0075, and the Regional Board acted accordingly.

**B. EPA's Regulatory Anti-Backsliding Provisions Do Not apply to Discharge Prohibitions and RWLs**

The EPA regulatory Anti-Backsliding Provisions also do not apply to the Discharge Prohibitions and the RWLs of the MRP Order. Baykeeper contends that the Permit's RWLs and Discharge Prohibition provisions “easily fit” within the “standards” or “conditions” provisions of federal regulations, and thus violate the EPA's anti-backsliding regulations.<sup>6</sup> We disagree. When this anti-backsliding regulation is read along with other regulations in the same chapter, it is apparent that the meaning of “standard” and “condition” does not apply to the RWLs provisions and Discharge Prohibitions based on the regulation cited by Baykeeper, as that regulation only applies to “interim” effluent limitations, standards and conditions set forth in section 122.44(l)(1). The provisions in question are not “interim” provisions.

Moreover, nothing in the regulations place RWLs and the Discharge Prohibitions within the meaning of “standards,” and “conditions” as permit conditions referenced in these regulations relate only to required conditions, not the discretionary RWL provisions contained in the MRP Order. Additionally, as described in the Fact Sheet, the intent of the EPA's regulations was to address evolving technology standards for traditional point sources. As discussed above, the Discharge Prohibitions and RWLs for MS4s are discretionary in nature.

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<sup>6</sup> 40 C.F.R., § 122.44(l).

**C. Even if Federal Anti-Backsliding Provisions Apply, Exceptions to Anti-Backsliding Apply**

The application of federal Anti-Backsliding Provisions is somewhat academic, because the requirements at issue are exempt in any event. In the Los Angeles matter, the State Board concluded that it was unnecessary to resolve the ultimate applicability of the regulatory Anti-Backsliding Provisions, because, assuming for the sake of argument that they did apply, the new WMP/EWMP requirements would qualify for an exception to backsliding. The Provision C.1 requirements of the MRP Order similarly fall under an exception.

The CWA and federal regulations contain exceptions to the Anti-Backsliding Requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time. 33 U.S.C. § 1342(o)(2)(B)(i). The federal regulations similarly allow less stringent conditions, standards, or limitations when new information would have justified the application of different permit conditions at the time of issuance. 40 CFR §§ 122.44(l)(1), 122.62(a)(2).

New information has emerged since the adoption of the 2009 MRP permit that significantly changes, shapes, and better defines the alternative compliance pathway that is provided under the current MRP Order. This relates to satisfaction of provisions relating to pesticides (Provision C.9), trash (Provision C.10), and mercury and PCBs (Provisions C.11&12).<sup>7</sup> Permittees must be in full compliance with these provisions to avail themselves of the alternative compliance path for Discharge Prohibitions and RWLs exceedances. The revisions to these provisions were made by the Regional Board based on an abundance of new information relating to permittee efforts to achieve compliance with WQS over time.

Due to the nature of stormwater discharges and the difficulty of removing pollutants from these discharges, alternative compliance pathways are needed to further the iterative process. MS4 permittee have compiled many years of monitoring data. These data demonstrate that significant investment and time is required to provide solutions for water quality challenges. The challenges are made more complex by the characteristic imperviousness of the developed environment. Controlling sources of MS4 stormwater pollutants and reconstructing the built environment towards restoration of more natural hydrologic processes are tied to the development cycle. Implementation of green infrastructure requires many years to complete. Accordingly, even assuming the anti-backsliding provisions were applicable, the exception to anti-backsliding would apply.

Furthermore, requirements of the MRP Order are as or more stringent than the prior MRP. The preceding MRP, set forth in Orders No. R2-2009-0074, as amended in Order No. R2-2011-0183, required compliance with RWLs and Discharge Prohibitions (also Provision C.1 in the previous orders), directed Permittees to achieve those limitations through the iterative process, and retained the Regional Board's discretion to enforce compliance with these provisions at any time. The Regional Board's recent MRP Order continues to require compliance with Discharge Prohibitions and RWLs, applies more stringent requirements for timely implementation of

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<sup>7</sup> We do not comment on Provision C.14 bacteria controls as they do not apply to the Alameda County permittees.

control measures and other compliance requirements specified in Provisions C.2 through C.15, and reserves direct enforcement of the Discharge Prohibitions and RWLs to situations where a permittee fails to comply with the specified provisions. The permit specifically states as follows in Provision C.1:

*“Compliance with Provisions C.9 through C.12 and C.14 of this Order, which prescribe requirements and schedules for Permittees identified therein to manage their discharges that may cause or contribute to violations of water quality standards (WQS) for pesticides, trash, mercury, polychlorinated byphenyls (PCBs), and bacteria, shall constitute compliance during the term of this Order with Receiving Water Limitations B.1 and B.2 for the pollutants and the receiving waters identified in the provisions.”*

Further, the Regional Board MRP Order contains additional language for compliance with the trash abatement Provision C.10 with regard to the Discharge Prohibitions A.1 and A.2 during the term of the MRP Order.

The prior and current Regional Board orders approached Provision C.1 in a manner designed to achieve compliance with Discharge Prohibitions and RWLs. The current MRP Order under review imposes more stringent Discharge Prohibitions and RWLs than required under previous orders. A comparison of the specific language of Provisions C.9, 10, 11, 12 and 14 of the MRP Order with the provisions of the previous 2009 order, as amended in 2011, demonstrate that the provisions have clearly become more rigorous

### **III. Adoption of Alternative Compliance Pathways for the MRP Order’s RWLs and Discharge Prohibitions is Not in Violation of State Board Order No. WQ 2015-0075.**

Baykeeper argues that the alternative compliance pathway provisions of the MRP Order are in violation of State Board Order No. WQ 2015-0075. We disagree, and the Regional Board also disagreed with this argument in their adoption of the MRP Order.

State Board Order No. WQ 2015-0075 found that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the RWLs provisions mandated in Order WQ 99-05. Order WQ 2015-0075 concluded that the WMP/EWMP approach provides permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of receiving water limitations while remaining in compliance with the terms of the permit.

Further, the State Board directed all regional boards to consider the WMP/EWMP approach to RWLs compliance when issuing Phase I MS4 permits going forward. In doing so, the State Board acknowledged that regional differences may dictate a variation on the WMP/EWMP approach, but that such variations must nevertheless be guided by a few principles. Baykeeper fails to mention this essential language of the State Board that clearly indicates that the State Board left to individual regional board’s substantial discretion with respect to adopting alternative compliance programs that are designed to address RWLs compliance. The State Board stated that they expect the regional boards to follow these guiding principles unless a regional board makes a specific showing that application of a given principle is not appropriate

for region-specific or permit-specific reasons. In Order WQ 2015-0075, the State Board also noted with approval alternative compliance language submitted by CASQA in the review process.<sup>8</sup>

The State Board directed that Phase I MS4 permits should incorporate an “ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.”<sup>9</sup> The MRP Order acknowledges this directive and states that the State Board Order requires regional boards to consider reasonable compliance options to achievement of RWLs and to follow the seven guiding principles in considering alternative pathways for compliance with RWLs.<sup>10</sup>

In summary, Order No. WQ 2015-0075 found that the fundamental alternative compliance issue for review was whether the Los Angeles MS4 Order’s WMP/EWMP provisions constituted a legal and technically sound compliance alternative for achieving compliance with RWLs. The State Board concluded that it did. Similarly the MRP Order contains legally and technically sound compliance alternatives.

In our Program comments on the Tentative MRP Order submitted to the Regional Board on July 10, 2015, we urged the Regional Board to clarify and strengthen the applicability of State Board Order No. WQ 2015-0075 with respect to alternative compliance pathways in the MRP Order. The Regional Board’s Response to Comments of October 16, 2015 responded that “*We agree that the Order should reference State Water Board Order WQ 2015-0075 and consideration of its alternative compliance approach principles and their applicability to Provisions C.9 – C.12 and C.14.*”<sup>11</sup> Regional Board staff then revised the Fact Sheet for Provision C.1 to reference the State Board Order and to reflect their further consideration of its alternative compliance pathway approach principles. This revised language was adopted by the Regional Board in Provision C.1 and the Fact Sheet relating to this provision and thus, became part of the MRP Order.

We turn now to specific consideration of the **seven guiding principles** in the context of the MRP Order as is directed by the State Board for consideration of alternative compliance pathways in MS4 permits.

- 1) **The first guiding principle** is that the RWLs provisions of Phase I MS4 permits should continue to require compliance with WQS in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the RWLs provisions as directed by State Water Board Order WQ 99-05.

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<sup>8</sup> State Board Order No. WQ 2015-0075, p.51, footnote 142.

<sup>9</sup> State Board Order No. WQ 2015-0075, p. 33.

<sup>10</sup> The MRP Fact Sheet is incorporated into the MRP Order by reference - Order No. R2 2015-0049, p.1. See Fact Sheet p. A-25 that references the seven guiding principles enumerated in State Board Order No. WQ 2015-0075, pp. 51-52.

<sup>11</sup> Response to Comments on October 16, 2015 Tentative Provision C.1, pp 1&2 of 8.



Response: Provision C.1 of the Regional Board MRP Order accordingly continues to require compliance with WQS in the receiving waters and continues to contain the RWLs as directed by Order WQ 99-05, just as it did in the previous permit. This has not changed. In the MRP Order, the iterative process is not enough for compliance. Instead, the Permittees must further achieve compliance with the requirements and timelines set forth in Provisions C.9-12 and C.14. The Regional Board stated that the MRP Order “explicitly applies” this guiding principle.<sup>12</sup>

The MRP Fact Sheet provides that this Order, as did the previous order, goes beyond requiring an open-ended iterative approach to compliance with water quality standards by including pollutant-specific provisions, C.9 through C.12 and C.14. The Fact Sheet specifically references State Board Orders No. WQ 98-01 and 99-05,<sup>13</sup> and states that provisions and limitations implement adopted TMDL wasteload allocations and the associated implementation plans in the Basin Plan, and specifies what Permittees must do during the term of the Order to manage discharges of the specific pollutants that may cause or contribute to violations of water quality standards. If complied with, the Permittees will be deemed in compliance with the Discharge Prohibitions and Receiving Water Limitations for these pollutants.<sup>14</sup> The assessment in the Fact Sheet is accurate, clear, and in line with the first guiding principle.

- 2) The second guiding principle is that the Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the RWLs for that water body-pollutant combination. The Baykeeper petition does not directly reference this guiding principle.

Response: The Regional Board Order implements adopted TMDLs, wasteload allocations, and the associated implementation plans in the Basin Plan for water body-pollutant combinations; pesticides and pesticide caused toxicity in all receiving waters (Provision C.9) – the Regional Board has adopted a TMDL for pesticides; trash in all receiving waters (Provision C.10); mercury in all San Francisco Bay segments and receiving waters in the Guadalupe River watershed (Provision C.11) – the Regional Board has adopted a mercury TMDL; PCBs in all San Francisco Bay segments (Provision C.12) – the Regional Board has adopted a TMDL for PCBs; and fecal indicator bacteria in San Pedro Creek and Pacifica State Beach receiving waters (Provision C.14).<sup>15</sup> Regional Board implementation of this guiding principle was appropriate.

- 3) The Third guiding principle is that the Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with RWLs without being in violation of the RWLs during full implementation of the compliance alternative.

Response: We disagree with the Baykeeper conclusions on this guiding principle. The Regional Board found that the requirements of C.9 through C.12 and C.14 are ambitious, rigorous and transparent because they will require Permittees to fully commit to and implement challenging

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<sup>12</sup> Fact Sheet Attachment A-25.

<sup>13</sup> Fact Sheet Attachment A-24.

<sup>14</sup> Fact Sheet Attachment A-25-26.

<sup>15</sup> Fact Sheet Attachment A-25.

but achievable tasks to ultimately meet water quality objectives.<sup>16</sup> We agree that this guiding principle was met, and we describe more fully below the rigor of the permit provisions.

Provision C.9 (Pesticides Toxicity Control) requires permittees to: maintain and implement an Integrated Pest Management Policy (IPM); train municipal employees in their duties on use and application of pesticides; require contractors to implement IPM; interface with county agricultural commissioners; undertake a detailed public outreach program directed at reduction of use of pesticides and promote appropriate disposal of unused pesticides; and evaluate implementation of pesticide source control actions. In written comments, many municipalities expressed concern with the stringency of the provision that requires contractors to implement IPM.<sup>17</sup> The transparency promoted by Provision C.9 is demonstrated by the detailed reporting requirements for each of the sub-provisions in Annual Reports, the extensive pesticide and toxicity monitoring requirements of Provision C.8.g, the reporting requirements for water quality standard exceedances in Provision C.8.h., and the public outreach programs. All of this information will be in the public records.

Provision C.10 (Trash Load Reduction) contains many continuing and new prescriptive and rigorous requirements including requiring permittees: to achieve 70% reduction by July 1, 2017 and 80% reduction by July 1, 2019; to install and maintain mandatory minimum full trash capture systems; to provide specific demonstration of trash reduction outcomes; to provide annual trash hotspot selection and cleanup; and to provide trash load reduction plans. The record documents extensive comments expressing concern with the rigor, specificity and efficacy of the trash load reduction requirements.<sup>18</sup> These concerns are laid out more fully in the permittee Petitions. The promotion of transparency by Provision C.10 is demonstrated by the detailed reporting and documentation required, including in the required Annual Reports, and by the required documentation of design, operation and maintenance of each full trash capture system that must be available for review and inspection. This reporting and these submissions will be in the public records.

Provisions C.11 (Mercury Controls) and C.12 (PCB Controls) also contain detailed and rigorous requirements including implementation of control measures and milestones to achieve specific load reductions for urban runoff in the Mercury and PCB TMDLs; County specific PCB load reduction performance criteria to be achieved by June 30, 2018 and June 30, 2020; assessment of stormwater load reductions; implementation of Green Infrastructure to reduce loads with performance criteria by County – a major addition to the MRP process that was strongly supported by EPA in their written comments to the Regional Board;<sup>19</sup> the new requirement to evaluate PCB presence in caulk/sealants used in storm drains and roadway infrastructure; management of PCB-containing materials and wastes during building demolition activities – another major addition to the MRP Order process; fate and transport studies of PCBs; risk reduction programs; and another new requirement for annual Pollutants of Concern Monitoring Report submissions separate from other monitoring reports. Provisions C.11&12 again promote transparency through requiring rigorous reporting and documentation; the Annual Reporting;

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<sup>16</sup> Fact Sheet Attachment A-25.

<sup>17</sup> Regional Board October 16, 2015 Provision C.9 Response to Comments, p. 3 of 5.

<sup>18</sup> For example, see Regional Board October 16, 2015 Provision C.10 response to comments – 63 pages.

<sup>19</sup> USEPA letter to Thomas Mumley of July 10, 2015.

PCB load reduction progress reporting by April 1, 2016; PCB building materials and wastes protocols, implementation and assessment methodology that must be developed by June 30, 2019; and the monitoring requirements in Provision C.8 that relate to Mercury and PCBs. These compliance documents will all be public records.

The detailed pesticide, trash, mercury and PCB requirements in the MRP Order reflect an ambitious, rigorous and transparent process that properly enables permittees to utilize the alternative compliance path provided by Provision C.1.

- 4) The fourth guiding principle is that the alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.

Response: We disagree with the Baykeeper conclusions on this guiding principle. The Regional Board correctly found that the MRP Order complies with this guiding principle. The MRP Order implements all applicable TMDL requirements for multiple contaminants (pesticides, mercury and PCBs), calls for or allows for implementation of trash, mercury, and PCBs, and bacteria controls in watershed and drainage areas where they are most needed and most likely to be effective, and promotes and allows use of controls with multiple pollutant benefits. The Regional Board found that a watershed-based approach addressing multiple pollutants is not appropriate for the pesticides and pesticide-caused toxicity requirements. Consistent with the TMDL wasteload allocation and implementation plan, these requirements are pollution prevention management practices specific to urban use pesticides and apply to all watersheds and drainage areas.<sup>20</sup> We agree that the Regional Board's conclusions on this guiding principle are sound.

- 5) The fifth and sixth guiding principles are that the alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles; and that the alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply. Baykeeper does not reference these principles.

Response: Provision C.3.c of the MRP Order calls for adoption and implementation of low impact development consistent with Order WQ 2015-0075 principle 5 and 6. The mercury and PCBs requirements (Provision C.11.c and C.12.c) explicitly recognize and call for use of green infrastructure to meet pollutant load reduction requirements – a major new requirement in this MRP Order. This is also fully set forth in Provision C.3.j. The trash provision “allows use of low impact development green infrastructure as full trash capture systems, if appropriately designed, operated, and maintained.”<sup>21</sup> Although not directly required in the pesticides provision, low impact development principles and development and implementation of green infrastructure plans, including consideration of multi-benefit regional projects, could also have pesticides load reduction benefits.<sup>22</sup> We agree with these conclusions of the Regional Board that fifth and sixth guiding principles are satisfied.

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<sup>20</sup> Fact Sheet Attachment A-25-26.

<sup>21</sup> Fact Sheet Attachment A-26.

<sup>22</sup> Fact Sheet Attachment A-26.

- 6) The seventh and final guiding principle is that the alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions.

Response: We disagree with the Baykeeper conclusions on this guiding principle. Consistent with the seventh guiding principle, the Regional Board found that each of the pollutant- specific provisions also contains concrete milestones and deadlines and reporting requirements that provide rigor and accountability. The plain language of the relevant provisions of the MRP Order directly supports these conclusions. All reports, plans, and other required submittals will be made available to all interested parties and input and feedback from interested parties will be considered in the evaluation of all submittals.<sup>23</sup> The seventh guiding principle has been satisfied. We have already commented on these concrete milestones, deadlines, and reporting requirements in our discussion of the third guiding principle herein.

In summary, the alternative compliance pathways set forth in the MRP Order fully complies with the directives and the seven guiding principles set forth in State Board Order No. WQ 2015-0075.

#### **IV. The MRP Contains Monitoring Sufficient to Determine Compliance**

Baykeeper contends that the MRP Order does not include monitoring provisions sufficient to determine compliance with permit terms or yield data which are representative of the monitored activity. We disagree. The Regional Board rejected these Baykeeper arguments in their adoption of the MRP Order.<sup>24</sup>

Provision C.8 and other provisions provide numerous reporting and monitoring requirements. However, as the Baykeeper monitoring arguments focus on the alleged insufficient monitoring requirements to determine compliance with the Discharge Prohibitions and RWLs, we will focus our response on reporting and monitoring requirements for these constituents – pesticides, trash, Mercury and PCBs.<sup>25</sup> Many of the answers to Baykeeper arguments on stormwater monitoring are effectively answered in the MRP Order Fact Sheet, and we reference many of those specific findings in the discussion herein.

##### **A. Pesticide Toxicity Control Monitoring**

Provision C.9 (Pesticides Toxicity Control) requires permittees to certify implementation of their IPM policy or ordinance, report IPM tactics and strategy, along with other pesticide specific information in their Annual Reports (Provision C.9.a.iii); to report various municipal pesticide

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<sup>23</sup> Fact Sheet Attachment A-26.

<sup>24</sup> By referencing MRP Order provisions or findings, we are not admitting to the validity of the permit's adoption, provisions or the Fact Sheet's adequacy with regard to permittee Petitioner arguments, and we preserve all arguments in that regard.

<sup>25</sup> Again, we do not comment on Provision C.4 (Bacteria Controls) as it does not apply to Program permittees.

application training information in their Annual Reports (Provision C.9.b.ii); to report IPM-certified contractor compliance with IPM policies in their Annual Reports (Provision C.9.c.iii); to report their communications with County agricultural commissioners in their Annual Reports (Provision C.d.ii); to report public outreach activities in various pesticide outreach related activities in their Annual Reports (Provision C.9.e.iii); to report their participation in relevant pesticide regulatory process activities in their Annual Reports (Provision C.9.f.ii); and to report an evaluation of their assessment of IPM effort effectiveness and improvements made (Provision C.9.g.iii).

In addition to these Provision C.9 reporting and monitoring requirements, Provision C.8 also requires Pesticide and toxicity monitoring in urban creeks in the water column in dry weather (Provision C.8.g.i), in sediment during dry weather (Provision C.8.g.ii), and requires various wet weather pesticide and toxicity monitoring (Provision C.8.g.iii), along with follow-up for any pollutant that is present at a concentration exceeding its water quality objective in the Basin Plan (Provision C.8.g.iv).

The Regional Board concluded that the MRP Order describes type, interval and frequency of pesticides-related toxicity monitoring sufficient to yield data which are representative of both dry weather and wet weather urban runoff. Required analytes include toxicity and pesticides that are found at or near concentrations that cause chronic or acute effects to aquatic organisms.<sup>26</sup> Pesticide-related toxicity has been wide-spread and in part results from approved pesticide uses, and therefore, the monitoring is tailored to provide information on which pesticides are currently a water quality concern. Federal and state law pre-empt local governments from directly regulating pesticide sales or use, as noted in the Fact Sheet.<sup>27</sup> The Regional Board concluded that the MRP Order describes type, interval and frequency of pesticides-related toxicity monitoring sufficient to yield data which are representative of both dry weather and wet weather urban runoff.

The MRP Order finds that monitoring as required in Provision C.8 satisfies the objectives of identifying problems in the receiving waters and assessing the effectiveness of stormwater controls by requiring monitoring that will provide Permittees with sufficient data to pinpoint sources of pollutants and assess the effectiveness of efforts to reduce pollutants, both at the source and in receiving waters.<sup>28</sup> This effort can assess the magnitude of receiving water problems, the urban runoff contribution to receiving water problems, the sources of pollutants contributing to receiving water problems, and whether the conditions in receiving waters are getting better or worse. It is particularly important to note that the monitoring required in Provision C.8.g addresses POCs in the receiving waters for not only pesticide related toxicity, but also for mercury and PCBs, a multiple contaminant approach that should be encouraged and which reflects consistency with the guiding principles in Order WQ 2015-0075.

## **B. Trash Load Reduction Monitoring**

Provisions C.10 (Trash Load Reduction) contains various full capture system documentation requirements, subject to inspection and review upon request; requirements for the demonstration of trash reduction outcomes; requirements for trash management actions; and requires

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<sup>26</sup> Fact Sheet Attachment A-84-85.

<sup>27</sup> Fact Sheet Attachment A-84.

<sup>28</sup> Fact Sheet Attachment A-71, 78, 80.

submission of a testing plan to the Regional Board by July 1, 2017. (Provision C.10.b). For trash hot spot assessments, permittees must report the volume removed for hot spot cleanup in each Annual Report (Provision C.10.c), any new revisions to trash load reduction plans must be included in the Annual Reports (Provision C.10.d), and reporting in the Annual Reports are set forth in Provision C.10.f.

The proper consideration is whether the trash control strategies, monitoring requirements, and mandatory deadlines for trash reductions meet the MEP standard contemplated by the CWA and include such other provisions as the Board determines appropriate for control to ultimately meet the narrative water quality objectives for floating material, settleable material, and suspended material.<sup>29</sup> The MRP Order goes on to find that the permit is consistent with the statewide amendment to the Ocean Plan and the Inland Surface Waters, Bays and Estuaries Plan.<sup>30</sup> Stormwater permittees in the San Francisco Bay Area have been monitoring trash for almost ten years to meet permit trash load reduction requirements. This monitoring experience has demonstrated that trash monitoring data are highly variable and influenced by many factors outside the control of municipalities such as wind events, illegal dumping, etc.as mentioned by several permittees in the Regional Board hearings.

The MRP Order recognizes that there currently are no standard monitoring methods and protocols for monitoring trash in receiving waters. As certain petitions for review correctly argue, the true problem as to trash monitoring is that the MRP Order ties permit compliance to monitoring methods that have not yet been shown to be effective. Finally and logically, it observes that, during this Permit term, the Permittees will accordingly develop and test trash receiving water monitoring tools and protocols designed, to the extent possible, to answer various listed questions.<sup>31</sup> It should also be noted that the Statewide Trash Amendments do not require receiving water monitoring. Thus, Baykeeper's objection misses the mark.

### **C. Mercury and PCB Monitoring**

Provisions C.11 (Mercury) and C.12 (PCBs) also contain numerous reporting and monitoring requirements that relate to assessment of these pollutants in the receiving waters. These requirements, some of which are already referenced above include Annual Reporting for achievement of mercury and PCBs TMDL allocations (Provisions C.11.d.iii, C.12.d.iii); mercury and PCBs load reduction progress reporting by April 1, 2016 (Provisions C.11.a.iii, C.12.a.iii); reporting of methodologies and assessment of mercury and PCBs load reductions from stormwater (Provisions C.11.b.iii, C.12.b.iii); Mercury and PCBs green infrastructure reporting (Provisions C.11.c.iii, C.12.c.iii); reporting of implementation of Mercury and PCBs risk reduction programs (Provision C.11.e.iii; C.12.h.iii); new monitoring requirements for PCBs-containing building materials and wastes protocols (Provision C.12.f.iii); new monitoring requirements for PCBs use in caulks/sealants in storm drains or roadways (Provision C.12.e.iii); PCBs fate and transport study reporting (Provision C.12.g.iii); and the Monitoring requirements in Provision C.8 that relate to Mercury and PCBs.

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<sup>29</sup> Fact Sheet Attachment A, C.10-8, A-90 that references CWA §402(p)(3)(B)(iii).

<sup>30</sup> Fact Sheet Attachment A, C.10-8, A-90.

<sup>31</sup> Fact Sheet Attachment A-96-97.

The Regional Board has stated that requirements set forth in Provision C.8.f. Pollutants of Concern (POC) monitoring is intended to assess inputs of POCs to the Bay from local tributaries and urban runoff; provide information to support implementation of TMDLs and other pollutant control strategies; assess progress toward achieving wasteload allocations (“WLAs”) for TMDLs; and help resolve uncertainties in loading estimates and impairments associated with these pollutants.<sup>32</sup> The MRP Order goes on to find that, consistent with the federal regulations, water quality monitoring requirements in Provision C.8 require specific monitoring that will yield data that is both representative of the monitored activity and necessary to assure compliance with the requirements of the Permit.<sup>33</sup> We agree with this Regional Board assessment.

Baykeeper’s arguments should be rejected as to the monitoring and reporting requirements described above, both with respect to Provision C.8 as well as Provisions C.9, C.10, C.11 & C.12. As noted in permittee Petitions, certain monitoring and reporting requirements in fact exceed what is appropriate, and instead should be drafted to provide a practicable, effective path for permit compliance.

#### **D. End-of-Pipe Monitoring**

Finally, Baykeeper argues that the MRP Order is defective as it does not contain any stormwater outfall end-of-pipe monitoring, and that this contrasts with Southern California MS4 permits. We disagree that there is a hard and fast requirement imposed by the CWA or Order WQ 2015-0075 for end-of-pipe monitoring or that the type of monitoring requirements imposed on other MS4s sets a baseline for all other MS4 permits.

While the MRP Order monitoring may be different than Southern California MS4 permits, monitoring is not a one-size-fits-all activity. The amount and types of monitoring necessary will vary depending on the individual characteristics of each storm water discharge, especially considering the different watersheds, amounts of rainfall, and the regional hydrology in the San Francisco Bay Area that is different from that found in the Southern California MS4 jurisdictions. EPA has indicated that water quality monitoring programs may include ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.<sup>34</sup>

Baykeeper in their written comments to the May, 2015 Tentative Order and in subsequent comments criticized the Tentative Orders claiming that Provision C.8.f POC monitoring does not require monitoring when or where stormwater discharges occur, at or near stormwater outfalls. The Regional Board’s Response to Comments thoroughly addressed this. It stated that POC monitoring is required to be conducted during the wet season and that this sampling occurs during storm events and observed that outfall sampling will not yield information about progress towards meeting TMDL wasteload allocations and POC mass loadings to the Bay, which are the

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<sup>32</sup> Fact Sheet Attachment A-78.

<sup>33</sup> Fact Sheet Attachment A-71.

<sup>34</sup> U.S. EPA. 1996. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits. Sept. 1, 1996. <http://www.epa.gov/npdes/pubs/swpol.pdf>

primary purposes for this type of monitoring. It then further concluded that this information is obtained through bottom-of-watershed monitoring, as required in C.8.f.<sup>35</sup>

The Fact Sheet also finds that Provision C.8.d requires receiving water monitoring in lieu of outfall monitoring for several reasons: 1) there are no end-of-pipe limits in the permit to measure. Instead, the permit requires, for example, PCBs load reductions. Outfall monitoring would not allow the Board to assess whether the PCBs limits are met; 2) there are hundreds if not thousands of outfalls in the Permittees' jurisdictions, and it is impractical to monitor every single outfall due to both cost and safety concerns. Monitoring a subset of outfalls would provide information about MS4 discharges at those specific locations at only one limited point in time; and 3) outfall monitoring is time-and spatially limited. In contrast, the receiving water monitoring integrates the physical, biological and chemical effects to the water body of all MS4 discharges from multiple outfalls over multiple storms (i.e., time and space), yielding more useful data than outfall monitoring to determine compliance with the permit.<sup>36</sup>

Finally, the Baykeeper petition disputes certain MRP Order Fact Sheet monitoring related findings. The contested findings refer to the National Research Council (NRC) and EPA statements that MS4 end-of-pipe monitoring produces data of limited usefulness.<sup>37</sup> We reject this Baykeeper argument as unfounded and agree with the findings stated in the Fact Sheet. The monitoring recommendations of the NRC report support the discretion of regional boards to move MS4 permits away from outfall monitoring if justified by past results, for the reasons indicated herein. Many of the approaches and inputs required by the MRP Order have been needed for evaluating sources and loads so as to be consistent with the San Francisco Bay PCBs TMDL and have been supported in part through the Permittee participation in the Regional Monitoring Program and partly through TMDL implementation planning efforts by BASMAA and the stormwater programs.<sup>38</sup>

Baykeeper's specific reference to the NRC report in their footnote 6 is misleading. That particular reference is merely an introductory comment in the context of that chapter's overview. The reference clearly states monitoring is being reviewed for both MS4s and Industrial permits, and that the latter "has lagged behind" the MS4 program "both in requirements and implementation."<sup>39</sup> In other words, the NRC document uses the term "stormwater management" as an umbrella encompassing all types of stormwater permits and does not imply that monitoring by MS4's alone must extend "from outfalls to receiving waters". This is reflected in the chapter's separate recommendation sections for MS4s and for industrial dischargers

## **Conclusion**

In summary, it is evident that the MRP Order does not violate federal Anti-Backsliding Requirements, satisfies the seven guiding principles of Order WQ 2015-0075 for providing

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<sup>35</sup> Response to Comments on the May, 2015 Tentative Order, Provision C.8, 1 of 19, and Response to Comments of October 16, 2015 1&2 of 19.

<sup>36</sup> Fact Sheet Attachment A-72.

<sup>37</sup> Fact Sheet Attachment A.72-73.

<sup>38</sup> Fact Sheet A-114 (C.12-8).

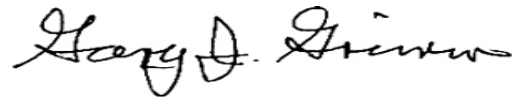
<sup>39</sup> NRC, Urban Stormwater Management in the United States (2009), p.257.



alternative compliance pathways, and contains more than sufficient monitoring and reporting requirements that fit the unique circumstances in the San Francisco Bay Region in order for Regional Board staff and the public to assess compliance with the MRP Order.

We thank you for your consideration of these ACCWP Program comments.

Sincerely,

A handwritten signature in black ink that reads "Gary J. Grimm". The signature is written in a cursive style with a large initial "G" and a distinct "J" and "G".

Gary J. Grimm

Cc A-2455(a thru m) Distribution List