



San Diego Unified Port District:
Tentative Order No. R9-2013-0001
Regional MS4 Permit Hearing Presentation

April 10-11, 2013

Jurisdictional Monitoring

- Port agrees with Regional Board that jurisdictional monitoring is necessary to determine source of exceedances
 - Ability for Copermittee to conduct additional, voluntary monitoring, above requirements in MS4 Permit is key
- Location of additional stations is critical
 - Monitoring at MS4 outfalls and receiving water not sufficient to identify sources of pollutants outside of Copermittee's legal authority to control
 - *See NRDC, Inc. v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880; *Los Angeles Flood Control Dist. v. NRDC, Inc.* (U.S. Supreme Court 2013) 133 S. Ct. 710

MS4 Owner/Operator Liability

- Copermittee should only be liable for discharges from MS4 facility **owned or operated** by the Copermittee
 - Liability cannot be assigned based on discharges from MS4 facility that is **located** within a Copermittee's geographic jurisdiction
- Liability based on modeling of storm water is not appropriate
 - *See Virginia Dep't of Transp. v. U.S. EPA, et al.*, No. 1:12-CV-775 (E.D. Va. Jan. 3, 2013)
- Particularly relevant for Port
 - Port's jurisdiction overlaps with jurisdiction of several Copermittees/contains MS4 facilities not owned/operated by Port
- Regional Board appears to acknowledge that MS4 liability requires ownership or operation of MS4 facility
- Port proposes that the MS4 Permit be revised to state:
 - "The location of an MS4 facility within any Copermittee's jurisdiction boundaries does not, of itself, make the Copermittee an owner or operator of that MS4 facility."

TMDLs Should not be Incorporated into MS4 Permit

- Regional Board has discretion not to incorporate TMDLs into MS4 Permit
 - TMDLs not in prior MS4 permits
- TMDLs are not a good fit for MS4 Permit
 - Incorporating TMDL compliance schedules/requirements into MS4 Permit may create numeric limits
 - Given legal issues and potential uncertainty of TMDL enforceability, inclusion of TMDLs may subject MS4 Permit to collateral challenge
- Economic considerations/compliance costs cannot be considered by Regional Board to set numeric limits in the MS4 Permit that are less stringent than federal standards
 - *See City of Burbank v. State Water Resources Bd.* (2005) 35 Cal.4th 613
- Copermittes willing to implement BMPs to MEP
 - More reasonable approach than including TMDLs in MS4 Permit