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STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

THURSDAY, APRIL 11, 2013

ITEM 8

WATER QUALITY CONTROL BOARD
BOARD MEETING ROOM
9174 SKY PARK COURT
SAN DIEGO, CALIFORNIA

1 APPEARANCES:

2 CHAIRPERSON: Tomas Morales

VICE CHAIR: Gary Strawn

3 BOARD MEMBERS: Eric Anderson
Henry Abarbarnel
4 Sharon Kalemkiarian

5 EXECUTIVE STAFF: David Gibson, Executive Officer
James Smith, Assistant Executive
6 Officer
Chris Witte, Executive Assistant
7

8 STATE BOARD STAFF
9 COUNSEL: Catherine Hagan
Nathan Jacobsen

10 ALSO PRESENT: Christina Arias
11 Laurie Walsh
Eric Becker
12 David Barker
Jeremy Haas
13 Barry Pulver
Eric Rosenbaum
14 Chiara Clemente
Chris Means
15 Ben Neill
Jody Ebsen
16 Debbie Woodward
Julie Chan
17 Sean McClain

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1 San Diego, California, Thursday, April 11, 2013

2 9:06 a.m.

3

4 CHAIRMAN MORALES: We've got a couple of
5 announcements and then we'll begin directly with the
6 elected officials who were given a time start of 9:15 but
7 before we get there, we wanted to make some announcements
8 about yesterday's proceedings and how we would like to
9 conduct today's.

10 MS. HAGAN: Excuse me. You need to do the roll
11 call.

12 CHAIRMAN MORALES: Why don't we start with the
13 roll call.

14 (Laughter.)

15 MS. WITTE: Mr. Anderson?

16 MR. ANDERSON: Here.

17 MS. WITTE: Mrs. Kalemkiarian?

18 MS. KALEMKIARIAN: Here.

19 MS. WITTE: Mr. Strawn?

20 MR. STRAWN: Here.

21 MS. WITTE: Chairman Morales?

22 CHAIRMAN MORALES: Here.

23 MS. WITTE: Dr. Abarbarnel? Not here.

24 CHAIRMAN: MORALES: Okay, couple of things about
25 yesterday. We tried to set up the proceedings in a way

1 that was fair to the copermittees, designated parties,
2 interested speakers. One of the things that did happen
3 yesterday was that I think the term was "rippers,"
4 although we won't say that. A number of the groups had
5 folks from their organizations that, while not claiming to
6 be on behalf of the organizations, whether they were
7 copermittees or NGOs, it appeared as if they were, with
8 the exception of the BIA.

9 By our calculation, there were roughly five
10 minutes of those types of presentations from folks for
11 both the copermittees and the NGOs. We're not going to
12 deduct that time. We'd ask that that not -- well
13 actually, it won't occur today because we're moving on to
14 a different presentation, but we are going to give the BIA
15 an extra five minutes to sort of even things up a bit.

16 Now, with that, I think I see some of our elected
17 officials and while we're scheduled to begin at 9:15, I
18 think we can go ahead and start the proceedings.

19 MR. GIBSON: Mr. Chairman, good morning. Members
20 of the Board, we should also do public forum this morning
21 on items not pending before the Board.

22 CHAIRMAN MORALES: Did we receive any speaker
23 cards from the public for items not pending before the
24 Board?

25 Okay, so seeing no takers, we will move on to the

1 speakers with respect to Item Number 8. It's a
2 continuation of yesterday.

3 So for those that are in the room and that are
4 going to speak, I would like to very briefly administer
5 the oath and if you'll stand and after I say one sentence,
6 just say "I do," I would appreciate it. And then when you
7 do come to speak to state your name and that you have
8 taken the oath.

9 Do you swear that the testimony you will provide
10 is true and correct? If so, say "I do."

11 CROWD: I do.

12 CHAIRMAN MORALES: Thank you. With that, we'll
13 begin with our elected officials and Mayor Filner.

14 MR. FILNER: Good morning. Thank you,
15 Mr. Chairman. Thank you, Board for allowing us to speak
16 this morning.

17 I'm here with my colleague, Chairman of the Board
18 of Supervisors, Chairman Cox. Actually we've been working
19 together on issues such as this for I think 25 years since
20 he was Mayor of Chula Vista and I was City Councilman of
21 San Diego. So we know each other pretty well and I would
22 agree on a whole number of things, so thank you for
23 allowing us to speak.

24 I don't think there's any mystery of why we're
25 here. I think all the mayors of the County signed a

1 letter to you asking for a little bit more time to discuss
2 these issues further. Each of us as Mayors and County
3 Board has the responsibility for improving water quality
4 and we join you in your commitment for that. We want to
5 make sure that happens and each of us has a responsibility
6 for paying for pollution prevention programs and water
7 quality improvement projects.

8 We don't absolve ourself of any responsibility.
9 We know this is going to cost us in both energy and money
10 and we are prepared to do that. We're going to do
11 everything possible to make sure that we can increase
12 funding to do what I know the Board and all of us want to
13 do. We all have that responsibility and we take it very
14 seriously. We, too, have a responsibility to protect our
15 residents from any poor policies that come about and this
16 is, I think, why we're here today.

17 I think we need some further cost benefit
18 analysis on this before it is passed. These requirements
19 have known technical deficiencies and that leaves the
20 taxpayers on the hook to pay for unnecessary, badly
21 thought out goals, laying out nearly six dollars as we
22 estimate for every single dollar of benefit under some
23 calculations.

24 So please don't implement regulations that will
25 leave copermitttees susceptible to third-party litigation

1 which would waste our money, our taxpayers' money, that we
2 want to spend on actually improving water quality. I
3 think little of the permit has been vented thirdly through
4 the state and as stated in our joint letter from the
5 mayors, the proposed solutions may not even be workable.

6 Let's work on something better. Without changes,
7 the permit will invite litigation, which is not good for
8 any of us, political turmoil, which is not good for any of
9 us. That's -- some people think that I invite that.

10 In a hurdle for future investment in water
11 quality improvements in this region, I don't think we are
12 ready yet. We all want what you want on this Board. We
13 all want clean water. We are committed to it and we want
14 to make this permit successful. Let's work together to do
15 that.

16 Thank you, Mr. Chairman. Thank you.

17 MR. STRAWN: Chairman Cox.

18 MR. COX: Thank you, Mr. Chairman and Members of
19 the Water Quality Control Board. It's an honor to be here
20 and to follow Mayor Filner in an issue which is very, very
21 important to all of the 21 copermittees in San Diego
22 County.

23 The mayor referenced a letter that we have here
24 that I'd like to submit, which is signed by 19 of the 21
25 copermittees, expressing basically the concern that Mayor

1 Filner had referenced the fact that we certainly want to
2 work with you in a cooperative vein to come up with the
3 conditions for a new stormwater permit, but we feel that
4 there's a need for more time to sit down and try to work
5 through some of the issues, particularly in regards to the
6 bacteria TMDLs.

7 I would respectfully request your Board to
8 continue this hearing to a later date because the proposed
9 permit is, in our opinion, really not ready to be adopted.
10 Reasonable time has not been provided to the public to
11 review the final proposed permit language of your Staff's
12 response to the public comments.

13 We'd ask that you please provide a minimum of 45
14 additional days for stakeholders to review and comment on
15 the significant changes that have been made from the
16 earlier draft before your Board considers adoption of the
17 permit.

18 The County of San Diego is absolutely committed
19 to clean water and we are doing something right about it
20 as a region. I'm very proud of the comprehensive and
21 vigorous stormwater program that we have developed in the
22 last 20 years to comply with the Municipal Stormwater
23 Permit.

24 Between the County of San Diego, our 18 cities,
25 the Port District, the Airport Authority, we currently

1 spend about 120 million dollars per year in taxpayer
2 dollars to comply with the permit requirements, and that's
3 each and every year.

4 In the County, our stormwater program costs over
5 30 million dollars annually. We've seen remarkable
6 improvement in water quality in the last 40 years with the
7 inception of the Clean Water Act. And locally, over the
8 last few decades, water quality at local beaches has
9 improved significantly, particularly during dry weather
10 conditions. This is important because residents and
11 visitors flock to our local beaches during the summer
12 months.

13 Over the last several years, Heal the Bay has
14 given more than 90 percent of our San Diego beaches "A"
15 grades during the summer months. Even though water
16 quality has been improving and we have programs in place
17 that are working, permit requirements continue to escalate
18 and have reached a point that is no longer sustainable.
19 The costs and benefits of permit requirements must be
20 balanced. It's imperative that mandated permit actions be
21 justified by equal or greater benefits that are likely to
22 result.

23 We think the biggest unsubstantiated cost in the
24 permit is the bacteria TMDL. The cost estimates in the
25 six watersheds in which the County shares jurisdiction is

1 estimated to be 2.2 to 4.2 billion dollars over the next
2 20-year compliance timeline. For the County, TMDL costs
3 alone have the potential to double our existing annual
4 expenditures on stormwater control, taking money directly
5 away from other important public services.

6 As elected officials responsible for the
7 stewardship of the taxpayers' dollars, the Board of
8 Supervisors takes very seriously its responsibility to
9 ensure that the public is getting good results from its
10 investments. We cannot make that case to the public at
11 this time for bacteria TMDL.

12 You will hear from our technical experts later
13 today that current technology is not capable of removing
14 bacteria to levels that would meet bacteria limits we're
15 being held to, especially during rain events. As a
16 result, we are setting ourselves up for failure and a
17 failed public policy. That doesn't do anybody any good.

18 You also will hear that the measurements required
19 to evaluate compliance with the TMDL do not distinguish
20 between different types of bacteria, some of which are
21 known to come from natural sources and pose less risk to
22 public health.

23 The bottom line is that the cost effective
24 analysis of cost benefit analysis was never conducted
25 prior to adopting TMDL. What we know is there is very

1 good water quality in our beaches when it's not raining.
2 But over 60 percent of the TMDL costs would be devoted to
3 removing bacteria from stormwater during rain events.
4 There aren't that many rainy days in San Diego. We all
5 know that. So the TMDL is essentially forcing us to spend
6 a great deal of public money to fix a condition that
7 exists only a very small fraction of the year.

8 We'd like to have a better understanding of the
9 overall environmental and public health benefits of this
10 regulation before we ask our taxpayers to commit literally
11 billions of dollars of additional cost to this program.

12 I would also like to emphasize the importance of
13 partnerships on this issue. A prime example is the very
14 good -- and I think significant work that has been done in
15 the Tijuana River Valley, which is a part of my
16 district -- which has been utilized over the last few
17 years to approach water quality improvements in a more
18 collaborative manner. And I give a lot of credit to Mr.
19 Gibson and members of his staff that we've had a chance to
20 work with. I think that's a very good example of a
21 positive thing that is happening that is truly changing
22 certainly the water quality and the conditions of the
23 Tijuana River Valley.

24 This same approach can and should be applied to
25 permit implementation. The County remains very committed

1 to clean water. With respect to the bacteria issue and
2 ocean water quality, the County has been a regional leader
3 for many years. I've been personally involved over the
4 years in securing additional resources for continued water
5 quality monitoring in the San Diego beaches. This is
6 important work and we will continue to find ways to work
7 with our partners to ensure that it continues.

8 In closing, please grant a continuance on this
9 matter so that regulated parties and stakeholders will
10 have the necessary time to review the proposed permit
11 language prior to your Board hearing for consideration to
12 adopt the permit. And I urge you not to include the
13 bacteria TMDL in this permit until adequate and
14 appropriate information is available for analysis in order
15 to determine if public health benefits justify the cost.

16 Again, the County is committed to working with
17 you and your staff to find the best way of tackling the
18 stormwater issues, but it is not good public policy to
19 simply throw additional dollars at the problem when we are
20 not sure what the results will be.

21 I thank you for the opportunity to speak to you
22 today and again, thank you for your consideration in this
23 matter.

24 MR. ANDERSON: Chairman Cox, if I could share --
25 I do share your concern about the bacteria TMDL and there

1 is a time schedule included in it and I just want to
2 clarify. Perhaps the staff could clarify better than I
3 can because I'm just a farmer. But the bacteria TMDL was
4 a separate process that's already improved and it is
5 included due to the regulations on the MS4s. It's not
6 something that we can change or delay or, I mean, it
7 doesn't -- it's not an MS4 Permit. It's included in the
8 MS4 Permit, but it's not the MS4.

9 And so all the cost concerns and the time to
10 comply is a separate process. At some point, we may need
11 to reopen the TMDL and address those economic concerns and
12 the way to best achieve compliance with the bacteria. But
13 this is more of a discussion about the stormwater permit,
14 and we really have not much to do with the TMDLs that must
15 be included in there unless we just take it all apart and
16 do it all. It's better addressed as a separate process.
17 Am I stating that well?

18 MR. GIBSON: Good morning, Mr. Chairman. Thank
19 you, Board Member Anderson. You do have that correctly.
20 The TMDL is a Basin Plan Amendment approved by the Board
21 through sequel in which the Board did consider the cost.
22 We are committed with the language we've offered to
23 include a reopener clause in the permit. Should the TMDL
24 be revised, we would then probably revise the permit
25 itself.

1 There may be an opportunity during the next
2 triangle review to look at issues associated with the
3 TMDL, particularly where the costs are the greatest with
4 with wet weather quality objectives for bacterial
5 indicators.

6 The County has indicated that they are interested
7 in pursuing a project with the Southern California Coastal
8 Water Research Project. It is a project that I am also
9 willing to work with, SCCWRP, the acronym for that
10 organization. And on May 2nd, we'll be having a meeting
11 with San Diego County and SCCWRP commissioners and
12 Executive Director, Steve Leisburg to talk about how to
13 move forward on that project.

14 That could ultimately lead to a proposal for you
15 to consider in the next triangle review to tackle wet
16 weather water quality objectives in such a way that would
17 address the concerns of the copermittees and others in
18 that TMDL.

19 MR. O' DAY: Mr. Chairman, may I come to the
20 rescue of my client?

21 We'll be talking in our presentation -- my part
22 of the County presentation, a little bit more about this
23 issue but we think the Browner Case -- and I'll be talking
24 about that -- does give discretion to now go back and look
25 at that, reopen that bacteria TMDL before you bring it

1 into the permit. And we think there are very good reasons
2 for you to do that, both policy and legal and otherwise,
3 and so I will be talking about that.

4 I confess I haven't briefed Chairman Cox probably
5 fully on all those legal components so I felt the need to
6 come up and help him with that.

7 CHAIRMAN MORALES: Thank you, Mr. O' Day, and I
8 look forward to that presentation.

9 And Chairman Cox, I will say that, you know, we
10 really do sympathize and we're as concerned as you are
11 about cost. So I will make it one of my primary goals
12 once we get through the MS4 process to get us as a Board
13 and staff looking at the TMDL that is in place and see if
14 there isn't a way to arrive at the same solutions more
15 efficiently and for less money.

16 MR. COX: Well again, I guess our plea today on
17 behalf of the 19 copermittees that signed the letter would
18 be that you not make any decisions today in regards to the
19 TMDL, that you put that off and allow us the time to sit
20 down and work with you and your staff to see if we can
21 come up with a more acceptable manner in which to...

22 MS. KALEMKIARIAN: Chairman Cox --

23 MR. ANDERSON: -- I do have one last... I do want
24 to compliment your staff, Chairman Cox, on giving us a
25 very complete set of corrections to the permit, that

1 are -- they were excellent and did an admirable job in the
2 short period of time that they had and they did give us
3 some really good things to work on for the permit.

4 So I want to compliment your staff on doing that,
5 and the copermittees for pulling that off in the short
6 period of time.

7 MS. KALEMKIARIAN: Good morning. How are you?

8 This may not be something that you should address
9 but your staff, but I'll put it there so it can be
10 addressed. We heard lots of testimony last night from
11 surfers from Surfrider about all of the horrible things
12 that happen to them when they're swimming after a rain
13 event, and I was struck by your comment that we don't get
14 much rain in San Diego. I realize that.

15 I'm curious whether San Diego County would take
16 the same position as Orange County seemed to take
17 yesterday when we were told, "Oh, we're doing so well.
18 It's getting much better. Don't change what we're doing."
19 Does the County -- San Diego -- believe we do need to do
20 better, or the rain events are so infrequent that we can
21 live with it and wait for the 72-hour period to pass?

22 And I'm not saying that facetiously. I really do
23 want to know.

24 MR. COX: I think we certainly want to work in a
25 cooperative vein to continue constantly trying to improve

1 what we're doing in regards to measuring water quality and
2 trying to make sure that we provide good, accurate
3 information and that we try to deal with the sources of
4 pollution that's getting into the water. There's no
5 question about that.

6 In fact, the County -- I had a Board letter a
7 couple weeks ago which the Board -- they adopted, which
8 would be focusing on trying to come up with a newer type
9 of technology which is allowed by the EPA. But
10 unfortunately, the State of California does not allow us
11 to use that technology that would allow us to determine
12 whether there are pollutants in the ocean within four
13 hours as opposed to putting up signs waiting 48 hours to
14 determine whether it was polluted 48 hours before.

15 This technology exists. We actually started on
16 April 1st using this technology at some selected beaches,
17 and we are continuing to use the technology that we have
18 to use right now. But we're going to run a parallel test
19 for a year to determine -- and hopefully be able to zip in
20 information, which I think in talking with Mr. Gibson, I
21 think he's very familiar with that technology -- and it
22 would take a change in state law to allow us to rely on
23 that type of technology.

24 That's something we're incurring at our cost as a
25 way to better serve the public so that in realtime, or at

1 least within four hours, they will know whether a beach is
2 clean or not.

3 And obviously for a lot of communities,
4 particularly Imperial Beach suffers a lot from their
5 beaches being closed through no fault of their own, will
6 be able to hopefully get those beaches opened up in a much
7 quicker timeframe and letting the public know that the
8 beaches are safe to use.

9 So yeah, we're constantly trying to figure out
10 how we can better serve the public, ensure good water
11 quality for our beaches and our creeks and our rivers, and
12 we are committed to continue to do that. But we want to
13 do it based on good, sound science and technology and
14 unfortunately, I think the bacteria TMDL does not allow us
15 to do that at this point.

16 MR. STRAWN: I'll be real quick. I really
17 appreciate -- first off, I want to second the comments
18 about the professionalism of your staff, but specifically
19 your comment about the technology for measuring bacteria
20 near realtime.

21 I sat in on a meeting at the airport where you
22 discussed that with us, and just like to say we have
23 pushed the State Board a little bit on that issue and
24 we'll continue to that because I think that is part of the
25 answer, is getting better technology.

1 MR. COX: We'll probably need your help. I look
2 forward to that, assuming this test goes well, which we
3 think it will, to get a change in state law that would
4 allow us to use it throughout the State of California.

5 CHAIRMAN MORALES: I agree. And we will -- I'll
6 be sure to bring that up at the Chair's meeting and any
7 time I meet with the State Board in the future. And I
8 hesitate to say I'm really excited about DNA testing
9 because it makes me sound a little geeky.

10 (Laughter.)

11 MR. O' DAY: You and me both.

12 CHAIRMAN MORALES: Thank you very much,
13 appreciate it.

14 MR. STRAWN: Supervisor Bates from Orange County.

15 MS. BATES: Good Morning, Chairman Morales and
16 honorable Board Members. It is certainly a pleasure and
17 an honor to be before you this morning to represent Orange
18 County.

19 I am Patricia Bates. I'm Vice Chair of the
20 Orange County Board of Supervisors and I supervise the 5th
21 District, which our cities -- there's 11 cities and about
22 five unincorporated communities that are covered by this
23 permit.

24 Having completed your first full day of this
25 hearing, you have received input from, I'm sure, a broad

1 array of speakers expressing their opposition to some
2 aspects of the permit.

3 Many agencies including the County of Orange and
4 the cities of South Orange County have weighed in with
5 comments and expressed concern that this permit hearing is
6 premature. As you may know, Orange County has developed a
7 robust pollution control program and I'd like to add that
8 with the passage of our sales tax extension, Measure M2,
9 200 million dollars was submitted to water quality
10 improvement programs and we've had a robust involvement
11 from our cities in that program submitting projects and
12 those are underway.

13 Water quality has improved significantly over the
14 past 23 years as a result of our concerted and consistent
15 efforts. We continue our education in Orange County with
16 the Coastal Coalition, which I also chair. It's taken
17 over 100 years to build the urban landscape that provides
18 our homes, jobs and amenities of water and life, which we
19 all enjoy.

20 In hindsight, we all now know that building
21 practices that were standard in the past caused impacts on
22 our water quality.

23 Our stormwater program has made great strides and
24 continues to be successful as we learn from our data and
25 refine our approach. We need to continue these programs

1 in order to mitigate the hundred plus years of development
2 practices that need change, and you're at the forefront of
3 that. We certainly respect that and certainly your
4 efforts in that direction.

5 Orange County respectfully requests that you
6 listen to the speakers who have come before you and take
7 their comments to heart. Your staff initiated a great
8 stakeholder process last April that improved the proposed
9 permit through discussion and consensus. At the end of
10 October, unfortunately those stakeholder discussions were
11 terminated much to the disappointment of many
12 participants. The result of that action is that the
13 proposed permit being discussed in these hearings has
14 received opposition.

15 Therefore, in my most heartfelt terms, I
16 respectfully urge you to postpone this hearing and
17 reconvene both stakeholder's discussions with the intent
18 to adopt a permit that has the broadest support. Then we
19 can all declare victory -- and certainly with our
20 residents, our constituents, knowing that we're all
21 partners in this effort -- we'll work together to ensure
22 that going forward we do correct the practices that have
23 impaired our ocean.

24 In conclusion, I would like to mention that the
25 Board of Supervisors, my Chairman, Sean Nelson, was not

1 able to be here today. He's actually in Washington doing
2 a little lobbying to get us some money for our beaches and
3 these very programs. But we did send a letter and
4 unfortunately it didn't get included in the record, but
5 we'd like to forward that to you subsequently, especially
6 if we have some additional time for discussion on these
7 very, very critical issues before you.

8 Thank you, again.

9 MR. STRAWN: Thank you. And Jerry Kern, Deputy
10 Mayor of the City of Oceanside.

11 CHAIRMAN MORALES: I'd like to make a request of
12 all of the future speakers. Like most of our hearings,
13 this one is being transcribed and for the sake of our
14 court reporter's fingers, if we can keep the pace of our
15 presentations to a normal pace, it would be much
16 appreciated.

17 MR. KERN: As elected official, I feel your pain.
18 I understand and hopefully I'll do that.

19 (Laughter.)

20 MR. KERN: I was supposed to remind you I was not
21 here for the oath, because of traffic. Is there something
22 I should do or not do? I'll tell you the truth anyway.

23 (Laughter.)

24 CHAIRMAN MORALES: Good enough.

25 MR. KERN: I thank you for taking the time to do

1 this. I am Jerry Kern, Deputy Mayor of the City of
2 Oceanside and I'd like just a couple things. We do need
3 sensible regulations that meet the four basic goals:
4 Reasonable, scientifically based, attainable and
5 financially feasible.

6 These new regulations as proposed do not meet all
7 of these goals and I urge the Board to review these
8 regulations before there's an attempt to implement them.
9 At the very least today, I'd like the Board to grant a
10 continuance to a later hearing date, to provide a minimum
11 of 45 days for all the stakeholders to review and comment
12 on the significant changes from the earlier draft. We
13 should all be more compelled doing it right than doing it
14 quickly.

15 Specifically, I'd like to address a few critical
16 issues. First is the onsite retention of 85 percentile
17 volume. Retention at the 85 percentile has potential of
18 negatively impacting the habitat located adjacent to our
19 streams and rivers, creating a permanent drought
20 condition. Over time, this will create a permanent
21 habitat change along those waterways and more than likely
22 severely reduce the size of the habitat area that is
23 currently supported.

24 The City of Oceanside has worked closely with the
25 Army Corps of Engineers to build a sustainable habitat for

1 the final four miles of the San Luis Ray River. In fact,
2 our bacteria count has been significantly higher because
3 of the bird population that now inhabits the mouth of the
4 river. So we're doing a good job and it seems like we're
5 being punished for it.

6 Secondly, the application of naturally occurring
7 predevelopment conditions to a heightened modification
8 management plan calculations. Hopefully everybody
9 understood what I just said.

10 This requirement will remove the incentive to
11 develop existing sites by significantly increasing the
12 development cost that is not consistent with the
13 heightened modification plan in place. It will not foster
14 improvements in water quality and conflicts recently with
15 the implemented five-year HNP monitoring plan.

16 By removing the disincentives from redevelopment,
17 we can implement low-impact development practices and
18 improve water quality. If this regulation is implemented,
19 the receiving waters will remain subject to unmitigated
20 development. It will also constrict funding sources that
21 subsidize the stormwater programs.

22 There continues to be a significant concern with
23 the proposed permit due to the unreasonable cost without a
24 scientific base. The City of Oceanside currently spends
25 about 3.2 million dollars per year for permit compliance.

1 The new regulations would more than double that
2 cost. This is an unfunded mandate that the City of
3 Oceanside cannot absorb without affecting other basic
4 services like police, fire and other basic services.

5 I thank you for your time. I really would like
6 to emphasize -- and I think the other speakers have said
7 it -- is the 45 days, that all the copermittees and the
8 stakeholders have a real hard look at this and do this the
9 right way and something we can all agree on.

10 Thank you.

11 MR. STRAWN: Cheryl Cox, Mayor of City of Chula
12 Vista.

13 MS. COX: Good morning. As the mayor of the
14 second largest city in San Diego, I appreciate the time
15 that you've given us. The City of Chula Vista joins the
16 County Board of Supervisors, and particularly Chairman
17 Cox, in its call to action to protect the water quality
18 while controlling the mounting and unreasonable costs of
19 increased regulation on local governments, business and
20 industry.

21 You and your staff have spoken throughout the
22 permit issuance process about soliciting and incorporating
23 stakeholder comments during the development of the permit.
24 To date, our staff has worked productively with your staff
25 and made suggestions on early drafts.

1 If this permit moves forward as written, the
2 tentative order will result in a significant and
3 unprecedented level of regulation and cost to local
4 municipalities and significant costs passed along to
5 businesses and the developers.

6 Given that major sections of the permit have been
7 rewritten and can have substantial impacts on our
8 stormwater programs, eight business days is an
9 insufficient amount of time to review and analyze the
10 significant revisions in the tentative order prior to
11 today's hearing.

12 I urge the Board to grant a continuance to allow
13 more time for our stakeholders to review the significant
14 changes in the draft, seek clarification from Board staff,
15 and make recommendations that will improve permit
16 effectiveness.

17 Some of Chula Vista's larger concerns are the
18 additional and costly requirements for development
19 projects. First, implementing the requirements of this
20 permit represents at least a 30 percent increase in the
21 cost of Chula Vista's stormwater program during the
22 transition, followed by millions of dollars in costs
23 expected when the watershed and jurisdictional strategies
24 mandated by the permit are developed and implemented.

25 Second, the tentative order will impose

1 significant hardships on new development and
2 redevelopment, needlessly requiring almost all development
3 projects in the region to comply with expensive hydro-
4 modification requirements regardless of whether the
5 projects contribute to assuring water quality.

6 Third, the requirement to return urban infill
7 projects to conditions that existed under predevelopment
8 conditions would be a significant hardship to making
9 redevelopment projects pencil out. Despite the state
10 legislature's actions, local governments like ours
11 encourage, not discourage, redevelopment where possible.

12 Although the City of Chula Vista is not directly
13 impacted today by the bacteria TMDL, the overwhelming cost
14 to implement this requirement will impact funding for
15 watershed and regional efforts. In addition to the costs
16 I just described, Receiving Water Limitation requirements
17 unnecessarily expose copermittees to third-party lawsuits
18 and regulatory fines. That drives up costs for regulated
19 parties and for development in the region.

20 Local governments in San Diego worked together
21 with your staff and a host of technical experts for over
22 three years to develop a hydro-modification management
23 plan that makes sense. The Board approved that plan in
24 2010 and we're currently in the second year of a five-year
25 study to assess its effectiveness. Findings of the

1 hydro-modification management plan, including exemptions
2 for major river reaches, were the result of extensive
3 modeling and geomorphological studies endorsed by top
4 experts in this field.

5 This permit would ignore that good work and the
6 significant cost to develop it. Unfortunately, it would
7 prematurely establish new standards which have no
8 technical backing.

9 In summary, the result of the proposed new
10 requirements for development is that the structures
11 required to mitigate its impacts will expand exponentially
12 in number, will need to be bigger, and significantly more
13 costly. Implementing these requirements would be an
14 economic burden to the region, might not improve water
15 quality, and could result in undesirable effects such as
16 mosquito breeding or infrastructure damage.

17 Additional thoughts is that Prop 218 singles out
18 potable water, waste water, and solid waste fees to
19 require a protest vote rather than a positive vote to
20 increase fees. Props 218 and 26 make it very difficult
21 for local governments to raise the revenue needed to
22 comply with the permit.

23 If legislation allowed this exemption for
24 stormwater fees, it might enable us to advance water
25 quality efforts without jeopardizing other programs.

1 Local governments must manage taxpayer dollars
2 while making policy decisions for the good of our
3 residents. Granting our request for a time extension
4 gives local governments and the Board a better chance of
5 crafting final permit language that can result in programs
6 that make sense from both environmental and economic
7 standpoints.

8 Thank you for giving me the opportunity to speak.

9 MR. STRAWN: Gary Felien from Oceanside City
10 Council. I hope the got the name right.

11 MR. FELIEN: You got it right and you're one of
12 the few so you got good points, too.

13 Also, I wanted to say that I'm impressed that you
14 make the speakers take an oath of office to tell the
15 truth, and I think if we adopted that in Oceanside, we'd
16 cut down the amount of speaking considerably. I commend
17 you on that.

18 (Laughter.)

19 MR. FELIEN: There are plenty of people up here
20 with far more technical knowledge on these issues than me
21 so I'm not going to try and outdo people far more
22 qualified than myself on that. But I do just want to say
23 that economics do matter and that's my background.
24 Regulations need to be made with some thought as to their
25 economic impact.

1 California still has an extremely high
2 unemployment rate, well above the national average and
3 it's easy to see why. California has or is just short of
4 having the highest sales tax, the highest income tax, the
5 highest cost of electricity, the highest cost of water,
6 the of highest cost of gas, the highest workman's comp
7 insurance and above average property tax. And now on top
8 of that, this Board is considering an extremely expensive
9 set of new regulations that simply adds to the burden of
10 doing business with no commensurate improvement to the
11 environment.

12 Good weather only goes so far in creating jobs.
13 In many respects, the proposed regulations are poorly
14 drafted. They don't explain how we're supposed to know
15 what pre-Columbian water conditions are or how we'd ever
16 be able to measure that. They don't allow in the case of
17 for our City of Oceanside, they don't allow for natural
18 causes of bacteria, and they don't allow for us to adjust
19 for the condition of the water that comes into our city
20 and so we're stuck with suffering the impact of what
21 happens upstream.

22 And so for that reason, I -- one last point I'd
23 like to point out that Oceanside has a huge program that
24 we're investing in to create alternative sources of water
25 that will reduce our reliance on Metropolitan Water

1 District which will help the environmental impact on the
2 delta as well as the Colorado River.

3 All these programs will be placed in jeopardy by
4 the extremely high cost of these regulations. And so I,
5 too, would urge you to have a delay so the stakeholders
6 and people far more knowledgeable than myself have a
7 chance to hash out all the fine print in these regulations
8 to see if we can get a better balance between cost benefit
9 of improving the environment, which we all want to do,
10 while doing it in an economically, less painful way that
11 won't destroy business and continue our high unemployment
12 in our state.

13 Thank you.

14 MR. STRAWN: Ron Morrison, National City Mayor.

15 MR. MORRISON: Mr. Chair and Board, thank you so
16 much for allowing us this time. I'm going to do you a big
17 favor and forego my prepared speech because basically I'd
18 be repeating what so many people just before me already
19 said. But let me approach it maybe from a slightly
20 different way.

21 I am a lifelong resident of San Diego region and
22 I can remember on San Diego Bay when I was working my way
23 through college there was a lumber mill on that bay, which
24 is now where the convention center is. And that's how I
25 worked my way through college, working that lumber mill.

1 And during the summer it was hot. So what we would do is
2 during lunchtime, the best way to cool off, we jumped in
3 the bay and we swam out to the San Diego Rowing Club,
4 which is now Joe's Crab Shack.

5 In hindsight, the way that bay was at that time,
6 maybe that was not such a good idea. And some people when
7 they ask me why I got into politics, maybe I should say
8 maybe I swallowed some of that water. That might have
9 caused it.

10 But you look at San Diego Bay now, and you look
11 at the difference, and to answer your question are we
12 satisfied with what we've done? No, there is still a huge
13 amount of progress to be made, but we have made huge
14 strides in this area.

15 To be honest with you, if you look at San Diego
16 Bay in those days, you look at it now, you talk to the
17 surfers. I used to surf up and down this coast. In those
18 days -- it was the longboards in those days, and not these
19 short, light ones now. But it is a world of difference.
20 But do we have a long ways to go? Yes. But are we doing
21 things? And that is yes, also.

22 I know within my community, which is from
23 southern San Diego Bay, we've taken an area that has the
24 discharge into the bay that takes the stormwater -- it's
25 called Paradise Creek. Ten years ago, you could not go

1 near it because of all the chemical discharges and
2 everything else that was going into that, was going
3 directly into the bay. It was immediately next to an
4 elementary school, which had the highest disease rate and
5 asthma rate in the entire county.

6 Now that has been turned into a park that is
7 being used by people constantly and we're building upon
8 that. The water has been through a huge purification
9 process. Everything is -- big changes are being made.

10 I'm saying this to say that we are doing a lot of
11 things and do we need regulation? Yes, to make sure that
12 we continue to do that good work. But at the same time,
13 we want to make sure we don't overregulate so that we're
14 to the point where we have to divert the funds that we
15 have to overregulation to keep from doing the good work
16 that we are doing. So there's that balance.

17 So that's the one thing that I would want to
18 state, and say I'm in agreement with all the things that
19 the speakers have said before. But I would urge upon you
20 and plead upon you that the one thing that we need in this
21 is the balance between the regulations and the good work
22 we're doing, so that we can continue to do that good work,
23 but at the same time, protect our community with good and
24 healthy regulations.

25 Thank you very much.

1 MR. STRAWN: Thank you. Steven Weinberg, Mayor
2 of Dana Point.

3 MR. WEINBERG: Good morning. I'd like to thank
4 the Chair and the Board for allowing me this time to
5 present.

6 I'm Steven Weinberg, Mayor of Dana Point and I'd
7 like to make a couple of comments. I'm going to try to
8 summarize my speech as I go through since I've had to sit
9 on your side of the diest (phonetic) too many times and
10 I'd hate to see glazed over eyes hearing the same thing
11 over and over again. And one thing I will not say is
12 "babies will die."

13 My staff has indicated that the NPP permit
14 process has been more than open and productive than permit
15 renewals in the past. That said, they indicate that there
16 are remaining important issues that have our concerns,
17 some of which recently surfaced in the final draft. And
18 we'd like to resolve those.

19 Some of the issues also are very specific to
20 Orange County. And we'd like to see if we can -- how
21 would you say "parsh" Orange County so we can have maybe a
22 slightly different permit than the whole region has.

23 We appreciate the Board's trying to consolidate
24 the three and existing permits into one region permit, but
25 please understand we have just spent considerable time and

1 money developing and executing the fourth term permit, and
2 I find my staff spending significant amounts of time in
3 San Diego County working on major new changes with this
4 effort.

5 Please note that we are six square miles and we
6 consider ourselves six square miles of paradise and have
7 spent over 20 million dollars in the past 10 years on 19
8 diversions, two ozone treatment facilities, catch basin
9 filters on all public roadways, and have been rewarded
10 with 303(d) delisting for bacteria on our three beaches in
11 Dana Point.

12 We are now focusing our efforts jointly with the
13 state park, fellow copermittees, sewer districts,
14 Caltrans, South Coast Water District, and on South Coast
15 San Juan Creek and Doheny Beach State Beach as our
16 sanitary surveys are continuing. Please remember that
17 although we understand our role as a copermittee is
18 improving water quality, we share that responsibility with
19 state parks, as I said before, Caltrans, water districts,
20 school districts, independent sewer agencies, who all
21 reside within our city limits.

22 Please remember that it is not the city's
23 discharge that are the major contributors to pollutants
24 that are so reaching recreational waters in diminishing
25 amounts. People in vehicles are probably the major

1 polluters and I got to say with Committeeman, Commissioner
2 Anderson, I'm a poor dirt farmer from the Central Valley
3 so there are some times I was not made to be a politician.
4 But we are able to control these behaviors as much as we'd
5 like.

6 It's been a real journey. Please remember that
7 with each new permit interpretation of Clean Water Act by
8 this state, the burden of financing these improvements is
9 not borne by the State, but by the cities and private
10 developers in the municipalities. And as a local
11 municipality, the State of California and the Federal
12 Government have been taking funding away from us in the
13 last few years, not to mention the recession, which has
14 reduced our revenues by about 50 percent.

15 In that light, we continue to ask the Board to
16 consider the comments that our staff and our copermittees
17 have provided. Please allow us to sit down with your
18 staff one more time to help us resolve the finalizing
19 language.

20 In one area that is, I guess, critical with the
21 City of Dana Point, is to allow our Public Works
22 Department to use the USEPA approved Green Streets
23 guidance for roadway rehabilitation projects in south
24 Orange County as this is the most single expensive new
25 addition to the permit for municipal budgets.

1 Justification of adding nearly 25 percent, which I
2 understand you heard yesterday, to every roadway
3 rehabilitation project is simply more than we can afford
4 while EPA Green Street plans gets the majority of benefits
5 at a reasonable cost of around five percent.

6 I respectfully request that you give us some time
7 to work this out and I thank you for your service on this
8 agency. I know what it's like to sit back there and
9 listen to a bunch of politicians gravel before you.

10 Thank you.

11 MR. STRAWN: Supervisor Bill Horn. I know he's
12 running a little late. Has he arrived? No. James Knott
13 from City of Orange? Oceanside. City of Oceanside,
14 that's right.

15 MR. KNOTT: Good morning. Jimmy Knott, 127
16 Sherri Lane, City of Oceanside Utilities Commission. Yes,
17 I come to you today. You've had many people bring forth
18 technical issues and all sorts of things like that
19 including our staff here and also our council members.
20 But what I'm going to bring to you is a human impact.

21 In your proposal, you have no consideration of
22 our most vulnerable people in Oceanside- children and
23 seniors, our disabled and low-income. What your proposal
24 is doing is being onerous, burdensome and an action that
25 could lead for those few who are hanging on by their

1 fingernails economically to life and to homelessness.

2 This is what your plan will do. I cite the facts
3 that 23 percent of the children in Oceanside exist in
4 poverty. Twenty-one percent are seniors. Twelve to
5 sixteen percent, depending upon who you cite, of our
6 adults are having economic troubles, in poverty or low
7 income. Forty percent are technically capable in a --
8 basically can be applying for low-income status.
9 Ninety percent of those who are low-income live in rental
10 housing.

11 What happens if you're a homeowner or a business
12 owner of, let's say, an apartment complex, mobile home
13 park or something like that? They pass along any type of
14 increase to those who rent from them. What you're
15 proposing and what the levy will do will be all those
16 homeowners, apartment complex owners, mobile home park
17 owners, and it will be just passed on to these low-income
18 folks.

19 My question to you is very simple. I need your
20 help. I need your help very dearly. Where in your
21 proposal will you make an exclusion to help those
22 low-income people? Where?

23 Any increase is going to affect them. Tell me,
24 which meal are you going to tell me for them to cut out if
25 you don't? Which medication are they going to have to

1 take a quit for a day out of the month to pay this? And
2 also which trip to church or to a friend's house are they
3 going to have to cut out?

4 This is a dire impact and a human impact that
5 you're going to basically cause to the people in
6 Oceanside. Let's be real with this. Let's get down to
7 real-life impacts. I'm sad to come up here to actually
8 ask you all these things because the situation we should
9 be thinking about that when we make proposals. I try to
10 do it every time I make a decision and when I do, I cringe
11 and I hurt and I actually sometimes weep when I do. I ask
12 you, do you?

13 We should stop and think about what our decisions
14 do and have real-life impacts. I ask you to consider
15 these things when you do make a decision.

16 Thank you.

17 MR. STRAWN: Jesse Gipe, representing Senator
18 Anderson. Not here.

19 Kristen Huyck, Legislative Assistant for
20 Riverside County Supervisor, Kevin Jeffries. There you
21 are. Sorry I butchered that.

22 MS. HUYCK: Happens all the time. Good morning,
23 Chairman and Members of the Board. My name is Kristen
24 Huyck and I'm here on behalf of Riverside County
25 Supervisor, Kevin Jeffries.

1 Riverside County residents expect livable
2 communities and healthy lakes, rivers and streams, an
3 obligation that the County takes extremely seriously. In
4 much that has already been mentioned and touched upon by
5 previous speakers, there are some intervening factors and
6 competing directives such as prison realignment and the
7 pending integration of affordable healthcare at the State
8 and Federal levels, that are all pending or striving to
9 take a piece of the resources that the County has and
10 takes in.

11 Therefore, the new MS4 Permit must provide
12 flexibility to allow the prioritization of resources so
13 that we can solve problems, merge problems to address
14 multiple regulations where appropriate, and balance
15 environmental protection with the broader needs of our
16 residents.

17 The County wants to be partners in protecting the
18 environment and serving our citizens. Please give the
19 County the opportunity to work with you and your staff to
20 focus on the permit and to protect water resources and the
21 concern of making sure that we have clean water.

22 To that, we respectfully request that an
23 extension be provided and that regional Board Members ask
24 to work with staff and the copermittees on significant
25 outstanding issues brought to light with the release of

1 the new tentative order to ensure the concerns of staff
2 that is adequately addressed.

3 Thank you so much.

4 MR. STRAWN: The only other elected official card
5 we had was for Supervisor Horn. So when he arrives we'll
6 fit him in as soon as we can. Did I miss anybody?

7 So I guess that puts us to Riverside. So
8 Riverside County, do you have an order for your speakers
9 that you want me to follow?

10 CHAIRMAN MORALES: Do we need some time to set up
11 our PowerPoint? Okay, let's take a short break while we
12 get it set up and ready to go.

13 (Recess taken at 10:00 a.m.)

14 CHAIRMAN MORALES: Ladies and gentlemen, please
15 have a seat. We're going to let Riverside begin their
16 presentation.

17 MR. UHLEY: Good morning Chair and Members of the
18 Board. My name is Jason Uhley. I'm the Chief of
19 Watershed Protection for the Riverside County Flood
20 Control and Water Conservation District and I have taken
21 the oath.

22 And I guess I want to lead off by noting that one
23 of the presenters yesterday noted that he had a buttery,
24 smooth voice and it put people to sleep. My confession is
25 that I tend to talk fast, and sometimes I talk soft so I'm

1 sort of the vein of court reporters. So please feel free
2 to slow me down if you need to. I'm going to work very
3 hard to avoid that.

4 Our district serves as the principal coordinating
5 permittee for the Riverside County stormwater program
6 which includes the County of Riverside as well as the
7 cities of Temecula, Murrieta and Wildomar. And I will be
8 leading a joint presentation on behalf of our co-committee
9 group.

10 Our presentation will be led off by myself,
11 followed by David Garcia, District Staff and then we will
12 be -- the final speaker for our group will be Patricia
13 Romo, the Assistant Director for our County Transportation
14 Department. I'm hoping to go about 45 minutes in total
15 today.

16 Today I'll be leading -- I would first like to
17 join in the technical and legal comments of San Diego and
18 Orange County so I don't have to necessarily repeat
19 everything they said. I don't want to waste your guys'
20 time today. And I'd like to lead off by simply stating
21 that we support the vision of an outcome-based permit, a
22 permit that replaces the prescriptive programs that we've
23 been using today.

24 I think everyone that has spoken so far does. We
25 have common purpose. And I guess what I'd like to lead

1 off with is talking about what this vision means for me
2 and my program.

3 Riverside County has been in a state of permit
4 renewal since 2009. We're regulated by three regional
5 boards. I spend about 30 percent of my time haggling with
6 staff on the details of prescriptive permit requirements.
7 Why we should do something, whether it's legal to do
8 something, how we should do something, whether it's going
9 to work.

10 Once the permit gets adopted, I spend another
11 30 percent of my time trying to adapt our permit programs
12 to address the new goalposts. Richard had the vision
13 yesterday of the goalpost constantly moving. That's
14 another 30 percent of my time is adapting our programs to
15 meet the new requirements in the permits.

16 Then I get to spend about 30 percent of my time
17 working with our residents, our businesses, and our
18 communities and our plan checkers and our maintenance
19 workers and trying to explain to them why they need to
20 adapt their practices to the permits. And I find more
21 often than not, is that it engenders confusion, it
22 engenders frustration, it engenders resentment, and it
23 engenders resistance.

24 And the whole process sort of works against the
25 goals that we're ultimately trying to achieve. And so

1 when I hear this vision, what I hear is an ability to
2 shift from that model to a model that allows me to bend
3 our programs to fitting the needs of the watersheds and
4 the communities to achieve our goal, which I think will
5 engender support there.

6 The other thing I hear from this process or this
7 vision is that it will move away from the micromanagement
8 of our programs every five years, or in Riverside County's
9 case every year and a half, and allow us to focus on the
10 long game. I've talked about 30 percent of my time here.
11 I got five to ten percent of my time that can be really
12 spent on solving problems. I want to reverse that.

13 I want to be spending my time, and my staff's
14 time on solving problems. And the current structure of
15 how we're doing things prevents that. I am vested in the
16 vision. I want this to succeed. And I think everyone
17 else does here, too because Riverside probably feels it
18 more, but I think San Diego County and Orange County and
19 others would agree.

20 And I think if you listen to the vast majority of
21 the testimony that was provided yesterday, it wasn't
22 arguing against the vision. It wasn't arguing against
23 what we're trying to do with the permit. It was arguing
24 against the specific actions that are contained in the
25 permit, those thousand musts that Richard was talking

1 about. We expected that a lot of those musts were going
2 to be replaced by the WQIP, by this outcome-based program.
3 And I think what we've found is that's not what's
4 happening.

5 We've still got some areas of this permit that
6 remain very prescriptive, the new development programs,
7 even the WQIP itself is probably two to three times as
8 long as it was, a lot more prescription and a lot more
9 detail.

10 And that's where the rub is. And that's where
11 the frustration is. And that's ultimately what concerns
12 me because the vision is outcome-based, but the permit
13 still contains a lot of prescription and those
14 prescriptive requirements, we have to comply with them.
15 They're legally binding upon us.

16 And so, you know, when I was listening to your
17 testimony -- or not your testimony. When I was listening
18 to the questions from the Board, I sensed there was a lot
19 of questions about: Aren't we focused on outcomes here?
20 And it's because there's a lot of problematic details
21 still in the permit, and that's what we need to work out.
22 That's what we still need to solve. And in order to
23 succeed, that's what we need to do.

24 And that's why for the reasons I spoke about
25 earlier, that's why I think that we need to take the time

1 to do this right because I see that there is a huge
2 potential for a win down the road. And I'm very concerned
3 when I hear, "Well, we want to get this done by May."

4 What I would recommend is let's commit to the
5 outcome and then let's raise our expectations to success.
6 I do think I also need to concur with some of Orange
7 County's comments yesterday.

8 You know, Richard had the nice vision of the
9 train coming off the tracks with the public participation
10 process. I do think that happened and our perception of
11 the public participation process is similar to Orange
12 County's. It was uneven. And we need to put it back on
13 the tracks. That's really what we need to do and that's
14 what I'm hoping you're willing to provide directions for,
15 is to direct staff, to direct the stakeholders' to
16 success. We want you to do this. Find a way to meet in
17 the middle. Find a way to bring a permit back that can be
18 more broadly supported.

19 And I hope what I can do today is ultimately
20 convey to you not only why I think this is important, but
21 why it's worth taking the time to do it right, and what
22 some of the overarching issues are that we have with the
23 permit.

24 I first -- you know, I think it's clear from what
25 I stated that we're not ready to explore the permit today.

1 And because of that, I do need to state that we are not
2 not bound by this permit until we submit a report of waste
3 discharge, and we would expect that when we submit the
4 report of waste discharge, if we have any remaining issues
5 with the permit that they be taken up at that time by the
6 Board and that we would be able to present those issues,
7 and hopefully have them addressed.

8 But having said that, I truly believe it's in
9 everyone's interest to get it done right now, to take the
10 time to do it right now. I want to get to the point where
11 we can voluntarily support the permit. Yesterday during
12 the staff presentation, they said, "We don't think it can
13 be done."

14 I've worked with other regional boards. I've
15 seen consensus on permits. I have testified in support of
16 permits. I can tell you that it can be done. And I'm
17 hopeful that it can be done here.

18 And I also think it's important to know --

19 CHAIRMAN MORALES: Can I ask a quick question?
20 Sorry to interrupt but I don't want to lose a train of
21 thought. Say we did get back to the process where
22 Riverside gets together with our staff and there's an
23 agreement or a permit that you feel comfortable with. Say
24 that happened in the next month or the next two months or
25 next six months even. Even if that were the case, would

1 you still take the position that you're not bound by it
2 until you submit a report of waste discharge?

3 MR. UHLEY: Legally, that's true.

4 CHAIRMAN MORALES: Okay.

5 MR. UHLEY: But, you know, we have an option to
6 early enroll. And whether we do that or not depends on
7 whether we think this permit is actually going to do
8 better for our County and that's what I want to get to.

9 And I also want to point out the cities and the
10 counties kind of get vilified with dischargers a lot, but
11 I'd like to remind you that we are all subdivisions of the
12 State of California. We all serve the same public. And
13 we recognize that that public expects livable communities,
14 and they expect clean water, clean lakes, clean rivers,
15 clean streams, healthy receiving waters and they have a
16 lot of other expectations, too.

17 We should be working together more than we are.
18 Riverside County has exerted a significant amount of
19 effort to try to meet our residents' expectations with the
20 resources we have available to us. We're not made of
21 unlimited money. But we don't use that as an excuse. We
22 really try to look at how we can integrate multiple
23 regulatory requirements and ingrate the expectations of
24 our residents and try and come up with regional solutions
25 because we really believe that when you do that, you can

1 create things that are better than the sum of the parts,
2 and you can do it in a more cost-effective manner.

3 And that's another reason we support the vision,
4 is because I've seen it work in other regulatory programs
5 and I want to adapt it to work more here.

6 You know, and we want to succeed. We really do.
7 But as I stated earlier, we're not there yet. And I think
8 what we're seeing ultimately is that, you know, the vision
9 was for a program that was really WQIP-based, that allowed
10 the WQIP to drive the programs forward, allowed us to
11 present different ways to do things to you and then let
12 you approve them and say "Yeah, we think this can work."

13 But what we're seeing is we still got the
14 prescriptive permit with the WQIP kind of sitting on top
15 of it. It's kind of the dual permit now, and that's got
16 to get fixed. We do think that staff made a Yoeman's
17 effort to try to address concerns. They definitely
18 addressed many of our comments and we're thankful for
19 that. But at the same time, I think they did take some
20 steps backwards.

21 I think they took some steps backwards on new
22 development. We heard a lot about that yesterday. I
23 think they took some steps backwards on the WQIP, and I'm
24 going to talk about that more and why it's important to
25 fix that.

1 I also feel that I have to say that, you know, we
2 really feel that the public process was insufficient.
3 Nine days, you know, there was holidays in the middle.
4 That wasn't -- 61 pages of comments, 200 pages of response
5 to comments. I haven't been able to educate my managers.
6 The managers haven't been able to really fully educate our
7 electives. I haven't been able to educate our permittees.
8 Our permittees didn't see this presentation until Tuesday.
9 It's not adequate. And I'm concerned about that.

10 CHAIRMAN MORALES: Imagine how we felt having to
11 read it and your comments.

12 (Laughter.)

13 MR. UHLEY: I understand.

14 MS. KALEMKIARIAN: Can I just clarify something,
15 Mr. Uhley? When you say that, you're referring really to
16 the revised tentative. I mean, would you have felt that
17 way if there hadn't been a revised tentative issue with
18 the changes because you'd been reviewing it for a long
19 time?

20 MR. UHLEY: Well, if there hadn't been a revised
21 tentative with the changes, then that would have been
22 indicative that staff weren't listening to us and I think
23 would have made the situation worse.

24 Part of what our issue is, like I said, we want
25 this to succeed. The Executive Officer stated that this

1 is the most important action that your Board is going to
2 take this year, maybe for longer than that.

3 This action is going to represent an investment
4 of hundreds of millions of dollars by the cities and
5 counties within this region. This action has the
6 potential to have significant positive environmental
7 outcomes. And so, you know, when we get nine days to
8 review the revised draft and trying to absorb what it's
9 telling us? It's not right. I just feel that way.

10 You know, this is important. Let's do it right.
11 Let's take the time to achieve the goal. And I think if
12 you tell us that's what you want, it's more likely to
13 happen. I just go back to Board staff's statement that
14 said, "We don't think it can be done." Is that a
15 self-fulfilling prophecy?

16 So let's talk about why it matters. I mentioned
17 earlier that the WQIP has gone through-- there's a lot
18 more prescription in it and we're not sure it was
19 necessary. We actually liked the WQIP in the last draft
20 for the most part. There's a lot more detail. And in one
21 of the new components is receiving water limitation
22 compliance option.

23 There was a lot of testimony yesterday in the
24 public session about no safe harbor. This permit does
25 not -- should not include a safe harbor. We don't want to

1 see a safe harbor. I just want to point out if this
2 permit had a safe harbor, my testimony today would have
3 been "thank you."

4 This is not safe harbor. What this is is an
5 expression of the goal of the vision of the permit. This
6 is the ultimate expression of compliance. This is what
7 we're expected to achieve. This is where we're setting
8 the bar and defining MEP, and this is new. This is the
9 first time we've seen this. And this is the center, in
10 some ways, of the vision.

11 And one of the goals that have been set for the
12 vision particularly concerns me and that's the new merit
13 goal that focuses on attaining water quality standards.
14 And that goal bothers me for a couple of reasons, one of
15 which is that the permittees aren't the only dischargers
16 to the receiving waters. There's probably thousands of
17 dischargers to the receiving waters who are all equally
18 responsible for that. And I don't necessarily see the
19 recognition of that here.

20 And secondly, and more importantly, is that
21 there's an assumption, at least in the way it's written as
22 I read it, that attainment of receiving water standards
23 can be achieved at all times. But the reality is we're
24 working the natural environment and there's weather, and
25 there's storms. Like the storms that happened in 1993 in

1 Old Town Temecula that put the city three feet underwater.
2 Businesses. Homes. We can't guarantee receiving water
3 compliance in those conditions.

4 As a matter of fact, I believe that's why the
5 Clean Water Act has an MEP, maximum extent practicable,
6 standard for stormwater. They recognize that we can't
7 control the weather. We can't control Mother Nature.
8 There is a maximum level of effort that can be exerted.
9 But we maybe can't get there all the time with stormwater.

10 It's also the reason I think the L.A. permit had
11 a similar receiving water limitations compliance option
12 and they put a design storm in here. They said there's a
13 limit that we think you can reach. Now, I'm not saying
14 the design storm is the right solution. I haven't had
15 time to think about it. I haven't had time to confer with
16 our council or with the other counties, but it is the kind
17 of recognition that we need to think about what MEP means
18 relative to the vision and the goal and how we express it.

19 And this is really the center of the permit and
20 this alone warrants taking some time to discuss what is
21 this receiving water limitation? What is the goal that we
22 ultimately want to express here? How does the receiving
23 water limitations relate back to the WQIP? And making
24 sure that all of this relates back to Provision A so that
25 if we do achieve this, it is compliance. And I think the

1 goal here with the bar is to design a metric that pushes
2 us forward but that we can achieve and that will motivate
3 us to deliver.

4 CHAIRMAN MORALES: You know, it's funny you that
5 you reference that L.A. standard and you say that you
6 would need to take a look at it. A lot of people that are
7 subject to the L.A. MS4 permit and municipalities and
8 governments, their copermittees vehemently object to it
9 and say that's not the way to go, and say there are
10 problems with it.

11 So I kind of feel like from our end, the goalpost
12 keeps moving on the other side. If we make efforts to
13 meet and come up with something that's acceptable, it
14 never seems to be acceptable. Well, and it's just a
15 general statement because I know folks are going to talk
16 through the remainders of the day, but I asked you the
17 question earlier about the ROWD because my concern is it's
18 almost no matter what we do, somebody is going to object
19 to it or everybody is going to object to it.

20 I wish this were a perfect world where the
21 collaborative process ended up and we're all singing
22 Kumbaya, but I'm not getting that sense that it's going to
23 be the case. So do you see my concern?

24 MR. UHLEY: I do. I do, and from our perspective
25 what we're seeing in the latest draft is the goalpost

1 moving a little bit, too, and it's on both sides. And the
2 rub in my mind, ultimately, is that we're talking about
3 stormwater. We're talking about MEP, maximum extent
4 practicable. And there's a lot of flexibility in that.
5 And so the who, what, where, when, why questions, they get
6 debated. And they should be debated. And it takes effort
7 on both sides to be willing to hear each other and listen
8 to get to the middle.

9 I've seen it done. I've seen where we have been
10 able to support permits. I've stood up and testified and
11 supported permits. Santa Ana. Colorado. But it takes
12 Board direction sometimes to explain that's what you want
13 and even if you do, I'm not guaranteeing success. I
14 can't. There's a lot of people here. This is a big
15 permit. Three counties. I see that.

16 But I think we can do better. I think we can
17 build more consensus and we can get a more broadly
18 supported permit. All three counties, all the cities, I
19 think actually I could say all the cities, are in
20 opposition. I think we can do better. I think it's worth
21 the time to try.

22 CHAIRMAN MORALES: And I think all the NGOs are
23 in opposition. So if we just get one of you to agree with
24 it, we'll be doing better.

25 MR. UHLEY: That's true.

1 MR. STRAWN: Just a clarification. You're really
2 speaking in favor of going back to MEPs as opposed to the
3 numeric -- I talk about complex numeric requirements of
4 the receiving water?

5 MR. UHLEY: When we're talking about stormwater
6 permits, we're talking about an MEP-based program. And
7 what we're talking about here is setting outcomes and
8 those outcomes may be expressed numerically. We're trying
9 to find a way to express those in a way where we can
10 measure and show success.

11 The point I'm making is that on that measure, the
12 one that says "attain water quality standards," that's
13 beyond what we can achieve. And if we can't achieve this,
14 then we don't have compliance and that's the purpose of
15 this section.

16 So what I'm recommending is that we need to go
17 back and talk about how to tweak this so that the bar is
18 set at a sufficiently high level to motivate the people to
19 move forward, but that it's set at a level that's also
20 attainable.

21 This is ultimately --

22 MR. STRAWN: So if that had "MEP" at the end of
23 it, you'd be okay with it?

24 MR. UHLEY: That would be a start. We haven't
25 had a chance to talk about this with our electives, with

1 our managers, with the other copermittees. This is a
2 brand new provision of the permit.

3 So one way to solve a lot of the problem is that,
4 you know, I think the intention was to let the WQIP
5 ultimately be the center of the permit and let the WQIP
6 really drive the programs forward. And then have the WQIP
7 focus on how it's going to achieve the outcomes that we
8 establish.

9 But right now, the WQIP kind of sits to the side
10 a little bit. It doesn't drive the entire program
11 forward. There's still provisions that are prescriptive,
12 like I mentioned earlier. If we made the WQIP fully drive
13 the program forward, allowed it the flexibility to allow
14 us to propose alternatives to Provision C, Provision D and
15 Provision E, then a lot of the noise about the details
16 would be lessened because it would give us the opportunity
17 to propose something better to you.

18 We support the other comments by Orange on the
19 WQIP, and I also want to reiterate that we don't have
20 opposition to the water quality consultation panels. I
21 personally believe that a lot of times the most effective
22 input comes from the people that are closest to the
23 problem. I've learned more from farmers and maintenance
24 workers, I think, with regard to water quality issues than
25 some of the scientists and the engineers I work with.

1 So we support public input. We're okay with
2 that. But what I'm not okay with is letting the WQIP
3 panel have an approval authority over our programs. The
4 permit gives us compliance deadlines that we have to meet
5 and we can't have our programs held hostage by the Water
6 Quality Consultation Panel. They can advise, they can
7 give recommendations, you can make us respond to those
8 recommendations, but they can't have approval authority.

9 So I guess now I'm going to take my swipe at the
10 100 percent pollutant load reduction issue, even though we
11 heard so much about it yesterday. And I think yesterday
12 we heard a lot about can or cannot. I want to focus a
13 little more on why or why not. Why is this a bad idea?
14 Why do we not want to do this?

15 And to start with that, I want to try to make
16 sure I explain how the existing permits work, our 2010
17 permits, our 2009 permits. The Riverside 2010 permit says
18 the most effective BMP, the most effective way to reduce
19 pollution on the development is to retain runoff onsite
20 because if you retain the runoff onsite, you're probably
21 going to retain most if not all of the pollutants. So
22 that is set as the default bar.

23 The permit then goes on to say, "We recognize
24 this, in some cases for very valid reasons, that it is not
25 possible to infiltrate or capture onsite." In those

1 cases, what we want you to do is use the next most
2 effective technology for treating runoff. It's a
3 technology-based approach, and the next most effective
4 technology is widely believed to be biofiltration.

5 And so the permit has a standard in there that
6 says basically take a portion. Make sure that this
7 biofiltration BMP can store a certain percent of the
8 design capture (inaudible), 75 percent. It's very simple.
9 It's very understandable by our plan checkers, and
10 development community.

11 And then it goes on to say that we also recognize
12 in some cases biofiltration may not be possible because
13 you might have (inaudible) into a development, downtown
14 San Diego, or whatever. And so in those extreme cases,
15 which are really relatively rare, you can do other things.
16 And the permit talks about what those other options are,
17 but it's another level of technology.

18 So that's how the current permit is based. It's
19 not based on a pollutant load reduction kind of scientific
20 mathematical analysis. It's based on implementing the
21 best technology that's appropriate to the site. And
22 what's important, why we support maintaining that current
23 standard, is that this basic approach has been
24 incorporated in every stormwater permit that I'm aware of
25 that's been adopted since 2009.

1 In 2009, the Orange County Permit, the 2010
2 Riverside Permit. It's in the Santa Ana Permit. It's in
3 the Phase 2 permit. It's in the recently adopted L.A.
4 Permit. And what we're starting to achieve here is
5 consistency. And you have to remember that developers
6 don't work locally. A lot of developers work across
7 county lines, even statewide, the really big guys.

8 And so for -- I believe for development that a
9 certain level of consistency is appropriate because if we
10 can foster consistency, then we can start to educate.
11 They'll start to adapt, they'll start to accept, and then
12 they may even start to innovate. And now we've got all
13 these permits kind of aligned along this kind of basic
14 best technology approach. And to change that now would be
15 problematic and I would think it would reverse this thing
16 that's happening.

17 And that's exactly what's happening with this
18 permit. That's why we have a problem with this pollutant
19 load reduction language. And I understand it sounds
20 simple. It really does. Just figure out how much
21 pollutants are coming off a site, and then I don't care
22 what BMP you use, just design them to capture that level
23 of pollutants. It sounds simple.

24 But you have to figure out what the pollutants
25 are. They're specific to the development type. They're

1 specific to the receiving waters. And then if you have to
2 capture 100 percent of the pollutants that would have been
3 captured by the design, by a retention BMP, do you also
4 have to kind of predict acts of God, spills, illegal
5 activity, other things that might happen at the site to
6 achieve that standard?

7 And then even if we can do that, which is
8 actually the easier part, you have to know what are the
9 wash off rates for the development. And there are
10 hundreds of different development types. We have three to
11 four hundred land use codes in the County that we use to
12 describe different types of development. You would have
13 to have an assessment of what is the wash off. What types
14 of pollutants are generated? At what level? How do they
15 wash off?

16 And then you have to be able to do the scientific
17 analysis to show that you can implement a train of BMPs
18 that would effectively capture the same amount of
19 pollutants. There were some speakers at the end of the
20 day yesterday that said there's no BMPs that can do this.
21 And so it's not like you're going to implement the best
22 technology available for the site. You're going to be
23 doing these complex studies to figure out what the
24 appropriate mix of BMPs are for the site.

25 And it adds a level of complexity and a level of

1 expense and it changes what we're doing statewide and
2 that's a bad idea.

3 And the other reason it's a bad idea is that our
4 2010 permits, Orange and Riverside County, their 2009,
5 2010 permits, we just invested millions of dollars in a
6 design manual in a process to implement the standards that
7 are in those programs. We're just ready to roll those
8 programs out. Actually in Riverside, we already have to
9 some extent.

10 I want to address a comment that you made
11 yesterday about how are we going to move forward if we
12 don't push? I want explain how I think David's vision of
13 being bold, how we're doing that now in Riverside County.
14 We recognize Riverside County's got a lot of green field
15 development potential. I recognize, our program
16 recognizes, and our managers recognize that we've got one
17 shot to get those developments done right so that they're
18 not causing downstream pollution. If we don't, were going
19 to deal with it at the back end with TMDLs and more
20 regulation. It's in our interest to do it right now.

21 And so we invested hundreds of man hours and
22 hundreds of thousands of dollars in a development of a
23 design manual and we researched everyone who had to design
24 manual from here all the way out to Maryland. Not
25 everyone, just all the major players, the ones that kind

1 of have statewide or national significance, to try to make
2 sure that our manual was state of the art and state of the
3 science.

4 And then we went a step further because I wanted
5 to make sure, or we wanted to make sure, that we weren't
6 only doing the state of the science but that we were
7 maximizing the benefit that we could get out of these
8 BMPs. So then we went on to spend two and a half million
9 dollars on retrofitting our headquarters in Riverside
10 County for the flood control district to incorporate the
11 very technologies that we put in our design manual so that
12 we could demonstrate them and show them to the public.
13 This is how this is going to work. This is how this fits
14 into your site. This is how you would design it, and
15 incorporate that.

16 And we're including BMPs here like permeable
17 pavers, permeable concrete. And these are statistics from
18 the site. And I would like to -- I think we invited it
19 before but we would open an invitation to have the Board
20 or staff come out and visit the site. We'd really like to
21 show it to you. Permeable concrete. Permeable asphalts.
22 Biofiltration, really the BMP that's kind of at discussion
23 here today. Planter boxes the tree grew from.
24 Infiltration bases.

25 And we didn't stop just with the demonstration of

1 these technologies based on the design manual that we just
2 wrote, but we put another million dollars into testing
3 them so that we could figure out how to optimize them and
4 make them work better. And we actually, in some cases,
5 have multiple iterations of BMPs because we wanted to test
6 different design alternatives. So that as soon as we
7 could -- we're hoping within five years, we can collect
8 data to help us understand how these things are
9 functioning and figure out how to do them better so that
10 we can incrementally move them forward.

11 I think this is very consistent with what David
12 is ultimately expecting with the vision for this permit
13 that people are going to step out, take responsibility,
14 and do the things that are necessary to move the bar
15 forward. In this --

16 MR. ANDERSON: I'm still not sure I understand
17 what the permit precludes, this handbook approach on the
18 implement. If this works what would -- how would we
19 change what you're implementing, because this is for new
20 development, right?

21 MR. UHLEY: It is for new development. And this
22 site is intended to help educate developers and plan
23 checkers by how they can put this technology into their
24 developments.

25 MR. ANDERSON: And this permit prevents that from

1 happening?

2 MR. UHLEY: Well, the concern is that the new
3 language that's been put in the permit changes the
4 standard, and the current standard ultimately is based on
5 best technology. This is the best you can do onsite,
6 you're doing this. If you can't do that, here's the next
7 best thing. It just keeps going down the line.

8 What the permit proposes is kind of a scientific
9 study-based approach. This is going to be much more
10 complex to implement. We're going to have to completely
11 rethink our design manual. The types of BMPs that might
12 be recommended are going to be very different than what
13 we're proposing now to achieve what the Board staff is
14 asking us to do.

15 And I guess the last point I want to make is this
16 project that we implemented has received over a dozen
17 awards and it's local, state, national level. And I think
18 part of the reason it's getting so much recognition is
19 that there's recognition that what we're doing here has
20 value beyond Riverside County. This data we're
21 collecting, and information we're collecting, can be used
22 to feed back into these other permits that have similar
23 requirements and similar standards.

24 MS. KALEMKIARIAN: How will you know when you're
25 doing this like with your monitoring, what are you testing

1 for? Are you testing for the pollutants?

2 MR. UHLEY: We are. We're testing for the
3 pollutants that are most problematic in Riverside County.

4 MS. KALEMKIARIAN: Using the basin plan TMDL as a
5 guide as what to test for?

6 MR. UHLEY: We're using the 303(d) list
7 initiatives we see that are concerning to us. More
8 importantly, we're also focusing on volume. Because the
9 best thing we can do is try to capture as much runoff as
10 we can onsite. Because if you capture the runoff, you
11 don't have the pollutant discharge.

12 But in some cases you can't capture onsite. In
13 some cases you have to discharge. But maybe there's ways
14 that you can still maximize the amount of water you
15 capture onsite. Biofiltration BMPs have been shown that
16 they can retain potentially, in very poor soils, 40 to
17 50 percent of the runoff. Can we do better? That's what
18 we want to find out. That's what we're trying to test.

19 MS. KALEMKIARIAN: Is there any -- and bear with
20 me because I'm still learning this stuff. Is there a
21 relationship in your mind, or or have you figured out --
22 and Riverside is way inland, I realize that. But when you
23 look at receiving waters, what are you looking at?

24 MR. UHLEY: We're looking at particularly the
25 receiving waters in Riverside County. That's what we're

1 talking -- Temecula Creek, Murrieta Creek. All the
2 tributaries thereof. But, you know, we also discharge to
3 the Santa Margarita River --

4 MS. KALEMKIARIAN: -- Okay, so looking at those
5 receiving waters with the stuff, which is impressive and
6 gee, looks really good, are you able to see whether -- or
7 is there anything you're doing now that can show you
8 whether what you're doing at your test site is having an
9 impact on the water quality of the receiving water? Is
10 that even in the picture?

11 MR. UHLEY: Well, it's not. What it's going to
12 show is how well these BMPs are doing at pollutant
13 removal, which we could then extrapolate based on how well
14 they are doing at pollutant removal, if they're going to
15 be successful in addressing our concerns in the receiving
16 water. I mean, ultimately, the simplest test is does the
17 outflow meet the standards? So I guess basically, yeah,
18 we could.

19 We just completed this project basically this
20 year. Kind of just coming online and of course this is an
21 extremely dry year, so we don't have a lot of data yet.
22 But we're collecting the data and we're going to have the
23 data.

24 MS. KALEMKIARIAN: But this is the connection the
25 staff is trying to make as I understand it, that what are

1 you doing with the stormwater that's going to have some
2 impact on the receiving water? If we test the receiving
3 water for standards, can we back it up to see what you're
4 doing that's having that impact?

5 MR. UHLEY: I think the short answer is "yes."
6 What we're trying to do here is design the BMPs to
7 optimize their performance so they minimize impacts on
8 receiving waters and help us to attain standards.

9 And so, you know, the simplest solution for this
10 is just -- what we would ask is just restore the permit
11 language that was in the 2010 permits. Just drop that in
12 this permit. We provided edits and handouts to show how
13 that could be done. That would protect our investment.
14 That would kind of help to maintain that statewide
15 consistency that we're starting to see.

16 I'm really concerned that if we go to this
17 pollutant load reduction standard, it's not that simple
18 approach that the development community understand, that
19 our plan checkers understand. Calculation of DCB, you
20 need three variables: You need to know the area of the
21 site, you need to know the impervious area of the site,
22 and you need to know what the rainfall treatment volume is
23 you're trying to do.

24 If you know those three things, you can calculate
25 DCBs, you can sign BMPs. We go to a pollutant load

1 reduction, we're now talking about a new scientific study
2 to try and document that we would have achieved the
3 equivalent pollutant load reduction standard. It's much
4 more complex. It's going to cause confusion, frustration
5 and resistance.

6 CHAIRMAN MORALES: I have, I guess, a question.

7 I spent some time back East. I made friends with
8 people from all over the country and they used to say
9 stuff about California. And I came up with a candid
10 response. I would say, "We're not crazy in California,
11 we're just first." And turns out that eventually, yeah,
12 most of the rest of the country and a lot of things where
13 they thought we were crazy followed.

14 I don't know what will happen with the state's
15 standards going forward, and I don't think anybody in this
16 room does. But if I had to guess, I would say they will
17 be changing more towards what we're talking about here
18 over the long run.

19 Now, when you were talking about your examples of
20 water retention, biofiltration, it looked wonderful. You
21 mentioned that if we adopted the permit as written, you
22 would have to rewrite your manual. And I guess my
23 question is why? If that is the best you can do, do we
24 know whether or not that would be sufficient for what we
25 are asking in the permit as currently drafted?

1 MR. UHLEY: I think there were a couple guys that
2 testified at the end of yesterday, they were the guys, the
3 scientist and then the other guy was the technical -- the
4 BMP manufacturer guy. Vago. (Phonetic.)

5 They said no, that we don't have the technology
6 to do this. And my understanding is that biofiltration
7 will not remove 100 percent of the pollutants that would
8 have been captured if we would have been doing
9 infiltration or onsite capture. There is a discharge of
10 pollutants.

11 The advantage of biofiltration is it does capture
12 some volume, maybe even a lot of volume. So it does get a
13 lot of the pollutant loads reduced. But there's a
14 discharge, and there is still pollutants in those
15 discharges.

16 The other reason people slight biofiltration is
17 that the biological and chemical processes that kind of
18 occur within the BMP, kind of do add another level of
19 pollutant capture, but there's still a discharge. There's
20 not 100 percent removal.

21 CHAIRMAN MORALES: But doesn't the -- as
22 currently drafted -- the permit account for that and
23 suggest that if there isn't the ability to take care of
24 the volume or the pollution onsite, that alternatives
25 within the watershed are available to deal with an

1 equivalent amount of pollution, if you will. And then I
2 guess the question is is that really the beef? That it
3 will cost a little more because you have to do something
4 else in another part of the watershed if you can't do it
5 onsite?

6 MR. UHLEY: No, the -- you're right. The permit
7 does say if you can't do it onsite, you can do it offsite.
8 But here's the rough with that.

9 We support regional programs. We think they're
10 the way to go. But for a developer, they don't make sense
11 unless there's something kind of out there ready to go
12 that they can opt into most of the time.

13 And so I see the real benefit of regional BMPs.
14 In order for that program to really work and be
15 successful, what will end up happening is the cities and
16 the counties are going to have to make a significant
17 investment in really thinking about how to manage the
18 watershed, the watershed scales, identifying where we can
19 incorporate regional BMPs that are multipurpose,
20 multi-benefit, and then making those available to the
21 developer to participate in, because the developer is
22 going to have to -- if he can't do it onsite, he's got to
23 go offsite, right?

24 And if he has to go offsite, he has to find land
25 to buy. He's got to go through environmental primitive

1 processes. He's got to go through another level of review
2 and regulatory process and it's going to delay the
3 developments. And we think unnecessarily so.

4 We think that they shouldn't have to go offsite,
5 that the standard that we have has just been adopted in
6 2010. This is what the Board directed us to do two years
7 ago and we just developed a design manual. We spent
8 millions of dollars to develop a design manual and
9 approach based on that standard that you directed us to do
10 two years ago.

11 And you know when I started to lead off, one of
12 the things I said is what is this process -- what does
13 this outcome-based vision do that benefits me? It allows
14 me to focus on the long game and on the outcomes, and stop
15 the micromanagement of the details of the program every
16 permit renewal.

17 Give us the ability to figure out what the right
18 thing to do is and the flexibility to do it. I think you
19 will be surprised.

20 MR. STRAWN: And to that, I'm a little surprised
21 at that answer because I thought you were going to come
22 back and say the problem with it is calculating what that
23 hundred percent number really is and how much you have to
24 do offsite as opposed to the issue of actually doing it
25 offsite.

1 Am I missing something there?

2 MR. UHLEY: No, it's both. In reality, it's
3 both. The issue is that it makes the WQIP approval
4 process much more complicated, by default, automatically,
5 and unnecessarily so.

6 I keep coming back to the key to success with
7 these programs is ultimately simplicity and repetition.
8 It's engraining the practices into the communities. And
9 when we keep moving the bar, it never happens and it just
10 makes people frustrated and it makes them resistant. And
11 they throw up their hands and say, "We're never going to
12 succeed." That's what I deal with and that's what I'm
13 concerned about.

14 The other thing we heard -- and so why would we
15 make the process more complex? That's the first question
16 I'm asking you. Is it necessary to do that, especially
17 when I've tried to be bold. We've tried to do the right
18 thing and take ownership of the problem and develop a
19 system to move the science forward faster so that we can
20 protect the water quality sooner.

21 And what I'm hearing is, "Well, yeah, that's
22 fine. But we're going to tell you to do something else."
23 Is that the message that you want to deliver?

24 And the other thing is do we want to make the
25 process more complex? So, I missed the first part of that

1 because you asked kind of a two-part question originally.
2 Going back to your comment, Mr. Strawn.

3 But, yeah, the second part of it is that offsite
4 isn't as simple as it sounds. Offsite, in my mind, as a
5 professional that is going to have to deal with this,
6 offsite is going to depend on a huge investment by the
7 cities and the counties to identify these locations to
8 make them available and to make them reasonably linked to
9 the development schedule. The developers will look at the
10 offsite when it kind of fits within their timeframes.
11 That's going to require us to have stuff ready to go.

12 So we need to do that forward planning and I want
13 to do that forward planning. That's why we support the
14 concept here. At the end of the day -- I'm just going to
15 come back to what I said earlier -- is that we want to
16 succeed. We really do. We want to do the right thing. I
17 want to go home and talk about my victories, and I've got
18 victories that I can talk about now. But I think if we
19 restructure these permits, we rethink how we're doing
20 things, we can do more and we can do it faster.

21 And this variation that we're talking about,
22 which is well, should we push forward more now? Should we
23 change the bar, move the goalpost? It ultimately tells us
24 that if we step out in front and we try to do the right
25 thing that we're going to get bit. That's what I'm taking

1 away from this discussion and please, don't. Help us. We
2 want to succeed. We want to achieve the vision.

3 MR. ANDERSON: When you get a chance, could you
4 let me know what page the fix that you were suggesting is?

5 MR. UHLEY: It's on page 93.

6 If there are no other questions, I'd now like to
7 introduce David Garcia of our staff who's going to talk
8 about a few more technical issues we have.

9 MR. GARCIA: Good morning. My name is David
10 Garcia with the Riverside County Flood Control and Water
11 Conservation District. I took the oath. Thanks for
12 giving me the opportunity to speak on the proposed
13 regional order.

14 I wanted to concentrate on three items of
15 concern. First item is sediment transport. The second
16 item is the alternative compliance program. And the third
17 item is we would like to propose a flood control projects
18 exemption.

19 So our first concern. This concern was touched a
20 little bit by Mr. Taylor representing Orange County
21 yesterday. So we'd like to propose language, and the
22 changes to the permit to ensure that the permit properly
23 reflects the intent that receiving waters are protected
24 and not the critical sediment yield areas themselves.

25 So concern number two. I don't expect you to

1 read this. I don't expect anyone to be able to read that.
2 I'm just trying to show that serious revisions went into
3 the alternative compliance program, a program which is one
4 of the most important programs in the permit. In the
5 alternative compliance program, the goal is to provide an
6 opportunity for effective multipurpose, multifunction
7 regional projects.

8 We support and believe these projects can move
9 water quality protection forward faster than what is
10 possible through regulations of individual developments.
11 It allows us to leverage other resources from other
12 entities to achieve common goals, and it facilitates
13 watershed scale solutions. We're concerned that some of
14 the new requirements will negate the potential benefits of
15 these projects.

16 Specifically, we have two issues. The first is
17 the alternative compliance program allows for alternative
18 hydro-modification programs for flood control but not for
19 management of critical sediment yield areas that may
20 impact receiving waters. So we need the flexibility to
21 look at both. There's an issue -- excuse me.

22 The second is temporary mitigation is required.
23 So we'd like to note that the alternative compliance
24 projects are required to provide a greater benefit than
25 onsite mitigation. However, the permit also requires

1 temporary mitigation for developments.

2 Now there's an issue of fairness here as well as
3 a concern that dual mitigation will effectively discourage
4 developer support for projects that could provide a
5 greater good. So our recommendations for this concern.
6 The following text is recommended to address both issues
7 that I just noted. The first allows the permittees to
8 develop alternative compliance programs to manage
9 hydro-modification impacts from both flow and sediment by
10 appropriately referencing both provisions.

11 The second recommends the removal of temporary
12 mitigation requirement and a provision that we don't
13 believe is necessary.

14 So our third concern is the need for flood
15 control project exemption. Now, with regard to this
16 concern, it's important to emphasize our mandate from the
17 legislature, which makes up the mission of the Flood
18 Control District. And I'd like to thank staff -- they
19 mentioned it yesterday -- that they are important
20 projects. And our mission is typically misplaced in this
21 form as we're categorized as a discharger. Our mission is
22 to protect people, property, and watersheds from damage
23 from stormwaters, conserve, reclaim and save such waters
24 for beneficial use.

25 Now, flood control projects are watershed

1 protection projects. They consist of projects that
2 provide the following listed up there. Protection from
3 environmental disasters, erosion mitigation, stream
4 restoration, slope stability, water reclamation.

5 Now, subjecting flood control projects to
6 development requirements is inappropriate as development
7 requirements are designed to protect receiving waters from
8 upstream and adjacent land uses, where flood control
9 projects are the receiving waters themselves. Now there's
10 something lost in translation and we would like to clear
11 the language.

12 Further, these projects are already regulated by
13 this Board, which includes the 401 process. Now, the
14 Board staff did address this concern in the response to
15 comments and Board staff noted that it may be suitable to
16 relax the structural BMP standards for, or exempt flood
17 control projects but not before projects are evaluated on
18 a case by case basis. However, we don't see the
19 flexibility contained in the permit and we have
20 recommendations.

21 So our recommendation is that the following text
22 be incorporated into the permit to provide an explicit
23 mechanism for flood control project flexibility.
24 Additionally, we're requesting an alteration to the
25 definition of redevelopment to clarify that flood control

1 maintenance activities are not redevelopment projects.
2 Maintenance is critical to public health and safety.
3 We're asking to allow us the flexibility to implement our
4 mission and protect our communities without additional
5 complexities.

6 This language was taken from the L.A. permit, and
7 it clarifies that normal flood control maintenance and
8 repair activities, which are time-sensitive, are not
9 subject to development requirements. And it clarifies
10 that emergency work is not subject to new development
11 requirements.

12 So I appreciate your time letting me talk about
13 these issues. If you have any questions? Thank you.

14 I'd like to introduce Patricia Romo, who is the
15 Assistant Director of the Riverside County Transportation
16 Department.

17 Thank you for your time.

18 MS. ROMO: Good morning, Board Members, staff.
19 My name's Patricia Romo. I'm the Assistant Director for
20 the Transportation Department in Riverside County. I have
21 taken the oath.

22 I'm here today to talk specifically about public
23 works road projects and I'll be focusing on the
24 redevelopment of the existing public roads in southwest
25 Riverside County.

1 Riverside County Transportation Department is
2 responsible for the maintenance and safety of several
3 thousand miles of road within Riverside County. Our
4 obligation to the traveling public is to provide safe,
5 efficient, and reliable roads to travel on. Our motive is
6 not profit-driven but as public servants, we strive to
7 maintain and improve as many roads as possible within our
8 budget each year.

9 Each year, we prioritize our capital equipment
10 plan with safety projects being our top priority. The
11 primary source of our revenue comes from gas tax or sales
12 tax, which never really is enough and over these past
13 several years has been even more challenging as we
14 struggle to fund routine maintenance activities such as
15 pothole repair, guardrail repair, refreshing pavement
16 markings, responding to incidents, storm damage, and tree
17 trimming and at the same time trying to budget for
18 pavement preservation projects and safety improvements to
19 provide a safe and reliable transportation system for the
20 public.

21 To give you an example, the County of Riverside
22 receives about 20 million dollars a year for roadwork from
23 the State Highway Gas Tax Account each year. Yet our need
24 is really about 50 million dollars per year just to keep
25 up with the maintenance of our existing roads.

1 We do take advantage of state and federal safety
2 grants as often as we can. However, these come with
3 funding moments and time constraints.

4 As can be seen from this slide, public roads
5 are -- for the most part, linear. They're constrained on
6 both sides by private property, both developed and
7 undeveloped, and even the slightest take of private
8 property for public use can be challenging when you have
9 an unwilling property owner.

10 I'd like to make note of what I see as a
11 discrepancy within the draft permit. It refers to
12 "retrofit" rather than "redevelopment." And I just wanted
13 to clarify that we recommend that Provision E3 B1, which
14 addresses exemptions for road projects from development
15 requirements, be modified from the term "retrofit" to
16 "redevelopment" and that that more lines up with the
17 definition of redevelopment as it includes road projects.

18 We believe that the intent of the permit as it
19 refers to road projects was meant to be redevelopment and
20 not retrofit. So when we talk about redevelopment of a
21 public road the definition is the widening of a shoulder,
22 the addition of a turn lane, improvement of an
23 intersection, or the correction of a sharp curve to the
24 road or a dip in the road.

25 These projects made corrections to roads that

1 were built when Riverside County was a rural community and
2 when few drivers traveled these roads. Today we have
3 hundreds of thousands of residents in southwest Riverside
4 County and many of these rural roads see more daily
5 traffic than ever imagined. Theoretically, for future
6 widening was never preserved when these roads were built.

7 But today when we develop new roads, of course we
8 consider future development and we purchase adequate
9 (inaudible) for future expansion. With these projects, we
10 often purchase mitigation land to offset our impacts and
11 we also incorporate water quality BMPs to mitigate the
12 impacts of the new road, and again, that's for new
13 projects.

14 For redevelopment projects, we're faced with
15 constraints, like I mentioned, with the limited
16 right-of-way available within the existing public
17 right-of-way, a network of utilities which also share the
18 same corridors as the roads, finding restrictions and
19 deadlines and that limit flexibility, and in general,
20 demands from the public and our obligation to provide
21 safe, dependable roads.

22 However, within these constraints, we do continue
23 to provide BMPs to the maximum extent practicable using
24 the USEPA green street's guidance and that is our practice
25 today.

1 The County does strive to be good stewards of the
2 environment by protecting water quality and we believe
3 that we have come up with a plan that satisfies both the
4 needs of the Transportation Department and the San Diego
5 Regional Water Board. Two years ago, the County worked
6 closely with the Santa Ana Regional Board to develop
7 guidance specifically for public works road projects.
8 This guidance, approved last year, is substantially
9 similar to the guidance being developed in Orange County
10 and also the guidance being considered by Los Angeles
11 County for their road projects.

12 The guidance is developed around the green
13 street's concepts and those guiding principles that the
14 County will develop all projects with. It ensures that
15 all projects incorporate water quality BMPs and address
16 impacts of the maximum intent practicable using the
17 principles of the green streets principles.

18 We request that the new permit recognize the
19 existing green street's road standards as approved by the
20 Santa Ana Board and this permit, and by using these
21 principles the public is able to rely on us to provide a
22 safe road to travel on. We're able to get these projects
23 out to the public in a timely manner. We're able to take
24 advantage of grant funding to meet deadlines and the
25 County reduces its liability exposure due to potentially

1 dangerous road conditions.

2 MS. KALEMKIARIAN: May I ask a question just
3 about this green streets issue at this point, and perhaps
4 Wayne's staff can answer? I don't know who should.

5 It came up yesterday and I did a little Googling
6 on green streets last night just to understand what it
7 was. What is it about this permit that doesn't appear to
8 approve green street as an approach? It's an
9 environmental approach right, to try to deal with
10 pollutants?

11 So what is it -- and maybe Wayne needs to answer
12 this -- and why isn't it acknowledged, or is it something
13 that did not meet standards or is it just an omission?

14 MS. ROMO: Well, it's to the extent and we go
15 back to what everyone's been talking about, treating 100
16 percent of the pollutants, and it's very difficult for a
17 public works road project to do that because they are
18 linear and they're bound on either side by runway
19 constraints. So it's near impossible for me to be able to
20 treat 100 percent of the road runoff and capture all of
21 those pollutants within the limited right-of-way that I
22 have.

23 So if the requirements are imposed on simple
24 projects, something as simple as shoulder widening, if I
25 add more than 5,000 square feet of impervious area and I'm

1 bound by having to treat all of that, I'm going to have to
2 go and condemn a property owner to build a basin or some
3 sort of facility to treat that water.

4 MS. KALEMKIARIAN: Okay, so basically you're
5 saying the green street's approach for your situation is a
6 BMP is the best practice that you would want to have
7 acknowledged?

8 MS. ROMO: Right, so that would include tree
9 planters, swales, things that I can incorporate within the
10 existing roadway.

11 MS. KALEMKIARIAN: Wayne, is there anything you
12 want to add to that so I understand it better?

13 MR. CHIU: We do actually have something within
14 the provisions of the permit that allows for green streets
15 to be utilized for retrofitting of streets and roads. In
16 the previous version of the permit, we had an exemption
17 but limited it to streets or roads that are no larger than
18 two lanes. We removed that limitation so it can apply to
19 any street or road that is retrofitted.

20 I think there is maybe some misinterpretation or
21 misunderstanding of what that word retrofit means. In the
22 case of the widening of a street, he may not necessarily
23 consider that a retrofit, but if that widening of the
24 street resulted in the use of green streets for the
25 purpose of also improving water quality, I think that

1 would fall under this exemption. But perhaps that's not
2 fully clear in the language of the exemption or even in
3 the fact sheet.

4 As far as new roads, there is no exemption for
5 new roads to be allowed to just utilize green streets. We
6 would expect that green streets would be utilized as the
7 foundation to meet the design and performance standards,
8 but it may not get them all the way there. So then that's
9 where the alternative compliance options would probably
10 play a role if they could not fully meet it within a
11 project footprint. But that's why we have that
12 alternative compliance option, so that they can meet the
13 performance standard somewhere offsite.

14 MS. KALEMKIARIAN: So this much-discussed 100
15 percent issue and the retention of water, when it talks
16 about a priority development, that would include major
17 street widening or the building of a new street and then
18 this issue of this green street is enough? I mean, I'm
19 simplifying it, but that's kind of the crunch of the issue
20 here?

21 MR CHIU: We've provided green streets kind of as
22 the off-ramp from the full 100 percent pollutant removal
23 requirement but that is limited to just the redevelopment,
24 in her terms, of an existing street. But for a new
25 street, we believe that there should be enough planning --

1 upfront planning -- that can take place in order for them
2 to be able to meet the full requirements of the priority
3 development project. And if it can't be done within the
4 footprint of the project, then they can use some other
5 alternative compliance option.

6 MR. ANDERSON: My question is almost the same
7 thing, is if we fix the permit with Mr. Uhley's
8 suggestion, then the retrofitting provision here allowing
9 for existing paved allies, streets, or roads that are
10 designed in accordance with the USEPA industry's guidance,
11 would that be -- then would it work?

12 MS. ROMO: It probably would not. If you go back
13 to the original permit as it was -- the tentative order
14 that was drafted way back, I think it was over the
15 summer -- there was language in there that allowed for the
16 copermittees to develop guidance specific for public works
17 road projects because we still do have constraints. There
18 are situations where you're doing minor widening. There
19 may not be an option to incorporate the swales or the
20 parkways that are in the green streets. So that wouldn't
21 necessarily cover every situation.

22 So then in the original permit, it did allow that
23 opportunity and the guidance that we developed with the
24 Santa Ana region, it does talk about that we would follow
25 green street guidance but it does go through a series of

1 checklists on making sure that we incorporate to the best
2 of our ability to the maximum extent that we can BMPs,
3 swales, infiltration basins and so forth.

4 We go through and we take a look at the different
5 soils, infiltration rates, right-of-way available. We
6 make sure that we go through all of those steps to make
7 sure that we incorporate everything that we possibly can
8 within the existing right-of-way. So my fear is that the
9 piece that's missing is giving me that opportunity to
10 continue to work and provide those within the limited
11 right-of-way that I do have. And I just want to mention
12 that I am specifically talking about redevelopment here.

13 I do want to point out that in the tentative
14 order on page C9 there are definitions. And there is a
15 distinct definition -- difference between the definitions
16 of redevelopment and retrofitted.

17 Redevelopment -- "examples of redevelopment
18 include the expansion of a building footprint, road
19 widening, the addition to or replacement of a structure,
20 or certain conditions of impervious surfaces, where
21 retrofit is specific to develop the areas with intent to
22 improve water quality."

23 So there is a difference between the definitions
24 of those two and that's why I was suggesting that it may
25 have been an inadvertent error to discuss -- or when

1 you're talking about roads -- to shoulder widening and
2 simple improvements, to refer to it as retrofit. So the
3 purpose isn't for improving water quality. The purpose is
4 to improve the road by widening and so forth and that is
5 the definition of redevelopment.

6 MR CHIU: May I speak to that? There is a
7 difference between the definitions of redevelopment and
8 retrofitting in the definitions portion of the permit.
9 Retrofitting -- the intent of retrofitting, is for the
10 improvement of water quality in an area of existing
11 development.

12 So if you're looking at a road that is existing
13 and it has been retrofitted with at least one of the
14 purposes to improve water quality, I would say that meets
15 the definition of retrofitting. If it is purely to
16 redevelop and just replace or add additional impervious
17 surface to an existing area of impervious surface without
18 trying to improve the runoff conditions or the pollutants
19 that might be coming off of there and even potentially
20 increasing the amount of runoff or pollutants that might
21 be coming off of there, I would not call that something we
22 would want to accept.

23 MALE SPEAKER: Chairman Morales, I'm sorry I have
24 to object on behalf of the Riverside County copermittees.
25 If the question is addressed to Mr. Chiu, that's fine.

1 But I think he's engaging in sort of preliminary response
2 to comments. I would hope that his comments would not be
3 taken off our time. Thank you.

4 CHAIRMAN MORALES: Your objection is noted and in
5 fact, the timer was stopped.

6 MR. ANDERSON: Thank you for the clarification.
7 That helped.

8 MS. ROMO: If that is indeed the definition, the
9 language will need to be clarified within -- the
10 definition that's in the tentative permit because it is
11 not clear.

12 MR. GIBSON: Mr. Chairman, if I could interrupt
13 briefly to note that Mr. -- Dr. Abarbanel has joined us
14 now and rollcall will be adjusted to show that.

15 CHAIRMAN MORALES: Thank you.

16 MS. ROMO: So I'd just like to say that the
17 public does look to us, both of us, all of us, as public
18 servants to ensure that funds are spent in a way that
19 protect not only the environment, but the public as well.

20 And yesterday we heard from quite a few folks
21 that enjoy going to the beach and the lake and the rivers
22 as we all do. I think they have that expectation that
23 they have nice, safe, reliable roads to get there as well
24 so that they can get to those locations to enjoy them.

25 So I would urge you to allow for the development

1 of transportation and road guidance for public works
2 projects in the new MS4 permit as what was originally in
3 the original tentative order. These projects are very
4 different from all other non-road development projects and
5 we urge you to reconsider and allow the development of
6 guidance that address these unique needs.

7 I look forward to the opportunity to work with
8 Board staff to develop guidance that is fair, reasonable,
9 equitable, and compliant through an approach that
10 developed practical standard practices and policies
11 specific to public works road projects in lieu of the
12 typical project by project WQIP approach.

13 In closing, I'd just like to request that the
14 permit does include this additional language to allow for
15 the guidance of specific guidance, specifically for road
16 projects. It's been successful in the Santa Ana region.
17 It's working well. Everyone understands it. Like I said,
18 we do include BMPs to the maximum extent practicable
19 within the right-of-way and we will continue to do so.
20 This allows us to deliver these projects quickly.

21 We do have many projects in the County that we're
22 doing, hearing minor widening to improve the safety of an
23 intersection or slightly widening the shoulder in
24 locations that have frequent accidents occurring. So
25 these are projects that we certainly don't want to delay

1 and which would be delayed if we're forced to go offsite
2 to find a location to treat water runoff. And this is the
3 reason that I'm looking for alternatives, which could be
4 generated from guidance given the additional time to work
5 with staff.

6 Thank you.

7 MR. STRAWN: This goes back to Mr. Garcia's
8 presentation but any of you could answer. Can you give me
9 an example of a critical sediment yield area?

10 MR. UHLEY: It's critical course sediment yield
11 area and I think the idea is that we have land forms in
12 the watershed and some of them are more likely to erode
13 and provide sediment to the streams, which helps to
14 maintain stream stability. In some cases, the streams are
15 naturally unstable and it maintains the rate of change of
16 the streams.

17 So I think what the permit asks is that we --
18 well, what the response to comments said was you need to
19 maintain these critical sediment areas such that they
20 don't have an impact on the receiving water. But then
21 what we read in the permit was that you just need to
22 simply maintain all critical course sediment yield areas.
23 There's a difference there and the difference is focusing
24 on the impact to receiving water.

25 We would like the language to clearly reflect

1 what the intent was, as we understand it from the response
2 to comments, is keep the language focused on the impacts
3 of those course sediment areas and the changes to those on
4 receiving waters.

5 And then the other request we would make is that
6 you allow us -- (inaudible) is an issue that involves both
7 flow and sediment. But the permit -- this is one of those
8 areas where the permit bifurcates it. And it says you can
9 deal with flow to the WQIP. But you can't deal with
10 sediment. You have to follow our prescriptive
11 requirements for sediment.

12 We would request that both the flow and the
13 sediment pieces be allowed to be addressed to the WQIP
14 together so we can have a whole solution of (inaudible).
15 They're two relatively simple changes.

16 MR. STRAWN: So you and our staff could sit down
17 on a map or a picture and point out where all these
18 critical sediment yield areas are?

19 You know where I'm going with this. Is there
20 some difference of opinion of what is included in that
21 definition, or are you guys all clear on it?

22 MR. UHLEY: Exactly. And I think that's the
23 point is we need to define what's important. What is
24 course sediment yield areas? I think the concept is
25 understandable and I think Orange County's done some work

1 along this front already.

2 But I think the goal here is what is the impact
3 on the receiving water? Let's make sure we're not
4 (inaudible) receiving water. Just want to keep the permit
5 language focused on the goal and allow the WQIP to allow
6 us to find better ways to achieve the goals. That's what
7 we're after. We want to succeed.

8 Some of our preliminary sediment yield maps that
9 we're doing for the existing permit hydro-modification
10 plan shows that the entire region will be subject to
11 sediment yield. So without a more detailed study, we
12 could dig into the course sediment.

13 MR. ANDERSON: I do have one comment for the
14 transportation agency. In reading her letter, it seems
15 like staff captured the intent of the January letter of
16 the Department of Transportation and included a very
17 succinct little different version but pretty much by the
18 intent, and I'm kind of surprised that now she's asking us
19 to go back to the previous tentative order and asked for
20 originals.

21 MR. UHLEY: Well I think, if I may, I think
22 there's an issue of semantics here. I think we're all
23 agreeing to the goal of we want redevelopment. We want
24 road projects that are in existing urban areas, that are
25 widenings, that are working within the constraints of the

1 existing urban environment to be able to use green
2 streets.

3 The question is whether the word "retrofit" is
4 the right way to characterize that exemption, or whether
5 the word "redevelopment" is the right way to characterize
6 that exemption. I think what Patty was trying to ask for
7 is just can we add the word redevelopment and then we know
8 that we think that meets what we want to do.

9 MR. ANDERSON: I think what she said to us was
10 she wanted to go back to the previous tentative order,
11 right?

12 MS. ROMO: No. Let me clarify. Not the previous
13 tentative order, but the previous draft of this tentative
14 order. Their original draft included language to allow
15 us --

16 MR. ANDERSON: The one we heard at the workshop?

17 MS. ROMO: Pardon me?

18 MR. ANDERSON: The one we heard at the workshop
19 in November?

20 MS. ROMO: Yes, but when we went to the workshop
21 in November that language was already stricken. It was
22 stricken before we got to the workshop in November.

23 MR. ANDERSON: Oh, okay.

24 MR. UHLEY: I'd just like to close right now.
25 I'd like to thank you for your time. I'd like to thank

1 you for your excellent questions. I'm very glad to see
2 that you're engaged. It is helpful. And I would like to
3 reiterate that the goal's important. I think we can
4 develop a more superlative order with time. I think we
5 can work out some of these details and it's worth our
6 time. It really is.

7 And I would like to reiterate our invitation to
8 come see our facility that we've constructed. We're very
9 proud of it. Maybe it might help to answer some of these
10 questions. That's another reason. We can go show you
11 what we're doing and maybe that will help clarify what the
12 issue is.

13 Then finally, coming back to this issue of the
14 100 percent pollutant load reduction, I think at one point
15 in staff's testimony they stated that we don't see a
16 difference. This is what we're doing before. If that's
17 the case, then why don't we just go back to the language
18 that was in the 2010 permit and make it clear?

19 With that I'd like to thank you guys for your
20 time and we'd like to end our presentation.

21 MR. STRAWN: So we're away from Riverside now and
22 we're working on the total four hours for the
23 copermittees.

24 CHAIRMAN MORALES: Let's take a short break.
25 We'll get you a time count. Just so the folks know, my

1 intent will be as soon as you're done with your
2 30 minutes, and if you want to go less than 30 minutes
3 that's fine, we'll break and then I will have to go take
4 care of what I have to go take care of and we'll reconvene
5 at 3:00. But you will go for your 30 minutes.

6 And my intent is as soon as we come back, we'll
7 begin with the NGOs and if I could get a couple of
8 representatives from the NGOs to come up. There's one
9 thing we need.

10 MR. STRAWN: I do have a card here from the Port.
11 I believe I didn't have it in that pile but I'll move it
12 over. And the answer to your question is we show you to
13 have one hour and 14 minutes remaining; is that right?

14 (Whereupon, at 11:38 a.m., a recess was taken.)

15 CHAIRMAN MORALES: Okay, let's take our seats.
16 We're going to have our next speaker for San Diego County.

17 MS. KALEMKIARIAN: I think I need to procedurally
18 say something before we start. Apparently, I need to tell
19 everyone when I said I Googled "green streets," I looked
20 at the EPA definitions. I did see a picture of a swale,
21 which I will disregard and it will not influence my
22 decision. I'm getting used to these rules.

23 CHAIRMAN MORALES: For the record, the EPA's
24 definition of green streets is part of the record in this
25 matter.

1 MR. CROMPTON: Chairman Morales and Members of
2 the Board, I'm Rich Crompton, Director of Public Works for
3 the County of San Diego and I have taken the oath.

4 I'm here today with the County of San Diego to
5 reiterate the County's remaining concerns on the revised
6 tentative order. There are many significant changes to
7 the order. So the County's first request is to urge your
8 Board to grant a continuance to allow at least 45
9 additional days for your stakeholders to review the
10 significant changes in the draft permit and to seek
11 clarification from Board and staff.

12 Also as a public works director who deals with
13 the issue of the County streets that we just discussed,
14 the County of San Diego and the San Diego copermittees do
15 concur with the recommendation for priority development
16 project exemptions to make the switch from retrofitting to
17 redevelopment.

18 The issue of numeric limits or backdoor the
19 bacteria TMDL is so important to the County that we
20 traveled to Sacramento and Washington D.C. earlier this
21 year to meet with our state and federal representatives
22 and to meet directly with both EPA Region 9 and with Nancy
23 Stoner the Acting Assistant Administrator for Water at
24 USEPA.

25 The crux of the problem is that USEPA issued a

1 2010 memo, that is cited by your staff in its response to
2 comments, as supporting the incorporation of TMDLs as
3 numeric limits in this permit.

4 The 2000 memo states, and I quote from the memo,
5 "EPA recommends," and I emphasize the word recommends,
6 "that where feasible the NPDES permitting authority,"
7 that's your Board, "exercise its discretion to include
8 numeric effluent limits in permits."

9 USEPA has clearly indicated in our discussions
10 that the controversial 2010 memo is strictly guidance and
11 that local authorities have the discretion to draft
12 permits based on local needs. Not only has the 2010
13 guidance memo not been reviewed or accepted by the Office
14 of Management and Budget, which is standard practice, but
15 Nancy Stoner herself told us that the state has ultimate
16 discretion to decide how TMDLs get worked into permits.

17 So Board staff's argument that their hands are
18 tied and that they are obligated by federal laws and
19 regulations to incorporate the TMDL as is just doesn't
20 seem to hold water because we find ourselves in the
21 position that nobody's taking ownership of the issue where
22 we have the state pointing at the feds and then we have
23 the feds that are pointing back to the state.

24 The numeric limit based bacteria TMDL is the
25 single biggest cost driver in the permit. We've estimated

1 these costs to be between 2.8 and almost 5 billion dollars
2 over the twenty-year compliance timeframe of which
3 18 years remain. So this is billions of dollars, billions
4 of taxpayer dollars over the next 18 years.

5 The County of San Diego's portion of the bacteria
6 TMDL compliance cost is estimated between 286 and
7 567 million dollars over these remaining 18 years. So
8 this works out to about 16 to 31 million dollars per year,
9 and again this is taxpayers' money.

10 And I remember Chairman Morales, you asked the
11 question, you said, "These are just dollars. What does
12 this mean?" At the last meeting you asked that question
13 so we listened. And what is an additional 30 million
14 dollars a year?

15 Well to the County, our entire parks program --
16 we have great parks. I encourage you all to come to
17 County parks. Our entire program for all our citizens is
18 a 30 million dollar program. To put it into perspective
19 for public works -- I mean, I have to scrape to find six
20 or seven million dollars a year to do pavement
21 resurfacing.

22 So 30 million dollars to the County, that's a
23 significant additional sum, and that's on top of the
24 30 million we're already spending for stormwater
25 compliance. So it's basically doubling our compliance

1 cost.

2 CHAIRMAN MORALES: Actually, since you mentioned
3 that, I would like to clarify that I don't want anybody
4 left with the impression that I was implying I didn't care
5 about dollars. My question went to what made up the
6 dollar figures that you all were throwing at us that were
7 across the board to use the phrase very concerned about
8 cost and efficiency.

9 MR. ABARBANEL: I wonder if I may? Comparing
10 parks to clean waters is apples to persimmons in my
11 opinion, at least in the City of Del Mar when MS4 permits
12 demand required the ratepayers of the water system and the
13 sewer system were quite happy to pay for that product and
14 to pay for parks because they got something that was
15 extremely important to them.

16 Are you telling us the County of San Diego is not
17 willing to ask its ratepayers to pay for clean water?

18 MR. CROMPTON: Well, I think there's a couple
19 things. One is we can't ask ratepayers to pay for clean
20 water because it's not a utility.

21 So to raise money for clean water, as some of the
22 speakers said previously, would require a vote of the
23 people. If we wanted to go out and do a fee for clean
24 water, that would be a Prop 218 Prop 26 vote of the
25 people. There's not a rate we could just go out and

1 impose. And I think that's probably the best way I can
2 answer your question. Right now this is a general fund
3 obligation.

4 MR. ABARBANEL: I am, of course, a victim of Prop
5 218 in my history but that doesn't stop you from doing
6 good things. It gives you a little threshold to cross.

7 MR. CROMPTON: So while the revised tentative
8 order allows some BMP-based compliance options, the
9 biggest problem remains that the bacteria TMDL targets are
10 unattainable and the potential benefits of spending
11 significant additional resources is not well understood.

12 We've spoken with Dr. Wilma Wooten, who is the
13 County of San Diego's Public Health Officer, about where
14 stormwater-borne illnesses during and after rain events
15 fall on the hierarchy of priority public health issues
16 that she deals with. And Dr. Wooten shared with us the
17 County's top 15 public health issues including things like
18 heart disease, diabetes, mental disorders, cancer, lung
19 disease, pneumonia, asthma and the flu. And stormwater
20 related illnesses, they're not on the list.

21 There's simply not good information available
22 that quantifies the actual public health burden resulting
23 from bacteria-borne illnesses in creeks and beaches. The
24 proposed permit with the costly bacteria TMDL is in effect
25 a forced reallocation of local government taxpayer funding

1 from proven problems to an unproven one. There's still
2 more work to be done on this permit.

3 Again, I urge your Board to grant a continuance
4 to allow enough time to evaluate the latest draft, and for
5 your staff to work with the copermittees and stakeholders
6 to resolve the outstanding issues. I'll now turn this
7 over to Jim O' Day from County Council.

8 MR. ANDERSON: Just a quick question. Whether
9 we incorporate that bacteria TMDL or not in the stormwater
10 permit, it's still a TMDL that needs to be complied with
11 or revised. Are we agreeing?

12 MR. CROMPTON: And I think this will hold well
13 into our county council conclusion.

14 MS. KALEMKIARIAN: I think I have a question.
15 Not part of your time, right? I'm sorry, I didn't catch
16 your name.

17 MR. CROMPTON: Sure, I'm Rich Crompton.

18 MS. KALEMKIARIAN: Crompton. Thank you, Mr.
19 Crompton. What you just said raised a question in my mind
20 that I thought I'd ask Chairman Cox.

21 And I think he kind of answered it and kind of
22 didn't, and that is that it appears from your testimony
23 that the County's position is that stormwater runoff that
24 would cause, in this case, water-borne diseases in the
25 ocean is really not high on the hierarchy of health

1 priorities for the County.

2 MR. CROMPTON: I think it's a different -- I'd
3 state it differently. The County has many competing
4 priorities and so the fact that this issue was framed as a
5 public health issue, it was framed as a public health
6 issue back at the November meeting. And your Board asked
7 staff to come back with some proof of that and they
8 brought a 2006 report that showed hey, this is a public
9 health issue.

10 What I'm saying is -- I'm not saying it's not a
11 public health issue at all. What I was saying is as a
12 County we have many competing public health issues and
13 according to our public health official, this isn't even
14 in the top 15.

15 MS. KALEMKIARIAN: Okay, so -- and I picked that
16 up a little bit from Chairman Cox's testimony when he
17 said, "Hey, there's a three-day time when you can't use
18 the ocean and we just wait for it to blow away and we'd
19 like to be able to notify people sooner." Okay, good.
20 That would be nice. But that doesn't deal with preventing
21 the problem. And I thought, okay. Well, he seems to be
22 saying that we can live with those three days.

23 From the County's economic perspective, because
24 we heard testimony yesterday about that, not just from the
25 environmentalists but from folks from government. You

1 don't see that times when the water's not swimmable as an
2 important business issue for tourism and use of the
3 recreational facilities?

4 MR. CROMPTON: No, I definitely wouldn't say
5 that. Our concern -- and we're going to talk to it -- is
6 there just hasn't been a cost benefit analysis done.
7 There are costs, definitely, but how do they compare?
8 We're going to talk to that.

9 MS. KALEMKIARIAN: Okay, and would someone
10 please, when you address that -- because this is beyond
11 what my knowledge base is yet -- is whether that cost
12 benefit analysis is permissible under the Clean Water Act.
13 So I imagine Counsel will address that at some point.

14 MS. ABARBANEL: So as a resident of the County of
15 San Diego, thank you for working for me.

16 How much did it cost to go to Sacramento and to
17 Washington?

18 MR. CROMPTON: Not sure what those costs were.

19 MR. ABARBANEL: Would those costs possibly have
20 been better spent doing a cost benefit analysis of the
21 problems that you're addressing here?

22 MR. CROMPTON: You know, I'm not going to answer
23 that. I'm not sure how I should answer that.

24 MR. ABARBANEL: Well you shouldn't. I do. You
25 should have done the latter. For me.

1 MR. CROMPTON: Okay. Thank you.

2 MR. O' DAY: Thank you Mr. Chairman, Board
3 Members. I was hoping to escape the watchful eye of our
4 late arrival Board Member but I haven't done that so I've
5 got my work cut out for me.

6 And I have a slide about procedural objections
7 but I think we covered all that yesterday. And
8 Mr. Chairman, you kindly made all the rulings that we
9 needed on that.

10 Just to cover one point that Miss Hagan
11 mentioned, I just want to reaffirm separately on behalf of
12 the County of San Diego that we are aware of and we have
13 read and seen and heard and are going to be hearing all of
14 the comments and objections and issues raised by the
15 copermittees, and without having to necessarily repeat and
16 reiterate all of those, we would ask that there be an
17 acknowledgement that we are not waiving any of those
18 issues.

19 I think that was our discussion yesterday, but I
20 recall Miss Hagan saying that we should specifically
21 reserve that for the record and that's what I'm doing.

22 I'm here to talk about the two big issues. I
23 know this is no surprise in a legal sense and those are,
24 of course, the receiving water limitations language and
25 the bacteria TMDL.

1 Provision A, and I'm responding here in a way to
2 the legal one response from Counsel and the part of that
3 response is that LGL 1 asserts that nothing has changed as
4 a result of the NRDC Ninth Circuit opinion. And as I
5 understand it from reading it, Miss Hagan is saying we
6 knew all along that all of these provisions were
7 separately enforceable in this permit, and that you might
8 be in a position where you might get sued about any one of
9 them at any particular point in time.

10 Now, maybe we were in denial over that or it had
11 not happened to us certainly. But the reality for us now
12 is that a court has issued a ruling with the result that
13 unless there is compliance with the receiving water
14 limitation language, and that it's linked to the process,
15 copermitttees can be sued for receiving water language
16 violations at any time. That is the holding in the NRDC
17 opinion.

18 We believe the tentative order as issued using
19 Provision B to link the alternative compliance process to
20 the receiving water limitations and the Water Quality
21 Improvement Plan process to the receiving water
22 limitations language is not adequate and it does not give
23 us the protection we want.

24 And I want to emphasize we've endorsed the water
25 quality improvement process and one set of comments that

1 we heard throughout the workshops from, I think
2 particularly Wayne, was this is an adaptive management
3 process. We want you to fail early, fail often.

4 Now, we didn't take that that you really wanted
5 us to fail. We took it as you wanting us to engage in
6 creative ways to design programs that would work. And in
7 our fear with the receiving water limitations language and
8 the threat of third-party actions, we don't have any fear
9 from this Board and from staff. Part of your job is to
10 control and regulate us, and we believe you've always done
11 that and we might disagree occasionally, but mostly in a
12 reasonable way.

13 But this is about accountability and control. If
14 we have the language in the permit the way that it is,
15 there is going to be a problem because when we go to
16 design a program, if a third party says, "We don't like
17 the way you're designing your program," they can just say,
18 "Well, we're going to sue you over it."

19 And then we have a dilemma for our Board. What
20 are we going to do? Are we going to redesign the program
21 and do it another way? And at that point, we really have
22 no choice but to perhaps cow down or to go ahead with the
23 program they want us to do it. And who is responsible if
24 that program fails? Not the third parties who have
25 imposed their will on us.

1 And that's what this is about. We want to be
2 accountable but in being accountable, we also want to be
3 in control. And I don't think that's unreasonable and
4 that needs to be addressed. That's what everyone has been
5 pointing to the State Board about.

6 We really seek what Congress intended in 402 of
7 the Clean Water Act. That was enacted, really, to set a
8 completely separate standard from MS4 permits. We want
9 you to get back to that separate standard for MS4 permits
10 and I'd like to kind of take on the safe harbor issue.

11 Safe harbor to me is a marketing term. It's a
12 rallying cry. It's what is shouted when we really ask you
13 to get back to the original intent of 402 of the Clean
14 Water Act. We're not asking for a get out of jail free
15 card here. And so we think safe harbor is really a
16 misnomer.

17 Everybody knows that what's going on here is
18 we're taking what is an open system and really an add
19 point source system that ends up becoming a point source
20 system, if you will. And that has its unique challenges,
21 its unique management issues and those are very difficult
22 to manage because of the nature of the system.

23 That was recognized by Congress in 1987 when they
24 enacted 402 P of the Clean Water Act. It's a separate
25 standard, the MEP standard. It's intended to be unique

1 and I've had regulators even with your State Board
2 administration say to me, "Well, we kind of realize that
3 it's morphed into something more akin to a traditional
4 point source system regulation standard, but it is what it
5 is," and they blame it on EPA.

6 So we're not looking to eliminate citizen suits.
7 If we're violating our permit, citizens have a right to
8 sue us. Requesting the changes or elimination of the
9 receiving water limitation language provisions would not
10 change that. It would just change who is going to be
11 accountable and who is going control the way we design our
12 programs and the way we run our programs.

13 So solution: Remove the receiving water
14 limitation language. Did he really say that? I can feel
15 the eyes rolling behind me. Please don't tell me how many
16 people's eyes are rolling and people will be saying to me
17 seriously, Jim? Is that really seriously what you're
18 saying?

19 I'm suggesting it as a serious alternative. You
20 have the discretion under the Browner decision to apply
21 the MEP standard in such a way as it's intended in our
22 mind and this would solve the problem. Now, I'll admit
23 it's radical. Some people asked you yesterday to push the
24 envelope and I'm asking you to push the envelope. Remove
25 the receiving water limitation language.

1 You'll still have the Water Quality Improvement
2 Plan process in place. You will have solved our concern
3 about accountability and control over our programs and
4 we'll still be subject to citizen suits, or threat of
5 citizen suits, over doing what we're required to do in the
6 permit, but not over how we design and run and control our
7 programs.

8 I'm not seeing a lot of traction on your eyes on
9 that but in the alternative -- there is an alternative and
10 that's been suggested by other parties -- define
11 compliance in concrete terms in Provision A. That's
12 probably the more traditional approach, which will link
13 the Water Quality Improvement Plan and iterative process
14 to the receiving water limitation language. We don't
15 believe that the way it's been prepared in the current
16 tentative order accomplishes that.

17 I'll move on now to the bacteria TMDL --

18 MR. ABARBANEL: I wonder if I can comment. I
19 haven't thought one way or another about the specific
20 suggestion but when you come up here and talk about if you
21 have to be accountable, you want to be in control, in my
22 mind you're flying in the face of the core of the
23 democratic process itself.

24 Once the Board of Supervisors, in your case a
25 group of elected officials, take the responsibility to go

1 down a certain path, responding to their constituents and
2 their citizens, they are accountable. If they choose not
3 to take that response and go down a different path, they
4 are accountable for the other paths.

5 It's not as if they're a different body than the
6 people who came and asked them to take the path. They're
7 the same bunch of people, some of whom have been elected
8 to take responsibility and make decisions and the others
9 are still citizens.

10 And you're asking us to think about the Board of
11 Supervisors or a city council or, God forbid, a United
12 States Congress that it is separate from the individuals
13 who ask them to govern them?

14 MR. O' DAY: May I respond? That's not what I'm
15 saying. When I say accountability and control, I'm
16 talking about accountability and control for designing and
17 implementing our programs within the context of the
18 Stormwater Permit regulatory apparatus.

19 Perhaps I gave you the wrong impression. I
20 apologize for that. I did not mean to say we want to be
21 in charge of everything. We recognize this Board's
22 authority. We recognize Congress's authority. We have
23 some opinions about what we think Congress's intent and
24 authority are. I've already spoken about those. Thank
25 you.

1 The second issue of course is -- and you've heard
2 a lot about this, the bacteria TMDL numeric effluent
3 limitations and legal response number four.

4 The reason we're focusing so heavily on this
5 November 12, 2010 EPA memorandum which talks about the
6 strong recommendation to bring numeric effluent
7 limitations into stormwater permits as opposed to the
8 earlier 2002 memo which talked more about BMP-based
9 approaches for MS4 permits, is we heard a lot about this
10 in the workshop and processes over the last 12 months.
11 The word that we got was that that created a lot of
12 pressure for this to be how the permit would be designed.

13 And as Mr. Crompton said, and I will confess I
14 did go on those trips, I did meet with USEPA. In D.C. I
15 met with Region 9 representatives David Smith and Mr.
16 Kemler and I met with Jonathan Bishop and the State Water
17 Board and it was all to discuss these issues. And there
18 was a lot of this. There was -- the Region 9 people say
19 well that's -- they wrote that memo and they're ramming
20 that down our throats and they got Region 9 saying no, no,
21 that's California. They're always out there. The way
22 they implement it is something that's a little ahead of
23 the curve.

24 And so we're very concerned about the
25 applicability of that memo. That's what I wanted to

1 address. That memo has not been reviewed for propriety
2 yet by the US Office of Management and Budget and I did
3 meet with them. And they also acknowledged that memo is
4 sitting there. It's not yet been approved and they don't
5 know when it's going to be approved. But I want to give
6 your staff some solis.

7 There's a recent case, Court of Appeal decision
8 Iowa League of Cities versus EPA that says a memo like
9 that constitutes improper rule making and cannot support
10 analysis. And I want to read that language very quickly.

11 "If an agency acts as if the document issued in a
12 temp court is controlling the field, if it treats the
13 document in the same manner as it treats a legislative
14 rule, if it bases enforcement actions on the policies or
15 interpretations formulated in the document," and here's
16 the operative part, "if it leads prior parties or state
17 permitting authorities to believe that it will declare
18 permits invalid unless they comply with the terms of
19 document, then the agency's document is, for all practical
20 purposes, binding." We think that that is the impact of
21 that November 12, 2010 memo and under this case law, we
22 think that it's to be ignored.

23 We've said a lot about we believe you have the
24 discretion not to bring the bacteria TMDLs into the permit
25 at this time and we're urging to go back and revisit all

1 of the waste load allocations and the assumptions based on
2 some science we think you're going to hear and find
3 compelling in a moment. And we believe you absolutely
4 have the discretion to do that, and we think that you
5 should do that.

6 I'm going to jump ahead and I put up on the
7 screen -- this applies to State Board Order, Water Quality
8 Order 2000-15. This applied to a decision about a
9 designated use within a basin plan, but I think the
10 principle here applies to the argument that we're making.
11 And as you see, in general, the Board agrees that where a
12 regional Water Quality Control Board has evidence that its
13 designated use does not exist and likely it cannot be
14 feasibly attained, it is unreasonable to require a
15 discharger to incur control costs to protect that use.

16 And that particular quote comes from a recent
17 case, California Association of Sanitation Agencies versus
18 State Water Resource Control Board. And the principle
19 there is that unreasonable costs for an infeasible result
20 should be reviewed in the context of this bacteria TMDL.
21 And what it's really about -- I understand the argument
22 from staff and the responses from Counsel about 40 CFR
23 122.44d. I understand that.

24 I think it's really a timing issue, and our
25 concern is once you bring those numeric bacteria effluent

1 limitations into the permit, and if you do that in this
2 round of the permit renewal, it's very hard to modify them
3 although it sounds like there's some intent to look at the
4 basin plan and to look at the bacteria issue by the Board
5 or staff. I think I'm hearing some possible rumblings
6 about that.

7 But once you bring those numeric effluent
8 limitations into the permit, then there's going to be a
9 problem potentially with backsliding claims,
10 anti-backsliding provisions. And the better policy -- the
11 better public policy at this point, we think, given all
12 these concerns and the large cost, is to not do that, not
13 bring them into the permit. Start a basin plan amendment
14 process to go back and look at it in light of the science
15 as well as we think the science that might be coming and
16 avoid being in a place where your hands are completely
17 tied.

18 And as we mentioned, the cost of compliance is
19 about anywhere from 2.8 billion to 5.1 billion over time.
20 The assertion in response to comments that we failed to
21 factor in costs is not implemented in the TMDL, it's
22 misplaced. And I know you're going to hear a lot of that
23 later on today that we're not factoring in the costs of
24 not implementing that. However, there is no reliable
25 evidence on that and that's acknowledged in your staff's

1 fact sheet, fact sheet 19, that there has been no reliable
2 study that has quantified the economic value of the TMDL.

3 We have requested that a recently released study,
4 that I believe the City of San Diego recently released and
5 I understand it was transmitted to your Board prior to
6 today. There's a Point Loma Nazarene University study --
7 it's dated April 2011 but it was released to the public I
8 think about a month or two ago -- that's relevant to this
9 issue. It shows that cost outweighs benefit. I'm not
10 going to --

11 MS. HAGAN: We haven't determined whether that
12 document will be allowed into the record yet. We've asked
13 other parties to review it to see if they object or feel
14 that they'll be prejudiced by its admission into the
15 record. So if you could keep your testimony as to it
16 general at the moment.

17 MR. O' DAY: I'm not going to testify about it at
18 all, about the contents. I'm not probably qualified to do
19 that.

20 I would like to state that we believe it should
21 be included in the record. It was evidence that wasn't
22 available until very recently. It's relevant on the
23 issues in this proceeding and if the determination is that
24 it is not going to be received into the record, I would
25 just like my objection noted at this time for the record.

1 CHAIRMAN MORALES: That's fine. Your objection
2 is noted. And I think for my benefit, I would like
3 clarification as to exactly when this study was first
4 available. You mentioned it hadn't been available until
5 the last few months but if you could just provide
6 clarification, after the break is fine.

7 MR. O' DAY: So our proposal is, at this time, to
8 not incorporate the bacteria TMDL numeric effluent
9 limitations into this permit. Open a process. Look at
10 the basin plan and look at the science and let's try to
11 get this right. We think that's the right way to go.

12 MS. KALEMKIARIAN: I have a question going back
13 to the Ninth Circuit case and these are concerns about
14 strict liability. And I'm assuming it's permissible for
15 us to have read the case, which I was just glancing at.

16 What did the previous permit say about RWL and
17 whether you could discharge or not? I don't imagine it
18 said oh yeah, you can discharge and we don't worry about
19 the standards.

20 MR. O' DAY: No, the previous permit has the
21 Provision A and Provision B language the way that it is
22 now, I believe. That's only been modified to bring
23 into -- in Provision B, to bring in the WQIP process as an
24 alternative compliance option.

25 MS. KALEMKIARIAN: Okay, so A2 has been there all

1 along?

2 MR. O' DAY: Yes.

3 MS. KALEMKIARIAN: So the concern that San Diego
4 County and I believe other copermittees have is that after
5 this Ninth Circuit opinion, there's now some kind of
6 strict liability and you would like to have some help in
7 the permit not making that even worse or not making that
8 more onerous than it needs to be. I mean I'm being very
9 general when I'm saying it --

10 MR. O' DAY: Well, the nature of the
11 stormwater -- if you went out today, you would find
12 violations of receiving water limitations and everyone
13 knows it. Everyone says it. And you've heard a lot of
14 comments yesterday "don't take that loaded gun out of our
15 hand."

16 So the threat is very real for us. This is not
17 theoretical. This is not legally theoretical. The threat
18 is very real and it's voiced often. And we're asking you
19 to you look at the impact and we've asked the State Board
20 the same thing and they have that under review.

21 But this Board has always been out front in a lot
22 of things and this is an opportunity. But we're asking
23 you to take that problem for us with having control and
24 accountability for our programs within the context of the
25 permitting process away from third parties. Not

1 compliance --

2 MS. KALEMKIARIAN: I understand that. Would this
3 have been your request before this court opinion? Was
4 that request made when the last permit was under review?

5 MR. O' DAY: I don't know. I wasn't in this
6 domain at that time. Probably not. I don't think anyone
7 expected that a court was going to make each and every of
8 those provisions independently enforceable. That was
9 really when the light got shone on. I know staff and
10 Counsel is saying we knew that was a risk for you guys all
11 along. But it became a real risk and is a real risk for
12 us now and it's significantly going to impact our ability
13 to control and manage our programs.

14 I'll turn it over to Todd Snyder with the County.

15 MR. SNYDER: Thank you, Jim. I understand we
16 have six minutes left. So we had very extensive comments
17 on sort of the technical flaws and our concerns about the
18 scientific foundation of the TMDL.

19 I am going to make a couple points and then defer
20 to Ken Susilo with Geosyntec to discuss a couple examples
21 of our concerns. I think that's about as much as we can
22 do. All of the information that Ken will be presenting is
23 part of the written record. We did submit comments by the
24 January deadline. We did not receive adequate responses
25 to those comments or the criticisms of the TMDL.

1 One thing I would add to Jim's suggestion about
2 the County's preference of excludeing the TMDL from the
3 permit at this time, if you choose not to do that, please
4 direct your staff to follow through by the deadline to
5 reopen this TMDL because we're concerned with the resource
6 limitations and constraints on the Board staff to actually
7 use the reopener. So please direct them to do that.

8 With that said, I will hand it over to Ken
9 Susilo. I was going to go through his qualifications, but
10 trust me, he's highly qualified to speak to this.

11 MR. GIBSON: Mr. Vice Chair, just as a procedural
12 matter before the gentleman begins speaking, I wanted the
13 record to note that Chair Tomas Morales has excused
14 himself at 12:25.

15 MR. SUSILO: Good afternoon, Members of the
16 Board. As Mr. Snyder indicated, I'm Ken Susilo, and I'm
17 principal with the firm Geosyntec Consultants. I'm a
18 professional civil engineer in the State of California, a
19 diplomate water resources engineer and certified
20 professionals stormwater quality.

21 Mr. Snyder outlined three major areas of
22 technical concern that relate to the inclusion of the
23 bacteria TMDLs for beaches and creeks. Given the time,
24 I'll be limited to give you one example on this. And I
25 apologize, I'm going to have to go move up and advance to

1 certain slides because I'm not going to be able to go
2 through the entire presentation.

3 MR. STRAWN: Don't rush to the point that we take
4 our court reporter into --

5 (Laughter.)

6 MR. SUSILO: Understood. The first point had to
7 do the with the reflection of the state of science and
8 recently collected data and so the one example I wanted to
9 discuss was with respect to the referenced watersheds.

10 Back in 2002, TMDL was developed and there was an
11 establishment allowable exceedance frequency of 22
12 percent. Since then, a significant amount of data has
13 been collected for those referenced watersheds. This is a
14 plot that shows you on the vertical axis exceedance
15 frequency and then the years on the bottom. And you can
16 see three bars for every year.

17 The bar to the left is the wet weather single
18 sample concentration. It's sort of a brownish color and
19 that bar should be compared to the solid black line. So
20 what you can see as you look at those bars relative to the
21 one that four out of eight years, that reference watershed
22 exceeds the 22 percent threshold.

23 The second thing to look at is on the far right,
24 it's sort of a very light blue bar, and that is the dry
25 weather single sample, and that would be compared to the

1 dashed line at the bottom, which is a zero percent
2 allowable exceedance. And you can see that it's about --
3 there is one year that makes it, but over 85 percent of
4 the time, the dry weather sample does not comply.

5 So if you were to take a look at this timeframe,
6 you would conclude that a 28 percent allowable exceedance
7 frequency would at least be representative of a reference
8 watershed noting there is variability there as well. For
9 the dry weather, same example. You can conclude that you
10 have about a ten percent annual exceedance frequency. And
11 again, instead of 20 and 10, we're looking 22 and 0.

12 This is for small watersheds. This is on a
13 relatively small watershed compared to a lot of the
14 coastal San Diego watersheds that we have here. SCCWRP in
15 2006 did a study and looked at (inaudible) and another
16 large watershed and concluded that 30 percent was the
17 appropriate number for wet weather single sample
18 exceedances.

19 So that's sort of the point. The last point on
20 this is the definition of wet and dry and it seems like a
21 trivial point, but the Los Angeles Regional Board defines
22 wet and dry as .1 inch of the 72-hour emptying period.
23 The TMDL defines it as .2, which may seem trivial but if
24 you're thinking about what happens between a tenth of an
25 inch and two tenths of an inch, and if you're putting that

1 up to the two tenths of an inch into that zero exceedance
2 frequency category, it does become significant. So that's
3 the point in terms of the state of the science.

4 Next point I'd like to talk about has to do with
5 attainability. So I wanted to make a statement that
6 there's a significant amount of variability and
7 uncertainty and I guess I should preface this. When I'm
8 talking about attainability, it's the ability to hit a
9 specified target number. So it's not that you can do BMPs
10 and not get a benefit, but it's to actually hit the number
11 that's in the permit.

12 So that's what I'd like to discuss here. A
13 number of conditions sort of factor into attainability.
14 Some include the loading conditions of the watershed,
15 hydrology, frequency of rainfall in storm events, you
16 know, saturated conditions, high groundwater tables,
17 direct loading, direct sources into the the receiving
18 waters. A big thing is concentrations.

19 So this is a plot that shows you a distribution
20 of four different types of BMPs. Again, on the vertical
21 axis you have enterococcus concentrations. To the bottom
22 you have four different types and they're paired. So the
23 box on the left is the influent. It's paired with the
24 effluent and you can see there are a couple that get
25 there. And in fact, retention ponds and wetland basins

1 have a probability of getting there. Am I going too fast?

2 MR. STRAWN: I'm going to give you an extra
3 minute just to ask you to talk a little bit slower because
4 I see our reporter is shaking in her boots.

5 MR. SUSILO: I apologize.

6 So a big factor in terms of attainability is how
7 it is concentrated and what this shows is that you got a
8 couple BMPs that can get close and there's some
9 feasibility of crossing the line of that, I think that's a
10 35 MPM line there for enterococcus. Manufactured devices.
11 Disinfection. You send it through a wastewater treatment
12 plant, it can get you to that level of disinfection. But
13 if we're looking at natural treatment systems, it's very
14 difficult to get to that and you can see this from the
15 data itself.

16 The last question, there's been a lot of talk
17 about costs and benefits. And there was some discussion
18 about 2006 study that looked at regional public health
19 cost estimates. I actually -- in the presentation, which
20 I think you have in your file, there is a significant
21 breakdown of costs that were developed in the
22 comprehensive load reduction plans. And those costs
23 included wet weather and dry weather types of BMPs,
24 structural and nonstructural BMPs. And the key difference
25 here is the CLRPs that comprehensive load reductions plans

1 talk about it in terms of wet weather and dry weather
2 because those are the regulatory guidelines that we're
3 looking at in terms of wet weather and dry weather
4 criteria.

5 This study breaks up it in wet season and dry
6 season. So there's useful information here in terms of
7 the health cost and the percentage of the total cost over
8 the course of the year between the two seasons. What I've
9 attempted to do here is to extract the number of wet days
10 and dry days within the wet season so that we can actually
11 do a comparison now saying what is wet weather cost, which
12 is the far column there to the left versus wet season, wet
13 weather. 360,000 dollars to 1.8 billion to the dry
14 weather costs and you can see that 20.5 to 47.4.

15 The thing to take away here obviously is the
16 bottom line, which is 2.4 percent of the cost apply to wet
17 weather and about 97 percent of the cost apply to dry
18 weather conditions.

19 And this will be my last slide. There's been
20 some discussion about that relative comparison. So as we
21 look at wet weather, and again, there's more detailed
22 information in your presentation, the wet weather costs
23 are about 63 percent of the total cost and the net benefit
24 is about three percent.

25 And with that, I'll give it back to Todd Snyder

1 for closing.

2 MR. SNYDER: We have a lot more we would have
3 liked to say, but I think we've met our time limit. So
4 again, I really encourage you to either exclude the TMDL
5 from the permit or direct your staff to reopen the TMDL.

6 MR. ANDERSON: So a quick question. So you now
7 feel you have sufficient evidence to reopen the bacteria
8 TMDL and take it on?

9 MR. SNYDER: I think we have suggestive evidence.
10 We're collecting addition evidence now. For example,
11 we're in the middle of a four-year study to understand the
12 natural levels of bacteria here in local San Diego
13 watersheds. We need a couple years to finish that study
14 and there's other things I could go into, but the TMDL
15 requires a reopener by 2016 and we would want to stick to
16 that date at the latest.

17 MS. KALEMKIARIAN: I have a question for you and
18 maybe of the gentleman who likes to speak too fast. The
19 benefit cost public health benefit slides, if we could go
20 back to that one. Twenty-four I think it is.

21 I'm not understanding it. So these are health
22 costs of the public health system, is that what it is?

23 MR. SNYDER: Well, this is a sort of benefit
24 statement as it's tied into costs associated with some
25 studies that were done in 2006 by I think it's Gibbon with

1 Pendleton and Bain (phonetic) and it looked at
2 gastrointestinal illness with respect to water quality.

3 MS. KALEMKIARIAN: Okay. So these aren't budget
4 numbers. This is their estimate of what are the costs of
5 health during a wet season or during the dry season?

6 MR. SNYDER: Correct, and that's in Los Angeles
7 and Orange County.

8 MS. KALEMKIARIAN: So they're looking at what are
9 hospitals incurring or whatever they're using as their
10 reference data -- which Henry will tell me later why
11 that's important -- but anyway, the data that's going into
12 each box is trying to show gastrointestinal illness you're
13 saying?

14 MR. SNYDER: That's right, and to predict the
15 cost.

16 MS. KALEMKIARIAN: Okay, so during the wet season
17 supposedly 1.6 to 8.5 million dollars in cost. During the
18 dry season, a much higher amount?

19 MR. SNYDER: Right, and they had to run a couple
20 analytical models -- and this is not my study. But they
21 had to run some analytical models because there wasn't a
22 complete data set and so they needed to fill some of those
23 data and come up with these estimates, which is why you
24 have ranges of numbers.

25 MS. KALEMKIARIAN: So your point in presenting

1 this is that during the wet season it appears there was
2 less cost for gastrointestinal illnesses than during a dry
3 season?

4 MR. SNYDER: During the wet season and the wet
5 weather condition. So that's going to be the -- in order
6 to try to compare the apples to apples, we developed a
7 necessity in the comprehensive load reduction plans. We
8 had to do wet weather and dry weather types of measures.
9 And so we have two sort of pots of budgetary costs and
10 those estimates, and so the attempt is to try to convert
11 those to equivalent cost here with wet weather and dry
12 weather.

13 MS. KALEMKIARIAN: Okay.

14 MR. ABARBANEL: Catherine, are these studies
15 referred to here in the record?

16 MS. HAGAN: I don't know the answer to that.

17 MR. SNYDER: This study in particular, the 2006
18 given study, I believe, is in the record and the written
19 record. It was also addressed during the November and
20 December workshops. It was brought up by some of the NGOs
21 as a good example of how there are costs incurred as a
22 result of not implementing this TMDL.

23 MR. ABARBANEL: You mistook me for a lawyer. So
24 your answer is probably correct or in the record. I want
25 to know whether I can read them. Do we have them?

1 MS. HAGAN: I don't have them but we can I'm sure
2 get them.

3 MR. SNYDER: I believe they're referenced in the
4 record. I'm not sure.

5 MR. O' DAY: So that's my answer to you, Sharon.
6 I have no idea whether they're fantastic or not.

7 MR. SNYDER: The other thing that will help to
8 answer your question is you see the bottom of each of
9 these slides? We actually put up -- created a website for
10 this presentation that contains all the source information
11 that contains the data. So if you jot down that website
12 you'll find those particular studies.

13 MS. HAGAN: You may read any document that's in
14 the record even if we don't have a copy as something that
15 you may look at. We can get a copy for you.

16 Mr. Vice Chair Strawn, I don't know where you are
17 if you still have questions, but I've been told that Miss
18 Witkowski on behalf of the environmental group, would like
19 to ask a few questions at the appropriate time of the San
20 Diego County copermittees.

21 MR. STRAWN: Okay. Just to be clear, when we
22 were talking about their 30 minutes for San Diego, that
23 was an internal split done between the copermittees. Our
24 count as far as your total for hours is about an hour and
25 12 minutes left. How you split them up between you is

1 really your choice but I would ask how much longer you
2 want to go so I can answer Jill's question.

3 MR. BROWN: Well thank you, Board Members. I'm
4 the next one up. I'm Bill Brown. I represent the Port of
5 San Diego. We only have about a ten minute presentation.
6 If we could fit it in now, it's meant to work with Mr. O'
7 Day's presentation. It will make a lot more sense if we
8 try to do it before lunch.

9 MR. STRAWN: Okay. Jill, you okay if we wait
10 until the end of that or do you want to sandwich in
11 between?

12 MS. WITKOWSKI: If Mr. Brown doesn't mind, my
13 question will probably take one minute.

14 MR. BROWN: I can live with that.

15 MS. WITKOWSKI: To follow procedure from
16 yesterday, if this will be preferable, I have four
17 questions that I ask in quick succession if that's how the
18 Board would like to proceed. I think they're easy enough
19 to remember that they shouldn't have to be repeated but
20 I'd be happy to repeat if that works for you.

21 This is to the County. Since 2001, how many
22 receiving water limitation lawsuits has the County
23 defended? How many have they defended since the Ninth
24 Circuit NRDC decision? How much notices of intent to sue
25 have they received since the NRDC decision? And finally,

1 what's the total amount of money the County has spent
2 defending receiving water limitation lawsuits?

3 MR. O' DAY: I don't know, I don't know, I don't
4 know and I don't know. That's not meant to be flippant.
5 I don't have those statistics. It's never been asked of
6 us before in the context of this proceeding. I assume the
7 questions might be slightly rhetorical.

8 MR. STRAWN: My guess is your answer is probably
9 the one that Jill is expecting.

10 MS. WITOWSKI: Yes, I would just like to ask the
11 County if they have anyone who actually has that
12 information and could find it during the break. I'd be
13 more than happy to take an answer over the break.

14 MR. O' DAY: I'm not going to find that
15 information during the break. It would require a fairly
16 extensive search of our County Council records and also on
17 the financial aspects of it, that would take certainly
18 some time.

19 Miss Witkowski has served the County with a
20 number of public records acts for requests over the years
21 and I'm sure she could serve us with another one and we
22 would respond in that context and I think that would be
23 the appropriate way to handle this.

24 MR. ANDERSON: Can I make a brief comment about
25 this?

1 I think, Jill, are you trying to make the point
2 as the Regional Board has the authority to find at a
3 certain level that is fairly (inaudible) when an agency
4 creates a sewer spill?

5 And we really don't ever -- I've always been
6 tempted to just do it once to make the point and then --
7 but that fear is still out there that someday I might get
8 cranky and convince other Board Members to go along with
9 me. And so we know that the sewer agencies do keep that
10 in the back of their mind and behave much better than they
11 may normally behave if we didn't have that authority. Is
12 that kind of adding to --

13 MS. WITOWSKI: Yes, Mr. Anderson. The County has
14 raised significant information about different costs that
15 it faced. And I just wanted to know what costs they have
16 incurred on this since this is something they're asking
17 for and they're worried about our loaded gun.

18 MR. STRAWN: Okay, that took a little longer than
19 we probably expected. Bill, you're up.

20 MR. BROWN: Thank you again. That was a
21 California minute. We want to appreciate and we thank
22 everybody for their time and attention today.

23 I represent the Port of San Diego. We have our
24 own individual block of time and that's because we have
25 our own individual problems. We have three sets of facts

1 that are special to us.

2 First, for the Bay of San Diego we are the end of
3 the watershed. We only have a tiny portion of the land
4 associated with the watershed, less than one percent, but
5 we are at the end of the watershed. Another way of
6 putting it is that we are at the wrong end of the pipe and
7 that causes us a lot of concern.

8 The second thing is we have dug into this a
9 little bit. We found that we don't own the pipes or
10 operate them. For the majority of this, for the big
11 arteries that come into the bay, our upstream cohorts have
12 easements and ownership of the pipes. And so we have no
13 control over what's going on with those pipes, at least
14 not to the extent where we could remove them or somehow
15 alter those pipes.

16 To top it all off, our third concern is that we
17 are one of the environmental stewards of the bay and work
18 closely with this Water Board all the time to try to make
19 sure the bay is as healthy as it can be. So trying to
20 balance all those things I think will put into context
21 what our slides are about.

22 First, we have something a little bit different.
23 We're going to actually congratulate staff over taking one
24 of the comments. One of our comments is that you need to
25 have more jurisdictional monitoring. In other words, the

1 watershed has to be tested in more areas.

2 We heard about the NRDC case that went to the
3 Supreme Court. The real problem with that case when we
4 got back to Washington was that that Supreme Court was
5 mystified that the watershed had only been tested in two
6 places and nobody knew what to do with the whole thing
7 because the testing -- although there is robust testing of
8 the watersheds in many regards, there's not a lot of
9 testing as to where there are problems in the watershed or
10 where the problems start to occur.

11 So we ask that that be added here and your staff
12 has done that. They've also thrown in the bonus that we
13 get to do our own voluntary monitoring if we want to. And
14 we really appreciate the staff going through -- they have
15 hundreds of comments of course. They took this one to
16 heart and we really appreciate it and we want to make sure
17 that this does get into the new draft.

18 The next -- do you have a question?

19 MR. STRAWN: Yes, we remember from the bay
20 cleanup, sediment cleanup, this whole issue of who owns
21 the pipes.

22 MR. BROWN: Yes, I was right there in the middle
23 of that and we'll talk a little bit about that bay cleanup
24 as well just at the end here.

25 So this is all about who owns the pipes. I think

1 that the problem is that this got a little blurred in the
2 NASSCO sediment cleanup provisions.

3 There's a lot of talk about accountability based
4 on jurisdiction but the law is very clear that the party
5 responsible is the party who operates the MS4. We really
6 can't understand how we operate an MS4 that we don't own,
7 or pipes that we don't own, that somebody else has an
8 easement for, that we can't remove, and we have requested
9 that there would be clarification language put in here to
10 explain that just because a pipe goes through our
11 jurisdiction, our very tiny jurisdiction, that that does
12 not make a liable. And this has been a huge contention
13 and cost the court an awful lot of money and it's still
14 going on with this one single issue.

15 Okay, and then we'll move to the last issue. We
16 agree with the County and Mr. O' Day that the TMDL should
17 not be incorporated in the MS4 permit. We believe that
18 you have the ability to do that if you want to. We don't
19 think it's a good idea. We think the law is clear that
20 you have discretion.

21 The way that we look at it is you heard a lot
22 about the economic problems. You heard a lot about the
23 technical problems. We as lawyers look at it as a third
24 problem. My partner has told me that TMDL stands for too
25 many damn lawyers and from a legal point of view, I think

1 that is one of the problems. We're concerned that if the
2 TMDLs are written into this permit, that it will create a
3 legal morass that will be huge.

4 The legal problems with TMDLs if you write them
5 into the MS4, it's not one and one is two, it's
6 exponential growth. Also, for this Board it has another
7 problem that if the TMDLs are legally attacked and found
8 to be wrong not on an economic or a technical basis but on
9 a legal basis, then that may derail the entire MS4. And
10 there have been recent legal attacks on this, including a
11 case in Virginia where they pointed out that modeling is
12 not a substitute for actual effluent checking.

13 We think that the TMDLs may suffer from the same
14 problems here in San Diego and if that's true, you're
15 looking at a situation where all the lawyers who
16 specialize in TMDLs, and all the lawyers who specialize in
17 MS4s are all going to end up in the middle of this single
18 proceeding.

19 And then lastly, we do believe that putting TMDLs
20 in here will cause an explosion in actual litigation as
21 well. I have represented the Port in the matters and we
22 have spent millions of dollars in litigation where
23 receiving water limitations is an issue. You've all heard
24 that. You've been at the NASSCO hearings. You've seen
25 the parade of lawyers. I also played a minor role in the

1 County of Los Angeles case that went all the way to the
2 Supreme Court. That, again, was a legal morass that
3 defied anybody's ability to believe how big that would
4 get.

5 I think it's really a problem that if you write
6 TMDLs into this permit, that you're going to have an
7 exponential growth in the legal problems that are going to
8 be before this Board on a regular basis. I think this is
9 a perfect example of something that you may put off for a
10 few months to see if there's some way that we can speak to
11 your staff and see if there's a way to disengage TMDLs
12 from this process legally.

13 We understand that TMDLs will still go forward.
14 We understand that MS4s will still go forward. But if you
15 don't have them joined, it might make life a lot easier
16 for all of us.

17 That's my presentation. Thank you very much.

18 MR. ABARBANEL: So thank you very much. I didn't
19 realize it this morning until you spoke this afternoon
20 that the Port of San Diego and I have something in common.
21 I don't run an MS4 system myself. I live in a city that
22 does have one. If there's a violation that is caused by
23 the action of one of my neighbors, I'm responsible for
24 that because I'm part of a community that has decided that
25 water quality is very important. I can't order my

1 neighbor. I don't know if the City could to cease and
2 desist but I believe that because I am responsible and am
3 part of the community, I can go speak to my neighbor and
4 cooperate with my neighbor.

5 I think this Board, through primarily the
6 leadership of the Executive Officers, has shown us through
7 the Tijuana River Valley Cleanup, how one can do that when
8 the barriers are infinitely higher and international. And
9 I recommend that the Port stop complaining about being
10 part of the copermittees and work with them, including my
11 own city. Thank you.

12 MR. BROWN: We understand that. We are not
13 complaining about being part of the copermittees. We
14 understand that. We just want to see that the people at
15 the end of the pipe have a chance to state in a fair
16 manner. But we are not complaining about being part of
17 the MS4 permit.

18 Thank you.

19 MR. STRAWN: Thank you, and by my count, I think
20 I misspoke earlier, we're looking at 37 remaining minutes
21 for the copermittees. I think I did some math wrong
22 earlier. So --

23 MR. O' DAY: May I approach? I got the
24 impression that the Port time was being charged against
25 the copermittee time. If I'm incorrect about that, I

1 apologize. If it has been, I think they were listed as a
2 separate party and having their own time on the agenda;
3 were they not?

4 MR. STRAWN: The list was given to me had them as
5 a separate party under copermittees.

6 MR. O' DAY: I'm saying they had their own block
7 of time --

8 MR. STRAWN: It wasn't though.

9 MR. O' DAY: No?

10 MR. STRAWN: I don't think I was given that
11 separately but we can consider that. We're talking seven
12 minutes here.

13 MS. HAGAN: I don't know that they were given --
14 they asked for a separate block of time. But the hearing
15 procedure didn't provide one. But whether the Chair
16 granted it, and I don't recall that, I'm not sure. I can
17 double check.

18 MR. STRAWN: It's not on the notes the way I have
19 it and I suggest--

20 MR. O' DAY: Perhaps I'm mistaken. I just wanted
21 to make sure.

22 MR. STRAWN: I'm going to suggest we plod on and
23 get it done as expeditiously as possible, and we'll deal
24 with any shortcomings at the end.

25 MR. BURHENN: I guess we're Mr. Vice Chair at

1 this point. David Burhenn, again representing the
2 Riverside copermittees, and with me the other County
3 Council.

4 At this time we'd like to reserve our remaining
5 time. I believe all presentations have been made for
6 potential rebuttal. And I don't know that the Chair has
7 yet indicated when rebuttal would be appropriate, but we
8 would like to reserve that time at this point.

9 MR. STRAWN: We will leave you 36 and a half
10 minutes. I think that decision of just how we'll do
11 rebuttals hasn't necessarily been made yet, but unless
12 there's some complaints from anybody we're going to allow
13 that.

14 And we were kind of waiting to see if Supervisor
15 Horn came before we broke. The other option would be
16 to --

17 MR. O' DAY: I guess Supervisor Horn is not here
18 of course, but he might be here around 3:00. We're
19 tracking him down.

20 MR. STRAWN: That's fine because we'll reconvene
21 at 3:00. My question is do we want to go any further here
22 or should we go ahead and take a two-hour break and when
23 we start back up, I think we start with the NGOs.

24 We need a break. Thank you all. We'll see you
25 at 3:00 o'clock promptly. Promptly 3:00 o'clock.

1 (Recess taken at 12:58 p.m.)

2 MR. STRAWN: I apologize. I asked you to all be
3 here by 3:00 p.m. promptly and you all obliged. But we
4 are waiting for Supervisor Horn, and Chairman Morales so
5 we probably will be another five minutes if you want to
6 move around a little bit. I will give you a few minutes'
7 warning before we start.

8 We're going to delay this for 15 minutes so I
9 apologize. It's kind of unavoidable without having to
10 take a chance of having to repeat stuff. So we're going
11 to take a break until 3:30 and I'm sorry for having you
12 all holstered like this.

13 Okay, if we can work our way back to our chairs
14 we're going to be ready to start here in just a couple
15 minutes.

16 I will call us back to order. We'll make a note
17 that Chairman Morales is absent at this time. We'll make
18 a note as soon as he arrives. The next on the agenda
19 should be the NGOs.

20 Jill, are you going to start that or -- and I
21 show that you have 58 minutes. You were dinged a minute
22 or two for some cross-examination and I would remind
23 everybody as you come up to speak be clear, slow and give
24 us your name and state whether you have been sworn in.
25 Thank you.

1 MS. WITKOWSKI: Thank you. Two things. We do
2 have a PowerPoint but also I spoke with Miss Hagan before
3 the break and we did want to discuss the exhibit that San
4 Diego County is seeking to enter into evidence and we'd
5 like to address that if it is appropriate at this time,
6 I'd be happy to do so or to do so later.

7 MS. HAGAN: Do you want to take that on, Mr. Vice
8 Chair, or do you want to wait for Chairman Morales?

9 MR. STRAWN: My inclination is to go through with
10 the normal testimony and at the end of her testimony she
11 can come back to that. Hopefully, Tomas is here by then.
12 If not, we'll consider it at that point.

13 Will that throw you off if you do your whole
14 presentation first and we'll save the other comments for
15 the end?

16 MS. WITKOWSKI: Not at all. Thank you. My name
17 is Jill Witkowski. I'm the Waterkeeper for San Diego
18 Coastkeeper. I'll be presenting with Noah Garrison from
19 NRDC and Colin Kelly representing Orange County
20 Coastkeeper and Inland Empire Waterkeeper.

21 I was approached by someone in the audience who
22 also was at the shipyard hearings and had a request to
23 repeat the Jaws theme that I sang in my closing argument
24 there, and I thought that wasn't quite appropriate but if
25 I were to do the same thing here, I would probably sing

1 the Titanic theme and say this permit should be like
2 Titanic and have no safe harbor.

3 We heard a lot of testimony last night about
4 people saying that the opposite of what our elected
5 officials have said and many of our copermittees have said
6 and it's so expensive. People spoke from their heart
7 about why water quality is important to them and what the
8 cost is to them. Dr. Abarbanel in November had a really
9 astute question which was: What is the cost of not
10 adopting this permit?

11 Not only did we hear about people getting sick,
12 we had testimony last night from the Izzy Tihanyi who is
13 the owner of Surf Diva and she talked about the cost to
14 her business. We also had -- Board Members were not privy
15 to the focus meeting process, but we had several
16 passionate advocates from South Orange County including
17 the South Laguna Civic Association and our friends from
18 Clean Water Now who talked about Aliso Creek and the
19 severe erosion damage there and how that impacted water
20 quality and how that not only impacted the creek, but some
21 of the sewage services and other utilities and the massive
22 costs that not only have been spent but are continuing to
23 be spent.

24 So those are -- and if you have more questions
25 about that, I'm sure some of the staff -- Board staff

1 could tell you more about this because it's been an issue
2 in front of the Board for over a decade.

3 I'd also like to say at this time that I've been
4 asked by Leslie Reynolds of Ground Work San Diego and
5 Penny Elia from the South Laguna Civic Association to say
6 that this testimony is also on their behalf as well.

7 I'd like to talk about some of the things that we
8 like from this permit that have been changed since the
9 last go-around. We really appreciate that the staff has
10 taken into account our feedback on enhanced public
11 participation in the water quality improvement process.
12 They've added some really great things in including having
13 a schedule for public participation so that the public
14 will know when they will have a chance to speak, and also
15 for groups who cover more than one watershed to be able to
16 allot our time effectively.

17 We also like the consultation panel process. We
18 think that this is a good process. We encourage the
19 copermittees to select their environmental representatives
20 wisely and to pick those who really do have knowledge.
21 And San Diego Coastkeeper is looking forward to
22 participating in some of those groups as well.

23 The copermittees have expressed some reservations
24 about the independent consultation panel, and that's
25 actually only in relation to the Safe Harbor Provision,

1 and the Alternative Compliance Provision we'll be talking
2 about, where they have a sort of veto process throughout
3 the rest of the permitting Water Quality Improvement Plan
4 process. They have an advisory capacity.

5 San Diego Coastkeeper, we like the idea that the
6 off-ramps are incorporated into the Water Quality
7 Improvement planning process. We hope that copermittees
8 and the watersheds actually do take this option because we
9 think that this is the best way to plan for really
10 rebuilding our watersheds and using our money wisely to
11 get the best water quality improvement.

12 We also like that there will be official public
13 notices on each aspect of the Water Quality Improvement
14 Plan that will be submitted by Board staff. We think it's
15 very important to involve the public throughout that
16 process and we hope that that process is staggered as much
17 as possible to get the most public comment.

18 We also like some of the development requirements
19 that there is a standard, a bar, to be set that applies to
20 all of the copermittees. We've heard from folks at
21 Riverside that they like everything, get all the standards
22 to go away and that each watershedder can have its own
23 standards and we actually like that there are certain
24 standards that apply everywhere. We think that's
25 important.

1 In the last version of the permit there was an
2 alternate infiltration design that was retaining the
3 volume the same as undeveloped conditions determined
4 through modeling. That provision has been removed and we
5 agree with that. The USEPA also opposed that provision as
6 well and we're happy that it was removed.

7 We are also happy on the predevelopment versus
8 pre-project. We've heard some of that today. We believe
9 that the staff got it right that it is important to do
10 predevelopment instead of pre-project. And one of the
11 reasons that that is really important is because the
12 language isn't exactly predevelopment. It's no more than
13 ten percent worse than predevelopment. So if that
14 language is changed to pre-project, it's no more than ten
15 percent worse than pre-project. You continue to get worse
16 and worse runoff conditions.

17 Another thing that we also liked is requirements
18 within these alternative compliance provisions that
19 developers set aside sufficient money to make sure that
20 they mitigate for their impacts. That wasn't in a prior
21 version and we are glad that we were heard.

22 However, there's one big, big problem that we
23 have. We call it our poison pill and it's the alternative
24 compliance section for what we call the safe harbor. I'm
25 going to turn it over to Noah to discuss some of the legal

1 aspects of the problems that we have with this section.

2 MR. GARRISON: Thank you very much, Members of
3 the Board. My name is Noah Garrison. I'm with the
4 Natural Resources Defense Council. I have taken the oath
5 as well.

6 So I want to start with this version and say it's
7 interesting. I believe it was Chair Morales earlier who
8 said, "Well, we've got all the permittees opposed to this
9 and now all the environmental groups are all opposed to
10 this, so we're right on target here."

11 We're not really opposed to the majority of the
12 permit. We definitely have concerns that we would like to
13 see addressed. We have a couple of other topics that Jill
14 and I will speak about. But quite honestly, our
15 opposition really stems from the safe harbor that was
16 inserted into the permit in the last two weeks. That is
17 the primary concern we have. And if you were to strike
18 that provision, it really eases the vast majority of our
19 concerns with this permit at this point.

20 MR. STRAWN: If I can ask a question? I hate to
21 see what color cards, but you changed your cards from
22 green to red from yesterday to today. Was that because of
23 the safe harbor?

24 MR. GARRISON: I would attribute that to a
25 clerical error yesterday as opposed to any indication that

1 we had switched our position overnight. But the red card
2 is primarily a result of the safe harbor. I apologize for
3 any confusion that may have caused.

4 MR. STRAWN: And I apologize for using the term
5 because I don't like the "safe harbor" term. It's not
6 very descriptive. Even though it's fair, I have the same
7 concerns that the City had yesterday.

8 MR. GARRISON: On behalf of the Los Angeles
9 Superior Court system on using that term I apologize as
10 well. We're keeping that in terms of the way the courts
11 have described this previously, and then trying to --
12 continuing that wording so there's no confusion.

13 So what I want to describe is the compliance
14 option, safe harbor or whatever term it is, it is
15 attributed to it, is in a legal provision under this
16 permit and under the Clean Water Act. The reason being
17 that it is something that is being proposed and used for
18 this permit that would relieve compliance requirements
19 from the previous permit, and this sort of relief was not
20 available previously.

21 It violates anti-backsliding considerations under
22 the Clean Water Act, which I'll discuss. It also violates
23 anti-degradation. It also violates anti-degradation
24 requirements under both state law and under federal law.

25 Finally, one of the concerns we have outside of

1 just the pure legality of this term is that from an actual
2 practical implementation standpoint, this is going to
3 require on effectively a watershed by watershed basis,
4 review analysis, participation by the environmental
5 groups, by your Board staff and any number of other
6 stakeholders, on incredibly complex technical material
7 that I would submit these groups simply don't have the
8 time to properly do the job to be sure that you're meeting
9 water quality standards.

10 The proposals that would be required by this are
11 absolutely enormous in terms of their scope to do them
12 right including the modeling that's required, analysis of
13 the BMPs and whatever practices will be put in place. And
14 from a time commitment standpoint, it becomes incredibly
15 unwieldy. From that standpoint alone, let alone the
16 legality, it really should not be included in the permit.

17 So I'm going to start --

18 MR. ABARBANEL: I'm sorry. I would appreciate it
19 if you would elaborate on your last point with an example
20 that is slow and illuminating. I find this to be
21 interesting but I'm a little confused about it.

22 MR. GARRISON: Absolutely. What's required under
23 the new provision that's in place, this alternative
24 compliance for receiving water limitations or discharge
25 prohibitions would be several levels of analysis that

1 include modeling to demonstrate the pollutant load that is
2 being contributed to receiving waters, to determine what
3 BMPs and practices will be put in place, where they will
4 be put in place, the pollutant removal efficiency of these
5 practices, all through a final analysis that demonstrates
6 that TMDLs will be met, for water quality standards will
7 be met.

8 These are incredibly complex technical
9 undertakings. And so this isn't sort of a -- even trying
10 to put together a guidance manual for something where
11 you're trying to come up with specific BMPs to implement,
12 not to meet a set specific numeric standard is an
13 incredibly difficult process.

14 I've sat on technical advisory groups in Orange
15 County and Ventura County, and that alone is a multi-tier,
16 incredibly time-intensive task. When you're looking at
17 this watershed by watershed to meet specific numeric
18 standards through modeling and other BMP efficiency
19 discussions, that is an overwhelming undertaking.

20 MR. ABARBANEL: That helps a great deal. I
21 understand your legal arguments. Is it a sense of lack of
22 confidence?

23 I mean, suppose the modeling and analysis of BMPs
24 and so forth could be made free and instant, are you
25 arguing that they are insufficiently accurate or precise,

1 that they shouldn't replace the alternative?

2 MR. GARRISON: That is certainly a concern and
3 the potential for that and the issue being that in the
4 event that that modeling or BMP efficiency or whatever
5 other parameters are in place is not correct and the
6 pollution is not abated to the level necessary, then
7 they're in compliance.

8 MR. ABARBANEL: I just wanted to separate your
9 thoughts about the quality of the outcome, which of course
10 changes over time, and the cost. That seems to me those
11 are two different issues. As I said, if it were free you
12 still have a concern about it.

13 MR. GARRISON: We do with current approaches,
14 yes, we still have a concern. It would certainly be
15 reduced to a degree in that we would be less concerned
16 about the time and resource needed.

17 MR. ABARBANEL: Right. I'm trying to separate
18 that.

19 MR. GARRISON: But the outcome would still be a
20 concern.

21 So just taking a backtrack under the Clean Water
22 Act, these are very background materials, but effectively
23 the State is required to develop water quality standards,
24 which are a scientifically derived maximum level of
25 pollution that is sufficient to protect beneficial uses

1 whether they're public health, aquatic life, other
2 recreational uses. The State determines these water
3 quality standards.

4 The water quality standards are set in order to,
5 as the Supreme Court has put it, to prevent water quality
6 from falling below acceptable levels. And I think that's
7 an important consideration that when waters aren't meeting
8 water quality standard, or we're not protecting waters to
9 the point that they meet water quality standards, then
10 effectively by definition you're not protecting the public
11 health. You are not protecting aquatic life. You're not
12 protecting the environment. And that's why for all
13 permits under the Clean Water Act, the base premise is
14 that they are in place to meet water quality standards or
15 to attain water quality standards.

16 We've heard a lot about the MEP Standard and that
17 stormwater permits are a different breed and there are
18 some different standards. But overall, for all MEP
19 permits, the ultimate goal is meeting water quality
20 standards.

21 Now, this Board, in 2001, because of the
22 pervasive pollution problems that were in this region and
23 the need to clean up the waters and protect the waters
24 that were meeting beneficial uses, rightly determined that
25 the proper standard is just to set a -- dischargers must

1 meet water quality standards. There are a series of
2 specific practices they must undertake. There are any
3 number of BMPs or provision that's they must implement.
4 But ultimately, the absolute standard of the permit is
5 simply they must meet water quality standards.

6 And the EPA supported this and it's also been
7 upheld by the Appellate Courts of California, which I'll
8 talk about in a second.

9 So the question is what's different about this
10 permit? And under section 2B 3C there is a provision now
11 that was inserted in the last two weeks that states that
12 the copermittees may utilize implementation of the Water
13 Quality Improvement Plan to demonstrate compliance. For
14 each copermittee in the watershed management area that
15 chooses to utilize this option, the copermittee will be in
16 compliance with provisions A1A, A1C and A2A. That
17 includes the receiving water limitations, which state you
18 must meet water quality standards.

19 Now, that is the definition of a safe harbor.
20 There are certainly varying degrees of them. But the
21 Ninth Circuit Court of Appeals stated no such safe harbor
22 is present in this permit, referring to the Los Angeles
23 permit. There is no textual support for the proposition
24 that compliance with certain provisions shall forgive
25 noncompliance with the discharge prohibitions.

1 That is exactly what this is. Compliance with
2 this alternative process whereby you conduct modeling and
3 come up with a BMP solution or a slate of projects or
4 approaches you will take, as long as you implement those
5 approaches or those practices, you are then in compliance
6 with the discharge prohibitions and receiving water
7 limitations. By the Ninth Circuit's definition, that is
8 absolutely a safe harbor. So that's why I refer to it
9 that way.

10 I understand your objection to that phrasing, but
11 under the Court's determination of what this really means,
12 it's a safe harbor. And this is where our concern lies is
13 that this removes the water quality standards as the
14 backbone of this permit, as the end all, this is what you
15 must do to be in compliance with this permit.

16 Now, to the claims that the Ninth Circuit case
17 has suddenly changed the landscape, and that the
18 determinations by that Court, suddenly everyone is now
19 aware that they can be potentially sued and third-party
20 litigation can occur. The Ninth Circuit case hasn't
21 changed anything. Your Board Council has reiterated that
22 in their own response to comments.

23 The Ninth Circuit case, all they did was draw on
24 and actually reiterate the findings of California courts
25 from far earlier. So in 2001, it was understood that the

1 permit required compliance with water quality standards.
2 That permit was litigated by the building industry and in
3 2004, California Appellate Court held that the permit's
4 water quality standards are proper under Federal law, that
5 the Board could enforce numeric, specific, stringent
6 requirements for meeting water quality standards.

7 In case there was still a confusion, the Los
8 Angeles County Permit, also adopted in 2001, was litigated
9 shortly after and the trial court in that case, where
10 numerous permittees sued on the receiving water
11 limitations which said you must meet water quality
12 standards, the trial courts said that the Regional Board
13 included parts 2.1 and 2.2, which require compliance of
14 water quality standards in the permit without a safe
15 harbor. These are independently enforceable requirements
16 that were prohibited discharges that caused for contribute
17 to a violation of water quality standards.

18 At this time, it was clear that these permits
19 could be enforced and the requirement to meet the water
20 quality standards was an independent, completely wholly
21 self-enforceable provision.

22 Now, just to sort of bring this full circle, the
23 Ninth Circuit actually referred back to these cases. The
24 Ninth Circuit said in determining that of course, you
25 could go forward with a lawsuit in order to enforce these

1 water quality standard compliance requirements, the Ninth
2 Circuit stated "we do note as did the District Court that
3 when the validity of this permit was challenged in
4 California State Court, the argument that the permits
5 discharged prohibitions were invalid for not containing a
6 safe harbor was rejected."

7 The Ninth Circuit basically just reiterated what
8 the California courts had said and said that the lawsuit
9 could proceed. It then became an issue of compliance, not
10 an issue of whether there was any question over whether
11 you could enforce these provisions.

12 So at least as of 2005, and I would argue as far
13 back as 2001, all parties have known that these were
14 independently enforceable standards. So it's not that
15 this new permit with these new provisions will suddenly
16 put them out of the compliance. They've been out of
17 compliance for seven years. We're as far back as when it
18 was adopted for 12 years. There is nothing that this
19 permit changes or the Ninth Circuit changes in that
20 regard.

21 So moving on with the new provision, I'm going to
22 discuss the concern and why it's actually an unlawful
23 provision in the permit.

24 The Clean Water Act requires that permits cannot
25 allow for backsliding. And anti-backsliding requirements

1 state when a permit is renewed or reissued, interim
2 backflow limitations, standards or conditions, must be at
3 least as stringent as the final effluent limitations
4 standards or conditions in the previous permit. These are
5 regulations on the Clean Water Act. I know that some of
6 the permittees stated that the receiving water limitations
7 are not actually effluent limitations.

8 I would point that the Clean Water Act defines an
9 effluent limitation incredibly broadly and courts have
10 similarly described them broadly as any restriction
11 established by the State or the Administrator on
12 quantities, rates, and concentration of chemical,
13 physical, biological and other constituents which are
14 discharged from point sources.

15 This is absolutely an effluent limitation. Even
16 if it wasn't, as you can see in the Federal regulations,
17 it's certainly a standard or condition in the permit. So
18 it's not a concern. But these do constitute effluent
19 limitations.

20 So sort of summing up to this point, and then
21 I'll show the specifics here, we have receiving water
22 limitations that have been in the permit since 2001 and
23 that California courts have upheld in similar language
24 since at least 2005 as being independently enforceable.

25 The 2001 and 2007 permits in San Diego certainly

1 did not contain any kind of waiver or safe harbor from the
2 receiving water limitations. The Ninth Circuit decision
3 hasn't changed that. But this permit would go ahead and
4 say well, even though you've been required to do this for
5 the past 12 years, we're going to come up with a system
6 that relieves you of compliance if you are implementing a
7 plan that's been approved by the Board, and at a minimum
8 would extend time. It would say that while your putting
9 your plan in place, you don't have to be held accountable
10 for the water quality standards.

11 The Third Circuit of -- excuse me. Of the Third
12 Circuit, the EPA Region 3 has stated that backsliding in
13 NPDES permits is prohibited. I point that this actually
14 refers to an MS4 Permit. So backsliding requirements
15 absolutely apply in a stormwater context. But backsliding
16 is prohibited and allowing additional time to complete a
17 task that was required by the previous permit, constitutes
18 a less stringent condition and violates the prohibition
19 against anti-backsliding.

20 So by saying you're going to allow further time
21 while I implement these plans and work through to try and
22 eventually achieve water quality standards, and during
23 that period they're not required to meet the standards, it
24 violates the anti-backsliding requirement.

25 There's a -- this is a chart that shows how

1 backsliding works and effectively what it states is the
2 first question that's sort of hard to read off the top --
3 I apologize -- but is the effluent limitation based on a
4 state standard? And in this case they absolutely are.
5 These are State water quality standards.

6 The next question is are water quality standards
7 being met? And if they're not, you can follow the path on
8 the right. If they're not, then you cannot revise the
9 permit to allow for a change. If they are, then you run
10 up against two different problems.

11 First, it has to meet anti-degradation
12 requirements. And in this case, the permit has not
13 provided any anti-degradation analysis, and I'll get to in
14 a second. But even still, the revision still has to be
15 compliant overall with meeting water quality standards.
16 And again, in this case, because it would potentially
17 relieve compliance for meeting water quality standards, it
18 doesn't meet the backsliding requirements.

19 Similarly again, under regulations in the Clean
20 Water Act, if it's a standard or condition not an effluent
21 limitation, it still cannot backslide from the previous
22 permit.

23 So I want to talk a little bit about
24 anti-degradation policy and this is a fairly complex area
25 of Clean Water Act law, and State law, but I'll try to sum

1 it up fairly quickly, which is anti-degradation protects
2 uses and water quality necessary to meet uses for a
3 variety of waters ranging -- three tiers including high
4 quality and it's lower tier, all waters of the State. So
5 effectively, anti-degradation protects all water
6 statewide.

7 The catch to this is that water quality can be
8 lowered only in very limited circumstances and there
9 haven't been analyses performed here that would allow for
10 that. And in no case, under any circumstances under
11 federal law can water quality be lowered to a level that
12 would interfere with existing or designated uses meaning
13 it can't allow waters to become impaired.

14 MR. STRAWN: Can you slow down?

15 MR. GARRISON: Sorry, I apologize. I'm a New
16 Yorker and it's taken a lot of training to get me to this
17 point.

18 MR. STRAWN: Clearly you're the vein of all court
19 reporters.

20 MR. GARRISON: If it were just court reporters I
21 would take that as a compliment. And I apologize.

22 The problem with, again, the provision that is in
23 the permit now is it says that even for waters that aren't
24 impaired, that don't currently have the TMDLs, we're going
25 to relieve compliance with water quality standards and you

1 can come up with a plan that will attain them and while
2 you're implementing that plan, you're relieved of meeting
3 water quality standards. So if that water then becomes
4 impaired as the plan is being implemented, they're
5 relieved of compliance for it. And that would violate
6 anti-degradation requirements.

7 Effectively, the point being where a TMDL doesn't
8 exist, you can only lower the water quality in very
9 certain circumstances and you absolutely cannot lower the
10 water quality to the point that it fails to meet quality
11 standards and that's what this permit would allow.

12 So just a quick sidenote on TMDLs. The one thing
13 that I can say about this provision is that there's a
14 point that we sort of uneasily may agree with and that is
15 where a TMDL actually is in place for a particular water
16 body pollutant concentration, we do agree that there
17 should be a provision or at least would be allowed for a
18 provision to be in the permit, that relieves compliance
19 with meeting the receiving water limitations as long as
20 the TMDL is being implemented properly.

21 For example, say, for the bacteria TMDL, as long
22 as interim limits and interim milestones and numeric
23 requirements are being met along the way through the TMDL,
24 even if water quality standards are not being met, so long
25 as the TMDL is being complied with, we agree that it makes

1 no sense for us to say but you have to meet water quality
2 standards for bacteria. That's a process that EPA, this
3 Board, the State Board, have all been through to lay out a
4 schedule in order to attain water quality standards. It
5 doesn't make sense that the permit would then say you must
6 meet them on day one.

7 So we do agree there is room for somewhere in the
8 permit a provision providing a safe harbor or a waiver
9 from compliance or a relief from compliance would make
10 sense in the case of TMDLs. But elsewhere, where there is
11 an impaired water and there is no TMDL in place, or where
12 waters are current meeting water standards and are not
13 impaired, this provision allowing for a waiver from an
14 alternative compliance with receiving water limitations is
15 unlawful under the Clean Water Act.

16 With that, I'm going to turn it over to Jill
17 Witkowski. She's going to talk a little bit more about
18 the problems with the provision as it's currently written.

19 MS. WITKOWSKI: This provision that was added on
20 March 27th is two pages long starting on the bottom half
21 of page 31. And I'm going to walk through very briefly
22 some of the problems with it just to show that not only is
23 it illegal, but the problem is this is an irreparable
24 provision. You cannot fix this.

25 And first, in spirit, the third to last speaker

1 yesterday, one of the engineers, really said when we're
2 talking about outcome-based, we're really talking about
3 receiving waters. And that to me is the heart of what
4 this permit is is focussing on outcomes in the receiving
5 water.

6 What this provision does is say we're going to
7 focus on process and not care about the outcome, not care
8 about the receiving water. And so this provision to me
9 not only is illegal, it violates the spirit of this
10 permit.

11 So going to walk through some sort of technical
12 stuff on problems that I picked out just in my two weeks
13 of looking at this. So we're focused on this watershed
14 model or other watershed analysis. There aren't any
15 standards for this model. No peer review, no data on
16 which it's based. As a wise man once said, "All models
17 are wrong. Some are just more right than others," or
18 "less incorrect than others" shall I say. So models can
19 be garbage in, garbage out. They're very extensive.

20 The lack of standards here is problematic. I'm
21 concerned there's not enough data for a robust analysis.
22 As we heard the County yesterday, they're lobbying for
23 less monitoring and I have yet to see that we have robust
24 data for all watersheds for all pollutants to be able to
25 run robust modeling.

1 The bacteria TMDL, to me, is a good example of
2 why this will not work. The bacteria TMDL went through
3 years, years of technical analysis and peer review and
4 then it was revised again. This was what, a seven-year
5 process? It was definitely a multiyear process and people
6 are still saying the science isn't good.

7 The Water Quality Improvement Plans are supposed
8 to be done in two years and that was the bacteria TMDL's
9 one pollutant. There's also inconsistencies on what the
10 modeling is supposed to achieve. On page 32 it said it
11 will achieve numeric goals within the established
12 schedules. But then later in the appendix, F53, it's not
13 really true. They have to reasonably demonstrate that it
14 can achieve goals within the established schedule. So
15 there's very little protection here that we're actually
16 going to get to the water quality that we want.

17 On strategies required, in Provision B3B, this is
18 further down in the paragraph, said they are actually
19 going to implement these. There's no reference to the new
20 standards that you have to include. So because our
21 current Water Quality Improvement Plan just focused on the
22 worst pollutants, we've got a disconnect here about
23 whether you have to just do the worst pollutants or if you
24 have to do them all. So that's a language problem.

25 And we've got lack of cross-referencing between

1 these sections. Good for us because this provision can
2 just be chucked altogether without any impact to the rest
3 of the permit. But if you were actually going to try to
4 keep it in, it's completely confusing and there needs to
5 be a lot of cross-references added.

6 For the monitoring and assessment, it says that
7 it's going to happen but we don't know how often. We
8 don't know the minimum. We don't know when they're going
9 to occur. We heard the County say yesterday that, well,
10 you don't really want to look at wet weather because you
11 really can't tell and it's all over the place and a
12 suggestion of maybe five years or more of being able to
13 have assessment. It's unclear.

14 With compliance schedule regulations, there are
15 specific requirements about interim dates not exceeding a
16 year. They also talk about compliance schedules only
17 available when it's necessary to allow a reasonable
18 opportunity to contain compliance. With requirement
19 issues, less than three years. So if any of the basin
20 plan standards were more than three years before, this
21 doesn't apply.

22 And then this also talks about recommencement of
23 discharge. So this provision is only for discharges that
24 stop and then start again. And are they even allowed for
25 continuing discharges? No, this goes back to Noah's

1 anti-backsliding.

2 We've got this consultation panel issue. Again,
3 this would be insufficient public involvement. This to
4 us, if it were actually in the permit, would be a major
5 modification because you're now having all these standards
6 that they would have to meet for all of the permit
7 requirements. And there are specific, under the
8 regulations, things that have to be done.

9 There has to be a request for a modification. We
10 have to follow notice and comment procedures. Compliance
11 schedules under those are only allowed for Act of God,
12 strikes blood, things that we don't have here. So I think
13 we're trying to fit a square peg into a round hole.

14 Other problems. Then this -- now, how long does
15 this last? So you have a plan and then it's approved by
16 the Water Board. So now you're in compliance without
17 having to actually do anything. You put together a plan.
18 You're meeting the receiving water limitations. There's
19 no guarantee of a hearing because under the provisions in
20 F1 B4, which are the Water Quality Improvement Plan
21 sections, the Executive Officer can decide there's not
22 going to be a hearing.

23 So we could hypothetically have these whole plans
24 that say we're in compliance with receiving water
25 limitations because we have a plan and only one

1 environmentalist got to look at it and we're not having a
2 hearing and this is terrifying. Then how long does this
3 last?

4 We remain in compliance as long as the analysis
5 is accepted and continues to be accepted. The
6 copermittees had a problem with the continue to be
7 accepted yesterday. I think it should continue to be
8 accepted if there were new information. They have to
9 demonstrate progress. What does that mean? Do we have to
10 actually meet interim limits? There's nothing that says
11 if you don't meet an interim limit, you're now in
12 noncompliance, and now we can take enforcement action
13 against you for being not in compliance with the receiving
14 water limitations.

15 There's this connection with the other
16 copermittees implementing their editor process. I love
17 that part of it because so far we've seen the editor
18 process to be a sham. No one has done it yet and so
19 compliance is basically tacked to other people doing a
20 real editor process, nobody will ever get a safe harbor
21 because we've got this sham process that hasn't actually
22 occurred.

23 In the end, this is a bad policy. Not only is it
24 illegal, not only is it poorly written, this is a policy.
25 It doesn't have to be in here. The copermittees asked for

1 it. They're afraid of some so-called loaded gun. This is
2 an unknown -- this is a fear that doesn't really exist
3 because the amount of money that they've spent defending
4 these receiving water limitations -- I'll answer for the
5 County is zero. Nobody has sued over this yet. The
6 Regional Board hasn't enforced over it yet.

7 And what the Regional Board is really trying to
8 get at is trying to get these TMDLs that are not done for
9 receiving waters that are impaired and need TMDLs and they
10 want them done by the copermittees.

11 Let's have a process, let's have a third-party
12 process like the Penasquitos sediment TMDL. Let's have --
13 if the copermittees really want protection from a scary
14 environmentalist, why don't they go to the Board and say,
15 "Hey, we've got problems. We are not in compliance. Give
16 us a cleanup and abatement order. Give us a time schedule
17 order. We will admit that we've got problems."

18 But they haven't yet done that. They have these
19 report that's say, "Oh, we're doing such a great job.
20 Look at all this money that we're spending. We've got all
21 these reports." But if they're really concerned that the
22 water quality is a problem, let's work on it together and
23 see some admission of some guilt and let's work toward
24 solutions.

25 I'm going to tell you since we're right after

1 lunch and I like analogies, I'd like to tell you and to
2 show you my depths of despair over this provision, I'd
3 like to talk about cake.

4 So this permit to me is like a cake that we spent
5 a really, really long time talking about and getting ready
6 to bake and baking it and everybody's got their little
7 cooks in the kitchen about how it's supposed to be. And
8 some people think it's been cooked too long, and some
9 people say that it's lumpy, but it's a pretty good cake.
10 And then the staff went and they frosted it with mud, and
11 now I don't want the cake anymore. I have a really hard
12 time with this cake. I'd really like you to scrape the
13 frosting off the cake, and give us the cake that we had
14 that we had, that we worked so hard on.

15 With that, I will turn it back to Noah.

16 MR. GARRISON: That's fairly hard to follow but
17 I'll do my best.

18 I do want to say throughout this that we do
19 really appreciate the efforts that staff have made and
20 their response to our questions and the effort they've put
21 in to meet with us and discuss the permit terms.

22 We have a fundamental disagreement on including
23 this provision but staff have really done an excellent job
24 of being responsive when we've asked them questions and to
25 coming to us with potential solutions and I think they

1 should be absolutely commended for the work they have
2 done.

3 With that, I'm going change tracks here quite a
4 bit. As I said, the Receiving Water Limitations
5 Alternative Compliance option is really our primary
6 concern with the permit right now. With that removed, I
7 think our major objection to adoption would effectively go
8 away. But there are things that we certainly would like
9 it see cleaned up in the interest of getting a better
10 permit and making it more easy to implement something.

11 One of the things that's been talked about quite
12 a bit in the last day and a half or so is the long bank
13 development requirements and the change between simply a
14 retention standard and a remove 100 percent of pollutant
15 standard.

16 And I have to say while I absolutely appreciate
17 staff's intention here and I think that there are certain
18 things that are absolutely admirable and things that we
19 would like to see in a 100 percent pollutant removal
20 standard, we tend to agree actually on this front with the
21 permittee community that we would rather see a
22 retention-based standard. This is what we've been seeing
23 all throughout California when we've actually been pushing
24 for it quite a bit, is effectively a hierarchy that starts
25 with a standard that states you must retain onsite the

1 85th percentile storm.

2 This is a graphic from Dr. Richard Horner from
3 the University of Washington, who was on the National
4 Academy of Scientists expert panel on the stormwater
5 pollution. What it shows is actually for the majority of
6 development types, those five bars on the left which
7 represent different types of development, single-family
8 residential, redevelop projects, commercial projects.

9 If you're on soils that are at least somewhat
10 infiltrated, you could actually retain 100 percent of the
11 runoff across the board. So meeting the 85th percentile
12 standard or even a 95 percentile standard, which we think
13 would be warranted, but certainly the 85 percentile
14 standard, is absolutely feasible and a strong approach to
15 take.

16 Those bars on the right-hand side are for the
17 same types of development on non-infiltrative soils, soils
18 where it's assumed there's literally no infiltration
19 capacity, clay soils. There are areas of San Diego County
20 or Orange County that sort of meet this parameter. But
21 even in those cases, retention of at least 50 percent if
22 not 70 or 80 percent of that standard is still feasible
23 and the rest can be treated using other practices.

24 So we agree fundamentally with the approach of
25 set a retention standard where it's not feasible for

1 whatever set constraints you have to meet that standard,
2 allow for a biofiltration to treat some multiplier of the
3 remaining volume. Biofiltration, as many people have
4 already indicated, is not as effective at removing
5 pollutants and so if you treat a larger volume of runoff,
6 you potentially could start getting at removing a similar
7 pollutant load. And that's why we say that you might
8 treat 1.5 times the volume.

9 I know that Riverside County has a separate
10 standard. I believe they state that it retains more
11 runoff, or would treat more runoff. But in either case,
12 you have a retention standard which brings all sorts of
13 benefits in the retention of stormwater, followed by a
14 biotreatment, which is the next best practice we can have.

15 Alternative compliance for offsite mitigation or
16 regional projects would absolutely be a valid approach in
17 this case, whereas infeasible (inaudible) onsite, if
18 that's available under the permittees, we would support
19 it. But the retention standard should be the primary
20 standard, not this 100 percent of pollutants.

21 MS. KALEMKIARIAN: Can I have you clarify
22 something because it's getting late and I want to be sure
23 I heard it right. So you agree with the copermitttees'
24 request that the 100 percent requirement shouldn't be in
25 the permit?

1 MR. GARRISON: We agree with their interpretation
2 that it should be a retention not the 100 percent of
3 pollutants standard.

4 MS. KALEMKIARIAN: So what the wording was before
5 in that section?

6 MR. GARRISON: Right. Exactly. In fact,
7 previously the permit had, under a different alternative
8 compliance scheme, but it did have a biofiltration option
9 with a 1.5 times multiplier, I believe, and that's
10 something that we could live with I would say as a next
11 step down if it is infeasible to retain the runoff.

12 I know Riverside County will speak to their
13 standard. But each having that multiplier means we are
14 treating a larger volume of runoff. We're getting at
15 least a better percentage of the pollution out of the
16 water before it's discharged from the site.

17 MS. KALEMKIARIAN: But it would be acceptable to
18 you even without the 1.5. I mean, just the way it was
19 written before, before the revision?

20 MR. GARRISON: I would have to see exactly what
21 the revision was before on the next step for infeasibility
22 and I'm not entirely sure there was exactly an
23 infeasibility structure in the same way. So I would have
24 to ask staff if it was written like that.

25 The Ventura Permit and the Los Angeles County

1 Permit both have structures in place like this. Orange
2 County has a similar structure in place. They just don't
3 have a multiplier on their biofiltration requirement and
4 that's something we would want to see changed.

5 With that, I'm going to turn it back to Jill and
6 then ultimately to Colin Kelly.

7 Thank you very much.

8 MS. WITKOWSKI: I have a quick correction. I
9 spoke about Miss Elia earlier and she is not with South
10 Laguna Civic Association. She is with the Hobo Aliso
11 Chapter of the Sierra Club.

12 I want to talk briefly about the concrete
13 conveyance channel hydro-modification exemption, which
14 people seem happy about except for the environmental
15 community, especially Jim Pew from the Ottoman Society.
16 We've been talking about the concrete conveyance channel
17 but I want to talk about what this means actually in
18 reality.

19 So I found some concrete conveyance channels that
20 actually go concrete all the way from the point of
21 discharge to San Diego Bay, and they actually have names
22 of -- these maps actually are courtesy of the City of San
23 Diego -- from their channel clearing, their Flood Channel
24 Maintenance Program as they call it. So they call it
25 Solola Channel and Cottonwood Channel. In C there shows

1 that according to their record, those channels are
2 concrete for their length.

3 So no problem, right? We have concrete
4 conveyance channels. There's no issue with that except
5 that these concrete conveyance channels are actually in
6 the Basin Plan called funding intermittent streams.

7 So these weren't channels with just concrete
8 boxes that the City of San Diego built in the middle of a
9 field and are just completely manmade. They, at one
10 point, were streams and should be streams. And they
11 actually have beneficial uses. They have wildlife
12 beneficial uses, and warm aquatic life beneficial uses.

13 And under the Clean Water Act we have to protect
14 those beneficial uses existing and potential beneficial
15 uses. If you want to remove those beneficial uses,
16 there's a mechanism for that called a use attainability
17 analysis, which is a very long process that I wouldn't
18 recommend. It would be terrible.

19 But under this permit, we have to protect the
20 beneficial uses. And so either one, the wildlife habitat
21 beneficial use is not being met because we've got these
22 channels concreted, or if you've actually seen some of
23 these concrete channels, they do get deposition in them,
24 and then they get vegetation in them and then they do
25 support wildlife.

1 And the problem with having no hydro-modification
2 requirements in that area is that if you get increased
3 flow, you're going to blast out the habitat that actually
4 occurred in there and you will have -- you will not be
5 respecting the beneficial uses. You'll have negative
6 problems there.

7 And as you can see, this is from the EPA but it
8 was also in the hydro-modification presentations that were
9 last summer through the focus meeting process,
10 hydro-modification is one -- it's actually the number
11 three source of -- it's actually impairments for rivers
12 and streams.

13 So with that, I'd ask you to reconsider that
14 exemption and take it out. And now I will pass it to
15 Colin Kelly.

16 MR. KELLY: Hi, my name is Colin Kelly. I'm the
17 Staff Attorney for Orange County Coastkeeper and Inland
18 Empire Waterkeeper. I don't get down here very often.
19 I'm mainly in Region 8 most of time but like the County of
20 Riverside --

21 MR. STRAWN: Did you state that you --

22 MR. KELLY: -- I have taken the oath, thank you.
23 Like the County of Riverside, I can sort of
24 relate. I'm in three Regional Boards as well. We're in
25 almost the entire area of Riverside so we get Colorado as

1 well. So it's a treat.

2 This is just a current state of area water
3 bodies. This is sort of a bigger picture presentation.
4 Basically, the copermittees who have been here, we've
5 heard from them yesterday, they've had around 20 years to
6 meet water quality standards at least in these permits.
7 And some as can be seen in the answers to comments from
8 the County of at least Orange, don't acknowledge they
9 contribute to exceedances of water quality standards
10 through their MS4 systems.

11 And the Regional Board has rarely -- this one or
12 Regional Boards outside of 9 -- have taken enforcement of
13 the existing permit -- or permits for, and even when
14 public health has been at risk.

15 Just briefly, this is a description of just the
16 303(d) list of water bodies in this regional board for
17 South Orange County.

18 Aliso Creek -- some of the pollutants that are
19 here are contaminants. Aliso Creek is indicator bacteria,
20 toxicity -- I'm not going to go over all of these. They
21 include phosphorus, copper for Dana Point Harbor, toxicity
22 in zinc, toxicity for Laguna Canyon. Oso, toxicity. Prima
23 Deshecha, cadmium, nickel. El Segundo's toxicity. San
24 Juan is selenium, nitrogen and toxicity.

25 And Pacific Ocean is very broad. So I'll just

1 give you an example of San Clemente's City Beach. North
2 Beach is total coliform. There's also enterococcus and
3 total coliform on other parts of the shoreline in the
4 Pacific Ocean.

5 This is a picture of Crystal Cove. That does not
6 look very natural, that color. For 303(d) lists of water
7 bodies in Riverside County, that's Temecula Creek. Long
8 Canyon Creek is iron, manganese, E. Coli, and fecal
9 coliform. Warm Springs is iron, phosphorus and total
10 nitrogen. And Temecula, this one, is toxicity.

11 Now, this is to show there's a significant
12 problem we have here. I deal with all of Orange County
13 and it's pretty startling when you see that 303(d) listed
14 water bodies in north versus south, there's a lot more in
15 south Orange County than one might expect compared to the
16 geographic area that we're talking about for the regional
17 board.

18 For areas of beach closures in 2011, 300
19 closings. Orange County, 750. We heard a lot yesterday
20 from copermittees that this is really not as large a
21 problem as one might think, that we're really -- we're
22 almost there. We're almost to the end line on this and
23 we've really improved. And Orange County Coastkeeper, we
24 don't contest that. I think that the Counties, the
25 copermittees, should be given a great amount of credit for

1 the amount of work that they have already done in the past
2 20 years. Water has definitely improved and it's in large
3 part due to the actions of these counties and the Regional
4 Board. So they should be commended for that.

5 However, stormwater is still the largest cause
6 for these beach closures. And the costs we heard
7 yesterday of implementing permits definitely can be
8 expensive in certain situations. However, you're only
9 looking at one half of the costs.

10 So we'll just take a case study. Now, this is in
11 Huntington Beach, which is in Region 8, but in 1999 it was
12 closed for much of the year. There were closures --
13 Huntington is Surf City USA. They have the Open of
14 Surfing there. The economic impacts -- it's still not
15 really determined what the cause of the bacteria level
16 jumps to cause the closures. However, a lot of people
17 point at urban runoff.

18 After the Huntington Beach closures, researchers
19 at USC detected polio virus, coxsackie and hepatitis A in
20 the urban runoff pouring from the storm drains into
21 California beach waters.

22 Now, you're likely to hear from copermittees that
23 was 1999. This is 2013. There's truth in that. The
24 County has done some very good work in improving since
25 1999 and that should not be ignored. I don't think we are

1 quite where we should be, and I don't think that hitting
2 the pause button on development of permits is really
3 appropriate.

4 I'll give you another little tidbit. Researchers
5 at UCI, which is a proud Orange County University, found
6 that over a two-year period surfers in Newport Beach and
7 Huntington Beach were twice as likely to get sick than
8 their counterparts in Santa Cruz 400 miles north.

9 I grew up as a surfer in Southern California, and
10 the first thing you learn as a surfer before you stand up,
11 after you either borrow someone's surfboard or buy your
12 own if you're lucky enough, is if it rains don't go in the
13 water until the fourth day. And I'd like to be able to
14 live in a Southern California where I don't have to teach
15 that to my children, that they should be able to go in the
16 water without worrying about getting sick.

17 So another case study right here. This is San
18 Clemente, a little bit closer to home. It's in Region 9.
19 We frequently -- in South County, this is the number one
20 issue I receive calls about and that's Poche Beach. I'm
21 sure you're all familiar with Poche. It's a regular on
22 Heal the Bay's annual Beach Bummer list. Since 1999, it
23 has received an F grade every single year except for 2005
24 when it received a D.

25 So this is an issue for the County as a whole.

1 But the phone calls I receive from people who live nearby
2 Poche, I have to let them know because of our name people
3 think I'm a regulator. So I get yells. The phone calls I
4 receive are people screaming at me about Poche, literally
5 screaming at me. So I have to calm them down and say,
6 "I'm not the correct person to yell at. I'll give you
7 their number." But I try to walk them through, and we are
8 all part of this process with Poche. This is a situation
9 where, again, the County should be given a lot of credit.

10 There is no doubt the County has put a
11 significant amount of resources towards improving this
12 beach. Now, that has not yielded results that people are
13 happy with, but I don't necessarily think it's all the
14 County's fault. I think it is their responsibility.

15 There was a watershed study that was performed at
16 a cost of around 280 thousand dollars to determine the
17 source of high bacteria levels and in the water coming out
18 of Poche Creek. And the County installed a runoff
19 treatment system with ultraviolet light that discharges
20 into a scouring pond. That facility cost approximately
21 three million dollars. So that's a good amount of
22 investment. The County was trying to do the right thing.

23 What makes me nervous about the existing permit
24 is that I believe a lot of the action that the County has
25 done on this has been, at least in the background, a

1 recognition that they have to do something, that although
2 they can take calls from people in San Clemente about
3 this, that they just can't simply ignore it.

4 This is a problem that there may be a solution
5 out there. I have spoken with the County about it. This
6 is a very complex situation. The scouring pond is a
7 significant part of that problem. And there are other
8 non-regional Board issues related to this.

9 But I sit back and think if there was something
10 like a safe harbor, if the County could just put a plan
11 forward and not necessarily see that an outcome happens,
12 would we be as far along in this development of a solution
13 as we are today? If this was the law ten years ago, if
14 this was the permit in 2001, would we be 15 years away,
15 20 years away from a solution? Because I think now we're
16 five years away from a solution at least. But it's a
17 concern about the County's accountability to the people
18 who live in this area.

19 MS. KALEMKIARIAN: May I ask you a question along
20 those lines? Tell me your name again.

21 MR. KELLY: Colin Kelly.

22 MS. KALEMKIARIAN: Colin. Because we're talking
23 about the safe harbor, from the perspective you have of
24 trying to enforce -- for lack of -- this is the enforcers,
25 but monitor and be an advocate, when you say that having

1 these provisions that were added, you fear would lessen
2 the motivation. Do you think it was a fear of litigation
3 that was motivating the County before?

4 I don't hear that that's the case? What was
5 motivating them? And then I'm going to follow up. From
6 your perspective practically speaking.

7 MR. KELLY: Well, I don't really think that the
8 copermitttees understand the complexities in bringing in
9 action to enforce some of these things. If the counties
10 think that they're incredibly difficult to comply with,
11 they're incredibly difficult to enforce. So unless you're
12 a highly experienced nonprofit, this might be something
13 that would be difficult for the average -- or let's say,
14 community group to do deal with.

15 MS. KALEMKIARIAN: Let me try to focus my
16 question because the way that these alternative compliance
17 provisions appear to me to be is that it's an attempt for
18 a regulator to engage in this interim process and to say,
19 well, if you haven't gotten here, we're going to try to
20 pull you forward some more by having interim goals and
21 working on your plan. I understand that. I'm not saying
22 I think it's going to work or not work.

23 Before this was in existence, and the permit --
24 the previous permit as I understand, didn't have anything
25 like this, that said you have to do it. So what was

1 motivating this improvement over ten years in your
2 opinion?

3 MR. KELLY: It's hard for me to determine what
4 the motivation is and I think that I would be remiss if I
5 didn't -- I think the County and most counties at least
6 have in the back of their minds, the managers, that
7 third-party enforcement is a possibility.

8 Now, I don't think it's a likelihood with a lot
9 of these things, but it's a consideration.

10 MS. KALEMKIARIAN: So what tools did you have in
11 your toolbox, as an attorney who cares about this, over
12 these last few years? I mean just hassling them? Which
13 is a big tool.

14 MR. KELLY: Yeah, it is a big tool. I can give
15 you a third-party activist secret and the secret is if
16 copermittees are engaged in a good faith effort to reach
17 solutions, we have other things to deal with. We see good
18 and bad actors who are permittees.

19 And speaking for Coastkeepers, I'm not speaking
20 for anyone else, the County of Orange was making a good
21 faith effort in dealing with this. The City of San
22 Clemente was going in good faith trying to deal with this.
23 This is a complex issue with Poche Beach in particular.
24 I'm not assured that if the County could simply put forth
25 the proposal to the Regional Board and say, "Here's our

1 plan," and we're allowed to step back, implement something
2 and say, "Well, it didn't work but we tried." I don't
3 think that would necessarily see the advancement towards a
4 solution as quickly as what's going on right now.

5 MS. KALEMKIARIAN: So these provisions, just
6 to -- because I'm really trying to understand as an
7 activist, if you had under the alternative compliance some
8 very specific things they were saying they were trying to
9 implement, that wouldn't give you even more ability to
10 prod them and poke them and get them to move? It would
11 give you less?

12 MR. KELLY: I don't see the liability problem
13 that the counties are talking about. I think those are a
14 losery. A lot of these are the fear of potential
15 litigation. But as Noah and Jill have laid out, that fear
16 has been there a long time and yet that has not resulted
17 in taxpayer money being spent defending the County in any
18 of these actions.

19 Now, as a person who represents the public
20 interest, we have members. The membership of
21 environmental organizations want to see progress. The
22 people who talk to us about Poche want to see Poche
23 cleaned up as quickly as they can. Everyone in that
24 situation is frustrated. I just don't reasonably think
25 that if the County was allowed a way out, that we would

1 be -- ten years ago -- we would be where we are today.

2 I think that it allows resources that otherwise
3 would go towards cleaning up Poche to be dedicated instead
4 to something else that for the people of San Clemente, who
5 want to be able to use their water without getting sick,
6 that's a choice that those people are not going to like.
7 And it is going to violate the ability of those people to
8 actually access the water because it's not meeting its
9 uses.

10 Going on to Riverside, if I've answered your
11 questions, Riverside is distinct with Inland Empire
12 Waterkeeper and Orange County Coastkeeper. Orange County,
13 coastal Orange County, is going to have development. But
14 in my role as the Staff Attorney for Inland Empire
15 Waterkeeper, that's where the real development is
16 happening. We saw a swift decline in development after
17 the crash.

18 All 80 percent of my time now in Inland Empire
19 Waterkeeper is dealing with development now. Mega
20 development is coming to Riverside. There is a huge plan,
21 multiple plans, to really go after and develop Moreno
22 Valley, outside of your jurisdiction but it's going to
23 have effects in this area. We think that Riverside County
24 in Region 9, this is where low-impact development is going
25 to hit hard.

1 So we want to make sure that there's a
2 well-reasoned plan to really encourage low-impact
3 development. And the situation that we're seeing is that
4 a lot of the development that happened pre 2008 that has
5 sort of fallen off and has stalled, they are saying that
6 low-impact development does not even apply to them because
7 it was entitled before the adoption of the last MS4
8 Permit.

9 So on Riverside County, I think that Riverside
10 has actually done some really interesting things. They
11 have definitely adopted a lot of the spirit of low-impact
12 development and Inland Empire Waterkeeper really
13 appreciates that. But this -- on the low-impact
14 development side is-- this is where we're looking to see
15 how this permit was actually enforced.

16 And in closing, these permits are really a vision
17 of where we're going and that's why Waterkeeper is
18 concerned about that, because Waterkeeper considers this
19 to be a hoke that copermittees do what they say they're
20 going to do and if they don't, well, they tried.
21 And it's a working -- we appreciate this is a working
22 document. There is WQIPs. There is involvement of the
23 copermittees.

24 But we also have to remember that these things
25 have long-term impacts. And when we talk about what

1 low-impact development is going to look like in this
2 permit, in areas that are going to go through development
3 like southern Riverside County, those impacts are going to
4 be (inaudible). So we should at least determine what we
5 think low-impact development is and how we're going to
6 implement that.

7 I'm not sure what our available time is but we
8 reserve the remaining of it for any rebuttal.

9 MR. STRAWN: Four and a half minutes left. We'll
10 round it to five minutes for you.

11 MR. GARRISON: Thank you very much for your time.

12 MR. GIBSON: Good afternoon, Mr. Chairman. I'd
13 like the record to show that Tomas Morales returned to our
14 session at 4:07 p.m.

15 CHAIRMAN MORALES: And I would also like the
16 record to show that I sincerely apologize to the audience.
17 Court of Appeal actually took us at the very end. But I
18 do apologize.

19 MS. HAGAN: Do you want to see if any parties
20 have cross-examination of the environmentalist groups?

21 CHAIRMAN MORALES: Do any of the designated
22 parties want to cross-examine any of the folks that
23 testified on behalf of the NGOs?

24 MALE SPEAKER: No.

25 (Laughter.)

1 CHAIRMAN MORALES: Seeing no takers --

2 MS. HAGAN: Would this be a good time to address
3 the City of San Diego's cost benefit analysis document?

4 MR. STRAWN: Jill, you had a request earlier to
5 make a point. Can we back up and do that? We were kind
6 of waiting for Chairman Morales to come back and you just
7 needed a minute for this, right? But it does count
8 against your time.

9 CHAIRMAN MORALES: Actually on this, I don't
10 think it will because what we're talking about is a
11 document that was newly brought to our attention, and the
12 determination is whether we make it part of the record or
13 not.

14 MS. HAGAN: So maybe it would be helpful if I
15 just refresh for you the standard to consider new
16 information and then you can hear from the folks who are
17 proponents of the document and opposed to the document.

18 The regulations that apply to our proceedings
19 allow the Board to establish dates for receipt of written
20 comments and cutoff dates, written evidence, new evidence.
21 A date was established earlier in this proceeding back on
22 January 11th.

23 And so the standard then, in our regulation, says
24 that the Board may refuse to admit late evidence. The
25 policy is to discourage submission of surprise or late

1 exhibits and information.

2 It also says that the Board shall refuse to admit
3 it if it would prejudice any party. However, the Board
4 may choose despite that to allow it if the person who
5 seeks to have it introduced would suffer severe hardship
6 if it's not admitted into the record.

7 CHAIRMAN MORALES: So it's not really a "shall."

8 MS. HAGAN: So it's not a complete "shall." It
9 gives you some discretion. And then while you were away,
10 there was brief reference to this document by County
11 Council for San Diego --

12 CHAIRMAN MORALES: Actually, I was here for that.

13 MS. HAGAN: Oh, you were here for that? But he
14 didn't get into a lot of detail about it. And there may
15 have been a reference to it by one of the County's
16 witnesses who spoke after Mr. O' Day.

17 CHAIRMAN MORALES: Right. And I think I did pose
18 a question as to when the document was actually first
19 published or available.

20 MR. O' DAY: Actually, we have someone here who
21 can clarify that. It isn't me. It's Kris McFadden from
22 the City of San Diego.

23 MR. MCFADDEN: Good afternoon. Kris McFadden,
24 Deputy Chief, City of San Diego. I was sworn yesterday.

25 This document was something the City actually

1 started working on about 2010 in response to the bacteria
2 TMDL. We did discuss it internally and with our City
3 administration at that time, we chose not to finalize the
4 document. Now that the CLRPs had come out at the end of
5 last year and with our new administration, we once again
6 brought it up. They did feel that it was proper to
7 actually get this information out.

8 We did share it at that time and March is
9 actually -- of this year -- is when we did finalize it and
10 then made it available to the public. And actually what
11 we've done, just to clarify, the County did ask for that
12 information. We did provide it to them. I provided it
13 just by e-mail very -- relatively recently to
14 Mr. Gibson -- and just as an informational item that if --
15 I believe it was information that the Board had requested
16 previously and other meetings and it's just something that
17 we had put out there to start discussing with the Board.

18 CHAIRMAN MORALES: I'm going to pose a question.
19 If this document isn't admitted into the record, will the
20 City of San Diego or any of the other copermittees suffer
21 a severe hardship?

22 MR. MCFADDEN: I will speak, at least on behalf
23 of the City of San Diego, we're not presenting this as
24 evidence today. It's something that the County had
25 presented. So the City's not going to take an issue

1 either way with it not be admitted or being admitted.

2 CHAIRMAN MORALES: Thank you. Same question for
3 the County.

4 MR. O' DAY: Well, yes. It's part of the
5 available evidence in support of our position and that's
6 why we put it in our presentations. I referred to it in
7 my presentation. It was referred to in Mr. Susilo's
8 presentation, although due to time he didn't actually get
9 to that slide, but it's in that presentation.

10 It wasn't available until after the deadline for
11 the submission, but it is relevant and we think you have
12 the discretion to include it in the administrative record
13 and we think that you should include it in the
14 administrative record. And if you elect not to do that,
15 of course, we'd just like our objection noted for the
16 record.

17 So, I mean, frequently in administrative
18 proceedings, as you are aware, the Court permits you to
19 supplement the record even after the proceedings are
20 closed if it's material that's new and wasn't available at
21 a particular deadline and is relevant to the proceeding.
22 And I think that principle clearly applies to this study.

23 CHAIRMAN MORALES: It sounded to me like the
24 standard was a little more than relevance which is why I
25 asked the question. If you could be more specific, what

1 would be the hardship you would suffer if it's not
2 admitted?

3 MR. O' DAY: Well, we would be deprived of our
4 opportunity to put relevant evidence in support of our
5 presentation into the record in this proceeding.

6 And I don't think -- I think the fix might be --
7 I understand Miss Witkowski's objection to it. She's
8 probably going to say -- I'll let her speak of course --
9 she's probably going to say there are references in there
10 to other studies and things, and we haven't had time to
11 review it, and fully get it and comment whether we think
12 it's got any validity.

13 I would suggest that perhaps the fix might be to
14 offer Coastkeeper the opportunity to do that and submit
15 some post-hearing commentary on it if, in fairness, I
16 think that would be fair. But to leave it out, I don't
17 think would be fair to the County.

18 CHAIRMAN MORALES: Okay let me hear from the
19 NGOs.

20 MS. WITKOWSKI: Thank you. Jill Witkowski and I
21 have taken the oath.

22 If I understand from Mr. McFadden that this
23 document, which I had originally been given right before
24 lunch says April 2011, and then someone from the City gave
25 me the one with the March 2013 on it right after I

1 returned from lunch, I haven't been able to see any
2 differences between the reports. But Mr. McFadden did say
3 that this was available at sometime in March. It's now
4 April. Even having had it a week ago would have been
5 helpful.

6 Typically, we like the Regional Board to be able
7 to consider all important evidence or relevant evidence to
8 make its decision, but we haven't had a chance to read
9 this and while it does rely on some of the studies that
10 are in the record, it also refers to -- the cornerstone is
11 talking about a 2007 Weston Report that has been called
12 the strategic plan and it looks at the implications of the
13 strategic plan.

14 I don't know what that is. I haven't had an
15 opportunity to see it. Frankly, I don't have time to now
16 review this and write separate comments on it given my
17 limited resources. And so for those reasons, I think it's
18 prejudicial, and frankly, I believe it's actually not
19 relevant given the law on the TMDL, which is that it must
20 come in according to the law.

21 I apologize. I have one more procedural
22 objection to get on the record. I'd like to make a timely
23 objection to the hearsay evidence of the County of San
24 Diego's conversation with Miss Wooten, their health
25 expert. I understand that under the hearing procedures we

1 acknowledge that it can be used to supplement or explain
2 other evidence, but it's not sufficient in itself to
3 support a finding. Thank you.

4 CHAIRMAN MORALES: Well, the objection to the
5 hearsay evidence is noted.

6 MS. HAGAN: Mr. Morales, may I just add that
7 regardless of whether you allow this document into the
8 record, any slides that were on presentations that were
9 submitted but were not actually used by the copermittees
10 and presented to the Board need to be excluded from the
11 record and they will be. If they were presented and we're
12 not receiving written materials, those slides need to be
13 removed.

14 So I just wanted to make that clear. Mr. O' Day
15 mentioned that some portions of the presentation that were
16 not actually presented to the Board, but they won't be
17 included in the record.

18 MS. KALEMKIARIAN: Are we finished with that
19 issue or do you need to --

20 CHAIRMAN MORALES: No, I'll go ahead and make a
21 ruling at this time.

22 I think we'll go ahead and allow it in just
23 because it is late information and to the extent it's
24 information that if it wasn't added to the record might be
25 prejudicial to the County. I will allow it in.

1 We'll determine whether we need to give the NGOs
2 an opportunity to comment on it and actually how much time
3 they should have to comment on it. Because it's looking
4 like it's getting close to 5:00 o'clock. The NGOs still
5 have five minutes and we've yet to hear from the BIA
6 folks.

7 So it's either going to be a very long day or
8 we're not going to be able to conclude this today.

9 MR. O' DAY: May I be heard on one point that
10 Miss Hagan just made?

11 CHAIRMAN MORALES: And snatch victory from the
12 jaws of defeat?

13 MR. O' DAY: Well, if I'm hearing her correctly,
14 she's saying that the slides that were not actually put up
15 on the screen by our expert Mr. Susilo are not going to be
16 considered part of the record. That is a separate issue
17 from and I appreciate your ruling on the study.

18 I guess this is one of those situations where you
19 said at the beginning of this proceeding when I registered
20 my procedural objections, if you have an offer of proof
21 and you need more time because you have an offer of proof
22 and you haven't had the time to do that, then please let
23 us know.

24 Well my specific offer of proof is the remainder
25 of Mr. Susilo's slides and he wasn't able to get through

1 them because of the time limitations and the overall time
2 limitations that we have here.

3 And once again, it's the issue of one block for
4 three major copermittee groups and the County needed some
5 time for its own separate presentation. They're very
6 relevant to this issue of the bacteria TMDL. They're
7 science-based. I think they're critical to your analysis
8 and we either request that they be placed into the record
9 or that Mr. Susilo will be permitted to complete the
10 presentation and put those slides up if we're going to be
11 technical in that he has to put them up and talk about
12 them in order for them to be in the record.

13 And I make that motion at this time,
14 Mr. Chairman.

15 CHAIRMAN MORALES: Okay, until he talks about
16 them I'm not inclined to make it part of the record.

17 MR. O' DAY: Please note my objection for the
18 record.

19 CHAIRMAN MORALES: Of course.

20 MS. KALEMKIARIAN: May I ask another procedural
21 question?

22 Miss Hagan, I would appreciate a response to the
23 NGO observation that these alternative compliance measures
24 are illegal and aren't in compliance with the Clean Water
25 Act. I don't know whether now is the time, but I'm just

1 asking at some point that we get Counsel's response to
2 that. And I don't know if you've had a chance to even
3 review that issue since it's been raised.

4 MS. HAGAN: I have but I've reviewed some of it
5 but there is one point I'd like to look at further if
6 there's an opportunity to, before I reply.

7 CHAIRMAN MORALES: And Mr. O' Day, I did want to
8 point out unless you feel a little too prejudiced that you
9 all have a little over 30 minutes. So I suppose
10 Mr. Susilo could do his presentation.

11 We're going to start now with the Industry
12 Association but before we do, let's take a very short
13 break so that you all can come in for the end of the day
14 session.

15 MR. STRAWN: And for planning purposes, the
16 Building Association has 75 minutes remaining.

17 (Whereupon, at 4:53 p.m., a recess was taken to
18 change reporters.)

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1 I, Delise A. Martinelli, Certified Shorthand
2 Reporter for the State of California, do hereby certify:

3
4 That the meeting was taken by me in machine shorthand and
5 later transcribed into typewriting under my direction and
6 that the foregoing contains a true record of the meeting.

7
8 Dated this 13th day of August, 2013, at San Diego,
9 California.

10

11 _____.

12 Delise A. Martinelli.
13 CSR No. 13713

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