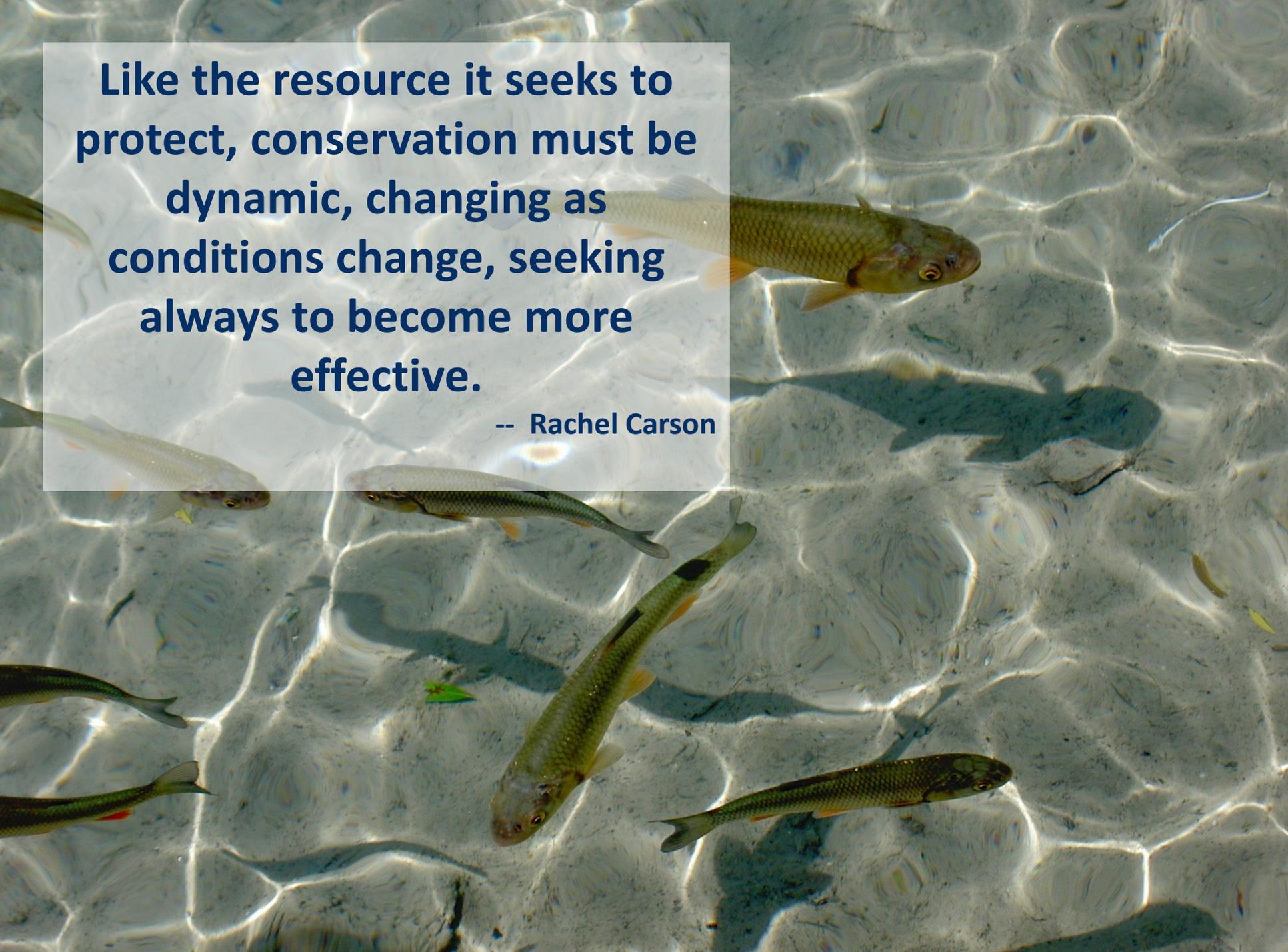


COMMENTS OF ORANGE COUNTY CO-PERMITTEES

Tentative Order No. R9-2015-0100
Adoption Hearing
Nov. 18, 2015

Mary Anne Skorpanich, County of Orange
Ryan Baron, County of Orange
Jeremy Jungreis, Rutan & Tucker, LLP



Like the resource it seeks to protect, conservation must be dynamic, changing as conditions change, seeking always to become more effective.

-- Rachel Carson

Water Board's Permit Intent

- Flexibility
- Innovation
- Strategic prioritization
- Outcomes focused
- Incentivizing
- Integrated
- Tools to achieve success

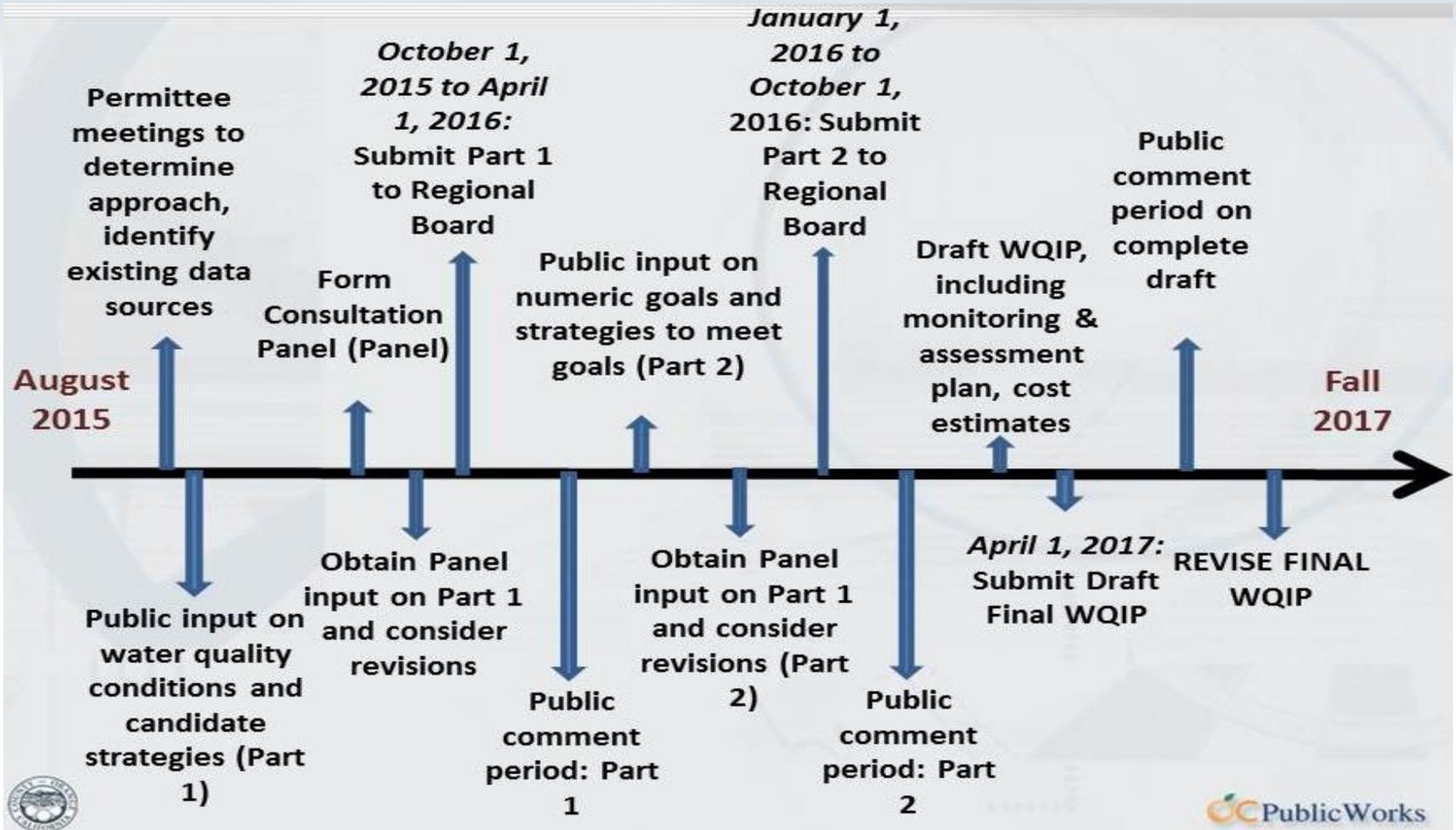
Compliance During WQIP Development

- Tentative Order needs to deem a permittee in compliance with the permit's prohibitions and numeric limitations during the WQIP planning and development period (Provision B.3.c)

Roadmap

- Development & Implementation Background
- Assumptions and implications about WQIP planning and development
- State Board Order on LA Permit
- EPA Comments
- Recent litigation in South OC

The WQIP Development Process



Pollutants of Concern

303(d) Impairments		
Enterococcus:	9	
Total Coliform:	9	
Toxicity:	8	
Phosphorus:	5	
Indicator Bacteria:	5	
Selenium:	5	
Total Nitrogen as N:	3	
Turbidity:	2	
Fecal Coliform:	2	
Sediment Toxicity:	2	
Cadmium:	1	
Nickel:	1	
Copper:	1	
Zinc:	1	
Dieldrin:	1	
Benzo[b]flouranthene:	1	
Chloride:	1	
Sulfates:	1	
TDS:	1	
Diazinon:	1	
DDE:	1	

Attaining Numeric Limits: South OC Implementation Costs

Estimates of Cost by Impervious Area per Subwatershed

Subwatershed	Total Area (ac)	Impervious Area (ac)	Cost (\$55,000/ac)	Cost (\$70,000/ac)
Aliso Creek	22,283	7,798	428,890,000	545,860,000
Dana Point	6,571	2,374	130,570,000	166,180,000
Laguna Coast	12,362	1,771	97,405,000	123,970,000
San Clemente	12,254	3,906	214,830,000	273,420,000
San Juan River	101,928	13,656	751,080,000	955,920,000
San Mateo Creek	12,241	436	23,980,000	30,520,000
Totals	167,639	29,941	1,646,755,000	2,095,870,000

State Policy Issue

- Courts have held that MS4s are not required by CWA to strictly comply with numeric effluent limitations.
 - *Defenders of Wildlife v. Browner* (9th Cir. 1999); *Chesapeake Bay Found. v. Md. Dep't of the Env't.* (Anne Arundel Cir. Ct., Dec. 2014)
- EPA has not promulgated binding regulations, only issued non-binding guidance encouraging States to require strict compliance with numeric limits, where feasible.
 - 2014 EPA Stormwater Memo Est. TMDL WLAs (Nov. 2014) (“This memorandum is guidance. It is not a regulation and does not impose legally binding requirements on EPA or States.”).
- State Water Board clarified that regional water boards should require strict compliance with WQS.
 - Order WQ 2015-0075, State Board Order on LA Permit (July 2015).

Implications of Alternative Compliance Pathway

- Permittees shall develop watershed improvement plans.
- Tentative Order provides option to develop interim/final numeric goals, strategies, compliance schedules, annual milestones.
- Effectively requires development of TMDLs, compliance schedules, TSOs by permittees in exchange for compliance.
- Assuming the State's responsibility.

Compliance During Development

- Extensive planning + State requirement + State obligations (cost & resources) = Full Compliance.
- Planning and development is fundamental to implementation.
- Bright line for compliance should not be drawn at approval of the WQIP.

State Board Order 2015-075

- Recognized compliance with RWLs will take many years of technical efforts.
- Reasonable to provide for an alt compliance process if 7 Principles followed.
- Principle 3 – “Phase I permits should provide for a compliance alternative that allows permittees to achieve compliance with RWLs over a period of time.”
- RBs should “consider” LA WMP/EWMP pathway (also CASQA if consistent with 7 principles).
- Region-specific or permit-specific reason if a principle is not followed.

State Board Order 2015-075

- Found compliance during development period sufficiently constrained and reasonable (pp.48-50).
 - Must meet relevant deadlines for WMP development
 - Other actions were not put on hold – implementation of LID, green streets and other watershed control measures
 - State Board was concerned there was no room for deviation and allowed deadlines to be adjusted or extended.

Tentative Order

- Does not follow Principle 3.
- Instead of allowing compliance with numeric limits over time, it requires permittees to strictly comply with prohibitions and limitations immediately upon enrollment and throughout the 2+ year planning period.
- No ability to prioritize until WQIP approval.
- No permit-specific or region-specific finding or reason provided in the permit.

EPA Comments

- EPA comment letters
- No citation to federal regulations
- Federal “preference” = State Issue
- EPA did not disapprove the LA Permit
- State Board did not adopt EPA’s position

EPA Guidance

- EPA recommends immediate attainment of numeric water quality objectives as final numeric effluent limits—a noble but, in many cases, infeasible—goal for municipal stormwater.
 - EPA not focused on attainability, practicability or multi-billion dollar cost of attaining current numeric limits in each watershed.
 - **But they should be:**
 - State and federal law require such consideration.
 - Action this Board will take is based on state, not federal, law.
 - If Co-Permittees are reducing pollution to the MEP while developing WQIPs, then EPA has no basis for objection.

City of Laguna Beach

- Risk of lawsuits prior to WQIP approval.
- Laguna Beach is proactive beachfront community. Water quality matters.
- Most dry weather MS4 flows already diverted to sanitary sewer.
- Robust and well-funded stormwater program.
- Riverwatch sues Laguna Beach for sewage collection system spills.
 - Alleges strict liability for any non-stormwater discharge into the MS4
 - Demands substantial infrastructure overhaul
 - Demands a future role in managing the City's wastewater and stormwater systems.
 - Demands large award of attorneys' fees.
 - \$400,000 spent in City transaction costs

Other Examples

- Not an isolated incident. RiverWatch has sued multiple So Cal cities (e.g., Carlsbad, Monterey).
 - Many of the “targets” are considered “green” cities and have robust (and well funded) pollution prevention programs
- Change in tactics: RiverWatch is now going after alleged municipal MS4 violations associated with discharges to/from MS4s.
 - Laguna Beach, San Luis Obispo, and Whittier
 - Also suing other small MS4s such as Universal Studios

Effect of Wrongful Lawsuits

- Citizen suit settlements can take authority out of Regional Board hands and put resolution of MS4 issues in the hands of a judge.
- Potential for inconsistent judicial decisions adverse to Regional Board priorities.
- Each settlement diverts large amounts of staff time away from Clean Water programs—often for little to no water quality benefit.
- Incongruent with a watershed based approach to improving water quality.

Regional Board Intervention

- Regional Board initiating enforcement or intervening in citizen suit proceeding does not solve the problem.
- RWL exceedances can result in Mandatory Minimum Penalties and, at minimum, the stigma of enforcement.
- Intervention or enforcement requires filing of lawsuit by Regional Board to cut off citizen suit.

Regional Board Should Determine Compliance

- Permittees recognize the role third parties have in enforcement.
- But, Regional Board should have initial authority to determine MS4 compliance.

Full Compliance Adopted by Other Regions

- San Diego region would be the only region without compliance during WQIP development.

Incentivizes Planning

- Regional Board concern that compliance during development won't incentivize permittees
- Solution = require rigorous development efforts that includes:
 - Meeting all development deadlines,
 - Public data solicitation process,
 - Review of priority water quality conditions with a consultation panel,
 - Draft agreements with watershed partners, and
 - Continued implementation of existing control measures

Proposed Language

- New Provision B.3.c.(3)
 - Any Copermittee who wishes to utilize the implementation of the Water Quality Improvement Plan to demonstrate compliance with the requirements of Provisions A.1.a., A.1.c. A.1.d., A.2 and A.3.b within a Watershed Management Area will also be deemed in compliance with such requirements during the development of the Water Quality Improvement Plan, so long as the Copermittee complies, either individually or with other Copermittees, with the Water Quality Improvement Plan development schedule in Provision F.1.a and F.1.b.

Closing

- Need for compliance during development
- Questions?

“Hard-Out”

- Regional Board should have initial discretion to determine compliance.
- State Board rejected “hard out” in LA Permit.
- Permittee would need to be afforded notice and opportunity to be heard (informal adjudication) before compliance determination could be revoked. *Saleeby v. State Bar of California* (1985).
- Findings & record must provide meaningful judicial review.