

1 **MEMORANDUM OF UNDERSTANDING**

2 **BETWEEN THE**

3 **COUNTY OF SAN DIEGO, CITY OF SAN DIEGO, and COUNTY OF ORANGE,**

4 **AND THE**

5 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION**

6 **REGARDING**

7 **BACTERIA TOTAL MAXIMUM DAILY LOAD (TMDL) AND RECOMMENDATIONS FOR TMDL**
8 **REVISIONS**

9
10 This Memorandum of Understanding, hereinafter referred to as "MOU," is made and entered into this
11 day of _____, 2016 (hereinafter "EFFECTIVE DATE"), by and between the County of San Diego,
12 County of Orange and City of San Diego, hereinafter referred to collectively as "the COPERMITTEES" and
13 individually as "a COPERMITTEE," and the San Diego Regional Water Quality Control Board, hereinafter
14 referred to as "SAN DIEGO WATER BOARD." The COPERMITTEES and the SAN DIEGO WATER BOARD
15 will hereinafter be referred to collectively as "PARTIES" and individually as a "PARTY."

16 **RECITALS**

17 WHEREAS, the County of Orange, through separate agreement with the Cities of Aliso Viejo, Dana Point,
18 Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita,
19 San Clemente, San Juan Capistrano, and the Orange County Flood Control District, is the principal permittee
20 representing the south Orange County Copermittees through this MOU; and

21 WHEREAS, the Total Maximum Daily Loads for Indicator Bacteria Project I – Beaches and Creeks
22 (hereinafter "BEACHES AND CREEKS TMDL") in the San Diego Region Resolution No. R9-2010-0001 was
23 adopted by the SAN DIEGO WATER BOARD on February 10, 2010, and incorporated into the National Pollutant
24 Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the
25 Municipal Separate Storm Sewer System Draining the Watersheds within the San Diego Region (MS4 Permit)
26 [Order No. R9-2013-001 and Order No. R9-2015-001] on May 8, 2013 and February 4, 2015, respectively; and

27 WHEREAS, the BEACHES AND CREEKS TMDL was developed using limited data and the SAN
28 DIEGO WATER BOARD recognizes that special studies by third parties such as dischargers and other interested
29 persons could result in improved analysis in future proceedings to consider updates to the BEACHES AND
30 CREEKS TMDL; and

31 WHEREAS, the Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor
32 and Shelter Island Park in San Diego Bay ("DANA POINT HARBOR/SHELTER ISLAND TMDL") was
33 developed using limited data and the SAN DIEGO WATER BOARD recognizes that special studies by third
34 parties such as dischargers and other interested persons could result in improved analysis in future proceedings to
35 consider updates to the DANA POINT HARBOR/SHELTER ISLAND TMDL; and

36 WHEREAS, some of the COPERMITTEES have undertaken special studies to collect data and perform
37 modeling (hereinafter "SPECIAL STUDIES") that may serve to validate or support revisions to the prior analysis
38 which served as the basis for the BEACHES AND CREEKS TMDL and DANA POINT HARBOR/SHELTER
39 ISLAND TMDL; and

1 WHEREAS, the PARTIES are in favor of developing, by a transparent and inclusive process, a robust and
2 mutually-acceptable COST-BENEFIT ANALYSIS (hereinafter "COST-BENEFIT ANALYSIS) and Project
3 Reports with recommendations for changes that will support a constructive discussion between the PARTIES of
4 stormwater planning and implementation in general and the BEACHES AND CREEKS TMDL and DANA POINT
5 HARBOR/SHELTER ISLAND TMDL in particular; and

6 WHEREAS, the SAN DIEGO WATER BOARD participated in the development of workplans for the
7 SPECIAL STUDIES, including, but not limited to the San Diego Region Reference Study, the Surfer Health Study,
8 and jurisdiction-specific studies, such as the Tecolote Quantitative Microbial Risk Assessment, and the County of
9 San Diego's dry weather bacteria source identification project; and

10 WHEREAS, the SAN DIEGO WATER BOARD Resolution No. R9-2015-0043, the 2014 Triennial
11 Review of the Water Quality Control Plan for the San Diego Basin (Basin Plan), supports the evaluation of Contact
12 Water Recreation (REC-1) Water Quality Objectives as a Tier 1 Priority for the Triennial Review and supports the
13 completion of a COST-BENEFIT ANALYSIS, stating: its staff would "continue to seek a third party cost benefit
14 analysis regarding compliance with regulations of the San Diego Water Board, with a specific focus on the
15 infeasibility of meeting wet weather TMDL water quality objectives for bacteria indicators."; and

16 WHEREAS, the PARTIES desire to establish a procedural framework to assure that the COST-BENEFIT
17 ANALYSIS is conducted in an appropriate manner so that the resulting data, and data from SPECIAL STUDIES,
18 can be considered in future SAN DIEGO WATER BOARD proceedings to potentially update the BEACHES AND
19 CREEKS TMDL and DANA POINT HARBOR/SHELTER ISLAND TMDL, as warranted, and for other water
20 quality planning purposes; and

21 NOW THEREFORE, the PARTIES agree as follows:

22 **1. TERM**

23 The EFFECTIVE DATE of this MOU shall be the date this MOU is fully executed by the final
24 signatory and shall continue in effect until terminated in accordance with Paragraph 8 of this MOU, but
25 for no longer than five years.

26 **2. PURPOSE**

27 The purpose of this MOU is to memorialize the commitments of the PARTIES with regard to the
28 COST-BENEFIT ANALYSIS in order to assure that the COST-BENEFIT ANALYSIS and review of
29 the SPECIAL STUDIES' reports are appropriately conducted using the best available science and
30 information to facilitate potential updates of the BEACHES AND CREEKS TMDL and DANA POINT
31 HARBOR/SHELTER ISLAND TMDL and to promote sound water quality planning.

32 **3. ROLES AND RESPONSIBILITIES OF PARTIES**

33 The following provisions define the roles and responsibilities of the PARTIES with regard to the
34 development and implementation of the COST-BENEFIT ANALYSIS and the PARTIES agree to the
35 following:

36 **A. PROJECT WORKPLANS**

37 The PARTIES will develop a Project Workplan for the COST-BENEFIT ANALYSIS, which will
38 define in detail the tasks to be completed, how those tasks relate to the development of potential
39 updates to the BEACHES AND CREEKS TMDL and DANA POINT HARBOR/SHELTER
40 ISLAND TMDL, the methods for completing the tasks, an approximate schedule for completing
41 the tasks, and the expertise required to perform the tasks. The SAN DIEGO WATER BOARD
42 staff will cooperate with the COPERMITTEES in the development of the Project Workplan; such

1 cooperation will include, but not be limited to, attending and participating in meetings with the
2 COPERMITTEES regarding the workplan and reviewing the workplan to confirm it meets
3 applicable quality assurance requirements. The PARTIES may seek input from but not limited to
4 the United States Environmental Protection Agency and the State Water Resources Control Board,
5 when appropriate, regarding scientific methods employed, data gathered, assumptions used,
6 interpretation of agency rules and regulations, and other relevant issues that may arise during
7 development of the Project Workplan for the COST-BENEFIT ANALYSIS.

8 B. PROJECT WORKPLAN IMPLEMENTATION AND REVISION

9 The Project Workplan for the COST-BENEFIT ANALYSIS will provide the foundation for
10 execution of the COST-BENEFIT ANALYSIS. The PARTIES will vet and utilize the most
11 current science and best available data in carrying out the COST-BENEFIT ANALYSIS. The
12 PARTIES agree that the COST-BENEFIT ANALYSIS shall include a quantification of costs and
13 benefits under current conditions (i.e., based on today's water quality) for purposes of comparison
14 to the costs and benefits of the water quality that would be achieved through implementation of the
15 TMDLs as written, and the costs and benefits of other TMDL modification scenarios to be
16 identified in the Project Workplan. The COPERMITTEES may retain qualified consultants to
17 assist with conducting the COST-BENEFIT ANALYSIS, subject to the COPERMITTEES usual
18 rules and procedures for procuring such services. Although an approximate schedule will be
19 provided in the Project Workplan, the project timeline for the COST-BENEFIT ANALYSIS will
20 ultimately be left to the PARTIES discretion. If during execution of the COST-BENEFIT
21 ANALYSIS the PARTIES determine that revisions are necessary to achieve project objectives, the
22 PARTIES will revise the Project Workplan as needed to achieve those objectives. The PARTIES
23 will work collaboratively to develop a transparent and inclusive process for completion of the
24 COST-BENEFIT ANALYSIS.

25 C. STAKEHOLDER ENGAGEMENT ON COST-BENEFIT ANALYSIS WORK PRODUCTS AND 26 REPORTS

27 The PARTIES will seek input from the public and interested parties during review of the COST-
28 BENEFIT ANALYSIS work products and reports. The PARTIES will perform outreach to various
29 stakeholders (e.g., nongovernmental organizations, research institutions, citizen groups, etc.) to
30 ensure maximum appropriate participation of those stakeholders in review and consideration of the
31 COST-BENEFIT ANALYSIS work products and reports. Based on comments from the
32 stakeholders, the PARTIES will determine what changes, if any, should be made to the COST-
33 BENEFIT ANALYSIS work products and/or whether additional investigation is necessary. If the
34 PARTIES determine that changes or additional investigation are necessary, the COPERMITTEES
35 will revise the COST-BENEFIT ANALYSIS work products accordingly.

36 D. PROJECT REPORTS AND TMDL UPDATE

37 Upon completion of the COST-BENEFIT ANALYSIS and other SPECIAL STUDIES, the
38 COPERMITTEES will summarize the resulting findings in written Project Reports provided to the
39 SAN DIEGO WATER BOARD. The Project Reports may include the COPERMITTEES
40 recommendations for how the results change, or warrant update of, the BEACHES AND CREEK
41 TMDL and DANA POINT HARBOR/SHELTER ISLAND TMDL. The SAN DIEGO WATER
42 BOARD will review the Project Reports to determine if the proposed updates of the BEACHES
43 AND CREEKS TMDL and DANA POINT HARBOR/SHELTER ISLAND TMDL resulting from
44 the COST-BENEFIT ANALYSIS and other SPECIAL STUDIES are consistent with applicable
45 State and Federal requirements. Three potential pathways may result: (1) If PARTIES agree that
46 the findings support an update of the BEACHES AND CREEKS TMDL and DANA POINT
47 HARBOR/SHELTER ISLAND TMDL, the PARTIES will cooperate to develop, in accordance

with the schedule in Table 1, amendments to the BEACHES AND CREEKS TMDL and DANA POINT HARBOR/SHELTER ISLAND TMDL, and corresponding amendments to the San Diego Regional MS4 Permit, for consideration by the SAN DIEGO WATER BOARD in a public hearing. (2) If evaluation of the COST-BENEFIT ANALYSIS and other SPECIAL STUDIES work products and the Project Reports confirm the current BEACHES AND CREEKS TMDL and DANA POINT HARBOR/SHELTER ISLAND TMDL targets as written, then the PARTIES agree to revisit the TMDL implementation plan to consider additional allowances, such as an extended compliance timeline and/or alternate locations of compliance points, which will be considered by the SAN DIEGO WATER BOARD in a public hearing. Under this scenario, the SAN DIEGO WATER BOARD and COPERMITTEES additionally agree to cooperate in the development of a funding strategy for TMDL implementation. (3) If the PARTIES do not agree that the COST-BENEFIT ANALYSIS and other SPECIAL STUDIES work products and the Project Reports support an update of the BEACHES AND CREEKS TMDL and DANA POINT HARBOR/SHELTER ISLAND TMDL, the PARTIES agree to bring recommendations from the COPERMITTEES to a SAN DIEGO WATER BOARD public meeting or workshop. Under this scenario, the PARTIES may also identify additional studies or analysis that may resolve the significance of the findings or establish a mutually agreeable independent panel of technical experts to advise the PARTIES regarding the findings.

To demonstrate a collaborative commitment to a transparent and timely process, a schedule with key milestone dates is included in Table 1. While each milestone may not be met by the date indicated, the PARTIES agree to make every effort, in good faith, to meet the proposed milestones by those dates. Reasonable grounds for delay in meeting the milestones may include unforeseen circumstances, not limited to the following: COPERMITTEES do not meet the schedule for submitting work products; and, the PARTIES agree that additional investigations are necessary to fill identified data gaps. If the PARTIES agree that there are reasonable grounds for delay, the PARTIES will revise the schedule and agree to make every effort, in good faith, to meet the revised milestones.

Table 1: KEY PROJECT MILESTONES

ACTIVITY	RESPONSIBLE ENTITY (IES)	ESTIMATED DUE DATE
SPECIAL STUDIES Reports	One or More COPERMITTEES (or PARTIES) (with review by SAN DIEGO WATER BOARD)	October –June 2016
Project Report with recommendations for changes to BEACHES AND CREEKS TMDL and DANA POINT/SHELTER ISLAND TMDL, as warranted	COPERMITTEES (with review by SAN DIEGO WATER BOARD)	September 2016
Cost-Benefit Analysis of Feasibility to Meet Wet Weather Targets of BEACHES AND CREEKS TMDL and DANA POINT/SHELTER ISLAND TMDL	COPERMITTEES (with review by SAN DIEGO WATER BOARD)	September 2016
SAN DIEGO WATER BOARD Adoption Hearing for Proposed Amendments to the Beaches and Creeks TMDL and the NPDES MS4 Permit (Order No. R9-2013-0001), if	SAN DIEGO WATER BOARD	April 2018

warranted		
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1 4. **COMMUNICATION AND DISPUTE RESOLUTION**

2 The PARTIES agree to employ ongoing, timely, and open communications to identify issues and
3 problems that may arise during the development and implementation of the COST-BENEFIT
4 ANALYSIS and Project Reports. In the event that deficiencies, delays, or other detrimental
5 circumstances occur during the course of COST-BENEFIT ANALYSIS and Project Reports
6 development and execution, the PARTIES will initiate discussion and actions as necessary in an
7 attempt to resolve said deficiencies, delays, or detrimental circumstances. In the event that a dispute
8 arises regarding any aspect of this MOU, the PARTIES agree to assign appropriate individuals to
9 negotiate an acceptable resolution of the dispute.

10 5. **FUNDING AND SAN DIEGO WATER BOARD STAFF TIME**

11 Funding for the COST-BENEFIT ANALYSIS, SPECIAL STUDIES, and development of Project
12 Reports will be determined separately from this MOU. The PARTIES agree and understand that such
13 funding will come from a variety of sources, including existing cost-sharing agreements between the
14 COPERMITTEES. However, the PARTIES understand that the actual cost of development and
15 execution of the COST-BENEFIT ANALYSIS, SPECIAL STUDIES and development of Project
16 Reports will be borne by one or more of the COPERMITTEES and not by the SAN DIEGO WATER
17 BOARD, unless it chooses to participate as a funding partner with COPERMITTEES.

18 Although the SAN DIEGO WATER BOARD may not contribute to the actual cost of development and
19 execution of the COST-BENEFIT ANALYSIS, SPECIAL STUDIES, and development of Project
20 Reports, it nonetheless agrees to commit the SAN DIEGO WATER BOARD staff time and resources
21 necessary to facilitate the COST-BENEFIT ANALYSIS process in a timely manner and agrees to
22 assume and be responsible for all of its internal costs associated with that process, including the costs
23 of reviewing, analyzing, and commenting upon the COST-BENEFIT ANALYSIS, SPECIAL
24 STUDIES work products, Project Workplan, and Project Reports. Furthermore, the SAN DIEGO
25 WATER BOARD agrees to commit the staff time necessary to process in a timely manner any
26 warranted amendments to the BEACHES AND CREEKS TMDL and DANA POINT
27 HARBOR/SHELTER ISLAND TMDL resulting from the COST-BENEFIT ANALYSIS and Project
28 Reports and other state or federal efforts on Bacteria Objectives. In the event that higher priority
29 obligations arise and/or staffing resources become reduced, the San Diego Water Board reserves the
30 ability to redirect staff time to other projects.

31 The obligation of the PARTIES to complete the services identified in this MOU are contingent upon
32 the availability of sufficient funds in the budgets approved by the COPERMITTEES respective
33 governing bodies each fiscal year this MOU remains in effect. In the event that such funding is
34 terminated or reduced, the PARTIES may modify or terminate this MOU, pursuant to Section 6 or 8,
35 below.

36 6. **MODIFICATION OR RECISSION**

37 No alteration or variation of the terms of this MOU shall be valid unless made in writing and signed by
38 all of the PARTIES.

39 7. **RESERVATION OF AUTHORITY**

40 Nothing in this MOU is intended to constrain or limit, nor shall have the effect of constraining or
41 limiting, the authority of the PARTIES in carrying out their legal responsibilities and exercising their
42 discretion in management, regulation, coordination, and control of water quality or land use affecting
43 water quality. Furthermore, nothing in this MOU obligates the COPERMITTEES to conduct the

COST-BENEFIT ANALYSIS and prepare the Project Reports and SPECIAL STUDIES' reports. The SAN DIEGO WATER BOARD acknowledges that the COPERMITTEES cannot be bound to perform the COST-BENEFIT ANALYSIS and prepare the Project Reports and SPECIAL STUDIES' reports.

8. TERMINATION/WITHDRAWAL OF PARTY

One or more of the PARTIES may terminate their involvement in this MOU without cause or penalty immediately after thirty (30) days' written notice, unless otherwise specified. Notice shall be deemed served per the terms of Section 16, below. If a PARTY exercises the right to terminate this MOU, the remaining PARTIES shall not be relieved of their obligations under this MOU.

9. ATTORNEY FEES AND COSTS

Each PARTY agrees to bear its own attorney fees, costs, and all other legal expenses in connection with any action seeking to enforce, construe, challenge, or interpret the terms of this MOU.

10. ADVICE OF COUNSEL

Each PARTY acknowledges it has consulted with and been advised by its respective attorneys concerning the terms of this MOU, or that it knowingly declined to consult with or seek the advice of an attorney, and that it has executed this MOU after independent investigation.

11. JOINT DRAFT

Each PARTY has had the opportunity to participate in the drafting and preparation of this MOU. Any construction to be made of this MOU or any of its terms or provisions shall not be construed against any one PARTY.

12. WARRANTY OF AUTHORITY TO EXECUTE AGREEMENT

Each person executing this MOU on behalf of any PARTY hereto hereby warrants that he or she has authority to so execute this MOU in that capacity, that no other approval or consent other than that of the person executing this MOU is necessary for the due and legal execution of this MOU and that the PARTY on whose behalf the MOU is signed, including that PARTY's agents, officers and employees, is legally bound thereby as of the date the MOU is fully executed.

13. COUNTERPARTS

This MOU may be executed in counterparts, with the same force and effect as if executed in a single, complete document. For purposes of this MOU, a facsimile or Portable Document Format ("PDF") execution shall be considered as the equivalent of a wet ink signature, shall be deemed good and valid acceptance of this MOU, and shall be reasonably relied upon by all PARTIES.

14. AMERICANS WITH DISABILITIES ACT

As state and local government entities, all PARTIES are required by law to comply with Titles I and II of the Americans with Disabilities Act. PARTIES hereby certify that they have enacted policies that substantially comply with the Americans with Disabilities Act. PARTIES shall remain individually responsible for their own Americans with Disabilities Act compliance programs.

15. RIGHT TO AUDIT

Each PARTY retains the right to review and audit and the reasonable right of access to other PARTIES' respective premises to review and audit the PARTIES' compliance with the provisions of this MOU ("PARTY's Right"). PARTY's Right includes the right to inspect and photocopy, and to

1 retain copies, outside of the PARTIES' premises, of records related to this MOU that are kept in the
2 ordinary course of business, including relevant books, records, and documents. The transmission of
3 documents between the PARTIES is not considered a public release of information and the PARTIES
4 do not waive applicable claims of privilege under the California Public Records Act, including but not
5 limited to the exemptions set forth in California Government Code sections 6254(a) and (k), 6255, and
6 California Evidence Code section 1040. Furthermore, the auditing PARTY shall withhold draft, pre-
7 decisional, and/or deliberative records from public disclosure to the greatest extent allowed by law.
8

9 **16. NOTICES**

10 All notices required or desired to be given under this AGREEMENT shall be in writing and (a)
11 delivered personally, (b) sent by certified mail, return receipt requested or (c) sent by telefacsimile
12 communication followed by a mailed copy, to the addresses specified below. A PARTY may change
13 the address for notices by giving the other PARTIES at least ten (10) days written notice of the new
14 address. Notices shall be deemed received when actually received in the office of the addressee or
15 when delivery is refused, as shown on the receipt of the U.S. Postal service, or other person making the
16 delivery, except that notices sent by telefacsimile communication shall be deemed received on the first
17 business day following delivery.

18 Director, OC Public Works
19 County of Orange
20 P.O. Box 4048
21 Santa Ana, CA 92702-4048
22

23 Asst. Director of Public Works
24 County of San Diego
25 5510 Overland Ave., Suite 410
26 San Diego, CA 92123
27

28 Director, Transportation & Storm Water Department
29 City of San Diego
30 9370 Chesapeake Dr., Suite 100
31 San Diego, CA 92123
32

33 Executive Officer
34 San Diego RWQCB
35 2375 Northside Drive, Suite 100
36 San Diego, CA 92108
37 Fax: (619) 516-1994
38

39 **17. ENTIRE MOU**

40 This MOU constitutes the entire MOU between the PARTIES.

IN WITNESS WHEREOF, the COPERMITTEES and the SAN DIEGO WATER BOARD hereto have executed this MOU on the dates opposite their respective signatures.

CITY OF SAN DIEGO

Date: 10/10/16

By: 

PAZ GOMEZ
DEPUTY CHIEF OPERATING
OFFICER, INFRASTRUCTURE/
PUBLIC WORKS

APPROVED AS TO FORM:
CITY OF SAN DIEGO COUNSEL

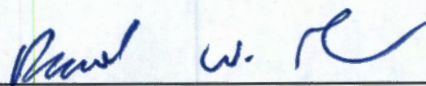
Date: 10/11/2016

By: 

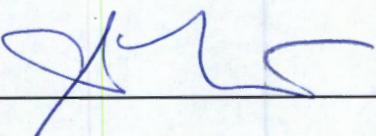
DAVIN A. WIDGEROW
DEPUTY CITY ATTORNEY

IN WITNESS WHEREOF, the COPERMITTEES and the SAN DIEGO WATER BOARD hereto have
executed this MOU on the dates opposite their respective signatures

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

Date: 31 May 2016 By: 
Executive Officer

APPROVED AS TO FORM:
SAN DIEGO WATER BOARD COUNSEL

Date: 23 June 2016 By: 

IN WITNESS WHEREOF, the COPERMITTEES and the SAN DIEGO WATER BOARD hereto have executed this MOU on the dates opposite their respective signatures

COUNTY OF ORANGE
a political subdivision of the State of California

Date: 06/29/2016 By: Shane Z. Gilbey
Director of OC Public Works

APPROVED AS TO FORM:
COUNTY COUNSEL

Date: 5.25.16 By: [Signature]

IN WITNESS WHEREOF, the COPERMITTEES and the SAN DIEGO WATER BOARD hereto have executed this MOU on the dates opposite their respective signatures

COUNTY OF SAN DIEGO,
a political subdivision of the State of California

Date: 8/18/16

By: _____


SARAH E. AGHASSI

Deputy Chief Administrative Officer
Land Use and Environment Group
County of San Diego

APPROVED AS TO FORM:
COUNTY COUNSEL

Date: 8/18/16

By: _____


THOMAS DEAK
Senior Deputy County Counsel