San Diego Regional MS4 Permit

Environmental Group Testimony

April 10-11, 2013

Jill Witkowski, San Diego Coastkeeper
Noah Garrison, Natural Resources Defense Council
Colin Kelly, Orange County Coastkeeper and
Inland Empire Waterkeeper

The Good:

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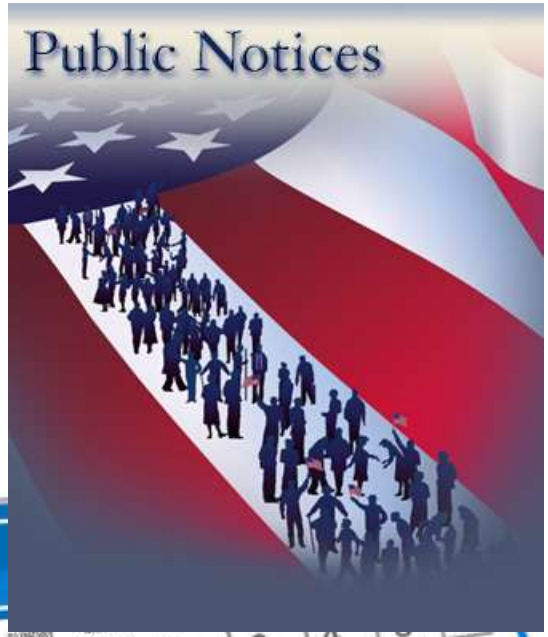

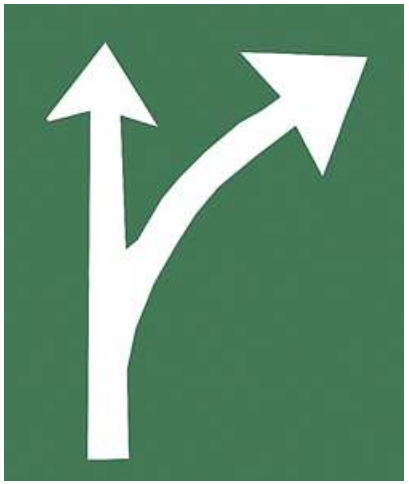

The Good:
Development Requirements

Retain volume same as undeveloped condition, determined through modeling

VS.

"THE POISON PILL"

The Clean Water Act

(OC Register)

(LA Times)

The Proposed Receiving Water Limitation Compliance Option

Proposed "Compliance Option" approach under section II.B.3.c is an impractical and illegal "Safe Harbor"

- Proposes safe harbors where none existed in previous permit
- Violates Anti-Backsliding Requirements
- Violates Antidegradation Requirements
  - Where no TMDLs exist, allows lowering of water quality while WQIPs are being implemented.
- Requires intensive staff and stakeholder resources.

Beneficial Uses and Water Quality Standards

State must adopt water quality standards – include maximum permissible pollutant levels sufficiently stringent to protect public health and enhance water quality consistent with designated uses.

33 U.S.C. §§ 1311(b)(1)(C), 1313

Water quality standards provide a basis for regulating discharges "to prevent water quality from falling below acceptable levels."

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology (1994) 511 U.S. 700, 704

Receiving Water Limitations

2001 San Diego MS4 Permit:

Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.

Receiving Water Limitations

9th Circuit Court of Appeals:

"no such 'safe harbor' is present in this Permit . . . . [there is] no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions."

Natural Resources Defense Council v. County of Los Angeles (2011) 673 F.3d 880, 897

2013 Tentative Order:

"The Copermittees may utilize implementation of the . . . Water Quality Improvement Plan to demonstrate compliance . . . For each Copermittee in the Watershed Management Area that chooses to utilize this option, the Copermittee will be in compliance with Provisions A.1.a, A.1.c and A.2.a. . ."

Permit at section II.B.3.c.(1)

Receiving Water Limitations

"we conclude the Permit's Water Quality Standards are proper under federal law."

Building Industry Assoc. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 880

The Regional Board "included Parts 2.1 and 2.2 in the Permit without a 'safe harbor.'" These are independently enforceable requirements that prohibit discharges that cause or contribute to a violation of Water Quality Standards.

L.A. County Mun. Storm Water Permit Litigation, No. BS 080548 at 7 (L.A. Super. Ct. March 24, 2005)

Anti-Backsliding

Anti-Backsliding:

> "when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit."

40 C.F.R. 122.44(l)(1)

Anti-Backsliding

- The RWL provisions have been in effect since 2001.
- Neither the 2001 or 2007 Permits contained a safe harbor for receiving water violations - the 9th Circuit decision or Supreme Court decisions did not change that.
- EPA Region 3 Letter – additional time to comply violates anti-backsliding provision.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

AUG 0 8 2012

Mr. Jay Sakai, Director
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"Backsliding is prohibited in NPDES permits. . . . Allowing additional time to complete a task that was required by the previous permit constitutes a less stringent condition and violates the prohibition against anti-backsliding."

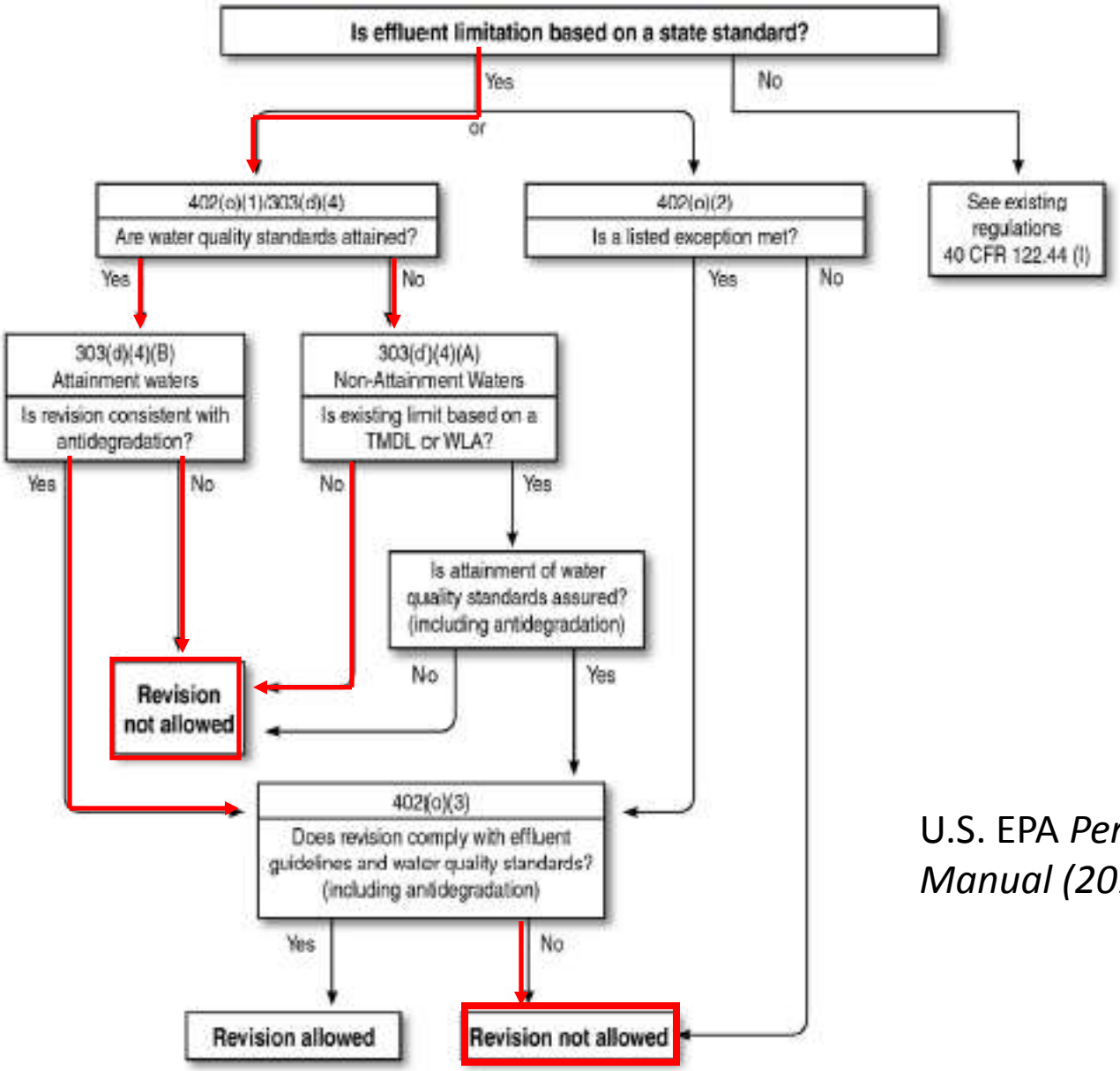
referenced permit pursuant to 40 C.F.R. §§ 123.44(b)(1) and (c)(1) and Section III.A of the MOA. As further explained herein, EPA believes that several substantive requirements for MS4 permits, as required by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), and its implementing regulations, have not been incorporated into the Prince George's County permit.

EPA's objection to the draft permit and identification of revisions needed before EPA can remove the objection, *see* 40 C.F.R. § 123.44(b)(2)(ii), are described below:

1. **Water Quality Standards**

Federal regulations require that all NPDES permits contain limitations to control discharges which may cause, have the reasonable potential to cause or contribute to an excursion above water quality standards. 40 C.F.R. §122.44(d)(1)(i). Part VI of the draft Prince George's County permit (Enforcement and Penalties) contains general language

Exhibit 7-2 Application of anti-backsliding requirements



U.S. EPA *Permit Writers' Manual (2010)*

If Not an Effluent Limit…

Anti-Backsliding:

> "when a permit is renewed or reissued, interim effluent limitations, *standards, or conditions* must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit."

40 C.F.R. 122.44(l)(1)

Antidegradation Policy

Protects existing uses and water quality necessary to support existing uses, or, for “high quality” waters, protects water quality better than necessary for “fishable/swimmable” uses.

Water quality may only be lowered in certain limited circumstances. In no case may water quality be lowered to a level which would interfere with existing or designated uses.

See, State Bd. Resolution 68-16,

40 CFR § 131.12

Violates Antidegradation Policy

- Where no TMDLs exist, allows lowering of water quality during and after plan development

- Unimpaired waters must be protected, not made a lower priority because they are not polluted or lack TMDLs.

Impaired Waters and TMDLs

TMDLs are the means for bringing impaired waterways back into compliance for pollutants such as bacteria, metals, trash, etc.

Clean Water Act NPDES permits must be consistent with the waste load allocation ("WLA") in each TMDL.

(40 C.F.R. § 122.44(d)(1)(vii)(B)

"When we're talking about outcome-based, we're really talking about receiving waters"

Major Problems B.3.c(1)(b)

- Hinges on "watershed model or other watershed analysis"
  - No standards (who can perform, peer review, data upon which it can be based)
  - Not enough data available for robust analysis
  - Bacteria TMDL = good example of problems
  - "**Will** achieve numeric goals within establish schedules" (p 32) v. "'reasonably' and 'quantitatively' demonstrate that… strategies **can** achieve goals within established schedules." (F-53)

Major Problems B.3(c)(1)(b)

- "strategies required under Provision B.3.b."
  - No reference in Provision B.3.b to new requirements under B.3.c
- Achieve goals within schedules "required by B.3.a" = only for priority pollution issues
  - Probably mean B.3.c(1)(a)
- Lack of cross-reference = confusion

Major Problems: B.3.c.(1)(c)

- Monitoring and assessment
  - No guidance as to frequency or minimums
  - 5 years or more?!
  - Compliance schedule = 40 C.F.R. 122.47
    - "time between interim dates shall not exceed one year"
    - "a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before *recommencement of* discharge"
    - But, are they even allowed for continuing dischargers?
      - *No, not under anti-backsliding*

Major Problems B.3.c(1)(d)

- Review and concurrence by majority of Consultation Panel
  - Insufficient public involvement
- Major Modification under 40 C.F.R. 122.62
  - Must receive request under 40 C.F.R. 124.5
  - Must follow public notice and comment procedures unless minor modification (122.63)
  - Allowed for compliance schedules for good cause = "act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy."

Major Problems B.3.c(2)

- Copermittee will "be in compliance… when the Water Quality Improvement Plan, incorporating requirements of B.3.c(1) is accepted by San Diego Water Board."
  - No guarantee of hearing F.1.b(4)
  - "Executive Officer may provide written certification to the Copermittees"

Major Problems B.3.c(3)

- "Remain in compliance as long as…"
  - Results of analysis "accepted and continued to be accepted"
  - Continue to implement, monitor and assess, "demonstrate progress"
  - No periodic review, no deal breaker, no bright line for when compliance removed
    - If not in compliance, does it automatically trigger enforcement?
  - Connect to other Copermittees implementing iterative process

BAD POLICY

Low Impact Development

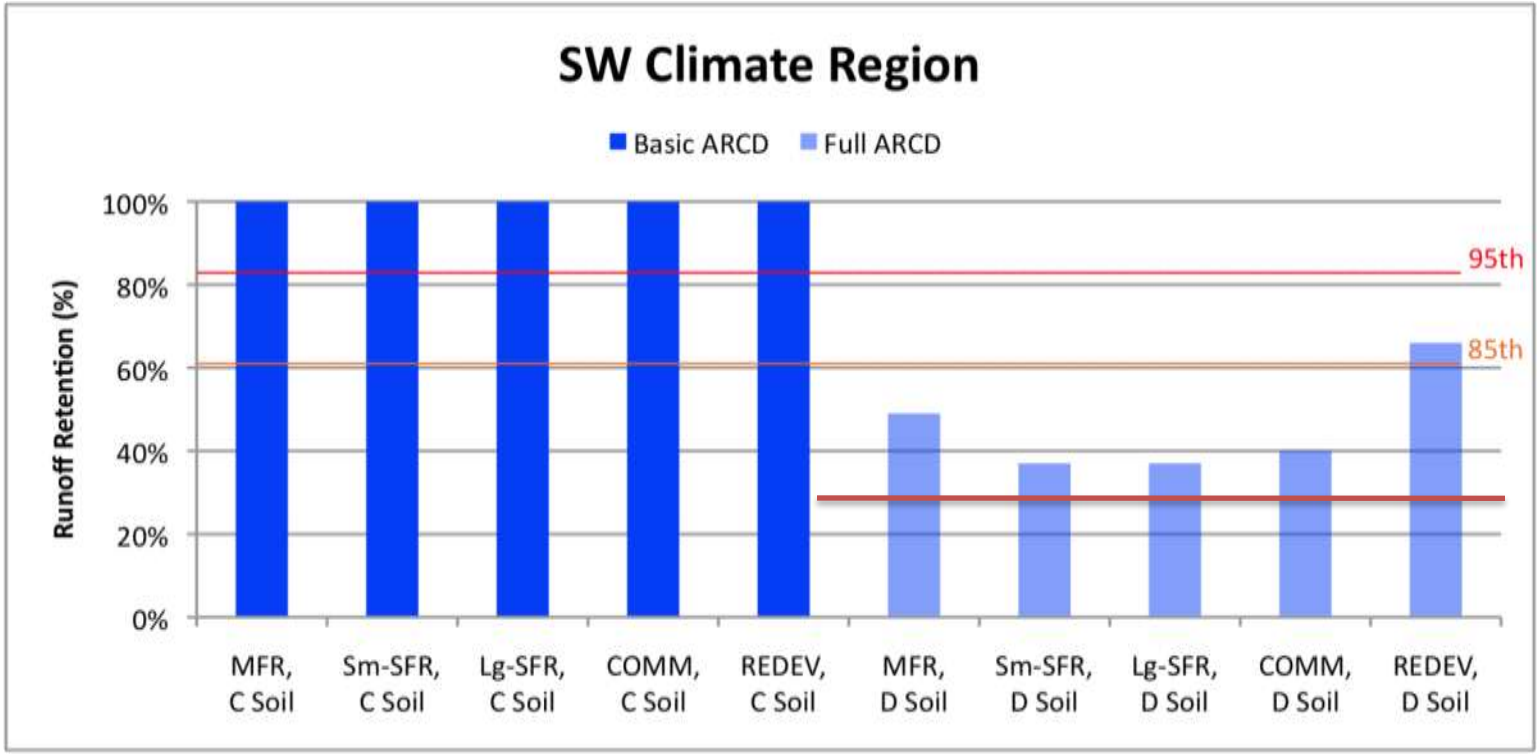
Environmental Services, City of Portland, Oregon/Kevin Robert Perry

LID is Cost Effective

Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices

focused on the latter issue, and the news is good. In the vast majority of cases, the U.S. Environmental Protection Agency (EPA) has found that implementing well-chosen LID practices saves money for developers, property owners, and communities while protecting and restoring water quality.

Feasibility of Retention

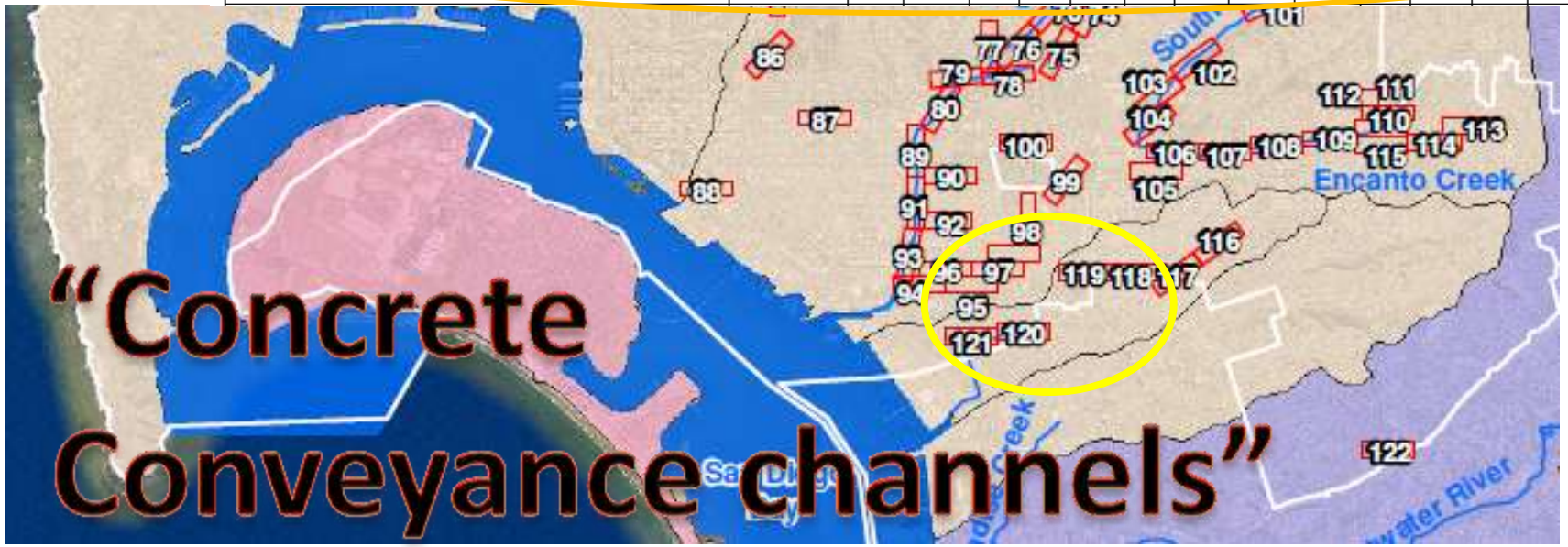


Top Ten National Sources of Impairments for Rivers and Streams

Description of this table

	EPA Source Name	Total Miles Impaired by Source
1	AGRICULTURE	113,662.70
2	UNKNOWN	91,823.72
3	HYDROMODIFICATION	79,399.66
4	HABITAT ALTERATIONS (NOT DIRECTLY RELATED TO HYDROMODIFICATION)	51,297.85
5	NATURAL	41,764.05
6	URBAN-RELATED RUNOFF/STORMWATER	38,114.89

			BENEFICIAL USE							
			FRSH	POW	REC1	REC2	BIOL	WARM	COLD	WILD
Chollas Creek [3,4]	8.22	+			○	●		●		●
South Chollas Valley	8.22	+			○	●		●		●
unnamed intermittent streams	8.31	+			○	●		●		●
Paradise Creek	8.32	+			○	●		●		●



118-119	88000258 88000260	Pueblo San Diego	Solola Channel	3.264	C
120-121	88000056 88000058 88000060 88000062 88000064	Pueblo San Diego	Cottonwood Channel	2.370	C

Current State of Area Waterbodies

- Co-Permittees have had years to meet water quality standards .
- Many co-permittees do not acknowledge they contribute to exceedances of WQS
- The Regional Board has rarely undertaken enforcement of the existing permit – even where the public health is at risk

303d Listed Waterbodies

- Orange County
  - Aliso Creek
  - Arroyo Trabuco Creek
  - Dana Point Harbor
  - Laguna Canyon Channel
  - Oso Creek
  - Prima Deshecha Creek
  - Segunda Deshecha Creek
  - San Juan Creek
  - Pacific Ocean

303d Listed Waterbodies

- Riverside County
  - Long Canyon Creek
  - Warm Springs Creek
  - Temecula Creek

Temecula Creek

Beach Closures

- San Diego County reported nearly 300 closing or advisory days in 2011 from all sources, and Orange County more than 750. Stormwater is the largest cause.
- Depending on the cost model used, for Orange County alone, excess cases of gastrointestinal illness from swimming in bacteria contaminated beachwater cost:
  - between $6 million and $16 million per year, or;
  - when willingness to pay *not* to get sick is included, between $56 million and $136 million per year.

Case Study: Orange County

- In 1999, Huntington Beach was closed for much of the summer due to elevated levels of bacteria.
- Many signs point to urban runoff.
- An economic study of a hypothetical closure of Huntington Beach due to poor water quality indicates:
  - One day = losses of $100,000
  - One month = losses of $3.5 million
  - Three months (season) = losses of $9 million

Case Study: San Clemente

- Poche Beach
  - Regular on Heal the Bay's Annual "Beach Bummer" list
  - Watershed Study
  - Poche Creek Runoff Treatment Facility

June 2011

Riverside County

- Regional “hot spot” of large scale new development during this permit’s term
- Shift from agricultural to urban
- Impacts of this permit will be felt for decades

Water Quality Realities

- Permits are a vision of where we are going
- A working document vs. a static plan cementing the status quo
- Decisions have impacts and act as precedent for future decision makers