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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
OAKLAND, CALIFORNIA

OCTOBER 19, 2005

EXCERPT OF PROCEEDINGS

ITEM 9:

Proposed Amendment to the Water Quality Control Plan  
(Basin Plan) for the San Francisco Bay Region to  
Establish a Water Quality Attainment Strategy,  
Total Maximum Daily Load, and Implementation Plan for  
Diazinon and Pesticide-Related Toxicity in Urban Creeks

LOCATION:

1515 CLAY STREET, SUITE 1400  
OAKLAND, CALIFORNIA

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3                   **Transcription By:**  
4                   *House of Scribes*  
5                   **Stockton, California**  
6                   **(209) 478-8017**

7 MR. WOLFE: Moving on to Item 9, we'll hear from Bill  
8 Johnson. Bill?

9 MR. JOHNSON: Good morning, I'm Bill Johnson. And it's a  
10 pleasure to be here this morning to tell you about our  
11 Water Quality Attainment strategy and TMDL for Diazinon  
12 and pesticide-related toxicity in Bay Area urban creeks,  
13 which I've been practicing saying in one breath. But  
14 that's the only time you're going to hear me say it this  
15 morning, because from here on out I'm simply going to  
16 refer to it as "the strategy."

17 And I'm hoping you can think of it as the strategy with  
18 something extra, because this strategy is more than just  
19 a TMDL. Although it does meet TMDL requirements, a TMDL  
20 is typically corrective, and this strategy is also  
21 preventative. So it covers all pesticide-related  
22 toxicity, not just toxicity that's attributable to  
23 Diazinon. It also covers all urban creeks, not just  
24 those that are officially listed as impaired on the  
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2 303(d) list. And in doing so, it reduces the need for  
3 future TMDLs.

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5 But perhaps I'm getting a bit ahead of myself, and it  
6 would be a good time to go over what I intend to talk  
7 about this morning. So today I'll tell you a bit about  
8 what the pesticide toxicity problem is, what some of  
9 these TMDL analyses are that we've tucked inside the  
10 strategy, and then I'll spend most of my time talking  
11 about the implementation plan, because that's the core of  
12 the strategy. And then we'll talk about the public  
13 process a bit.

14

15 So let's get started with the pesticide toxicity problem.  
16 The Basin Plan contains water quality standards that  
17 apply to our urban creeks, and those include beneficial  
18 uses like freshwater habitat and water quality objectives  
19 intended to protect the beneficial uses like a number of  
20 narrative objectives which I can paraphrase as simply no  
21 toxic substances are allowed in concentrations that are  
22 toxic.

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2 Unfortunately, throughout much of the 1990s a pesticide  
3 called Diazinon caused many of our creeks to be toxic,  
4 which we've learned through our standard toxicity test  
5 using our test organism *Ceriodaphnia dubia*, which you may  
6 have heard referred to as the water flea now and then.  
7 But unfortunately these water fleas didn't do very well  
8 when we put them in our urban creek water throughout the  
9 '90s. And because there was such widespread toxicity  
10 that was attributable to Diazinon, in 1998 U.S. EPA  
11 placed a number of urban creeks on the 303(d) list for  
12 Diazinon.

13

14 Now a lot of things have changed since 1998 in the  
15 pesticide world, not the least of which is that U.S. EPA  
16 decided to phase out Diazinon from most urban  
17 applications. They announced the phase-out in the year  
18 2000 and it went into effect fully at the end of 2004.  
19 So you can see in the top chart there, I've graphed total  
20 Bay Area Urban Diazinon Use, starting with the end of the  
21 1990s and going through 2003, which was the most recent  
22 year for which I have data. And you can see that just in  
23 this time period Diazinon use in the Bay Area plummeted

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2 by about 75 percent, and it's still on its way down into  
3 2004.

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5 But unfortunately our pest problems didn't go away, and  
6 so people started turning to alternative pesticides. And  
7 below I've got an example of just one alternative for  
8 Diazinon. It's Bifenthrin, which is an example of  
9 pyrethroid pesticide, which is a new category of  
10 pesticides that's just gaining in market share. And you  
11 can see that Bifenthrin, like many pyrethroids and other  
12 Diazinon alternatives, is just increasing in popularity  
13 at the same time that Diazinon is decreasing. And this  
14 is a problem because, unfortunately, we've discovered  
15 that pyrethroids have been causing toxicity in some of  
16 our urban creeks now.

17

18 See, pyrethroids are very sticky, and they stick to  
19 particles and organic matter that runs off into creeks.  
20 And so now what we're seeing is that the toxicity that we  
21 used to see in the water column is now shifting into the  
22 sediment. And we know this because we've done sediment  
23 toxicity tests using our sediment toxicity test critter,  
24 *Hyalella azteca*.

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3 So because the pesticide toxicity problem is complex and  
4 it's dynamic, you really need a comprehensive region-wide  
5 program to address it. So, again, we also need to meet  
6 those TMDL requirements, so I'll talk briefly about the  
7 TMDL aspects of the strategy.

8

9 We've proposed three targets. There's a Diazinon  
10 concentration target of 100 parts per trillion. It should  
11 be fairly easy to meet because, as I said, U.S. EPA has  
12 phased out most urban Diazinon uses. And there are two  
13 toxicity targets which I can, just for the sake of  
14 brevity, say they equate to toxicity as not allowed in  
15 urban creeks. But they may be a little bit harder to  
16 meet, especially because of these changes in the  
17 pesticide market and the conditions we're now seeing with  
18 pyrethroids.

19

20 Now, all of our targets are concentrations, and the  
21 advantages of this is that we can have a TMDL that's  
22 concentration based and then the allocations can be set  
23 equal to the TMDL, which is equal to the concentration  
24 based targets. So the advantage of a concentration based

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2 TMDL is that each source can get the same allocation.  
3 And, of course, there's lots of sources of discharges  
4 into our urban creeks, but I can summarize them for you  
5 with just two words -- urban run-off.

6

7 In the Bay Area pesticides are applied by professionals  
8 and private citizens to landscapes and to a surprising  
9 extent, impervious surfaces, primarily to address our  
10 number one pest complaint which is the Argentinian ant.  
11 It doesn't take much of the pesticide that's applied  
12 around landscape or these impervious surfaces around a  
13 home or other structure to run-off with rain or  
14 irrigation to cause the kinds of toxicity that we're  
15 observing in the creek.

16

17 So how are we going to address this issue? Our  
18 implementation plan in our strategy focuses on three  
19 areas. The first is proactive regulation, and by that I  
20 mean preventing pollution using existing regulatory  
21 tools, but using them better. Second is education and  
22 outreach. We need to decrease the demand for pesticides  
23 that threaten water quality and increased awareness of  
24 less toxic alternatives, because they do exist. Third,

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2 the strategy calls for research and monitoring to fill  
3 information gaps and to measure our progress and success  
4 as we implement the strategy.

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6 So I'll spend just a few moments talking about each of  
7 these areas in a little bit more detail. To really  
8 understand what I'm talking about when I refer to  
9 proactive regulation, you have to understand a little bit  
10 about the existing pesticide regulatory structure.

11

12 Pesticide regulatory programs, as they're currently  
13 implemented, do not necessarily protect urban water  
14 quality, unfortunately. U.S. EPA and the California  
15 Department of Pesticide Regulation generally focus a lot  
16 of their energy on agricultural run-off, and  
17 unfortunately overlook urban run-off. This means that  
18 neither agency conducts any urban run-off modeling before  
19 they register a pesticide. And that means that there's  
20 no estimate of the environmental concentration of a  
21 pesticide in water or sediment before the pesticide is  
22 registered.

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2 Moreover, these agencies are not requiring pesticide  
3 registrants to submit sufficient toxicity data to derive  
4 water quality criteria. So not only do we not  
5 necessarily have an estimate of the environmental  
6 concentration of pesticides in water or sediment, we also  
7 have no benchmark to compare it to, to know whether it's  
8 a problem or not. And so it's not surprising that every  
9 now and then a pesticide falls through the cracks, like  
10 Diazinon, and now we're seeing some of the pyrethroids  
11 doing the same thing.

12

13 So our strategy calls on these agencies to better protect  
14 water quality in their programs. With U.S. EPA, we're  
15 calling on them to better coordinate their pesticide and  
16 water quality programs. And we've gotten a jump start on  
17 implementing this strategy by submitting about 40 comment  
18 letters to date on federal pesticide registration  
19 actions. And as you probably know, the squeaking wheel  
20 gets a little grease now and then. So we are getting  
21 much more attention on water quality issues than we used  
22 to from the Office of Pesticide Programs at EPA  
23 headquarters. So there's been a lot of learning going on  
24 there, and they're starting to take some of our water

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2 quality issues more seriously, because they're starting  
3 to have a better understanding of what we're concerned  
4 about.

5

6 Closer to home, within the California Environmental  
7 Protection Agency, we've been working with our sister  
8 agency, The Department of Pesticide Regulation. We've  
9 been developing a collaborative process that focuses more  
10 on prevention. Our process calls for action before water  
11 quality standards are violated, which is something new in  
12 the pesticide regulatory world.

13

14 Turning to education and outreach, we certainly want to  
15 avoid a pattern that we've seen occur in the past, where  
16 we simply substitute one toxic pesticide for another.  
17 We're promoting, instead of pesticide bans per se, we're  
18 promoting smarter pesticide use. And we have a special  
19 name for that. We call it Integrative Pest Management,  
20 or IPM.

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22 IPM focuses on long-term pest prevention, and then uses  
23 pesticides only when they're really needed. When we use  
24 pesticides with IPM we target our treatment specifically

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2 on the pest we want to control, and avoid effects on  
3 other organism. And we select our pesticides to minimize  
4 risks to people and the environment, including water  
5 quality.

6

7 Now thus far, I think it's fair to say that the urban  
8 run-off management agencies have really led the way in  
9 terms of education and outreach. You've probably heard  
10 of their program "Our Water, Our World," which among  
11 other things places fact sheets in retail establishments  
12 giving consumers information about less toxic pest  
13 control at the precise time that they're making their  
14 pest control decision, right there in the store.

15

16 So they've been doing a lot, and we are supporting  
17 education and outreach through our grants and pilot  
18 projects, and we've also gotten a hand from the  
19 University of California Statewide IPM Program, and the  
20 Department of Pesticide Regulation.

21

22 Now I said the strategy calls for monitoring. It also  
23 calls for adaptive implementation. We need to monitor  
24 our creeks for toxicity and pesticides, and we need to

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2 track pesticide use so that we can anticipate trends in  
3 the future. And the strategy includes a method for  
4 calculating monitoring benchmarks, because as I said,  
5 oftentimes we don't have water quality criteria. So if  
6 we're going to do pesticide monitoring, we need to have  
7 some way of telling whether the concentrations we're  
8 seeing in our creeks are important to us or not.

9

10 And finally, the strategy calls for adaptive  
11 implementation, which means reviewing the strategy on a  
12 periodic basis to make sure that we're still on track.

13

14 Before I leave the topic of implementation I want to  
15 focus just a little bit more attention on the urban run-  
16 off management agencies, because of course they're the  
17 ones that we regulate directly through our urban run-off  
18 permits. And in recent years, as permits have come up  
19 for renewal, we've been inserting language into the  
20 permits that's much more like what the strategy calls for  
21 here.

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23 In fact, the new permit requirements are nearer the  
24 three-pronged approach that our implementation strategy

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2 has. So the urban run-off management agencies are now  
3 supporting proactive regulation, monitoring and  
4 characterizing creek conditions, and again, leading that  
5 education and outreach effort.

6

7 And there's actually two sides to the education and  
8 outreach. One is that they're reducing their own  
9 pesticide use, which is something they have full control  
10 over. And that means that they are able to adopt IPM  
11 policies and ordinances, track their own pesticide use  
12 and require employees to practice IPM and require their  
13 contractors to practice IPM. So that's something that  
14 they can definitely do, and after setting such a good  
15 example they're in a great position to reach out and  
16 educate others in the community, including pest control  
17 professionals and the public at large.

18

19 So let's talk a little bit about the public process. In  
20 your packet you've got 10 comment letters that we've  
21 received in the public review period. I'm just going to  
22 give you a little overview of those comments, with the  
23 caveat, of course, that I may not express them quite as  
24 eloquently as they were expressed in your packet. But

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2 fortunately we'll have an opportunity for oral testimony  
3 after I speak, and people can clarify anything that maybe  
4 I've left unclear. I'll also give you a preview of our  
5 responses so you'll have an idea of the direction we're  
6 going in, but our full responses aren't ready yet.

7

8 So we have a letter from the U.S. Environmental  
9 Protection Agency that's very supportive of our strategy.  
10 It suggests some minor technical revisions, and we'll  
11 make those revisions, but again EPA is very happy with  
12 the strategy. The California Department of Pesticide  
13 Regulation also supports the strategy, in particular  
14 they're very supportive of this collaborative effort that  
15 we've worked with them so closely on.

16

17 In their letter they do express caution regarding the  
18 commitment of resources, which we completely understand  
19 because, as a state agency, we know that resources are  
20 always limited. However, we think that putting these  
21 concepts into the strategy is a great way of helping us  
22 prioritize how we use our resources and getting resources  
23 allocated to the right places. So the Department of

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2 Pesticide Regulation is also concerned about how we go  
3 about calling on them to prevent water quality problems.

4

5 Again, the strategy advises DPR, the Department of  
6 Pesticide Regulation, that a reasonably foreseeable water  
7 quality risk is in fact a call for action. And this is  
8 new for them, and what is at issue here is not the  
9 substance of what we're trying to say, but how we go  
10 about saying it. So we're working that out with them.

11

12 Now there's a letter from Baykeeper Pesticide Action  
13 Network and Clean Water Action, and these stakeholders,  
14 while they find that there are things about the strategy  
15 that they like, they think that it doesn't go far enough.

16 They would like more specificity regarding actions and  
17 timelines. But we think that the Basin Plan Amendment  
18 includes detail that's appropriate for the Basin Plan,  
19 and that more detail is more appropriate in the permits  
20 that follow.

21

22 Now we appreciate their concerns about timelines, but we  
23 find that -- what we anticipate is working on very  
24 different kinds of pesticide problems with the Department

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2 of Pesticide Regulation, for instance. And it's hard to  
3 come up with a one size fits all timeline that describes  
4 how we're going to go about doing this. So if we can come  
5 up with a way of doing it, we will. But for the time  
6 being we're relying on our adaptive implementation plan  
7 that's part of the strategy, and the continuing planning  
8 process. That means we'll be periodically going back and  
9 looking at the strategy, and making sure that what we are  
10 doing is being effective.

11

12 So these stakeholders would also like the Board to  
13 regulate pesticide sales and use directly, and to  
14 delegate such authorities to local urban run-off  
15 permittees. We believe that it would be far more  
16 efficient to rely on the Department of Pesticide  
17 Regulation to enhance its existing regulatory programs  
18 than for the Board to generate new regulatory programs  
19 here. Moreover, we don't believe the Board has the  
20 authority to delegate authorities down to the local  
21 level.

22

23 Finally, these stakeholders would like us to remove what  
24 they call a shield for urban run-off management agencies.

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2 And I would argue that we haven't given anyone a shield.  
3 What the strategy does is it gives an allocation to  
4 urban run-off, and then it clearly acknowledges the joint  
5 responsibility on the part of the urban run-off  
6 management agencies as well as other parties like EPA and  
7 the Department of Pesticide Regulation. All these parties  
8 have a role to play in meeting the allocations and  
9 targets.

10

11 And speaking of the urban run-off management agencies,  
12 there's a collection of letters from various  
13 representatives from these kinds of agencies. While,  
14 again, there are things about the strategy that they  
15 like, they think the strategy goes too far. They're  
16 especially nervous about the potential for numeric  
17 effluent limits. And we think that this is what  
18 underlies a number of their comments that relate to  
19 separating out a specific Diazinon TMDL from a more  
20 general pesticide related toxicity strategy.

21

22 But I want to make clear to you that the strategy does  
23 not impose any numeric effluent limits. And we actually  
24 see no clear benefit from separating a Diazinon-specific

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2 TMDL from the rest of the strategy, especially if that  
3 Diazinon TMDL doesn't address toxicity, which of course  
4 is the narrative objective that applies here.

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6 These stakeholders have also asked us to assign  
7 allocations to what they call upstream sources. And  
8 again, we've been pretty careful at assigning the  
9 allocation to urban run-off, which is what gets  
10 discharged into the urban creeks, but we haven't assigned  
11 allocations to pesticide users like private citizens or  
12 professional pesticide applicators, or school districts,  
13 transit districts or vector control districts, which all  
14 operate under the purview of the urban run-off agencies.

15

16 And finally, just to give you maybe a broader perspective  
17 on this public participation process, this strategy  
18 reflects a decade of stake holders collaboration. Since  
19 1995 we have been meeting every other month in a forum we  
20 call the Urban Pesticide Committee to develop a strategy.

21 We've shared our interim products with the various  
22 stakeholders that participate in this forum and others  
23 that are invited. Culminating in March 2005 we gave an  
24 early Draft Basin Plan Amendment to our stakeholders, and

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2 then we proceeded to meet with them over the course of  
3 more than two months in small group meetings to make sure  
4 that we understood their concerns and their perspectives,  
5 and that we accounted for them to the best of our  
6 abilities.

7

8 These meetings included the stakeholders who commented,  
9 and their letters are in your packet. But they also  
10 included meetings with people who didn't choose to  
11 comment at this time, like agricultural commissioners and  
12 the Structural Pest Control Board and industry  
13 representatives. And then when we had taken into account  
14 the feedback we received, we packaged the best proposal  
15 we could come up with and sent it out for a 45-day  
16 comment period. And that brings us to today's hearing.

17

18 Now, just very briefly looking into my crystal ball, what  
19 I'd like to see next month is what -- we intend to bring  
20 back to you a final package with those responses to  
21 comments in it, and a Basin Plan Amendment and Staff  
22 Report that reflects some revisions in response to the  
23 comments and responses as appropriate, and a tentative

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2 resolution that will make it possible for you to consider  
3 Board action on the proposed strategy.

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5 So just to conclude, the strategy will protect water  
6 quality from pesticide-related toxicity. It meets TMDL  
7 requirements and it addresses the core causes of  
8 pesticide problems. It anticipates and prevents future  
9 impairments, and it ensures a consistent region-wide  
10 program to address Diazinon and pesticide-related  
11 toxicity in Bay Area urban creeks.

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13 CHAIRMAN WARREN: Thank you. Are there any Board  
14 questions at this point? Cliff?

15

16 MR. WALDECK: Two quick points. Are things that kill  
17 weeds in this same category, or are pesticides  
18 pesticides. I mean, so if you use, like, Round-Up or  
19 something like that.

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21 MR. JOHNSON: Things that kill weeds would meet the  
22 definition of pesticides that we put in the proposed  
23 strategy.

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2 MR. WALDECK: And then, second, I like the collaborative  
3 approach. I just think as we move forward -- and this is  
4 a problem when you deal with any two agencies that, even  
5 though they are working well together, that somebody goes  
6 to DPR and they say, "Well, that's really a Water Board  
7 thing," and they go to Water Board and they say it's a  
8 DPR thing. So who actually interprets, like, who it's  
9 supposed to go to or whose purview it is on a certain  
10 topic?

11

12 MR. JOHNSON: Well, that's one of the reasons why we  
13 thought it was important to include this collaborative  
14 process within the strategy, to try to get some clarity  
15 to that. In terms of interpreting water quality  
16 standards, that's clearly the Water Board's  
17 responsibility. In terms of regulating pesticide sales  
18 and use, we view that as the responsibility of the  
19 Department of Pesticide Regulation, and their codes  
20 actually call on it to address environmental issues as  
21 well. So we view it as our responsibility as  
22 representing the Water Board and having the water quality  
23 expertise as advising the Department of Pesticide

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2 Regulation so that they're able to use our information to  
3 make their decisions about what pesticides get used.

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5 MR. WALDECK: And I hate asking hypothetical questions,  
6 but let's just say are what the Water Board does is a lot  
7 stronger than what DPR actually wants to do, or is in  
8 their rules. Who bends to who?

9

10 MR. JOHNSON: Well, that's an excellent question. And to  
11 be honest, part of who bends to who has something to do  
12 with who's most stubborn and who has the most  
13 stakeholders behind them. But in reality, if it came  
14 down to a conflict between the two agencies, one of the  
15 routes of resolving that conflict would presumably be to  
16 go to the California Environmental Protection Agency and  
17 ask them to help us mediate that issue.

18

19 MR. WALDECK: Good. Thank you.

20

21 MR. WOLFE: My question's on the same topic. Do we have  
22 a legal opinion on file with respect to the issue of --  
23 if we need to take action to protect bay water quality,  
24 and order these agencies to then take action, are they

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2 then able to take actions that DPR claims they're  
3 prohibited from? You know, is there a legal opinion on  
4 that, this is an issue discussed in the Baykeeper letter.  
5 Baykeeper has a certain legal opinion on it. Do we have  
6 a legal opinion on that same issue, as of today?

7

8 MS. WON: A formal legal opinion on file as to --

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10 MR. WOLFE: A written legal opinion that someone's  
11 prepared, yeah. That's been --

12

13 MS. WON: There is no formal opinion in existence. I  
14 will note, however, that the Water Board can't as a state  
15 agency direct action of another state agency such as DPR.

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18 MR. WOLFE: No, no. This has to do with us directing the  
19 action of a permittee storm water agencies, and them  
20 therefore being authorized to take actions because  
21 they've been ordered by us to take actions that DPR  
22 claims they're prohibited from taking. If we order  
23 someone to do something and another agency says, "No, you  
24 can't do it," there's a legal conflict. And I want to

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2 know do we have a legal opinion on that conflict, and on  
3 how that conflict likely would be resolved by a court. We  
4 don't apparently have such an opinion prepared now. I'll  
5 comment on this later.

6

7 MS. WON: Okay.

8

9 MR. WOLFE: I just wanted to find out factually if we had  
10 any such --

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12 MS. DICKEY: If I can just weigh in on the theoretical  
13 question. It would depend upon the nature of what we  
14 were ordering someone to do, and whether or not there  
15 could be a basis found in our statute for doing that. So  
16 if it was a matter on which DPR had been given sole  
17 responsibility by the legislature to regulate, and the  
18 legislature had not seen fit yet to give us authority to  
19 regulate, then I think we can guess how that would come  
20 down.

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22 MR. WOLFE: Right, right. I understand. That's a good  
23 answer.

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2 MR. JOHNSON: I would just add that when we respond to  
3 the comments -- your question is actually something  
4 that's come up in the written comments as well. And so  
5 we will actually have a full response there in the  
6 written comments. So while we don't have a written  
7 opinion as a separate floating document available, we are  
8 developing a response which will in part relate to the  
9 legal issues.

10

11 MR. WOLFE: Well, there's a statement in the Staff Report  
12 that staff simply disagrees with that comment. And I  
13 wanted to know if that disagreement is sort of casual  
14 disagreement, or disagreement based on comprehensive  
15 legal research. And it's the former, not the latter at  
16 this point in time. That's what I was trying to find  
17 out.

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19 MR. JOHNSON: We're doing the research.

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21 MR. WOLFE: I understand. But it's not over yet, there's  
22 not a final thing.

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2 MS. BRUCE: All right. Bill, bear with me. I have a lot  
3 of questions, and I'm hoping you can educate me on many  
4 of them. In your presentation you said water quality  
5 objectives, specifically no toxic substances. So we're  
6 talking about pesticides here, but there are other things  
7 in the world besides pesticides that are toxic. So are  
8 you using pesticides in the larger sense of that term,  
9 because they are the largest percentage of those things  
10 that are toxic that may be entering our surface waters  
11 and bay? Or are we limiting this review to only those  
12 categories of toxic substances that can be called  
13 pesticides?

14

15 MR. JOHNSON: Let me try to answer that. You know, we  
16 started this process in part to respond to the 303(d)  
17 listing, which is for Diazinon-related toxicity. But we  
18 also knew the basis of that listing came down to this  
19 toxicity issue; that there was toxicity in the creeks and  
20 that's what the objective is. Most toxicity that we see  
21 in the creeks, we believe it probably does relate to  
22 pesticides. Which is not to say that we never see  
23 toxicity related to other things. We probably do as  
24 well.

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3 There are lots of times when we go out and we may see a  
4 toxic effect and have no idea where the toxicity is  
5 coming from. But we actually do know a lot about the  
6 pesticide world. So we know about Diazinon toxicity,  
7 we're starting to learn about pyrethroid toxicity. So  
8 when we know what the cause of the toxicity is, we're in  
9 a much better position to address it. And that's why  
10 this strategy is broader than the Diazinon issue, but  
11 doesn't go as far as saying, "Okay, now we're going to  
12 address all toxicity issues," because beyond pesticides  
13 I'm not sure where we could go. I'm not sure what we  
14 would say in terms of a specific action other than we  
15 need to continue monitoring, and we need to determine  
16 what the causes of any toxicity that we see are. In  
17 which case those things are already, for instance,  
18 required under our permits. We already have existing  
19 programs, the swamp program and also the permits do  
20 monitoring as well, to try to get at some of those  
21 answers.

22

23 MS. BRUCE: Okay. Thanks for that answer. I'm curious  
24 about some of the environmental fate and longevity of

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2 the pyrethroids. You've mentioned that they are sticky,  
3 they bond to the sediments. But how long do they reside  
4 in the environment, and in their residual period in the  
5 environment, do they change into daughter products and  
6 are those also toxic?

7

8 MR. JOHNSON: Well, they may have degradates that are  
9 toxic. I actually don't know about specific degradates  
10 at this time. Some pesticides do, I don't know that the  
11 pyrethroids do, per se. And I wish that I were really  
12 good at remembering page numbers, because I do know that  
13 somewhere in the Staff Report there is a little summary  
14 of the half-lives of pyrethroids. So I'm going to give  
15 you what I have off the top of my head, and then you'll  
16 have to understand that what's in the Staff Report is  
17 actually the right answer.

18

19 MS. BRUCE: Okay, I'll tell you what. Hold that thought.  
20 I will go back to the Staff Report and read it more  
21 carefully, because I missed that part.

22

23 MR. JOHNSON: Okay.

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2 MS. BRUCE: Okay, Page 68.

3

4 MR. JOHNSON: In short for everyone else, the half life  
5 can be, like, six months to a year.

6

7 MS. BRUCE: Okay, thank you. One of the concerns that  
8 was brought up in some of the comment letters -- and you  
9 referenced it in your remarks also -- was a concern about  
10 numeric effluent limits. And we've heard about that  
11 being contemplated at the state level as well. Can you  
12 speak in a little bit more detail about what is -- what  
13 will likely be the outcome of this with regard to the  
14 concern about numeric effluent limits, and is there any  
15 way that some of the stakeholders community could  
16 perceive this as a precedent, or as an opening of the  
17 door to numeric effluent limits?

18

19 MR. JOHNSON: I don't think so. I think that the concern  
20 is that this strategy contains toxicity targets, and that  
21 if one were to require numeric effluent limits, you would  
22 require it for the water quality -- the numeric water  
23 quality objectives as well as TMDL-related targets. And  
24 if there's a toxicity target, that that's one more thing

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2 that could become a numeric effluent limit. But this  
3 strategy doesn't actually address the issue of numeric  
4 effluent limits, other than to include a cross-reference  
5 to existing text in the Basin Plan that says at this time  
6 we don't think numeric effluent limits are appropriate  
7 for urban run-off.

8

9 But that could change if the Board were to change that  
10 portion of the Basin Plan and start requiring numeric  
11 effluent limits. But that's not what's on the table here.

12

13 MS. BRUCE: Thank you for that clarification.

14

15 MR. ELIAHU: So if you do not have any numeric limits,  
16 you don't have any enforcement. How can you enforce it  
17 if you don't have numeric limits?

18

19 MR. JOHNSON: Well, we enforce the narrative objectives  
20 as well. What we're not saying is an urban run-off, if  
21 we find that a storm drain is discharging above a  
22 particular concentration, that we find that is  
23 necessarily a violation that requires an enforcement  
24 action. We're using BMPs and saying if you implement

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2 these BMPs to the maximum extent that you can, then we're  
3 going to consider that okay.

4

5 MR. MUMLEY: I'd like to address that a little further.

6 This is Tom Mumley, from the Planning and TMDL Division.

7 You're asking a huge question regarding the philosophy  
8 of what's enforceable, are our narrative requirements  
9 enforceable? And I would assert, yes, they are. There's  
10 some difficulties in enforcing narrative requirements  
11 versus numerical requirements, at least in perception.  
12 There's cases where you could have a very explicit  
13 narrative requirement, thou shalt not do something. And  
14 if you have evidence that that something is being done,  
15 we could make a case for enforcement. It's just there is  
16 a burden of proof, a factual gathering exercise that  
17 makes some enforcement of narrative requirements more  
18 problematic than just taking a sample of water and  
19 comparing it with a number.

20

21 That's our challenge, and I think -- I'm very optimistic  
22 that we'll meet that challenge, and we'll provide  
23 clarify, certainty as to what's expected of  
24 municipalities to make it easy to track and account for,

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2 and if necessary, enforce. Because we'll have a clear  
3 delivery of what's expected of them, and that's the whole  
4 -- this would be a better way of enforcing pesticide-  
5 related activity, better responsibility of municipalities  
6 than applying a number system which would be very  
7 problematic in terms of how to determine actual  
8 responsibility for non-attainment of the number. Where  
9 would we measure it? There are a lot of issues regarding  
10 difficulty of measuring pesticides in the right place at  
11 the right time, et cetera.

12

13 MR. ELIAHU: Thank you.

14

15 MS. BRUCE: On one of your slides you say "decrease the  
16 demand for pesticides that threaten water quality." And  
17 then going back a couple of slides, you mentioned that  
18 Argentinian ants were one of the largest factors of, you  
19 know, reasons for people to spread pesticides around.  
20 You had some wonderful examples about collaborative  
21 activities with different agencies and organizations to  
22 encourage alternatives, to encourage a different way of  
23 thinking about applying pesticides. What is being done  
24 to look at ways of controlling those pest populations in

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2 ways that are more perhaps global and more regional in  
3 their reach or their nature, or completely without  
4 pesticides. You know, are there parasites on ants that  
5 we could let loose? You know, are there other kinds of  
6 non-chemical approaches being examined for this? In  
7 addition to those wonderful customer outreach kinds of  
8 activities.

9

10 MR. JOHNSON: Let me answer the question in two ways, and  
11 then you can tell me which ones actually answers your  
12 question. First of all, to control ants. You know,  
13 there are non-pesticide strategies. So you know, one of  
14 the things you can do about ants to keep them from being  
15 a problem is to exclude them from the house by sealing up  
16 cracks and crevices, which is not a pesticide. You're  
17 just making sure that they stay outside and they don't  
18 come inside.

19

20 In terms of pesticide use, you know, again, it's not  
21 necessarily the chemical that we're talking about.  
22 Sometimes it's how the chemical is packaged. So as  
23 opposed to a perimeter of spray, there may be a bait

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2 where it's all contained, and it's not a water quality  
3 problem.

4

5 But you were talking about big picture approaches to  
6 controlling these guys. And you know, one of the  
7 programs which I think there is an action item on for the  
8 agricultural commissioners in the list that actually  
9 relates to pest exclusion -- because the Argentinian ant  
10 is actually a new species. It's not native to California,  
11 it just came in later and now it causes a problem, and  
12 they compete pretty -- they're competitive with our  
13 native ants. So we have pest exclusion programs in the  
14 state of California, and those are actually working to  
15 keep pest problems from getting in. So you've probably  
16 heard about the Medfly, for instance. So that's a pest  
17 exclusion program. If we didn't have that program in  
18 place, then we'd have to be applying more pesticides to  
19 control this new pest.

20

21 MS. BRUCE: Okay. You also had something about a focus  
22 on prevention. Under your slide it was talking about  
23 Cal-EPA, and I -- and sometimes I have been keenly aware  
24 that we spend a whole lot more time and energy and money

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2 and resources and effort fixing problems that have  
3 already happened. And in this particular case, do you  
4 feel that there is a statutory framework sufficient --  
5 maybe this is a question for Yuri and DeeDee, but is  
6 there a statutory framework in place that is capable of  
7 enabling and empowering your work to be preventive? Is  
8 what we have to work with enough?

9

10 MR. JOHNSON: Is your question whether our regulatory  
11 framework -- can we be preventive, or is your question  
12 can others be preventive as well? Can EPA be preventive?

13

14 MS. BRUCE: Is your proposal going to hold legal water  
15 with the current regulatory and statutory framework we  
16 have now, that's really good at fixing problems once  
17 they've become problems, but may not be as good at  
18 enabling prevention.

19

20 MS. WON: I don't know if this is going to answer your  
21 question, but the TMDL is in response, clearly, to a  
22 problem. The problem of the 303(d) listing with respect  
23 to Diazinon. The overall strategy goes beyond and is  
24 preventative, and that is authorized under California

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2 law. Because in California we can be more stringent than  
3 what the Clean Water dictates, and the Clean Water  
4 dictates that you have to do a TMDL where you have an  
5 impaired water body.

6

7 MS. BRUCE: Okay, thank you. That answers my question.  
8 And just as a personal statement, I am an absolutely  
9 rabid organic food person, and a little bit of an anti-  
10 pesticide zealot. So you have my hearty support on  
11 keeping this stuff out of the water.

12

13 MR. JOHNSON: Thank you.

14

15 MR. MORSE: Can I ask you a question? Those little black  
16 ants that are very pervasive --

17

18 MR. WOLFE: I hate them, personally. There are very few  
19 creatures that I hate, but those little Argentinian ants,  
20 I don't know.

21

22 MS. BRUCE: I don't know if this is a plug for anything,  
23 but I use a little dish of honey mixed with boric acid,

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2 and I set it out for them and they eat that and they go  
3 away.

4

5 CHAIRMAN WARREN: That's a good idea. Thank you.

6

7 MR. WOLFE: Could I ask one last question?

8

9 CHAIRMAN WARREN: Yes.

10

11 MR. WOLFE: On Page A-1 of the Proposed Basin Plan  
12 Amendment there's language about toxicity. And I think  
13 that language applies generally to the whole Bay, is that  
14 right?

15

16 MR. JOHNSON: To all of our waters.

17

18 MR. WOLFE: To all of the waters within the basin?

19

20 MR. JOHNSON: Yes.

21

22 MR. WOLFE: Okay, thank you.

23

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2 CHAIRMAN WARREN: Okay, we do have several cards. If  
3 anyone wants to speak to this issue and hasn't filled out  
4 a card, if you would do so now I would appreciate it.  
5 Thank you. Okay, the first speaker is Jeff Brosso.  
6 Before he starts, we do have several cards. I'm going to  
7 ask the speakers to try to stay within the three-minute  
8 limit. Cliff will be the timekeeper on that.

9

10 MR. BROSSO: Good morning, Chair Warren and Board  
11 Members. My name is Jeff Brosso. I'm the Executive  
12 Director of BASMAA, which is the Bay Area Storm Water  
13 Agencies Association. We are urban run-off in the Bay  
14 Area. BASMAA's member agencies include all the Phase 1  
15 storm water programs in the Bay Area and some of the  
16 Phase 2 storm water programs in the Bay Area. I have  
17 just a couple of general remarks, and then three specific  
18 comments.

19

20 BASMAA and its 90 member agencies -- that's the cities  
21 and the counties and some special districts -- have been  
22 intimately involved, as I think Bill was alluding to, in  
23 the effort to identify and characterize the sources of  
24 and develop solutions to the problem of pesticide-related

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2 toxicity in Bay Area urban creeks for over 10 years. It  
3 was, in fact, one of our agencies that first discovered  
4 this problem in about 1993 or 1994. And we've been  
5 working collaboratively with Regional Water Board staff  
6 since that time.

7

8 As a result of those efforts over that 10-year period,  
9 our agencies have been recognized both informally and  
10 formally at the state and national level as national  
11 leaders on this issue. We commend the effort of Regional  
12 Water Board staff that has invested as well a lot of time  
13 on this over the last 10 years, to deal with what is a  
14 very important and -- but somewhat prickly environmental  
15 issue to really get your hands around and get in front  
16 of, frankly.

17

18 We especially appreciate staff's recognition that  
19 although pesticides may be discharged from municipal  
20 storm drain systems, municipalities are by and large not  
21 the source of these pesticides. Not the ultimate source  
22 of these pesticides. And also the recognition that the  
23 use of pesticides -- and this is in the Staff Report --  
24 that the use of pesticides, according to label

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2 directions, is approved by U.S. EPA and the California  
3 Department of Pesticide Regulation, i.e., legal use  
4 cannot be scientifically ruled out as the cause of this  
5 toxicity. That's fairly surprising to people when they  
6 are buying pesticides, that they actually might be buying  
7 something that's going to cause a problem in the  
8 environment.

9

10 We also appreciate and understand that from a technical  
11 standpoint -- and I want to make a distinction here --  
12 the proactive design of the Basin Plan Amendment,  
13 combining a -- focused on today's pesticide problem,  
14 which is Diazinon, with tomorrow's pesticide problems, we  
15 definitely and actually appreciate that technical  
16 standpoint. We actually like being constructive and  
17 proactive, and getting ahead of these problems. Because  
18 the other way is just not working.

19

20 However, I have to say that from a regulatory standpoint,  
21 it's clear from the Basin Plan Amendment and from our  
22 experience over the last 10 years that the existing  
23 federal and state pesticide registration processes do not  
24 prevent water quality problems, as surprising as that may

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2 sound, and as Bill has alluded to and you have talked  
3 about already this morning. The current regulatory  
4 scheme, both in terms of water law and pesticide law,  
5 does not prevent problems from occurring in urban creeks.  
6 And it's also very slow to react to those problems once  
7 they actually occur. As I said, we've been working on  
8 this for 10 years.

9

10 In addition, the existing federal and state pesticide  
11 registration processes unintentionally -- and I think it  
12 is unintentional, because I don't think anybody's  
13 actually thought about it -- places the burden of  
14 addressing pesticide problems on local governments. So  
15 it ends up in our lap every time, pretty much. And we  
16 are severely limited by what we can do technically to  
17 keep pesticides out of run-off, and we're also, as has  
18 been alluded to this morning, legally restricted by state  
19 food and ag code by what we can do. And there's an  
20 express prohibition in the state ag code that says that  
21 local governments are prohibited from regulating that  
22 registration, the sale, the transportation and the use of  
23 pesticides.

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2 So although we appreciate and understand the technical  
3 basis for the TMDL and support that in general, many of  
4 our comments that you hear from us in our letters and  
5 today are focused on the unintended regulatory  
6 consequences of that same proactive design, if you get  
7 where I'm going there.

8

9 Three specific comments. In terms of Diazinon targets,  
10 which is in Page 83, we think that Diazinon targets  
11 should be consistent with the state's recently-adopted  
12 listing and delisting policy. There's a phrase and a  
13 sentence that talks about Diazinon targets, and it says,  
14 "Diazinon concentrations in urban creeks shall not exceed  
15 100 nanograms," and they emphasize "during any one-hour  
16 period." Any one-hour period. And as Bill said, 100  
17 nanograms per liter is 100 parts per trillion, a very  
18 small number.

19

20 We think that the termination of exceeding frequency  
21 should be based on more samples. And so we would propose  
22 that the statement regarding the frequency of exceedences  
23 in the Basin Plan Amendment basically match up with the  
24 state's listing problem, which is really what this is all

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2 coming from. We think that by changing the statement in  
3 there about the frequently standard, that it would be  
4 consistent with state policy. And from a scientific  
5 perspective, it would allow for the flexibility to deal  
6 with sampling errors and other unexplained or  
7 nonrepresentative occurrences of Diazinon. Again, we're  
8 talking about any one-hour period. That's not much time  
9 to be trying to respond to.

10

11 Second comment, and specific comments on benchmarks.  
12 These monitoring benchmarks -- it's a new term, on Page  
13 A-14. The draft of the Basic Plan Amendment says in  
14 part, "Water quality criteria do not exist for most  
15 pesticides in the absence of water quality criteria,  
16 monitoring benchmark may be calculated." And we  
17 understand the value of that from a scientific point of  
18 view, of having a provisional guide that you can use to  
19 kind of start to figure where are we at, do we have a  
20 problem, do we not have a problem. But we actually are  
21 very concerned that such benchmarks may be used by some  
22 in determining compliance with our permits. And that  
23 would be a misuse of those values, from a scientific

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2 point of view. So we have that concern and you talked  
3 about that a little bit this morning as well.

4

5 We also note that the State Water Board is discussing the  
6 issue of storm water limits and the numeric limits and  
7 quantifiable measures. And so we would propose a  
8 sentence be added in the Basic Plan, and to explicitly  
9 explain that the intended uses of monitoring benchmarks  
10 do not include their use in determining compliance with  
11 NPDES permits.

12

13 And finally, on adaptive implementation on Page A-15, we  
14 strongly support the actions proposed in the Basic Plan  
15 Amendment for those federal and state agencies who are  
16 responsible for pesticide regulations, because I think it  
17 can really help us out in this regard. The cities and  
18 counties in the Bay Area, however, remain very concerned  
19 that these actions may not be fully implemented. After  
20 all, we don't have total control over what they do,  
21 resources are tight and they may not actually happen.

22

23 And as a consequence municipalities are concerned that  
24 they will ultimately be required in the new pesticides

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2 through the MPS permit to expend significant resources  
3 attempting to mitigate the impact over which they have  
4 very little control. Again, the hot potato sort of ends  
5 up in our lap. And because of that lack of control, the  
6 uncertainty in how things will proceed in the future --

7

8 CHAIRMAN WARREN: Can you sort of wind it up?

9

10 MR. BROSSO: Yes, I am. I'm on my last sentence.

11

12 CHAIRMAN WARREN: Thank you.

13

14 MR. BROSSO: It's a long one. Because of that lack of  
15 control and the uncertainty in how things will proceed in  
16 the future, and the negative consequences -- not just to  
17 municipalities, but more importantly to our collective  
18 ability to avoid or mitigate future water problems, we  
19 propose that the Basin Plan Amendment have some more  
20 clarity in the process that we'll be undertaken, if in  
21 fact some of these future pesticides cannot be dealt with  
22 through this strategy. And we have some language that we  
23 can provide to staff on that, which we already have.  
24 Thank you very much for your time.

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3 CHAIRMAN WARREN: Thank you. The next speaker is Robert  
4 Sorenson, followed by Gary Grimm.

5

6 MR. SORENSON: Good morning, Board Members. My name is  
7 Robert Sorenson. I'm the CalTrans District 4 Maintenance  
8 Storm Water Coordinator. And I'm here basically just to  
9 reiterate our position as stated in the September 19<sup>th</sup>  
10 letter to Mr. Johnson. CalTrans strongly supports the  
11 strategies and efforts to improve water quality in urban  
12 creeks. CalTrans has 935 miles of roadway, 52  
13 maintenance stations, two rest areas and over 4,500 acres  
14 of landscape. And that equates to roughly seven-tenths  
15 of one percent of the run-off, of the drainage. And in  
16 that point seven percent of the drainage, CalTrans uses  
17 zero Diazinon.

18

19 In our statewide monitoring characterization study  
20 Diazinon was found in almost undetectable quantities in  
21 the vast majority of the test sites. So it's our -- it  
22 was clear from our study that our system either conveys  
23 the run-off, or it does convey the run-off from other  
24 sources, and passes the run-off from other dischargers.

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2 Because we don't use the material in our small presence  
3 in the watershed, and there's -- and because of the small  
4 amount found in any of our studies, we ask the Department  
5 not be assigned a wasteload by allocation for this TMDL.

6 Thank you for your time.

7

8 CHAIRMAN WARREN: Thank you very much. The next speaker  
9 is Gary Grimm, followed by Andrea Ventura.

10

11 MR. GRIMM: Good morning, Chair Warren and Members of the  
12 Board. My name is Gary Grimm, and I'm Legal Counsel for  
13 the Alameda Countywide Clean Water Program, the storm  
14 water program for Alameda County. You have in your  
15 agenda material the program's comment letter, and we also  
16 agree with the comments of BASMAA. And I'm here today to  
17 comment on two issues. We'd like to support the Staff's  
18 Basin Plan Amendment proposal in two important areas --  
19 and it's always nice to be able to come here to support  
20 the proposal, and that's what I intend to do today in  
21 those two areas.

22

23 First of all, we support the statement of other urban  
24 storm water run-off management agencies that municipal

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2 storm drains are not the direct source of Diazinon and  
3 pesticide-related activity. It may be the conveyance,  
4 but the toxicity is more directly related to the  
5 application process and the registration of pesticides.  
6 And as you've heard today, municipalities have limited  
7 legal control over these discharges with respect to the  
8 registration, sale, transportation and use under state  
9 law. There's many things that municipalities can do, as  
10 set forth in the proposed amendment, and I'm sure will  
11 end up in our permits. But in certain areas there is  
12 certain limited legal authority that we have. The  
13 legislature has declared that there be a statewide scheme  
14 in terms of the use of and application of pesticides.

15

16 We disagree with comments by Baykeeper in their letter,  
17 where they comment that they believe that federal law  
18 overrides state law, or trumps state law on this issue.  
19 I think when you have two areas of law that address the  
20 same field, such as state law and federal law, regulatory  
21 agencies and courts try to find ways that both sets of  
22 laws can be interpreted consistently, so both can be  
23 applied. And I think that's what your staff has done  
24 here, taken both sets of laws -- Clean Water Act and the

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2 state law -- and applied them in this Basin Plan  
3 Amendment in the interest of water quality.

4

5 And we definitely support the proposed amendment's multi-  
6 agency approach in addressing this issue of all the  
7 agencies work together. And I think this is consistent  
8 with the State Board's recent direction on the mercury  
9 TMDL, that there be integrated approaches to TMDLs.

10

11 And then the second area is we strongly support the  
12 implementation statement that provides that urban run-off  
13 management agency responsibility for addressing  
14 allocations and targets be satisfied by complying with  
15 the requirements set forth in their NPDES permits, which  
16 are developed consistent with the Basin Plan Amendment.  
17 And this provides municipalities with knowledge and  
18 assurances regarding addressing the strategy. This is  
19 important language, and we disagree with Baykeeper again  
20 here, that this kind of language shields municipalities.  
21 We don't think it shields municipalities at all.

22

23 This implementation language informs municipalities of  
24 what will be required in the iterative process. The

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2 Board's NPDES permits for municipalities already  
3 anticipates the approaches in this Basin Plan Amendment  
4 that sets forth procedures right in the existing permits,  
5 that possible additional control measures can be put in  
6 place in Provision C-1 and C-2 in these permits, if water  
7 quality standards are not being met due to exceedances  
8 caused by urban storm water discharges. And this applies  
9 to not only Diazinon and pesticide-related activity, but  
10 it also applies to all pollutants. We pretty strongly  
11 feel that municipalities are not shielded.

12

13 So, again, we appreciate the Staff proposal and urge you  
14 to hold the line in these two areas. Thank you.

15

16 CHAIRMAN WARREN: Thank you very much. Andrea Ventura  
17 and then Alan Young.

18

19 MS. VENTURA: Good morning. My name is Andrea Ventura,  
20 and I'm here representing Clean Water Action. We are a  
21 national organization and I might add that we were  
22 founded back in the 1970s to ensure the passage of the  
23 Clean Water Act, so the discussion of that law is very,  
24 very dear to our hearts. I'm also here on behalf of the

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2 Environmental Justice Coalition for Water, which  
3 represents approximately 50 organizations around the  
4 state dealing with water issues and the impacts on  
5 citizens.

6

7 You have some of our specific comments in the letter.  
8 We're part of the letter that Baykeeper had sent in, and  
9 I'm going to allow my colleague from Baykeeper to make  
10 some of the specific comments that are reflected in that.

11 However, I did want to make some general comments about  
12 this TMDL, and the TMDLs that you consider in general.

13

14 First of all, I do want to say that we support the  
15 general premise of this TMDL, or the strategy. We  
16 applaud the Regional Board Staff's decision to address  
17 pesticide toxicity more broadly, instead of focusing  
18 solely on Diazinon or any particular pesticide, for that  
19 matter. And we also applaud them for recognizing the  
20 gaps in pesticide regulation. We think they're on the  
21 right track there, and we want to support that.

22

23 It is because of these gaps in regulation and the concern  
24 that addressing one pesticide at a time simply leads us

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2 to another problem with another set of pesticides and  
3 chemicals that cause similar toxic problems that we do  
4 have some general concerns, however. There seems to be  
5 somewhat of a paradoxical problem in writing TMDLs here.  
6 We see a lot of generalities and not enough action in  
7 various places.

8

9 When we see phrases like "we want to encourage integrated  
10 pest management or less toxic pest management," or  
11 phrases like "we may take further action if toxicity  
12 reduction goals are not reached," we have great concerns.  
13 We want to know what does that mean? Okay, what actions  
14 will Water Board take when we're not reaching certain  
15 goals? What actions will we take when other agencies --  
16 when those gaps appear and other agencies are not solving  
17 the problem?

18

19 The truth of the matter is that there has been a lot of  
20 action in this state by various departments,  
21 municipalities and agencies, and we still have toxicity  
22 problems. I myself live in a community where we're  
23 supposed to have a great pesticide program. And yet you  
24 go past all sorts of public land and buildings, and you

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2 see them out there spraying constantly, and there's no  
3 sense of pulling back on these processes.

4

5 So we want to fill those gaps. We want to have the TMDL  
6 explain to us exactly what actions would be expected at a  
7 bare minimum to address this problem. These  
8 generalizations of what we may or possibly do leave a  
9 great gap between what is possible to achieve with this  
10 TMDL, and what we will actually achieve. We also want to  
11 make the point that we do need to move toward less  
12 toxicity in general, and that has to be something that is  
13 regulated to some degree and in some very specific  
14 method.

15

16 We have learned the hard way and over a long period of  
17 time that relying on encouragement, education, and just  
18 kind of a working together sort of milieu doesn't get us  
19 there. We need the concrete actions and regulations that  
20 require a reduction in pesticide toxicity. Sometimes  
21 that means not using certain pesticides, sometimes that  
22 will mean looking for the specific chemicals that are  
23 less pervasive in the environment, that break down

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2 faster, that do not require as much application. And  
3 we're not seeing that structure in this TMDL.

4

5 I also want to make one final point, and as I said, I'm  
6 going to keep this very general. We do have to look, as  
7 we write these documents and enforce our regulations, we  
8 have to look at what our priorities are. We have to look  
9 at what is actually a health problem for our communities,  
10 and a pest problem. Ants, I hate them, too. People were  
11 saying that before. They're horrible and they're  
12 aggressive. They don't really hurt anybody. Do you want  
13 them in your house and in your cupboard? No, but as you  
14 said there are methods to deal with that. And we need to  
15 make sure that those methods are actually enforced. We  
16 can't say, "Well, I've got them coming in the house or in  
17 the building. This is a terrible problem and we've got to  
18 spray the heck out of them." We've got to look at  
19 this a little bit more wisely.

20

21 Weeds, ants, we have to decide, really, what is a problem  
22 where a pesticide is actually needed, what is necessary.  
23 And I would like to see us actually defining these  
24 things in a TMDL so that we will know in what direction

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2 we need to move. I'll keep it short and I'll end at  
3 that.

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5 CHAIRMAN WARREN: Thank you.

6

7 MS. JOCK: Good morning. I'm Ellen Jock, Executive  
8 Director of the Bay Planning Coalition. I'd like to say  
9 that this TMDL process, for all the challenges that it's  
10 presenting to the whole community, is a wonderful  
11 opportunity for our group specifically. Because we're a  
12 coalition of a broad and a diverse group, from the  
13 maritime industry to terminal operators to property  
14 owners to local government to all kinds of professional  
15 services. Homebuilders, recreational users. And so we  
16 are in the business of assuring and trying to develop  
17 sound science that backs up all the regulation that  
18 happens. Because that's the only way we can find we can  
19 work together.

20

21 So this opportunity here is really hands across the  
22 water, from the maritime industry to the land side on  
23 working on the TMDL. And I want to say that I was very  
24 impressed with what Bill and the Staff has done over the

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2 last 10 years. I have not been intimately involved with  
3 the pesticide program, but our board recently said we  
4 must focus more specifically and more directly on the  
5 TMDL process. We were very concerned that the mercury  
6 was remanded, after all the work that was done on that.  
7 And what becomes very evident to us is that we must focus  
8 more on the endpoint of the TMDL, which are developing  
9 actions that are feasible and practical to implement.

10

11 And so I want to offer the services of the Coalition in  
12 spending some more time with you, Bruce and Tom and the  
13 Staff, and also with the good work that Jeff Brosso is  
14 doing, to come up with actions. Because it's apparent  
15 with this Diazinon the whole matter of allocation and the  
16 worry about effluent limits, it's just impossible. And  
17 so what we're doing right now, we're reviewing the Staff  
18 document, and coming up with some more specific  
19 recommendations.

20

21 Now, I need to just be clear. Is the written comment  
22 period closed? Okay. So what I'm saying, basically  
23 today, will suffice for Bay Planning at the moment.  
24 Okay, fine.

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3 Here again, we want a TMDL that's feasible for Diazinon,  
4 and with actions that are implementable and practicable.

5 It appears as is the direction of this plan so far is  
6 good. The idea of a multi-agency integrated approach is  
7 fine, and we appreciate that. I would say we endorse  
8 Jeff Brosso's remarks, his particular concerns about a  
9 couple of the pages, I would say I would back those up  
10 specifically. I think we want to look more at the  
11 interface between the TMDL, and focus on water quality  
12 and sediment response.

13

14 The concern, particularly from our homebuilder community  
15 within the Coalition, is that if there is some certain  
16 thresholds or targets that the municipalities and  
17 therefore the construction industry will have to meet,  
18 are they already in violation, just even today as we  
19 speak? And so how permits are handled for the  
20 construction industry -- and I know there is already some  
21 BMPs established for sediment run-off in connection with  
22 urban run-off, so I want to have you look more at that to  
23 be sure that we can have a practical and feasible effect

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2 on the construction industry, and particularly the  
3 homebuilding as well.

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5 So with that, I will say, Bill, you're doing a good job.  
6 You're on the right track. And the Coalition will work  
7 more closely with BASMAA on developing a practical TMDL.  
8 Thank you.

9

10 CHAIRMAN WARREN: Thank you very much. Sajel?

11

12 MS. CHOKSI: Good morning, Board Members. My name is  
13 Sajel Choksi, and I'm with Baykeeper. I would like to  
14 first start off by thanking Bill Johnson and Tom Mumley  
15 (phonetic) for their hard, hard work on this TMDL.  
16 They've made significant strides on this pesticide  
17 problem in Bay Area urban creeks, and they've really  
18 taken a preventative approach, which we support, by  
19 having this apply not just to Diazinon but to all  
20 pesticides in all Bay Area urban creeks.

21

22 It sounds like everybody's read Barkeeper's 13-page  
23 letter, and you know that we have some legal flaws that  
24 we see in the TMDL. But I'm actually here today to focus

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2 on our belief that the implementation is missing a few  
3 key details that we think will really help achieve the  
4 preventative goals of this TMDL. So I'd like to focus  
5 the Board's attention today on four quick, reasonable  
6 improvements to the implementation plan that can be  
7 really quickly made.

8

9 The first is that Baykeeper strongly opposes the shield  
10 language that has been mentioned earlier today. If water  
11 quality is still impaired by pesticides and urban run-off  
12 allocations and targets aren't met, then it's not enough  
13 to say that we've done everything that's in the TMDL  
14 action plan. We have to say we'll do more. And that's  
15 what's actually codified in EPA regulations and in NPDES  
16 permits already. There needs to be an iterative process  
17 to BMPs, to improving BMPs and having future actions.  
18 And the shield basically prevents that from happening.

19

20 And so we're just saying either remove that shield,  
21 remove that sentence, or replace it with two really  
22 similar sentences that we're proposing. And there's not  
23 really much difference between what's there already and  
24 what we're recommending. Just sort of a -- the language

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2 that's currently in the TMDL can be interpreted in  
3 different ways, and we'd like to really be clear about  
4 what that sentence means.

5

6 The second thing is that we feel really strongly that the  
7 TMDL cedes too much authority to DPR. This Board has the  
8 responsibility to regulate water quality, there's no  
9 doubt about that. And the Board also has the legal  
10 authority through federal permits to regulate pollution,  
11 there's no doubt about that. And most case law, if not  
12 all -- it's like the first thing you learn in law school,  
13 federal law trumps state law. So most case law supports  
14 the notion that federal law would trump the food and ag  
15 code.

16

17 So our proposed solution for the Board -- and it's not  
18 even going that far -- is just to say in the  
19 implementation plan, have a deadline for DPRs. Say DPR  
20 is going to act by this time, and if they don't act  
21 within that time, the Water Board will then takes it  
22 action and do what it needs to do in order to keep these  
23 pesticides from getting in the water body.

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2 DPR doesn't act as quickly as we'd all like them to do,  
3 and they need a little bit of fire under their feet in  
4 order to make sure that they're actually protecting water  
5 quality, which is the Board's responsibility, too.

6

7 Another concern that we have is that five years is too  
8 long to wait for actions to be taken. Especially since we  
9 already have information that pyrethroid toxicity is  
10 occurring in our creeks. So why don't we just allow  
11 clear guidelines in the Basin Plan for permits to allow  
12 agencies to act more quickly and immediately? It's sort  
13 of the continuous improvement plan that's already  
14 codified in these permits in many cases. So they just  
15 need to be able to adapt to new information, and we think  
16 that's really important.

17

18 And finally, this TMDL should at least codify what is  
19 currently status quo in these urban run-off agency  
20 programs. Some agencies are falling behind their sister  
21 agencies in terms of pesticide controls, because they  
22 haven't adopted meaningful BMPs or strong pesticide IPM  
23 ordinances. And our proposed solution is just for the  
24 TMDL to set a level for what the current best performance

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2 is, and to say that this is the minimum standard and we  
3 need to work up from here. We don't think that that's  
4 too much to ask.

5

6 So we strongly urge the Board to make these improvements  
7 and changes to the TMDL. We urge you to direct your  
8 Staff today to do four things. To remove the shield for  
9 urban run-off agencies, to specify a deadline for when  
10 DPR needs to act, to establish guidance language for  
11 permits so that agencies can continuously adapt, and set  
12 a minimum standard for current best performance. These  
13 four actions are essential to achieving the good  
14 intentions of the TMDL. And I'm happy to continue  
15 working with you and with Bill and Tom to make sure these  
16 solutions are incorporated. Thank you.

17

18 CHAIRMAN WARREN: Thank you very much. Do any of the  
19 Board Members have any comment?

20

21 MR. WOLF: On the TMDL?

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23 CHAIRMAN WARREN: Yes, on this issue.

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2 MR. WOLF: Yes. Let me get organized here. Actually, I  
3 have five comments, and I'd be happy to type them up and  
4 give them to Staff later if that's helpful. I always ask  
5 the Board Members and the audience to bear with me. I  
6 believe I need to read the comments into the record, or  
7 state the comments in full into the record to be sure  
8 that they get considered, and they will take a bit of  
9 time.

10

11 I think a lot of good work has gone into the TMDL. I  
12 like the Staff report, and I really liked your  
13 presentation, Bill. I think it was excellent. I don't  
14 think that the 17 pages of the TMDL itself, though, which  
15 is all that will remain after a decision is made, are  
16 strong enough. And what I mean by strong enough -- and  
17 basically, I can't imagine my voting in favor of those 17  
18 pages next month. Significant revisions are going to be  
19 required -- and I'll talk through my comments here -- for  
20 me to support it.

21

22 I am confident, though, that those revisions can be done  
23 in a few months. I had the same feelings about the  
24 Tomales Bay TMDL when I first saw it. I didn't care for

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2 the first draft at all. The draft we adopted last month  
3 I thought was excellent. So I'm sure these comments can  
4 be addressed in a few months, I just don't see how it's  
5 going to be done in the next month.

6

7 The first comment has to do with the simultaneous  
8 adoption of a TMDL and water quality attainment strategy.  
9 I think it's confusing. I think we should clarify the  
10 two legal authorities that are involved. The benefit of  
11 doing that is there's less chance of an appeal or  
12 litigation, whether that's now or in the future. It just  
13 clarifies the legal basis for what we're doing.

14

15 We saw something in the Phillips Conoco Refinery permit,  
16 where clarifying the pollution prevention languages based  
17 on the -- I think it was Section 3.2.4 instead of Water  
18 Code 13267 made a big difference, and ultimately they  
19 chose not to appeal. I think clarifying the legal  
20 authorities that are involved here for these two separate  
21 actions, if you will, would be very helpful. I don't  
22 support separating the TMDL from the water quality  
23 attainment strategy fully, as was suggested in the  
24 comment letter from Adam Oliveri (phonetic), but I do

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2 think his point about clarifying the legal authorities is  
3 very important.

4

5 The other related point is that the water quality  
6 attainment strategy, the authority for that is more  
7 general, as was pointed out previously, than the TMDL.  
8 And I think we should be adopting a toxicity from any  
9 source, not just from pesticide-related toxicity. I'm  
10 very concerned that the first page in the TMDL, although  
11 it retains the narrative statements that there shall be  
12 no chronic toxicity in ambient waters, and also that  
13 there shall be no acute toxicity in ambient waters, it  
14 deletes the way we would determine that and measures used  
15 to determine that, which is essentially 90 percent  
16 survival, et cetera, that's in there. And that the only  
17 place we get any kind of numerical standard for figuring  
18 out whether this narrative standard has been complied  
19 with or not is with respect to only to pesticide-related  
20 toxicity and only in urban creeks in a later section.

21

22 So I think we're losing ground in the total toxicity  
23 area, and picking it up, maybe, in the pesticide-related  
24 area, and we should clean that up. I would like to see a

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2 water quality attainment standard for toxicity, at least  
3 in the creeks, from all compounds, whether it's  
4 pesticides or not. And we have the authority to do that.  
5 But because it's mixed in with the TMDL, I think you  
6 probably felt stretching to all toxicity in a pesticide  
7 TMDL was too far. Well, see, just sort of separate them  
8 in terms of legal authority, I think we can do both. We  
9 can have a general toxicity standard for ambient waters -  
10 - this is not for effluent, this is for ambient waters --  
11 and then we could also have the TMDL language with  
12 respect to Diazinon and whatever else.

13

14 So that's my first comment, clarify the legal  
15 authorities, and I hope use those legal authorities in  
16 the way that's most effective in the long term, in terms  
17 of avoiding appeals and litigation. And it provides the  
18 broadest basis for future actions of the Board. You  
19 know, a fish doesn't care why there's toxicity. They  
20 don't care if it's pesticide-related or otherwise. And  
21 so if monitoring through these efforts of the storm water  
22 agencies finds toxicity, then we should have the basis in  
23 the Basin Plan to then take action in response to that.

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2 This leads to my second comment, though. Which is I  
3 completely understand and support the storm water  
4 agencies concerns about them being asked to do things  
5 that, number one, they can't do. Or number two, if they  
6 try to do and fail, they've spent a lot of resources  
7 inefficiently. I do understand that and agree with that.  
8 And I think that's where this language that's being  
9 called a shield came from. And I don't know if calling  
10 it a shield is the right language, but I would call it a  
11 safe harbor that does explicitly say that these agencies'  
12 obligations are completed, are satisfied if they do the  
13 following things. That's it. You do the following  
14 things, you're done.

15

16 And I don't think we should be doing that, I think it's  
17 bad public policy. It restricts what we can do in  
18 permits later on. And it says we can't do anything in a  
19 permit that we haven't identified in the plan -- at least  
20 I think that's what it says. And I don't think we should  
21 be doing that.

22

23 Furthermore, as a matter of public policy, you typically  
24 offer someone a safe harbor like that when you're getting

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2 something that you wouldn't get otherwise. So, for  
3 example, we have a liability limitation in the United  
4 States for nuclear power plants. Owners of power plants  
5 are not liable for damage above some level. That's a  
6 federal safe harbor that was created to induce people to  
7 invest in nuclear power plants 20 years ago. There are  
8 times when public policy creates a safe harbor to induce  
9 people to do something that they wouldn't do otherwise.  
10 But in this case I don't see what we're getting for it.

11

12 You know, I understand the concern from the agencies, but  
13 there's no reason for us to say that, you know, they're  
14 not going to be held accountable for doing anything other  
15 than the following list, other than being nice to them.  
16 And that's not good public policy.

17

18 So I would like to see the shield either fully legally  
19 justified or removed, or modified. And it could be  
20 modified to state our intentions with respect to  
21 enforcement. That it is our intention to not take  
22 enforcement action for any sort of toxicity that is found  
23 when the storm agencies aren't likely to have the power

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2 to effect that, when it's likely to be outside of their  
3 power, or when we deem it to be outside of their power.

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5 That's really what they're concerned about. They don't  
6 want to be forced to try to solve problems that they  
7 don't have the power to solve, and I agree completely  
8 with them. But let's say that directly. We're not going  
9 to try to force them to do that through enforcement  
10 action. But saying that they're not obligated to do  
11 anything further than the list of certain things, I think  
12 is the wrong way to go about achieving their objective.

13

14 The third point. The implementation plan needs to say  
15 who, what and when. The should language that goes on for  
16 several pages isn't planning. I should take my kids to  
17 school in the morning, but they're not going to get there  
18 unless I have a plan for getting them there. Unless I  
19 say, "I'll take them on Monday, Tuesday, Thursday and  
20 Friday, and my wife will take them on Wednesday." That's  
21 our plan. It says who does it, who does what -- take the  
22 kids to school -- and when.

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2 Should. I should take my kids to school, as I say,  
3 doesn't get them there. I should put the garbage out on  
4 Thursday nights so that it will be picked up on Friday  
5 morning. That should language isn't a plan. And so  
6 there is a little bit of who, what and when here, but not  
7 very much. And we need a lot more of that.

8

9 For example, we should say what we're going to do with  
10 respect to this issue of confusing legal authority with  
11 DPR. So, for example, if we're going to ask them to  
12 commit in writing to do certain things, to clarify  
13 certain elements of the MOU, we should say we're going  
14 to, you know, ask them to do that by a certain date.

15

16 And in response to their response, if they say, no, they  
17 won't do certain things, well, then here's what we might  
18 do in response. If they say yes, then here's what we do  
19 in response. You can imagine some sort of branching  
20 diagram -- it doesn't have to be terribly complicated,  
21 maybe four or five key decisions related to each other in  
22 a branch. But that's, that lays out a logic for how  
23 we're going to work our way through these issues in the

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2 future. Who will do what and by when. That's planning.  
3 We can't do that within a permit.

4

5 A statement earlier was made some of these details should  
6 be left to the permits, and I agree with that fully. I  
7 understand that. But we can't within a permit talk about,  
8 you know, what we're going to do with respect to DPR, or  
9 what we're going to do with respect to the Structural  
10 Pest Control Board, or other things like that.

11

12 And then the last point is that I think -- I'm sorry,  
13 there's a second point to this point about who, what and  
14 when, and then there's a last point. The second point  
15 with respect to who, what and when is that I do think we  
16 need a strategy in those who, what and whens for how  
17 we're going to work through to success, despite all of  
18 these obstacles.

19

20 So, for example, if we think that we're going to need --  
21 or if we think that we might need to act on our own in  
22 the absence of DPR action, which I think is a plausible  
23 future. We don't know, but it's a plausible future.  
24 Then we should be planning on having a legal memo to

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2 address what we can do within our power sometime within  
3 the planning horizon. I'm not saying you need to do that  
4 legal work now, or even by the time that we adopt this.  
5 But you can say in here, you know, we'll evaluate the  
6 legal issues and report back to the Board within two  
7 years after adoption with a set of options for what the  
8 Board can do in the absence of DPR action or what not.  
9 So I think we need some sort of strategy for how we're  
10 going to work through these very unique special  
11 constraints that exist for pesticides.

12

13 We also, I think, can identify those things that clearly  
14 we can do now within that legal maze. You know, we can  
15 require educational activities, and I don't think BASMAA  
16 objects to that at all. We could require, as Baykeeper  
17 requested, that IPM be defined on a region-wide basis  
18 through some process. And that the agencies then promote  
19 IPM, even to the extent of telling customers, you know,  
20 these businesses are certified green businesses and offer  
21 IPM types of services. The businesses can't advertise.  
22 The Structural Pest Control Board has tied them up in  
23 that way, which I think is terrible, frankly. But the

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2 agencies do have the power to identify green businesses  
3 and to advertise that.

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5 And I'll tell you, I've tried the boric acid and honey  
6 trick, and it's worked sometimes. I also caulked up a  
7 very large area at one point to stop the ants from coming  
8 into my pantry, and that worked also. But in a couple of  
9 cases I couldn't figure out what else to do that was non-  
10 toxic, and I called in the pest guys and they sprayed.  
11 And I was delighted afterwards that the ants were gone.  
12 It would have been even better if I could have called  
13 someone and said, "Hey, would you come out here and look  
14 at it, and tell me what's best to do? And I've heard  
15 that your company, you know, will spray if necessary but  
16 also knows some other things to do." Maybe I mixed the  
17 boric acid and honey in the wrong mix, maybe these are  
18 ants that like protein, and I gotta mix the boric acid  
19 with meat, which is another thing they tell you. But I'd  
20 like to be able to rely on a professional to do that, and  
21 I don't know who to call, because they can't advertise.

22

23 And yet we have the power -- working with BASMAA we have  
24 the power to set up a program to do that. That is not

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2 prohibited, and this planning document doesn't identify  
3 those places where we're not tied up in knots. And we're  
4 going to drive through those openings and get as much  
5 success out of them as possible. So that should be part  
6 of the who, what and when also, I think. How we're going  
7 to get to success despite all of these options.

8

9 And my last point is that I think these changes should be  
10 done in the context of a template for revisions of the  
11 TMDLs. I mean, I thought that the revisions that took  
12 place on Tomales Bay were excellent. We have a table of  
13 who, what and when. It's a smaller table than we  
14 probably need in this case, because this is more  
15 complicated, but I thought the revisions were excellent.  
16 And I would hope that we would, you know, get something  
17 like that in this TMDL and we didn't. I think probably  
18 because you're just so busy and you have so many things  
19 in the pipeline.

20

21 And my fifth point is that I suggest that you take the  
22 time on this one to set up a template for implementation  
23 that can be used on all the TMDLs that come after it.  
24 And if you have to push the next TMDL in line, and

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2 everything behind that in line, if you have to push that  
3 back a month or two to get the template done, I would  
4 strongly support that. Because I think it will save a  
5 lot of Staff time in the long run. Thank you very much.

6

7 CHAIRMAN WARREN: Gary, thank you.

8

9 MR. WOLF: Oh, I'm sorry. I failed to mention in the  
10 third or fourth item there, that I spoke with Baykeeper  
11 last week about their comment letter, and I need to enter  
12 into the record that I did have that conversation.

13

14 CHAIRMAN WARREN: Margaret?

15

16 MS. BRUCE: I just had a question, briefly, on the  
17 comment from you, Bruce, that if we -- that you didn't  
18 want to extend the comment period because that would  
19 delay action on this until at least January. What is the  
20 problem with taking, you know, extending the time that we  
21 work on this? Is there, other than you've already  
22 donated an organ in putting this together, I'm sure. But  
23 why can't we take some more time to consider Gary's

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2 comments, to consider the comments of the stakeholders  
3 and move this forward at a later date?

4

5 MR. WOLFE: Well, there's no -- nothing legally stopping  
6 us. We're just trying to move all these forward, and  
7 we're feeling that after 10 years of working on this  
8 we're close to wrapping it up. From my perspective,  
9 we're in the process of -- that Bill has made a mess of  
10 this so much we had to promote him. So we're moving him  
11 into the NPDES division, and this sort of slows down that  
12 process. So it's a workload issue at one level, and it's  
13 also a sense that we feel we've been responsive to the  
14 issues that have been brought up over the last 10 years,  
15 and that there's nothing new under the sun, necessarily.  
16 Certainly there are opportunities to restate and tighten  
17 up why we state that.

18

19 CHAIRMAN WARREN: Cliff?

20

21 MR. WALDECK: I just wanted to comment on what Dr. Wolf  
22 had to say. And I do like how he brings it back to the  
23 Tomales TMDL and how the adjustments and changes were  
24 made there, as well as his comments about if we set up a

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2 certain template right here, it can make for a lot less  
3 work on our other TMDLs. What I don't have a skill set  
4 to assess is are these -- and I also like what he said  
5 about should, too. You know, the kids should get a ride  
6 to school who's going to drive them.

7

8 MR. WOLFE: As a new parent, you can relate.

9

10 MR. WALDECK: Yes, yes. And I would encourage Staff to  
11 take a look at what he had to say, and see if it can just  
12 fall into the world of clean-up language, so we -- you  
13 know, so it might not take a few months. Or if it is  
14 substantive changes that we need to make and what the  
15 Staff does here. I mean, I think in my naive optimism  
16 that Tomales Bay maybe clean-up language -- we cleaned it  
17 up and now we're apparently living happily ever after.

18

19 MR. WOLFE: Actually, in Tomales we were doing some  
20 further evaluation and running the model, and that took  
21 some time. We're certainly not anticipating further  
22 evaluation here. I think we're at the point where  
23 everybody sort of recognizes the actions, it's how we  
24 state them and how we clarify how the implementation

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2 plays out. And that's always the challenge, is how do we  
3 implement all of the --

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5 MR. WALDECK: And in the storm water world, we have  
6 always done best management practices, but once you put  
7 in a requirement for them to actually measure certain key  
8 toxicities along the way, is there actually a way in  
9 which we can ask these agencies to measure, but they're  
10 not penalized in case something comes out high? You  
11 know, like the way we do with NPDES permits. Because I  
12 think that's what the urban run-off concern is, is that  
13 we could measure it, we just don't want to get nailed if  
14 something's high.

15

16 Because if we could move it to the next step -- and I  
17 don't know what the law is on all of this here -- where  
18 they actually do measure certain things, and if they're  
19 high, at least we know, but we don't fine them for it,  
20 I'd be okay with that. Because that's the next step past  
21 best management practices, and I think that that's kind  
22 of what we'd like to get to.

23

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2 MR. WOLFE: Well, and that's always been the philosophy  
3 for storm water or nonpoint approaches, where we have a  
4 narrative approach that you have to implement best  
5 management practices. And you have to monitor those  
6 practices. If those practices aren't working, you look  
7 at other practices that might.

8

9 We have no intention of trying to get this to the point  
10 where -- and this is the concern about numeric effluent  
11 limits -- where you have a number, and much like with the  
12 point source discharges where we have the mandatory  
13 minimum penalties, if the number shows up you have an  
14 automatic penalty. And that's something we'll continue  
15 to push against.

16

17 Understandably, with the point source discharges, there's  
18 an opportunity there. It's felt that those parties have  
19 full control over those numbers, rightly or wrongly. And  
20 I think there's the broad recognition that in these areas  
21 such as storm water and other nonpoint, there's not that  
22 full control and that we need that best management  
23 practice approach. But as you're implementing that, you

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2 need to monitor, to indicate what are you actually  
3 accomplishing.

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5 So that's, I think, consistent with the approach, and  
6 that's sort of the direction we're always going to be  
7 taking for those source categories such as storm water or  
8 other nonpoint related categories.

9

10 CHAIRMAN WARREN: Margaret, you had a --

11

12 MS. BRUCE: Yeah, I just wanted to echo Dr. Wolf's  
13 comments and strongly support -- especially the idea that  
14 we do not want to be specific in the kinds of things we  
15 are going to do in the plan, if that would in any way  
16 limit us in the future. But then just to identify and  
17 prioritize those actions that we maybe have to avoid, but  
18 leave open the opening for, you know, clarify the scope  
19 at which we can play. I think there are lots of creative  
20 ways of doing things, including providing access to and  
21 encouragement for the adoption of model IPM ordinances,  
22 providing perhaps some benchmark or comparison  
23 information about the performance of those municipalities  
24 and locations where there are IPM ordinances in effect,

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2 and how those aquatic habitats may be healthier than  
3 those where IPM ordinances are not in effect, if in fact  
4 there is a statistical difference. So I just wanted to  
5 echo, Gary, your comments, and appreciate those.

6

7 MR. WOLFE: Well, I think what we need to do is take all  
8 of your comments and the comments that we've heard from  
9 the commenters today -- those comments were, by and  
10 large, consistent with the comment letters. There were  
11 suggestions and recommendations on working with us on  
12 wording changes; we'll look at that. I think we want to  
13 definitely -- and Gary, if you're able to put your  
14 comments and notes in something that we could look at,  
15 even though we've been scribbling down, and I think we  
16 understand the general gist, but we want to make sure we  
17 look at that. And we will look at where that puts us.

18

19 My understanding is that in terms of being able to make  
20 changes to what we've public noticed, that the changes we  
21 make need to be a logical outgrowth of comments received.

22 That if it's -- and I'm sure I'll hear some comments if  
23 I state this wrong, but if we do make substantive changes  
24 that are sort of in a new direction, that are not based

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2 on the comment received, that we may need to re-public  
3 notice, and that certainly adds in the process time that  
4 we're trying to avoid.

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6 But, you know, at the other level, we'll look at whether  
7 what you've given us and what the public's given us still  
8 puts us on track to come back next month, or whether that  
9 means we should come back in future months.

10

11 MR. WALDECK: I would like to chime in on something else  
12 that concerned me, what Gary said. He said that  
13 companies that are certified green in the pesticide world  
14 can't advertise themselves?

15

16 MR. WOLF: That's right.

17

18 MR. WALDECK: How does that law work? Because I'd kind  
19 of like to have this Board chime in on, you know --  
20 because becoming a green business is an extremely  
21 challenging process, and I think a lot of the green  
22 business programs out there, these companies become green  
23 and then they're on their own to promote themselves along  
24 the way. And I'd like to give whatever green world, you

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2 know, in this particular case a kind of a shot in the  
3 arm.

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5 MR. WOLF: Businesses in this area, and I don't mean  
6 pesticides, I mean the area of we're environmentally  
7 friendly, practices or ways of operating, are getting a  
8 tremendous advertising advantage and potential market  
9 advantage by getting certified. As Clifford knows, he's  
10 getting his office store certified as a green business.  
11 Is it certified?

12

13 MR. WALDECK: Yeah.

14

15 MR. WOLF: It is certified. You know, and this is  
16 something that most of the agencies around the Bay Area  
17 have promoted, and are using to help advance these goals.  
18 But the Structural Pest Control Board basically adopted  
19 a rule that's a gag rule on those who sell pesticide  
20 services. They're not allowed to advertise, and the rule  
21 goes so far as to say they're not allowed to advertise  
22 even if it's true. I mean, it specifically says that.  
23 It's not about fraudulent advertising, it's they're not  
24 allowed to advertise the environmental superiority of

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2 their services or any particular approach, even if  
3 there's very solid scientific evidence that it is  
4 superior. They're simply not allowed to do it. And it's  
5 an atrocious law, it's an infringement on the market  
6 economy, it's an infringement on all that makes America  
7 great.

8

9 It's about as onerous and terrible a regulation as you  
10 could -- you know, as you could imagine because it serves  
11 no public purpose. If it was against fraud, that would  
12 serve a public purpose. But this doesn't serve a public  
13 purpose, it serves a private purpose that that board was  
14 willing to support, which is to continue to sell  
15 pesticides.

16

17 MR. WALDECK: Is that a state board or --

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19 MR. WOLF: It's a state-appointed board, it's an official  
20 agency of the state, I guess. Not an agency, it's an  
21 official agency of the state. And we should be stating  
22 in our plan, perhaps if we think there's anything we can  
23 do about it, that we would file a letter of request with  
24 them to change their rule in that regard. To modify it

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2 to prohibit only fraudulent practices, or to allow it  
3 under certain circumstances. Whatever, I mean, our plan  
4 could perhaps try to go down that avenue. Or, as part of  
5 our plan we could say, "No, we're not going to go down  
6 that avenue because it's a losing avenue. We want to plan  
7 for success, not --" we don't want to plan everything, no  
8 matter whether it's going to succeed or fail. You know,  
9 we have to make a judgment about that, and the plan  
10 doesn't tell me. It doesn't tell me what we're going to  
11 do about that rule.

12

13 I did want to make one brief follow-up on something that  
14 several other people commented on. I think this issue of  
15 where the toxicity standard lies in the plan is  
16 important, the toxicity unit measurement lies in the plan  
17 is important. And I'm responding to your point, Bruce,  
18 about me bringing up anything new. I'm not really trying  
19 to bring up anything new, I'm trying to respond to the  
20 comments received.

21

22 And I do think, understandably, the agencies are  
23 concerned about a pesticide-related numeric toxicity  
24 standard -- even though it's ambient waters, not

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2 effluent. I understand their concern, because it's  
3 awfully close to being an effluent standard. It  
4 specifically says, you know, you can't have toxicity in  
5 receiving waters, even right next to the pipe that comes  
6 in from a storm loop. Okay, so where -- you know,  
7 effluent magically at that point changes from effluent to  
8 ambient. So we're awfully close to a numeric effluent  
9 standard by putting it in the way we've put it in here,  
10 and I understand their nervousness.

11

12 If instead we put it in Chapter 3, where it's a general  
13 toxicity standard for urban creeks -- if we don't want to  
14 do it for the whole Bay -- and it doesn't have to do with  
15 pesticides, it's toxicity, it's a standard. I think then  
16 we've made the point that we're going to go after  
17 toxicity in storm run-off, and you know, if there's  
18 toxicity in storm run-off we need to address it through a  
19 process. But we're certainly not holding storm water  
20 agencies to all the toxicity, because it's a general  
21 standard for the whole Bay. I mean, anyone who  
22 discharges and causes toxicity as measured in this way,  
23 is at risk of our taking action against them.

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2 I think some rearrangement in the way you present these  
3 things could diffuse some of the tension and get more  
4 effectiveness down the road. And I'm not really asking  
5 for anything particularly new, but I am asking for a lot  
6 of new structure in the way you present it.

7

8 CHAIRMAN WARREN: Bruce, is there anything else?

9

10 MR. WOLFE: No, I think we've heard some very good  
11 comments and suggestions, and we'll have to look at how  
12 we can respond and come back to the Board.

13

14 CHAIRMAN WARREN: Okay, I'm going to call for a five-  
15 minute recess, and come back. You need to know that we  
16 lose the quorum at 12:30, okay?

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18 MR. ELIAHU: We don't have to take any action on this.

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20 MR. WOLFE: No, there's no further action.

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22 [END OF ITEM 9.]

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