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17 **LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD**

18 NATURAL RESOURCES DEFENSE
19 COUNCIL, LOS ANGELES
20 WATERKEEPER, and HEAL THE
21 BAY,

22 Petitioners,

23 v.

24 CITIES OF ARTESIA, NORWALK,
25 LA MIRADA,

26 Respondents.

Order No. R4-2012-0175 (as amended)

**MEMORANDUM ON BEHALF OF
LOWER SAN GABRIEL RIVER
WATERSHED MANAGEMENT
GROUP CITIES IN OPPOSITION
TO PETITION CHALLENGING
APPROVAL OF NINE
WATERSHED MANAGEMENT
PLANS PURSUANT TO THE LA
MS4 (2012) PERMIT**

Date: September 10, 2015

Time: 9:00 am

Place: Metropolitan Water District of
Southern California (Board
Room)

1 I. INTRODUCTION

2 Three cities involved in the Lower San Gabriel River (LSGR) Watershed
3 Management Program, specifically Artesia, La Mirada, and Norwalk
4 (Respondents) jointly file this memorandum. The other cities participating in
5 the LSGR Watershed Management Group (Group) are: Bellflower, Cerritos,
6 Diamond Bar, Downey, Hawaiian Gardens, Lakewood, Long Beach, Pico
7 Rivera, Santa Fe Springs, and Whittier. The Los Angeles County Flood
8 Control District (District) is also a member of the LSGR Group, but it will
9 state its position in separate comments.

10 Respondents are part of the LSGR Group, which coordinated a
11 watershed management program that meets both the letter and the spirit of
12 the 2012 Los Angeles MS4 Permit (LA Permit). The Regional Board (Board)
13 should *deny* the petition of the NRDC, Heal the Bay and LA Waterkeeper
14 (Environmental Petitioners), who seek to eviscerate the entire Permit process
15 by seeking to have this Board undo years of work by its staff and the
16 Permittees and declare all Watershed Management Programs invalid based
17 upon a procedural technicality.¹ The Environmental Petitioners' substantive
18 claims against the LSGR Group's finally approved Watershed Management
19 Program also lack merit.

20 The Board should eschew the invitation of the Environmental
21 Petitioners to completely revise the essential structure of the LA Permit,
22 which was more than two years in the drafting, and another two-and-a-half
23 years in the administrative review process. Rather, the Board should focus
24 on the real implementation challenges—the challenge of implementing the
25

26 ¹ The Environmental Petitioners do indeed seek to eviscerate the LA Permit,
27 and have separately filed a petition seeking a writ of mandate to overturn the
28 LA Permit. That petition is Los Angeles Superior Court Case No. BS156962.

1 watershed management programs in order to attain the goals of the LA
2 Permit and the Clean Water Act.

3 **II. THE ENVIRONMENTAL PETITIONERS' CHALLENGE TO THE**
4 **TECHNICAL PROCEDURE IN WHICH THE EXECUTIVE OFFICER**
5 **APPROVED THE WATERSHED MANAGEMENT PROGRAMS**
6 **"WITH CONDITIONS" SHOULD BE REJECTED AS EITHER ILL-**
7 **FOUNDED OR MOOT**

8 **A. The Appropriate Standard of Review**

9 In seeking review of the action of the Los Angeles Regional Board's
10 Executive Officer issued on behalf of the Board, the Environmental
11 Petitioners have conflated and confused two different procedural paths
12 involving different standards of review. The standard for the State Water
13 Resources Control Board (State Board) to review a factual determination of
14 liability or other fact-based determination originally issued by a Regional
15 Board is the "substantial evidence" standard. *In Re: Stinnes-Western Chemical*
16 *Corp.*, Order No. 86-16 (State Board 1986).

17 Contrary to the implication of the Environmental Petitioners, this is not
18 a fact-bound adjudicative decision governed by the "substantial evidence"
19 standard, and the State Board's determination of its standard for reviewing a
20 Regional Board decision on specific facts as contained in *Stinnes-Western*
21 *Chemical Corp.* has no application to this petition.²

22 _____
23 ² The Environmental Petitioners also cite Code of Civil Procedure Section
24 1094.5(b) as a basis for their argument that the Executive Officer's decision
25 must be "supported by the evidence." (Petition Memo. at p.5, nn. 17 & 18).
26 But Section 1094.5(a) specifies that it applies when there is a judicial inquiry
27 into a final administrative order "made as a result of a proceeding in which
28 by law a hearing is required to be given, evidence is required to be taken,
and discretion in the determination of facts is vested in the inferior tribunal."
" The LA Permit does *not* require a hearing by the Executive Officer (or this
Board) before determining whether or not to accept a final watershed
management program, nor does it require evidence "to be taken" as part of
any deliberation by the Executive Officer. Thus, Code of Civil Procedure

(Continued...)

1 Rather, the Respondents submit that the proper standard is whether or
2 not the Executive Officer abused his discretion in determining that the
3 submitted final LSGR Watershed Management Program sufficiently met the
4 requirements of the LA Permit to merit that he “accept” the program. This
5 involves a more limited review of whether (or not) the Executive Officer
6 properly exercised his discretion in reviewing the LSGR Watershed
7 Management Plan and determining that the Program fairly met the LA
8 Permit requirements.

9 The Respondents now demonstrate why, as to the LSGR Watershed
10 Management Program, the Executive Officer exercised his discretion to
11 approve the Program in a reasonable fashion fully consistent with the LA
12 Permit.³

13 **B. The Red Herring Claim that the Executive Officer Acted**
14 **Beyond His Delegated Authority**

15 The Environmental Petitioners start with an initial argument that is a
16 red herring—whether the Executive Officer acted within his delegated
17 authority to “conditionally approve” the programs. The Environmental
18 Petitioners then answer their own question of whether a conditional
19 approval is proper with a resounding “No.” They explicitly argue that the
20 Executive Officer “acted outside of his legally delegated authority.” (*EP*
21 *Memo.* at 6).

22 The Environmental Petitioners’ procedural argument is flawed.

23 _____
24 (...Continued)

25 Section 1094.5’s “substantial evidence” review standard is inapplicable to
26 this Petition process.

27 ³ Respondents believe that many of the legal positions they raise are common
28 to other watershed groups, and anticipate that members of the Lower Los
Angeles River group and others may join in parts or all of the legal
arguments contained in this Memorandum.

1 Initially, the Environmental Petitioners confuse the question of “delegated
2 authority” from this Board with the question of whether anyone—this Board,
3 the State Board, or the Executive Officer had any power under the LA Permit
4 other than approve the final programs unconditionally. According to the
5 Environmental Petitioners, no one, not even the State Board, has such
6 authority. Thus, the matter is *not* whether the Executive Officer acted within
7 the scope of authority “delegated” to him by this Board. (*EP Memo.* at 6: Ins.
8 4-5).

9 Rather, in this case the Environmental Petitioners seek to obtain a
10 ruling that *no one*, even this Board, has authority to conditionally approve a
11 watershed management program. Respondents reject this claim, and turn to
12 the words of the LA Permit itself and to the long-term practice and policy of
13 this Board.

14 **C. The LA Permit’s Plain Language Does *Not* Require an**
15 **Unconditional Approval of a Watershed Management Program**

16 The Environmental Petitioners’ argument with respect to the nature of
17 the Executive Officer’s letter of April 28, 2015 to the LSGR Group starts with
18 a false premise—that the letter was something other than an “approval”
19 letter. We turn first to the actual text of the letter, which is part of Exhibit B
20 to the Petition.⁴ The letter signed by the Executive Officer states on page 3:

21
22 The Los Angeles Water Board hereby approves, subject to the
23 following conditions, the LSGR WMG’s January 28, 2015 revised
24 draft WMP. The Board may rescind this approval if all of the
25 following conditions are not met to the satisfaction of the Board
within the timeframe provided below. . . [listing of conditions].

26 ⁴ The Respondents refer only to items posted on this Board’s website with
27 respect to the Petition aside from their separate Request for Judicial Notice,
28 which is filed concurrently with this Memorandum.

1 The Environmental Petitioners claim that this letter constitutes an
 2 abuse of discretion by the Executive Officer because the “only authority
 3 delegated to him by the Regional Board was to approve or deny the WMPs.”
 4 (*EP Memo.* at p.6). But, the Environmental Petitioners are wrong for two
 5 separate reasons:

6 (1) The plain words of the LA Permit allow the Executive Officer to
 7 approve a watershed management program “*on behalf of the Regional Board.*”
 8 This language is found on page 55 of the LA Permit, Table 9. The Executive
 9 Officer therefore had express authority to sign a letter approving the LSGR
 10 Watershed Management Program. Thus, there is no valid question about
 11 whether the Executive Officer “exceeded his authority”; he did exactly what
 12 the LA Permit allowed him to do.

13 (2) Even if the Executive Officer’s April 28, 2015 letter was construed to
 14 focus on the conditions imposed as part of the overall approval, it would
 15 make no difference. This is so because the LA Permit simply allows either
 16 the Regional Water Board or the Executive Officer on behalf of the Board to
 17 issue an “approval or denial” of a final plan. The LA Permit is not a straight
 18 jacket that requires that the approval (or denial) be “unconditional.”

19 Table 9 of the LA Permit at p. 55 simply states in pertinent part:

Part	Provision	Due Date
VI.C.4.c.	Approval or denial of final plan by Regional Water Board or by the Executive Officer on behalf of the Regional Water Board.	3 months after submittal of final plan

27 ///

28 ///

1 The LA Permit in Table 9 references Part VI.C.4.c , but that section only
2 provides requirements for those Permittees that “elect to develop a [regional]
3 Watershed Management Program.” It does not contain any requirement that
4 constrains this Board (or its Executive Officer) on how it can review and
5 issue any “approval or denial” of a final plan. (LA Permit at p. 57, Part
6 VI.C.4.c).

7 Thus, the plain language in Table 9 does not require that the LA Board
8 issue an “approval or denial *without any conditions*”, and the LA Permit does
9 not elsewhere contain such language with respect to the approval process for
10 WMPs. NPDES permits, such as the LA Permit, are to be construed based
11 upon their plain language. In this case, the plain language of the LA Permit
12 does *not* require an unconditional approval (or denial), and that plain
13 language resolves the claims of the Environmental Petitioners. The Board
14 need explore no further. *See Alaska Community Action on Toxics v. Aurora*
15 *Energy Serv., LLC*, 765 F.3d 1169, 1172 (9th Cir. 2014) (NPDES permit to be
16 interpreted like a regulation, which “should be construed to give effect to the
17 natural and plain meaning of its words.”).

18 **D. Even if the LA Permit’s Approval Language Was Deemed**
19 **Ambiguous, the Permit’s Structure and Extrinsic Evidence**
20 **Support the Executive Officer’s Approval with Conditions of**
21 **the LSGR Watershed Management Program**

22 Even if for argument’s sake, there was some ambiguity in Table 9 to the
23 LA Permit on the scope of an “approval” and whether that word meant to
24 exclude an “approval with conditions”, then this Board should consider the
25 structure of the LA Permit as well as extrinsic evidence in order to interpret
26 the ambiguity. *See NRDC v. County of Los Angeles*, 725 F.3d 1194, 1205 (9th
27 Cir. 2013)(“If, however, the permit’s language is ambiguous, we may turn to
28 extrinsic evidence to interpret its terms.”).

1 **1. The Text and Structure of Part VI.C. of the LA Permit Do**
2 **Not Support Imposing any Artificial Requirement of an**
3 **Approval “Without Conditions”**

4 The text and structure of Part VI.C. of the LA Permit are designed to
5 impose conditions upon the Permittees who elect to proceed with a WMP (or
6 EWMP). Part VI.C. emphasizes the flexibility inherent in this process:

7 **C. Watershed Management Programs**

8 **1. General**

9 a. The purpose of this Part VI.C. is to allow Permittees *the*
10 *flexibility* to develop Watershed Management Programs to
11 implement the requirements of this Order on a watershed scale
12 through *customized* strategies, control measures, and BMPs.
(LA Permit, pp. 47-48, emphasis added).

13 Throughout the rest of Part VI.C., the language continues to describe
14 the flexible nature of the watershed management program process. Part
15 VI.C.1.f.iv., for example requires that those Permittees participating in a
16 WMP “modify strategies control measures, and BMPs as necessary based on
17 analysis of monitoring data. . .” Part VI.C.2.b. in turn provides that a
18 Permittee’s “full compliance with all requirements and dates for their
19 achievement in an approved Watershed Management Program. . . shall
20 constitute a Permittee’s compliance with the receiving water limitations
21 provisions in Part V.A. of this Order. . .” (LA Permit at p. 53).

22 Thus, the structure of Part VI.C. seeks to impose conditions and a
23 timetable on the Permittees who proceed with a WMP or EWMP. There is
24 absolutely *nothing* in the structure or language of Part VI.C. that suggests that
25 it was intended to limit the discretion of this Board (or its Executive Officer
26 acting on its behalf) in the precise manner of approving a WMP.

27 ///

28 ///

1 **2. This Board (and its Staff’s) Long-Standing Policy and**
2 **Practice of Approval of Submitted Documents with**
3 **Conditions**

4 The Los Angeles Regional Board knows and can recognize that both it
5 and its staff approve numerous work plans, technical reports, and other
6 submittals with conditions. This type of “approval with conditions” is often
7 practiced with respect to other provisions in the LA Permit.

8 To take recent examples of the long-standing Board policy of approvals
9 with conditions, we request that the Board take judicial notice of the
10 following five documents and one undisputed fact⁵:

- 11 (1) June 19, 2015 letter of Executive Officer to Upper San Gabriel River
12 watershed management group approving with conditions the
13 Coordinated Integrated Monitoring Program;
- 14 (2) June 24, 2015 letter of Executive Officer to Alamitos Bay/Los Cerritos
15 Channel watershed management group approving with conditions
16 the Coordinated Integrated Monitoring Program;
- 17 (3) June 18, 2015 letter of Executive Officer to Lower Los Angeles River
18 watershed management group approving with conditions the
19 Coordinated Integrated Monitoring Program;
- 20 (4) June 4, 2015 letter of Executive Officer to Upper Santa Clarita
21 watershed management group approving with conditions the
22 Coordinated Integrated Monitoring Program;
- 23 (5) July 10, 2015 letter of Executive Officer to Santa Monica Bay
24 Jurisdictional Group 2 & 3 EWMP group approving with conditions

25 _____
26 ⁵ Respondents are filing concurrently with this memorandum a formal
27 Request for Official Notice of these five referenced documents along with
28 other documents. This request is made pursuant to 23 Cal. Code of
Regulations Section 648.2.

1 the Coordinated Integrated Monitoring Program.⁶

2 (6) Undisputed fact: The Respondents request that the Board take
3 judicial notice of the fact that the LA Regional Board over the past 20
4 years has issued a number of letters approving work plans, technical
5 reports, and other documents with “conditions.”

6 This Board should consider the vast amount of extrinsic evidence of
7 how its staff has for years conditioned approval letters, and must conclude
8 that the language in Table 9 is fully consistent with the long-standing policy
9 and practice of an “approval with conditions.”

10 **3. This Board Should Construe Its Own Permit to Clarify**
11 **the Process of Approval with Conditions**

12 The Environmental Petitioners have, however, presented this Board
13 with the opportunity to construe this portion of the LA Permit in a common
14 sense and straight-forward manner. It should do so as a matter of sound
15 public policy.

16 The Board should adopt a common sense reading of the term
17 “approval” as stated in Table 9 of the LA Permit to provide the flexibility of
18 an approval with conditions. The U.S. Court of Appeals for the Second
19 Circuit has applied a similar common sense interpretation to a statutory
20 provision of the Clean Air Act requiring that EPA “approve or deny” a state
21 submittal under that Act. The language at issue was found in the Clean Air
22 Act and is remarkably similar to the LA Permit’s language:

23
24 Section 7410(a)(2) provides that the Administrator of EPA “shall
25 within four months after the date required for a submission of a
plan [by the State] *approve or disapprove (the) plan*, or any portion

26 ⁶ On June 19, 2015, the Executive Officer sent a letter approving the Lower
27 San Gabriel River watershed group’s coordinated integrated monitoring
28 program without any conditions.

1 thereof.”

2 *Connecticut Fund for the Environment, Inc. v. EPA*, 672 F.2d 998,
3 1002 (2d Cir. 1982), *cert. denied*, 459 U.S. 1035 (1982) (*Connecticut*
4 *Fund*)(*emphasis added*).

5 Notwithstanding the “approve or disapprove” language contained in a
6 Congressional mandate, the EPA conditionally approved a State
7 Implementation Plan (SIP) submitted by the State of Connecticut. An
8 environmental group petitioned the Court of Appeals to review the approval
9 arguing that: “the literal ‘approve or disapprove’ language of [section]
10 7410(a)(2) and the absence of any mention of conditional approvals in the
11 Clean Air Act preclude EPA’s conditional approval.” *Connecticut Fund.*,
12 *supra*, 672 F.2d at 1006.

13 The Second Circuit rejected this argument, concluding that such a
14 narrow interpretation of the term “approve” would frustrate the overall
15 purpose of the statutory scheme. As Circuit Judge Newman wrote for the
16 Court of Appeal:

17 But this Court has held that an agency’s power to approve
18 conditionally is inherent in the power to approve or disapprove.

19 “[T]he power to condition. . . approval on the incorporation of
20 certain amendments is necessary for flexible administrative
21 action and is inherent in the power to approve or disapprove.
22 We would be sacrificing substance to form if we held invalid any
23 conditional approval but affirmed an unqualified rejection
24 accompanied by an opinion which explicitly stated that approval
25 would be forthcoming if modifications were made.”

26 *Connecticut Fund, supra*, 672 F. 2d at 1006 (quoting *McManus v. CAB*, 86
27 F.2d 414,419 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961)).

28 This Second Circuit Court of Appeals reached an eminently practical
and sound construction of the words “approve or deny” in the context of the
Clean Air Act. This Board should adopt the same practical and sound
construction in construing almost identical language contained in the LA

1 Permit.

2 **E. Alternatively, the Board Should Rule that the Environmental**
3 **Petitioners' Complaint is Moot in Light of The Filing on June**
4 **12, 2015 of a Revised Plan and the July 22, 2015 Confirmation of**
5 **Approval Letter**

6 Alternatively, the Environmental Petitioners' challenge to the approval
7 process for the LSGR Watershed Management Program should be rejected as
8 moot. The Executive Officer issued his approval letter on April 28, 2015 and
9 gave the LSGR Group until June 12, 2015 to address the conditions contained
10 in his letter. The LSGR Group timely submitted a revised final WMP on June
11 12, 2015. A copy of that final WMP is part of the materials posted on the
12 Board's website for this hearing.

13 On July 22, 2015, the Executive Officer, on behalf of this Board, issued a
14 confirmation of approval letter for the LSGR Watershed Management
15 Program. A copy of that letter is part of the separate Respondents' Request
16 for Official Notice, item no. 2, and states in pertinent part:

17
18 After review of the final LSGR WMP submitted on June 12, 2015,
19 I have determined that the LSGR Group's WMP satisfies all of the
20 conditions identified in my April 28, 2015 approval letter. The
WMP dated June 12, 2015 hereby constitutes the final approved
WMP for the LSGR Group.⁷

21 Thus, the Environmental Petitioners' argument that the approval was
22 only "conditional" is moot because the Board subsequently issued a final
23 approval letter without any conditions. *See Santa Monica Baykeeper v. City of*
24 *Malibu*, 193 Cal.App 4th 1538, 1547-48 (2011) ("An appeal should be

25 _____
26 ⁷ The Executive Officer, acting on behalf of the Board also issued final
27 approval letters as to the Lower Los Angeles River watershed group A copy
28 of that letter is attached to Respondents' Request for Official Notice, item no.
1.

1 dismissed as moot when the occurrence of events renders it impossible for
2 the appellate court to grant appellant any effective relief.”; held that
3 challenge to EIR for construction of city’s Legacy Park project was moot
4 when the park was already completed prior to the determination of the
5 matter on appeal).

6 In this particular instance, the Environmental Petitioners seek a
7 remedy—reversal of a conditional approval—when the conditions have
8 already been met and a final approval letter has been issued.⁸ Thus, as in
9 *Santa Monica Baykeeper*, the Board should dismiss the Petition as moot with
10 respect to its procedural argument.

11 **F. The Environmental Petitioners’ Suggestion that a Full Permit**
12 **Modification Was Required for an Approval “With**
13 **Conditions” Is Erroneous**

14 Alternatively, the Environmental Petitioners suggest that the Executive
15 Officer’s approval “with conditions” constitutes an improper modification of
16 the LA Permit. Indeed, the Environmental Petitioners suggest that the Board
17 (as the agency issuing the LA Permit) must follow requirements to formally
18 modify the LA Permit, including giving notice and issuing a new draft
19 permit. (*EP Memo.* at 10). This argument is nonsense. It assumes the
20 conclusion—*i.e.*, that the LA Permit somewhere contains the words
21 “approval without conditions” in Table 9 (or elsewhere). But, as previously
22 discussed, the plain language of the LA Permit, its structure, and available
23

24 ⁸ This fact also ends the Environmental Petitioners’ concern that the so-called
25 “conditional approvals” were open ended based upon a theoretical Board
26 action after June 12, 2015 to impose an additional round of conditional
27 approvals. The Environmental Petitioners argued that this might allow the
28 Executive Officer to “indefinitely extend the Permit’s deadlines.” (*EP Memo*
at 7:19-24). Once again, the actual facts have mooted this potential concern of
the Environmental Petitioners.

1 extrinsic evidence, all support a rejection of the Environmental Petitioners'
2 efforts to revise the current LA Permit and insert the language "without
3 conditions" after the word "approval" in Table 9.

4 Moreover, the "conditions" cited in the approval letter are only clerical
5 in nature, requesting for example that certain language be added in certain
6 sections or that an attachment be included. Therefore, the approval was an
7 approval of the WMP with those clerical changes included as part of the
8 approval. This point is further supported by the fact that the approval letter
9 required that the LSGR Group "shall begin implementation of the approved
10 WMP immediately." (April 28, 2015 Conditional Approval Letter at p. 4)⁹.
11 Consistent with Table 9 of the LA Permit, which states that the next step in
12 the process after approval is to "begin implementation" of WMP, this
13 demonstrates that the Executive Officer's action was an approval of the
14 WMP, and instruction to proceed with implementation.

15 There is no need to modify the LA Permit, and the alternative
16 suggestion by the Environmental Petitioners should be rejected.

17 **III. THE APPROVED WATERSHED MANAGEMENT PROGRAM**
18 **MEETS ALL PERMIT REQUIREMENTS**

19 Environmental Petitioners finally arrive at their substantive objections
20 to the approved LSGR Watershed Management Program. But, these
21 objections, like the Environmental Petitioners' procedural arguments, lack
22 merit. The Respondents respectively refer to **Exhibit A** hereto, a chart
23 discussing and rebutting the allegations in the Environmental Petitioners'

24 _____
25 ⁹ The pertinent approval letters are posted on the Board's website by
26 watershed group. In the case of the LSGR group, the April 28, 2015 letter can
27 be located at:
28 [http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/san_gabriel/lower_sangabriel/LowerSanGabrielRiver-WMPApprovalwithConditions\(04-28-15\).pdf](http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/san_gabriel/lower_sangabriel/LowerSanGabrielRiver-WMPApprovalwithConditions(04-28-15).pdf).

1 March 25, 2015 comment letter regarding the watershed management
2 programs. Respondents discuss in this memorandum only one specific
3 aspect of the alleged deficiencies, the Reasonable Assurance Analysis, which
4 the Environmental Petitioners designate as “[p]erhaps the most glaring
5 deficiency in the WMPs. . . .” (*EP Memo at 11*).

6 **A. The Reasonable Assurance Analysis Document and Approach**

7 It is important for this Board to understand the amount of time and
8 effort that went into preparing the LSRG Reasonable Assurance Analysis.
9 The complete copy of the Reasonable Assurance Analysis included three
10 watershed groups, the LSRG, as well as the Lower Los Angeles River, and
11 the Los Cerritos Creek groups, and was contained in Appendix A to the
12 January 2015 submittal of a revised WMP by the LSGR Group. With internal
13 appendices and exhibits, the Reasonable Assurance Analysis comes to some
14 742 pages and is available at:
15 [http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwat](http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/los_cerritos_channel/LosCerritosChannel_WMP_Revised2.pdf)
16 [er/municipal/watershed_management/los_cerritos_channel/LosCerritosChan](http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/los_cerritos_channel/LosCerritosChannel_WMP_Revised2.pdf)
17 [nel_WMP_Revised2.pdf](http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/los_cerritos_channel/LosCerritosChannel_WMP_Revised2.pdf). In its text, the Reasonable Assurance Analysis
18 discusses the specific mathematical models chosen for the modeling and
19 projected long-term results within the watersheds (the LSPC model), and
20 also discusses in detail efforts to “calibrate” the model based upon observed
21 real-world data. (Reasonable Assurance Analysis, Sections 3-4). The
22 Reasonable Assurance Analysis then proceeds to discuss the actual pollutant-
23 load reductions required in order to meet the criteria projected in the
24 mathematical models as necessary to achieve receiving water limitations.
25 (Reasonable Assurance Analysis, Section 5).

26 The Reasonable Assurance Analysis then discusses which water years
27 were selected as representative of average wet weather conditions and as
28 representative of “critical” 90% wet weather conditions, in this case the water

1 years 2008 and 2003 respectively. (*Id.* at Section 5.2). The Reasonable
2 Assurance Analysis then continues to evaluate in detail the projected rainfall
3 amount for each of the three watersheds for a rainstorm reaching the 85% of
4 all expected storms in a 24-hour period and then explains in detail how these
5 calculations were utilized to arrive at projected required reductions in
6 pollutants in order to meet interim and final requirements for each
7 watershed. (*Id.* at Section 5.3).

8 The Reasonable Assurance Analysis contains myriad specific details to
9 demonstrate the factual support for its conclusions. A quick review of the
10 document shows that there are some 24 separate figures in the text
11 explaining various calculations and approximately 42 tables spread
12 throughout the text, some of them summarizing various milestones and
13 goals for the respective watershed groups. (*Id.* at Table 9-2 (planned runoff
14 reduction volumes for LSGR); Table 9-6 (pollution reduction program for
15 LSGR for interim and final goals); Table 9-10 (dry weather pollution
16 reduction program for LSGR). There are many more figures and tables in the
17 respective appendices that form part of the overall document.

18 In short, the Reasonable Assurance Analysis for the LSGR, the Los
19 Cerritos Creek and the Lower Los Angeles River groups was a detailed and
20 careful approach which expressly acknowledged and complied with this
21 Board’s guidance: “Guidelines for Conducting Reasonable Assurance
22 Analysis in a Watershed Management Program, Including an Enhanced
23 Watershed Management Program” (March 2014) (cited in Reasonable
24 Assurance Analysis at Section 1, p.6).¹⁰

25 _____
26 ¹⁰ We focus on this Reasonable Assurance Analysis for the three participating
27 watershed management groups, including the LSGR Group. But, we do not
28 mean to suggest that the separate Reasonable Assurance Analysis submitted
by other watershed groups were not equally comprehensive and detailed.

B. The Environmental Petitioners' Unfounded Criticism of the LSGR Reasonable Assurance Analysis (and the WMP)

The Environmental Petitioners list 7 alleged "deficiencies" for the LSGR WMP's portion of the Reasonable Assurance Analysis on page 13 of their memorandum. Respondents address each claimed deficiency in the following table and demonstrate that in each case the actual staff comments were in fact addressed in the final WMP or revised Reasonable Assurance Analysis.¹¹

Envir. Petition Summary of "Deficiency" (Listed in EP Memo.)	Actual Regional Bd. Staff Comment from Oct. 30, 2014	Response in January 28, 2015 Revised RAA (Appendix A to WMP)
1. No modeling of organics (PAH, DDT, PCB).	"We note that modeling was not conducted for organics. . . .An explanation for the lack of modeling is needed."	Sec. 5.3.1 (wet-weather required pollutant reductions) adopts the "limiting pollutant approach" and notes that organics for the LSGR and other areas are controlled through reduction of sediment and associated metals reduction. (RAA at pp. 38-42).

¹¹ The LSGR and the Lower Los Angeles River groups separately addressed the staff comments of October 2014 in their presentation at the April 13, 2015 workshop. A copy of that powerpoint presentation is also posted on the Board's website.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17
<p>2. No explanation for use of zinc as limiting pollutant.</p>	<p>“The RAA identifies zinc as the limiting pollutant. . . If the Group believes that this approach demonstrates that activities and control measures will achieve applicable receiving water limitations, it should explicitly state and justify this. . .”</p>	<p>The RAA dated Jan. 15, 2015 specifically explains in Sec. 5.3.1 why zinc is the “limiting pollutant” for the LSGR watershed and also several other watersheds. This explanation was in response to the Board staff Oct. 2014 comments and contains explicit detail as requested by staff.</p>	<p>Response in January 28, 2015 Revised RAA (Appendix A to WMP)</p>
<p>3. No predicted baseline presented for modeled pollutants.</p>	<p>“[T]he predicted baseline concentrations and loads for all modeled pollutants of concern. . . should be presented in summary tables for wet weather conditions.”</p>	<p>Baseline pollutant loading by watershed area shown in Table 5-6 of Revised RAA (p. 40).</p>	

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Envir. Petition Summary of "Deficiency" (Listed in EP Memo.)	Actual Regional Bd. Staff Comment from Oct. 30, 2014	Response in January 28, 2015 Revised RAA (Appendix A to WMP)
<p>4. No summary or time series comparisons of baseline data and applicable limits.</p>	<p>"[T]he differences between baseline concentrations/loads should be presented in time series for each pollutant under long-term continuous simulation and as a summary of the differences between pollutant concentrations/loads and allowable concentrations/loads for the critical wet weather period."</p>	<p>The RAA states on p. 39: "Plots showing the differences between the baseline loads, allowable loads, and exceedance loads are shown in Attachment F." Attachment F is described as: "Modeled Existing Versus Allowable Pollutant Loadings Plots."</p>

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Envir. Petition Summary of "Deficiency" (Listed in EP Memo.)	Actual Regional Bd. Staff Comment from Oct. 30, 2014	Response in January 28, 2015 Revised RAA (Appendix A to WMP)
<p>5. No measurable milestones for implementing BMPs in two-year intervals provided.</p>	<p>"The WMP should at least commit to the construction of the necessary number of projects to ensure compliance with permit requirements per applicable compliance schedules."</p>	<p>This was addressed in Section 5.3 of the Revised WMP as to structural BMPs. Section 5.2 of the Revised WMP also discussed a multi-city project involving Downey, Norwalk, Santa Fe Springs and Whittier with specific milestones for a Prop. 84 project.</p>
<p>6. No table provided existing runoff volume, required reduction and proposed reduction to achieve 85% by sub-basin.</p>	<p>"The Report presents the existing runoff volumes. . .for each major watershed area. . . The same information. . . also needs to be presented for each modeled sub-basin. . ."</p>	<p>Section 9.2.1 of the RAA and Attachment B of the RAA were updated to provide the requested sub-basin information.</p>

	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15	Actual Regional Bd. Staff Comment from Oct. 30, 2014	Response in January 28, 2015 Revised RAA (Appendix A to WMP)
	7. No table providing existing non-stormwater volume, required reduction and proposed reduction by sub-basin.	“The report needs to provide the same information, if available, for non-stormwater runoff. Alternatively, the report should include a commitment to collect the necessary data. . . so that the model can be re-calibrated during the adaptive management process. . . .”	Section 4.2 of the WMP contains the commitment to re-calibration of the model as requested by the staff.

16 This table demonstrates (and should be reviewed in connection with
 17 **Exhibit A** to this memorandum) that the Environmental Petitioners’ claim
 18 that the Executive Officer’s approval in April of 2015 with conditions “*fail to*
 19 *address any of the RAA inadequacies identified by the RWQCB staff*” (EP Memo at
 20 p. 14) is simply incorrect.

21 Under the applicable standard for review this Board should determine
 22 whether the Executive Officer reasonably exercised his discretion in
 23 determining that the submitted Reasonable Assurance Analysis fairly met
 24 the criteria of the LA Permit. Using this criteria, there can be only one
 25 answer—it clearly did meet that LA Permit standards, and the approval of
 26 the Reasonable Assurance Analysis and the Watershed Management
 27 Program must be upheld.

1 The Environmental Petitioners also raise what they term “substantive
2 program requirements” that the watershed managements plans allegedly
3 failed to met, citing to Exhibit D in support of their Petition. (*EP Memo* at 15).
4 The Respondents respectfully refer to **Exhibit A** attached to this
5 memorandum in response to those specific points, none of which has merit.

6 **IV. CONCLUSION**

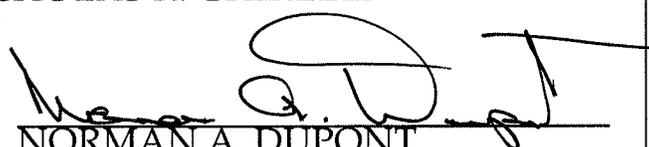
7 The Environmental Petitioners seek to eviscerate the LA Permit. They
8 ask this Board to reverse its Executive Officer’s determination and simply
9 deny all nine (9) of the watershed management programs. (*EP Memo* at p. 15).
10 The Environmental Petitioners suggest no alternative, nor do they suggest
11 how any of the cities in the nine Water Management Programs should
12 comply with the pending TMDLs and the receiving water limits required
13 under the LA Permit. Rather, they simply seek to end the LA Permit and put
14 everyone back into a pre-permit limbo.

15 This Board should instead *deny* the Petition and allow the LSGR Group
16 (and others) to continue implementing their reasonable and detailed
17 Watershed Management Programs as part of the LA Permit.

18 Dated: August 3, 2015

Respectfully submitted,

RICHARDS, WATSON & GERSHON
A Professional Corporation
NORMAN A. DUPONT
CANDICE K. LEE
NICHOLAS R. GHIRELLI

23 By: 

24 NORMAN A. DUPONT
25 Attorneys for Respondents,
26 City of Artesia
27 City of La Mirada
28 City of Norwalk

EXHIBIT "A"

Lower San Gabriel River WMP Group Comments to Petitioners' Analysis

Permit Citation	Staff Comments from October 30, 2014	NRDC Analysis of Revised WMP Response to Staff Comments	NRDC Summary of Conditional Approval Requirements	Group's Response to Petitioners' Analysis
Part VI.C.5.b.iv.(4)(b)-(d)	"...the WMP should at least commit to the construction of the necessary number of projects to ensure compliance with permit requirements per applicable compliance schedules."	The response implies no commitment beyond good intentions and a willingness to track progress (or its lack thereof) through the permit cycle.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.	The commitment language was included in the Revised (and Final) WMP in Section 5.3. Also included were modifications to increase the degree of clarity and specificity regarding schedules and actions for the current and next permit terms. Of particular note, WMP Section 5.3 was revised to include a 2015-2016 schedule of feasibility studies and site assessments to determine specific projects to address the milestones in the compliance tables of the RAA, Attachment B.
Part VI.C.5.b.iv.(4)(d)	"The MS4 Permit requires that the WMP provide specificity with regard to structural and non-structural BMPs, including the number, type, and location(s), etc. adequate to assess compliance. In a number of cases, additional specificity...is needed....there should at least be more specificity on actions within the current and next permit terms to ensure that the following interim requirements are met..."	The response, and other statements throughout the document, make it clear that no commitments to "specificity or actions" or associated timelines are made. There is also no cross-walk between scheduled completion dates and interim compliance deadlines. Given the vague nature of nearly all of the "milestones," it's not surprising that there is no direct linkage between actions, meeting interim requirements, and the schedule.	Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.	Section 5 of the Revised (and Final) WMP was modified to increase the degree of clarity and specificity regarding schedules and actions for the current and next permit terms. The corrections to the Final WMP further refined these commitments. The Group has also addressed the inherent uncertainty as to which specific BMPs will be implemented to address the milestones in the RAA compliance tables (RAA Attachment B): Section 5.3 was revised to include a 2015-2016 schedule of feasibility studies and site assessments to determine specific projects.
Part VI.C.5.b.iv.(5)	"The RAA identifies zinc as the limiting pollutant and notes that this pollutant will drive reductions of other pollutants. If the Group believes that that [sic] this approach demonstrates that activities and control measures will achieve applicable receiving water limitations, it should explicitly state and justify this for each category 1, 2, and 3 pollutant."	The draft WMP does not appear to have been modified in response to this comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.	Section 5.3.1 of the RAA justifies how Category 1, 2, and 3 pollutants are controlled through the limiting pollutant approach. This statement, along with a reference to the RAA for justification, is included in Section 4.1. The revised introduction to Section 5 provides explicit statements regarding the implementation of this approach in order to achieve applicable receiving water limitations.

Lower San Gabriel River WMP Group Comments to Petitioners' Analysis

<p>Part VI.C.5.b.iv.(5)</p>	<p>"We note that modeling was not conducted for organics (DDT, PCBs, and PAHs). It is not clear why these pollutants were not modeled or why previous modeling of these pollutants could not be used....An explanation for the lack of modeling is needed."</p>	<p>No change was made in the document in response to the comment.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>It should be noted that the original watershed modeling (based on LSPC) supporting the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL did not include simulation of DDT, PCBs, and PAHs. Rather, modeled sediment was used as a surrogate to estimate watershed loadings. Therefore, the 90th percentile of observed concentrations were assigned, meeting requirements set forth by RAA guidance provided by the Regional Water Quality Control Board.</p>
<p>Part VI.C.5.b.iv.(4)(c)</p>	<p>"The draft WMP appears to rely mostly on the phase-out of copper in automotive brake pads...to achieve the necessary copper load reductions....[O]ther structural and non-structural BMPs may still be needed to reduce Cu loads sufficiently to achieve compliance deadlines for interim and/or final WQBELs."</p>	<p>No change was made in the document in response to the comment.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>A change to the document was not necessary as explained in a response table to the RB. The RAA approach of controlling zinc, in concert with the modeled effect of copper load reductions anticipated through SB 346, anticipates that the application of the Watershed Control Measures and Compliance Schedule of Chapter 3 and 5, respectively, will reduce copper loads sufficiently to achieve compliance deadlines from interim and/or final WQBELs.</p>
<p>Part VI.C.5.b.iv.(5)(c)</p>	<p>"For waterbody-pollutant combinations not addressed by TMDLs, the MS4 Permit requires that the plan demonstrate using the reasonable assurance analysis (RAA) that the activities and control measures to be implemented will achieve applicable receiving water limitations as soon as possible....[The RAA] does not address the question of whether compliance with limitations for pollutants not addressed by TMDLs could be</p>	<p>There is no response to this comment.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>The introduction to Section 5 was modified to more clearly demonstrate that the compliance schedule is as soon as possible for pollutants not addressed by TMDLs.</p>
<p>Part VI.C.5.b.iv.(5)</p>	<p>"The draft assumes a 10% pollutant reduction from new nonstructural controls....additional support for this assumption should be provided, particularly since the group appears to be relying almost entirely on these controls for near-term pollutant reductions to achieve early interim milestones/deadlines."</p>	<p>There was no substantial advance over what was previously included, though the issue is acknowledged explicitly.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>Section 4.3 was added to the Revised WMP to address the Regional Board comment. The Regional Board also states that, "as part of the adaptive management process, the Permittees should commit to evaluate this assumption during Program implementation and develop alternate controls if it becomes apparent that the assumption is not supported." This commitment was also included in the in Section 4.3.</p>

Lower San Gabriel River WMP Group Comments to Petitioners' Analysis

<p>Part VI.C.5.b.iv.(5)</p>	<p>"Based on the results of the hydrology calibration shown in Table 4- 3, the error difference between modeled flow volumes and observed data is 19%....The higher error percentage could be due to the exclusion of contributions of flow volume from upstream. For calibration purposes, upstream volume should be included....Once model calibration has been completed, the upstream flow volume can then be excluded...."</p>	<p>Between the 2014 and 2015 RAA's, the % error improves from -19.0% to -3.31%. There is no text change to explain this difference, nor any difference in the graphed monthly hydrographs for observed and modeled flows.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>It should be noted that the entire watershed was included in the model for calibration purposes, including areas upstream and outside of the area addressed by the RAA. As such, there was no absence of upstream flow contributing to the error difference. As stated in the Regional Board comment, once calibration was completed, upstream areas were subtracted from the model for presenting load reduction targets.</p> <p>The plots in Attachment E were updated to show the daily calibration results. The Tables in Section 4.1.1 and 4.1.2 were updated to show the modeled versus observed volume error for the daily calibration results (versus the monthly that were shown previously).</p>
<p>Part VI.C.5.b.iv.(5)</p>	<p>"...the predicted baseline concentrations and loads for all modeled pollutants of concern, including TSS, should be presented in summary tables for wet weather conditions."</p>	<p>No change in the RAA to address this comment.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>An additional table was added to the RAA to reflect the baseline loads. Found on page 39 as Table 5-6.</p>

Lower San Gabriel River WMP Group Comments to Petitioners' Analysis

<p>Part M.C.5.b.iv. (5)</p>	<p>"The report presents the existing runoff volumes, required volume reductions and proposed volume reductions from BMP scenarios to achieve the 85th percentile, 24-hour volume retention standard for each major watershed area... The same information...also needs to be presented for each modeled subbasin...Additionally, more explanation is needed as to what constitutes the 'incremental' and 'cumulative' critical year storm volumes in table 9-6 and 9-7 and how these values were derived from previous tables.</p> <p>"The report needs to present the same information, if available, for non-stormwater runoff."</p>	<p>The request for a series of tables by subbasin has not been met; an added sentence defines the terms used but not how the values were derived from previous tables. No new information addressing comment about non-stormwater runoff.</p>	<p>No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.</p>	<p>Regarding the required information for the modeled subbasins, Attachment B of the RAA was updated to include the requested tables, along with a sentence to provide some clarification in RAA Section 9.2.1 (third paragraph).</p> <p>Regarding non-stormwater runoff, the complete comment from the Regional Board is as follows: "The report needs to present the same information, if available, for non-stormwater runoff. Alternatively, the report should include a commitment to collect the necessary data in each watershed area, through the non-stormwater outfall screening and monitoring program, so that the model can be re-calibrated during the adaptive management process to better characterize non-stormwater flow volumes and to demonstrate that proposed volume retention BMPs will capture 100 percent of non-stormwater that would otherwise be discharged through the MS4 in each watershed area."</p> <p>A commitment to the recalibration alternative was included in WMP Section 4.2.</p>
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