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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Plaintiffs,

v.

COUNTY OF LOS ANGELES, et. al,

Defendants.

Case No. CV 08-1467 BRO (PLAx)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND, THIRD AND FIFTH CLAIMS FOR RELIEF OR, IN THE ALTERNATIVE, DISMISS OR STRIKE PLAINTIFFS' PRAYER FOR INJUNCTIVE RELIEF

Date: March 9, 2015
Time: 1:30 p.m.
Place: Courtroom 14

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Regulations

I. SUMMARY OF THE ARGUMENT

Plaintiffs are seeking to enforce a permit that has been superseded for over two years. Because the permit is no longer in effect, there is no possibility that it can now be violated. This case should be dismissed as moot.

In 2008, plaintiffs Natural Resources Defense Council, Inc. and the Santa Monica Baykeeper (now known as the Los Angeles Waterkeeper) filed this citizen suit under Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365. Plaintiffs alleged that the County of Los Angeles ("County") and the Los Angeles County Flood Control District ("District") violated a National Pollutant Discharge Elimination System ("NPDES") municipal stormwater permit issued in 2001 (the "2001 permit") by the Los Angeles Regional Water Quality Control Board ("Regional Board") to 84 cities, the County and the District.

Three claims remain in this case: plaintiffs' Second, Third and Fifth Claims for Relief. All three claims are based solely on one provision of the 2001 permit: Part 2.1, referred to as "receiving water limitations." *See e.g.*, First Amended Complaint, Docket ("Dkt.") 55 at ¶¶ 64, 307-08, 316-17, 283, 338. Part 2.1 prohibits "discharges that cause or contribute to violations of Water Quality Standards . . . ." Dkt. 101-1 at 23.

In 2012, the Regional Board issued a new municipal stormwater permit (the "2012 permit") that modified in fundamental ways the manner in which permittees comply with this provision. (The 2012 permit is attached as Exhibit 1 to defendants' Request for Judicial Notice ("RJN").) The 2012 permit created new programs known as Watershed Management Programs ("WMP") and Enhanced Watershed Management Programs ("EWMPs") and added requirements relating to what are known as Total Maximum Daily Loads ("TMDLs").

WMPs and EWMPs represent a new paradigm for controlling pollutants in stormwater in Los Angeles County. Instead of viewing stormwater solely through the lens of water quality, WMPs and EWMPs constitute a watershed-based approach to implementing water quality improvements and EWMPs emphasize the use of

stormwater as a resource, by collecting and retaining it to recharge aquifers instead of being allowed to flow to the ocean, an especially important goal with respect to the current drought and the projected increased drinking water demands in the County that come with increased population. EWMPs can also provide additional benefits such as recreation. open space and flood management, while also providing water quality benefits.

A TMDL is a level of pollutants that all sources can add to a water body without causing an exceedance of water quality standards. 33 U.S.C. § 1313(d)(1)(C). The 2012 permit added 33 new TMDLs to the permit.

In order to encourage the use of WMPs and EWMPs and in recognition of the newly-required TMDLs, the 2012 permit specifically provides that compliance with the WMP, EWMP and TMDL programs shall constitute compliance with receiving water limitations (RJN Exh. 1, Parts VI.C.2.b., d, and 3.a. and b (pp. 52-53) and VI.E.2.c.ii (p. 143).)

Thus, whereas plaintiffs have claimed that defendants' discharges are strictly prohibited from causing or contributing to an exceedance of water quality under Part 2.1 of the 2001 permit, under the 2012 permit such discharges are permitted as long as defendants are complying with the WMP, EWMP and TMDL programs, which are designed to achieve the elimination of exceedances over a period of time. In other words, unlike the 2001 permit, the 2012 permit gives permittees time to accomplish compliance with water quality standards in light of the new TMDL requirements and as an incentive to design and implement WMPs and EWMPs.

The Regional Board made this change with full knowledge of the construction that the Ninth Circuit had placed on the 2001 permit in its 2011 decision and plaintiffs' claims in this case. (See RJN Exh. 2, 2012 Permit Fact Sheet, p. F-38-39.) Plaintiffs themselves said to the California State Water Resources Control Board ("State Board") in a petition challenging the 2012 permit:

Rather than maintaining the 2001 Permit's prohibition against discharges that

> cause or contribute to an exceedance of water quality standards, the 2012 Permit creates safe harbors that exempt compliance with the Receiving Water Limitations for Permittees that elect to participate in a WMP or EWMP . . .

In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-21012-0175), SWRCB/OCC Files A-2236(a) through (kk), Mem. of Points and Authorities in Support of Petition For Review, dated December 10, 2012, at 15, attached as Exhibit 1 to the Gest Declaration. (In fact, as noted above, Parts VI.C.2.b., d, and 3.a and b, and Part VI.E.2.c.ii of the 2012 permit are not "safe harbors that exempt compliance" but set forth the programs that *constitute* compliance.)

The 2012 permit also changed the monitoring provisions in the permit. These changes make clear that a permittee's compliance with the permit is no longer measured by the evidence upon which plaintiffs rely, *i.e.*, "mass emission" monitoring, which measures the quality of the water in the Los Angeles and San Gabriel rivers coming from all dischargers, permitted and unpermitted, as well as natural sources. Instead, under the 2012 permit, the monitoring of a permittee's own discharges, referred to in the permit as "outfall" monitoring, is to be used to determine whether a permittee's discharge is causing or contributing to an exceedance of receiving water limitations. (*Compare* RJN Exh. 3, 2012 Permit, Attachment E, Part II.E.1 *with* Parts II.E.2.c and 3.c (page E-4).)¶

In plaintiffs' Fifth Claim for Relief, plaintiffs allege that defendants violated a provision of the California Ocean Plan that prohibited the discharge of "waste" into an Area of Special Biological Significance ("ASBS") off the Malibu coast. (Dkt. 55 at ¶¶ 57-58,338). In 2012, the State Board adopted exceptions to its Ocean Plan, authorizing such discharges into ASBSs. RJN Exh. 4, State Board Resolution No. 2012-0012 (March 20, 2012) (the "Ocean Plan exceptions").[1] Under the Ocean Plan exceptions,

[1] ASBSs are created by the State Board pursuant to state law. *See* Cal. Pub. Resources Code § 36700(f). On March 2, 2010, the District Court granted partial summary judgment to plaintiffs on the Fifth Claim for Relief, after concluding that the ASBS discharge prohibition was a "water quality standard," and thus enforceable under Part 2.1 of the 2001 permit. Defendants have filed concurrently a separate motion requesting

the conduct that plaintiffs challenge in their Fifth Claim for relief is now permitted.

A CWA citizen suit is moot when "there is no reasonable expectation that the wrong will be repeated." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 66 (1987). Plaintiffs' claim for injunctive relief is moot when the permit term that plaintiffs seek to enforce is relaxed under a subsequent permit, or the challenged behavior is no longer being regulated. *NRDC v. Texaco Ref. & Mktg.*, 2 F.3d 493, 502 (3d Cir. 1993); *Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, 777 F. Supp. 1032, 1035 (D. Mass. 1991). Here, plaintiffs' prayer for injunctive relief is moot. The conduct which plaintiffs challenge is now permitted.

With respect to civil penalties, the Supreme Court has not resolved the issue of whether subsequent events can moot a CWA citizen suit for such penalties. As discussed below, the circuit courts are split with respect to this issue. Given the facts in this case, the Supreme Court's test in *Gwaltney* should be applied here and the claim for civil penalties also be dismissed. *See also Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1016-17 (8th Cir. 2003) (issuance of permit authorizing discharges moots civil penalties claim).

Defendants are in full compliance with the 2012 permit. Finding that the plaintiffs' three remaining claims are moot is not equivalent to allowing defendants to avoid their responsibilities under the CWA. Quite to the contrary, this is a case in which, notwithstanding the new permit and the Ocean Plan exceptions, plaintiffs are now asking this Court to usurp the programs under the new permit and the Ocean Plan exceptions through the issuance of an injunction against defendants.

The conduct that plaintiffs challenge in this lawsuit is now permitted. Accordingly, defendants request that the Court dismiss this case in its entirety as moot. Should the Court not dismiss this case in its entirety, then defendants request that the Court strike or dismiss plaintiffs' prayer for injunctive relief.

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that the Court reconsider that Order on the grounds that new evidence demonstrates that the Court's original ruling was based on a mistake of fact and law.

II. STATEMENT OF THE CASE

A. The Statutory and Regulatory Scheme

1. The Clean Water Act

In 1972 Congress enacted what is now known as the CWA, 33 U.S.C. § 1251 et seq. The CWA regulates the presence of pollutants in navigable waters, defined to be "waters of the United States." *See e.g.* 33 U.S.C §§ 1311, 1329, 1342, and 1362(7) and (12). The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nations' waters." 33 U.S.C. § 1251.

In Section 402 of the CWA, 33 U.S.C. § 1342, Congress established the NPDES program as the means for regulating pollutants from point sources.[2] Section 402(a)(1) provides that the EPA Administrator may issue a permit "for the discharge of any pollutant." The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. § 1362(12). Compliance with the terms of a permit constitutes compliance with the Act. 33 U.S.C. § 1342(k).

The EPA Administrator may delegate NPDES permit authority to a state. 33 U.S.C. § 1342(b) and (c). California has been delegated this authority. *See* California Water Code § 13370. In California, NPDES permits are issued by the State Board or regional water quality control boards. California Water Code § 13377.

2. Municipal NPDES Stormwater Permits

Initially, EPA, by regulation, exempted storm water uncontaminated by any industrial or commercial activity from NPDES requirements. The Circuit Court of Appeal for the District of Columbia invalidated that regulation, holding that the EPA administrator did not have the authority to exempt categories of point sources from

[2] A "point source" is defined as "any discernible, confined and discreet conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Section 402 permit requirements. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

In 1987, Congress enacted the Water Quality Act amendments, which established a new statutory scheme for the regulation of stormwater runoff. In enacting these amendments, Congress recognized the unique nature of municipal NPDES stormwater permits. Unlike an industrial facility, where polluted water can be treated at its source and the facility can choose either to treat or cease the discharge, municipal stormwater permittees must handle stormwater to prevent flooding and protect public safety. As the Eighth Circuit said in *Miss. River Revival, Inc., supra,* 319 F.3d at 1017, "Cities cannot stop rain and snow from falling and cannot stop storm waters carrying "pollutants" such as sediment and fertilizer from running downhill . . . . If the Cities do nothing, storm waters will flow into their sewer systems. On the other hand, any attempt to prevent discharge through established storm drains would, according to affidavits submitted by the City's experts, harm public health and the environment. . . . Thus, unlike industrial and commercial point source operators, the Cities simply could not stop the unpermitted discharges."

Accordingly, Congress enacted special provisions for municipal stormwater permits. "In the 1987 amendments, Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal stormwater discharge." *Natural Resources Defense Council, Inc. v. United States EPA,* 966 F.2d 1292, 1308 (9th Cir. 1992).[3] *See also Defenders of Wildlife v. Browner,* 191 F.3d 1159,

[3] EPA has articulated a similar conclusion. In addressing the type of pollution controls that would be required of municipal stormwater permittees under 33 U.S.C. § 1342(p)(3)(B)(iii), EPA stated:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or [publicly owned treatment works]. . . . Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge."

1164-66 (9th Cir. 1999) (In contrast to industrial NPDES permits, Congress provided that municipal stormwater permits could be issued on a system or jurisdiction-wide basis and were not required to have terms that require compliance with water quality standards.) [4]

Under the CWA, municipal stormwater permits are only required to have provisions that effectively prohibit non-stormwater discharges into storm sewers and "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B).

B. Plaintiffs' First Amended Complaint

Plaintiffs' First Amended Complaint seeks injunctive relief, civil penalties, and attorney's fees from the defendants for alleged 2001 permit violations due to the presence of pollutants measured at "mass emission" monitoring stations between 2002 and 2008 in the watersheds of the Los Angeles, San Gabriel, and Santa Clara rivers and Malibu Creek (Plaintiffs' First through Fourth Claims for Relief) (the "watershed claims") and pollutants allegedly discharged into an ASBS offshore of the Malibu coast (Plaintiffs' Fifth Claim for Relief) (Dkt. 55 at 41-47).[5] The complaint also alleges that the defendants violated the 2001 permit due to the alleged presence of pollutants at Surfrider Beach downstream of Malibu Creek and by allegedly failing to file "Receiving Water Limitation" compliance reports advising the Regional Board about these pollutants in the watersheds and at Surfrider Beach (Plaintiffs' Fourth and Sixth Claims

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55 Fed Reg. 47990, 48037-38 (Nov. 16, 1990), quoting Vol. 132 Cong. Rec. S16425.

[4] "Water quality standards" consist of the designated uses of a water body and the water quality criteria for such waters based upon such uses. 33 U.S.C. § 1313(c)(2)(A). As used in the 2001 permit, "water quality standards" is defined to mean the water quality criteria assigned to the water body. Dkt. 101-2 at 73).

[5] Pagination within Docket entries is to the original document's page number, not the page number assigned to the page by the electronic case filing system.

for Relief (*Id.* at 45-46, 47-48).

The 2001 permit is a seventy-seven page, single spaced document. Plaintiffs' claims, however, are based solely on one provision of the 2001 permit, Part 2.1, referred to as "receiving water limitations." *See e.g.*, Dkt. 55 at ¶¶ 64, 307-08, 316-17, 283, 338. Part 2.1 prohibits "discharges that cause or contribute to violations of Water Quality Standards . . . ." Dkt. 101-1 at 23.[6]

Three claims remain in this case. Plaintiffs' Second Claim for Relief alleges that defendants' discharges caused or contributed to exceedances of water quality standards measured in the Los Angeles River watershed between 2002 and 2007 in violation of Part 2.1 (Dkt. 55 at ¶¶ 64, 306). The alleged exceedances are set forth on Exhibit 2 to the FAC (Dkt. 55 at 18 n. 4; Exh. 2).

Plaintiffs' Third Claim for Relief alleges that defendants' discharges caused or contributed to exceedances measured in the San Gabriel River watershed between 2002 and 2007 in violation of Part 2.1 (*Id.* at ¶ 315 and Ex. 2).

Plaintiffs' Fifth Claim for Relief alleges that defendants discharged stormwater and non-stormwater into the ASBS in violation of Part 2.1 (*Id.* at ¶¶ 64, 283, 338). In this regard, plaintiffs allege that the State Board's Ocean Plan prohibits the discharge of any "waste" into the ASBS, such prohibition is a "water quality standard," and thus any discharge of any stormwater containing pollutants violates Part 2.1 (*Id.* at ¶¶ 64, 283, 337).

C. The District Court's Prior Orders

In 2009, the parties filed cross-motions for summary judgment. With respect to the Second and Third Claims for Relief, defendants argued that plaintiffs had to prove actual conduct, i.e., actual discharges by the County and District, that caused or

[6] The excerpts of the 2001 permit filed as Dkt. 101-1 reflect an amended version of the permit. Subsequent to the filing of these excerpts, the permit was again amended pursuant to court order, and the phrase in Part 2.1,"Except as provided in Part 2.5 and 2.6 below," was stricken, returning Part 2.1 to its original form. These amendments are not pertinent to plaintiffs' Second, Third, or Fifth Claims for Relief.

contributed to exceedances of water quality standards in the Los Angeles and San Gabriel river watersheds (Dkt. 114 at 12-15, 18-21).

Plaintiffs argued that they did not have to introduce evidence of such conduct by defendants. Plaintiffs argued that, under the 2001 permit, the District was required to analyze water quality at the mass emission monitoring stations in the rivers, and the monitoring results from those stations could be used to prove that the defendants violated the permit without evidence that the defendants actually discharged pollutants that caused or contributed to the exceedances that were detected (Dkt. 139 at 12).

With respect to plaintiffs' Fifth Claim for Relief, the County and District argued that they were not in violation of the Ocean Plan because they had applied for an exception to the Ocean Plan's waste discharge prohibition and that the prohibition was not, in any event, a "water quality standard" enforceable under Part 2.1 of the permit (Dkt. 114 at 21-25).

In 2010 and 2011, the District Court entered several orders. The court granted summary judgment to plaintiffs on the ASBS claim and granted summary judgment to the County and the District on the remaining claims. (Dkt. 280, 295, and 345). In ruling on the watershed claims, including plaintiffs' Second and Third Claims for Relief, the District Court found that there was no evidence that the County or District caused or contributed to the alleged violations of the 2001 permit's water quality standards on which plaintiffs based their claims (Dkt. 295 at 3-4). The court also noted that, under the permit, "A co-permittee, including the County and the District, is responsible 'only for a *discharge* for which it is the operator.' Permit ¶ G.4 at 20 . . . *See also* 40 C.F.R. 122.26(b)(1) ("*Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it operator.")." (Dkt. 295 at 3 (emphasis in original).)

D. The Appellate Proceedings

Plaintiffs appealed the judgment on the watershed claims to the Ninth Circuit. Plaintiffs again argued that they did not need evidence that defendants caused the

violations of the 2001 permit's water quality standards, and that the court could impose liability based solely on evidence of pollutants recorded at mass emission monitoring stations in the rivers without the need of evidence of "discharges," *i.e.*, actual conduct by the defendants in violation of the permit. *NRDC, Inc. v. County of Los Angeles*, 673 F.3d 880, 898 (9th Cir. 2011). The other portions of the case were stayed pending resolution of the appeal (Dkt. No. 307).

In July 2011, the Ninth Circuit both affirmed and reversed portions of the District Court's judgment. The Ninth Circuit affirmed the judgment in favor of the County in all respects and in favor of the District on two watershed claims (Santa Clara River and Malibu Creek). *NRDC*, supra, 673 F.3d at 901.

The Ninth Circuit reversed the judgment in favor of the District with respect to the Los Angeles and San Gabriel river watersheds, though not on the grounds urged by plaintiffs. The Ninth Circuit explicitly agreed with the District Court that liability could only be established by evidence of a discharge of pollutants by the defendants that violated the permit's provisions. *Id.* at 898-99. The Ninth Circuit found, however, that there was evidence of "discharges" by the District to the Los Angeles and San Gabriel rivers by reason of the water passing through channelized portions of the rivers themselves. *Id.* at 900-01.

The Ninth Circuit rejected defendants' argument that Part 2.1 had to be read in conjunction with another part of the permit, Part 2.3, which set forth an iterative process for reaching compliance with the water quality standards required by Part 2.1. Defendants had argued that, under the permit, compliance with Part 2.3 rendered defendants in compliance with Part 2.1. *Id.* at 897.

The District appealed this ruling to the United States Supreme Court. The Supreme Court unanimously reversed the Ninth Circuit, holding that the passage of water through the Los Angeles and San Gabriel rivers was not a "discharge" within the meaning of the CWA. *L.A. County Flood Control Dist. v. NRDC, Inc.*, 133 S. Ct. 710, 712-13 (2013).

Plaintiffs then requested the Ninth Circuit to reconsider their original argument that liability could be based on mass emission monitoring results alone, with no evidence of a discharge by defendants that caused the exceedances at the mass emission stations, notwithstanding that the Ninth Circuit had explicitly rejected that argument in the first appeal. *NRDC v. County of L.A.*, 725 F.3d 1194, 1203 (9th Cir. 2013).

On August 8, 2013, the Ninth Circuit reversed its earlier holding, and ruled that the mass emission monitoring could establish the County and District's liability. The Ninth Circuit reasoned that the 2001 permit required the District to conduct monitoring and that one of the objectives of this monitoring included assessing compliance with the permit. Therefore, the court concluded, exceedances of water quality standards measured at the mass emission stations constituted evidence of violations of the 2001 permit for which the defendants were liable, despite the absence of evidence that the County or District were a source of those exceedances. 725 F.3d at 1205-06. In reaching this result, the Court noted that "[o]ur sole task at this point of the case is to determine what Plaintiffs are required to show in order to establish *liability* under the terms of *this particular* NPDES permit." 725 F.3d at 1205 (emphasis in original).

Because the governing federal regulations and the language of the 2001 permit provided that a permittee is only responsible for permit conditions relating to the discharge for which it is the operator, however, the Ninth Circuit further held that while the defendants were "liable" for permit violations, the question of whether defendants were "responsible" for such violations would still have to be addressed by the district court in the remedy phase of the case. 725 F.3d at 1206-07.

E. The 2012 Permit

While the appellate proceedings were pending, the Regional Board adopted the 2012 permit. The 2012 permit, at more than twice the length of the 2001 permit, is fundamentally different from the 2001 permit and contains many new programs, imposes new and different obligations, and adopts a new monitoring approach for compliance and other purposes.

1. Receiving Water Limitations

The 2012 permit reiterates in substantial form the 2001 permit's original receiving water limitation provisions, including Parts 2.1 and 2.3 (Parts 2.1 and 2.3 of the 2001 permit are renumbered as Parts V.A.1 and Part V.A.3 of the 2012 permit, RJN Exh. 1 at 38-39.)

The 2012 permit, however, fundamentally differs in how permittees can comply with the receiving water limitations. Whereas the Ninth Circuit found an exceedance of a water quality standard in itself to constitute a violation of the 2001 permit, regardless of a permittee's compliance with other permit provisions (673 F.3d at 897), the 2012 permit specifically provides that such exceedances are *not* violations of the permit if the permittee is otherwise in compliance with the 2012 permit's WMPs or EWMPs, or is covered by the permit's TMDL provisions.

The WMP provisions are set forth in Part VI.C (RJN Exh. 1 at 47). The purpose of this part is to allow permittees the flexibility to implement requirements of the 2012 permit on a watershed-wide basis through customized strategies, control measures and "Best Management Practices." The intent is to encourage cooperation between cities, the County and the District and to give the permittees, including defendants, the ability to prioritize the more important water quality issues and to modify strategies and control measures (*Id.*, Parts VI.C.1.a and f).

Under the 2012 permit, permittees also have the option of developing an "enhanced" WMP, or EWMP, which would include large scale, multi-benefit regional projects. These projects would not only address pollutants, but could also provide other benefits such as percolating water into the groundwater to recharge aquifers and providing open space, recreational opportunities, and enhanced wildlife environment (RJN Exh. 1 at 48, Part VI.C.1.g).

The Regional Board recognized that this was a different approach from that taken under the 2001 permit, stating in the Fact Sheet accompanying the permit:

> There are several reasons for this shift in emphasis from Order No. 01-182. A watershed based structure for permit implementation is consistent with TMDLs . . . An emphasis on watersheds is appropriate at this stage in the region's MS4 program to shift the focus of the Permittees from rote program development and implementation to more targeted, water quality driven planning and implementation. (RJN Exh. 2 at F-40).

The WMPs and EWMPs represent a new paradigm for addressing stormwater pollution. For the first time, regional, watershed-based collaboration among permittees is recognized to be a superior means of improving water quality, and stormwater is treated as a resource, not a liability. Emphasis is placed on capturing and conserving stormwater, and using it to replenish groundwater aquifers rather than letting it simply flow to the ocean, an approach that is responsive to concerns statewide over increasingly limited water supplies. This approach also has the added benefit of reducing pollutants in the stormwater that does reach the rivers and ocean because less water runs off the land surface and thus less pollutants are transported through the watershed.

WMPs and EWMPs, however, require permittee resources for both planning and implementation. When the Regional Board adopted the 2012 permit, the Ninth Circuit had already ruled that an exceedance of water quality standards would constitute a violation of the 2001 permit's receiving water limitations section (Part 2.1) without regard to a permittee's compliance with other portions of the permit. 673 F.3d at 897. Because the Regional Board wanted to encourage permittees to use WMPs and EWMPs to comply with the permit, *the 2012 permit specifically provides that compliance with the WMP and EWMP programs shall constitute compliance with the receiving water limitations provisions of the permit, i.e., the old Part 2.1 of the 2001 permit* (RJN Exh. 1 at Part VI.C.2.b. and 3.a, pp. 52-53).

Additionally, in recognition of the additional time needed to plan and fund these programs, the Regional Board gave permittees eighteen and thirty months, respectively, to submit draft WMPs and EWMPs, and provided that permittees *would be in compliance with receiving water limitations* during this planning process (*Id.*, Part VI.C.2.d, and 3.b, pp. 52-53).

The 2012 Permit added another new requirement, compliance with 33 TMDLs (RJN Exh. 1, Part VI.E, p. 141). Under the CWA, each state is required to identify those waters within its boundaries for which effluent limitations are not stringent enough to attain water quality standards. 33 U.S.C. § 1313(d)(1)(A). After prioritizing these water bodies, the state is then required to establish a "Total Maximum Daily Load" for each of them. This load is set "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C).

The TMDL is recognition that the receiving water, *i.e.*, the water body, is not currently in compliance with water quality standards. If it was, a TMDL would not be required. 33 U.S.C. § 1313(d)(1)(A) and (C).

The 2012 Permit includes five TMDLs for the Los Angeles and San Gabriel rivers and several others for other water bodies within their watersheds (RJN Exh. 5, Permit, Attachment K, Tables K-5 and 6). These include TMDLs for bacteria in the Los Angeles River and metals in both rivers, contaminants that are the subject of plaintiffs' complaint. Under the 2012 permit's TMDL provisions, permittees are not required to comply with receiving water limitations for bacteria in the Los Angeles River until March 23, 2022, during dry weather and March 23, 2037 during wet weather (RJN Exh. 6, Attachment O, Page O-5 and O-7-8). For metals in the Los Angeles River, compliance is not required until January 11, 2024, for dry weather and January 11, 2028 for wet weather (*Id*. at O-5). (For metals in the San Gabriel River, covered by an EPA-adopted TMDL, compliance is achieved through participation in WMPs or EWMPs (RJN Exh. 1 at Part VI.E.2.c.ii, 3.b, and RJN Exh. 6, Attachment P, page P-1).)

In recognition of these extended dates, the 2012 permit specifically provides that:

> A Permittee's full compliance with the applicable TMDL requirement(s). . . . constitutes compliance with Part V.A [receiving water limitations] of this Order for this specific pollutant addressed in the TMDL.

(RJN Exh. 1, Part VI.E.2.c.ii, p. 143.)

The Regional Board made these changes with full knowledge of the Ninth Circuit's construction of the 2001 permit's receiving water limitations provision. In its Fact Sheet, the Regional Board specifically cited the Ninth Circuit's 2011 decision RJN Exh. 2 at F-38). The Regional Board acknowledged that it was taking a different approach:

> Nonetheless, the Regional Water Board is in a unique position to be able to offer multiple paths to compliance with receiving water limitations in this MS4 permit. . . . 33 of these TMDLs . . . will be implemented in this Order. . . .These compliance mechanisms provide an incentive and robust framework for Permittees to craft comprehensive pathways to achieve compliance with receiving water limitations – both those addressed by TMDLs and those not addressed by TMDLs.

Id. at F-38. The Fact Sheet then reiterated this position:

> The Regional Board recognizes that, in the case of impaired waters subject to a TMDL, the permit's receiving water limitations for the pollutants addressed by the TMDL may be exceeded during the period of TMDL implementation. Therefore, this Order provides, in Part VI.E.2.c, that a Permittee's full compliance with the applicable TMDL requirements pursuant to the compliance schedules in this Order constitutes a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the particular pollutant addressed by the TMDL.
>
> . . . .
>
> A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or enhanced Watershed Management Program constitutes compliance with the receiving water limitations provisions in Part V.A. of the Order for the specific water body–pollutant combinations addressed by an approved Watershed Management Program or enhanced Watershed Management Program.

Id. at F-39.

2. Monitoring

The Regional Board's new approach also is a reflected in the 2012 permit's monitoring provisions. Whereas the Ninth Circuit found that, under the wording of the 2001 permit, the mass emission station monitoring in receiving waters was to be used to measure a permittee's compliance with part 2.1 of the 2001 permit, 725 F.3d at 1205-07, the 2012 permit specifically provides that a new program, the monitoring of each individual permittee's own discharges known as "outfall based monitoring," and not

mass emission monitoring, is to be used for this purpose. RJN Exh. 3 at Parts II.E.2.c and d, p.E-4.

In this regard, the 2012 permit explicitly omits from the purpose of the mass emission monitoring the language relied on by the Ninth Circuit in reaching its holding that, under the 2001 permit, the objective of mass emission monitoring was to assess whether a discharge causes or contributes to an exceedance of water quality standards. *Compare* 725 F.3d at 1205 ("assess compliance with this [Permit]") *with* RJN Exh. 3, Part II.E.1 (assessing permittee's compliance with permit not listed as an objective of mass emission receiving water monitoring).

Thus, mass emission station monitoring (reflecting discharges by all sources of water flowing into the rivers), which is the basis for plaintiffs' complaint, is explicitly no longer used to determine whether a permittee's discharge causes or contributes to an exceedance of receiving water limitations. RJN Exh. 3, Parts II.E.2.c and d.

3. Plaintiffs' Statements about the 2012 Permit

Plaintiffs themselves have recognized the fundamental differences between the 2012 permit and the 2001 permit. After the Ninth Circuit's decision in August 2013, plaintiffs described the status of their Second and Third Claims for Relief to the Supreme Court as follows:

> The [Ninth Circuit's] holding is limited to the meaning of a few provisions of [the 2001] permit – provisions that are not replicated in other permits, and *that have now been superseded.*

Gest Dec., Exh. 5, Respondents' Brief in Opposition at 19, *Los Angeles County Flood Control District v. Natural Resources Defense Council,* United States Supreme Court Case No. 13-901, filed March 31, 2014 (emphasis added). Plaintiffs went on to state:

> [The Ninth Circuit's] holding also has limited significance even to the parties to this case, because the permit under review was superseded in December 2012 . . . The old permit, at issue here, measures compliance solely at in stream locations within the rivers. The new permit adds end-of-pipe outfall monitoring. *That change eliminates the source of the dispute in this case. The permit language construed by the court below thus has no future effect.*

Id. at 20 (emphasis added). Plaintiffs then added:

> The only consequence of the court's ruling is that *if* a future permit contains the same monitoring provisions as those at issue here . . . then the monitoring data will be used to assess a permittee's liability. But dischargers and regulatory agencies are free to choose a different compliance monitoring scheme, as petitioners and the Regional Board have already done for petitioners' new, jurisdiction-wide permit that went into effect in 2012.

Id. at 21-22 (emphasis in original).

In a petition to the State Board challenging the 2012 permit, plaintiffs explicitly recognized that the 2012 permit now provides that a permittee will be deemed to be in compliance with the receiving water limitations portions of the permit when the permittee is participating in a WMP or EWMP program, even if the permittee's discharges currently cause or contribute to an exceedance in the receiving waters. Plaintiffs described the 2012 permit thusly:

> Rather than maintaining the 2001 Permit's prohibition against discharges that cause or contribute to an exceedance of water quality standards, the 2012 Permit creates safe harbors that exempt compliance with the Receiving Water Limitations for Permittees that elect to participate in a WMP or EWMP. . . The 2012 Permit creates safe harbors by deeming a Permittee to be in compliance with the Permit's RWLs (which was required by the 2001 Permit), both once a WMP or an EWMP has been approved by the Regional Board and during plan development.

Gest Dec., Exh. 1, Mem. of Points and Authorities in Support of Petition For Review, December 10, 2012, at 15.

F. The Ocean Plan Exception

On March 20, 2012, the State Board adopted "exceptions" to its Ocean Plan's prohibition against discharges of "waste" into an ASBS. These exceptions applied to twenty-seven applicants for discharges ranging from the Oregon border to San Diego, including the County and District's discharges into the ASBS off the Malibu coast (RJN Exh. 4, State Board Resolution No. 2012-0012, Attachment A).

Following the State Board's action, the discharge of stormwater into an ASBS is now authorized as long as (a) the discharge is pursuant to an authorization such as a NPDES permit and (b) the authorization incorporates certain "special protections" set forth on Attachment B to the resolution (*Id.* at 3). The State Board found that granting the exceptions was in the public interest because such discharges are essential for flood

control, slope stability, erosion prevention, maintenance of the natural hydrologic cycle between terrestrial and marine ecosystems, public health and safety and other purposes (*Id.* at 2, Finding 10).

The special protections provide that existing stormwater discharges are allowed into the ASBS as long as they are authorized by a NPDES permit and, as pertinent here, are composed only of stormwater runoff and do not alter natural ocean water quality (*Id*., Attachment B at 1). Non-stormwater discharges are prohibited, except those essential for emergency response purposes, structural stability, slope stability, or which occur naturally (*Id*. at 2). A discharger is required to address the prohibition of non-stormwater runoff and the requirement to maintain natural water quality for stormwater discharges in an ASBS Compliance Plan (*Id*. at 2-3).

Under the exceptions, a discharger is given six years, until March 20, 2018, to comply with the requirement that their stormwater discharges into the ASBS maintain natural ocean water quality (*Id*. at 5, ¶ 3.e).

III. THE 2012 PERMIT AND THE OCEAN PLAN EXCEPTION RENDER PLAINTIFFS' PRAYER FOR INJUNCTIVE RELIEF MOOT

The jurisdiction of federal courts is limited to "cases" and "controversies." United States Constitution, Article III, section 2. "It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed." *United States v. Juvenile Male*, 564 U.S. __, 131 S. Ct. 2860, 2864 (2011) (*per curiam*) (internal quotations omitted).

There is no case or controversy where a case is moot. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A citizen suit under the CWA is moot when "there is no reasonable expectation that the wrong will be repeated." *Gwaltney, supra,* 484 U.S. at 66..[7]

[7] Where the mootness claim rests on a defendant's voluntary cessation of conduct, a defendant must show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl.*

Under 33 U.S.C. § 1365(a), a citizen suit may be brought to enforce the terms of an NPDES permit. 33 U.S.C. § 1365(a)(1) and (f)(6). The purpose of such a suit is primarily "forward-looking." *Gwaltney*, 484 U.S. at 59. "A citizen suit may be brought only for violation of a permit limitation 'which is in effect' under the Act." *Id., quoting* 33 U.S.C. § 1365(f). In such a case the district court has jurisdiction "to enforce such an effluent standard or limitation." 33 U.S.C. § 1365(a).

Where the permit is no longer in existence, however, there is no longer an effluent standard to enforce. Only if that standard is present in the new permit is there a standard to enforce. Thus, the courts have uniformly held that injunctive relief is moot where there is a new permit and the terms of the prior permit have been sufficiently relaxed, or where the challenged behavior is no longer being regulated in the new permit. *NRDC v. Texaco Ref. & Mktg.*, 2 F.3d at 502; *Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, 777 F. Supp. at 1035. *See also Miss. River Revival, supra,* 319 F.3d at 1016-17 (issuance of permit authorizing discharges moots discharge without permit claim).

A. Plaintiffs' Second and Third Claims for Relief Are Moot

Plaintiffs' Second and Third Claims for Relief allege that defendants violated Part 2.1 of the 2001 permit by reason of exceedances measured at mass emission monitoring stations. Plaintiffs argued and the Ninth Circuit found that, under the terms of the 2001 permit, plaintiffs did not have to show that defendants caused those exceedances and that defendants were liable without regard to compliance with other parts of the permit, *i.e.* Part 2.3, the iterative process. *NRDC v. County of Los Angeles*, 725 F.3d 1194, 1205-06; *NRDC, Inc. v. County of Los Angeles*, 673 F.3d at 897.

Servs. (TOC), Inc., 528 U.S. 167, 189 (2000), *quoting United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

Mootness here, however, is not based on defendants' cessation of conduct. It is based on a modification of the permit terms that now allow defendants' discharges, and therefore the "no reasonable expectation standard" is applicable. In any event, under either standard, plaintiffs' prayer for injunctive relief and civil penalties is now moot.

As set forth above, the terms of the 2001 permit upon which the Ninth Circuit relied now have been superseded by new terms in the 2012 permit.

First, the very exceedances of receiving water limitations for which the Ninth Circuit found liability, now no longer impose liability as long as a permittee is participating in a WMP or EWMP or implementing TMDLs. The Regional Board was aware of the Ninth Circuit's interpretation of its 2001 permit when it adopted this change. It was also aware that exceedances were present in receiving waters notwithstanding the permittees' compliance and implementation of the other programs required by the 2001 permit and that it would take time to eliminate those exceedances. In order to encourage its new WMPs and EWMPs, the Regional Board specifically provided that compliance with the WMP and EWMP programs, as well as TMDLs, shall constitute compliance with the receiving water limitations provisions of the permit (RJN, Ex. 1, Parts VI.C.2.b., d, and 3.a. and b, pp. 52-53, and VI.E.2.c.ii, p. 143).

Plaintiffs themselves acknowledge that the 2012 permit is different with respect to this part of the permit and that "rather than maintaining the 2001 Permit's prohibition against discharges that cause or contribute to an exceedance of water quality standards, the 2012 Permit . . . exempt[s] compliance with the Receiving Water Limitations for Permittees that elect to participate in a WMP or EWMP." Mem. of Points and Authorities in Support of Petition For Review, *supra*, at 15 (Gest Dec., Exh. 1).

Second, compliance with the permit's receiving water limitations is no longer measured by the mass emission monitoring, the only evidence upon which plaintiffs rely. Instead it is to be measured by each permittee's own outfall monitoring. (RJN, Exh. 3, Part II.E.2.c and 3.c)

In response to interrogatories, plaintiffs contended that this case is not moot only because exceedances at the mass emission monitoring stations continue to be recorded. (Plaintiffs' Response to Interrogatory Nos. 25 and 27, Gest Decl. Exhs. 2, 3 and 4.) As noted, however, the 2012 permit specifically provides that mass emission monitoring is *not* to be used to evaluate an individual permittee's compliance. *Compare* RJN, Ex. 3,

Part II.E.1 with Part II.E.2.c and 3.c (p. E-4). In their responses to interrogatories, plaintiffs do not contend that "outfall" monitoring of defendants' own discharges demonstrates that defendants' discharges are causing or contributing to an exceedance the receiving water limitations. Moreover, the 2012 permit specifically provides that compliance with the WMP, EWMP, and TMDL programs shall constitute compliance with the permit's receiving water limitations provision, without regard to exceedances at the mass emission stations. *See* RJN, Exh. 1, Permit Parts VI.C.2.b, d, and 3.a. and b, and VI.E.2.c.ii, pp. 52-53, 143. Plaintiffs in their responses to interrogatories allege no violations of any such programs. (Plaintiffs' Response to Interrogatory Nos. 25 and 27, *supra*.)

Although not an issue in this case, defendants are in compliance with the 2012 permit. They have filed WMPs and EWMP work plans for all watersheds into which they discharge and are regulated by the 2012 permit, and are in full compliance with the permit's WMP, EWMP and all applicable TMDL requirements relating to the Los Angeles and San Gabriel Rivers. Declaration of Angela George, ¶¶ 3-5. There has been no assertion by the Regional Board or anyone else that defendants are not in compliance with the 2012 permit and defendants continue to implement the programs thereunder. *Id.* at 6. The County's and District's 2014 Annual Reports reported that together the County and District expended in excess of $111 million in complying with the 2012 permit in fiscal year 2013 – 2014.[8]

In *NRDC v. Texaco, supra,* a new permit was issued during the pendency of the case that increased the flow limit at one outfall and eliminated the regulation of another. There was no dispute that Texaco was in compliance with the new flow limit and that the second outfall was not regulated. The court found that "[i]njunctive relief with respect to these effluent standards therefore is moot." 2 F.3d at 502.

[8] These annual reports are posted on the website of the Los Angeles County Department of Public Works at http://ladpw.org.wmd/NPDESRSA/AnnualReport/index.cfm. The annual expenditures are reported on page 5 of each report.

In *Massachusetts Public Interest Group, supra,* a new permit issued after the lawsuit was filed relaxed certain flow limits. The court held that claims for injunctive relief and civil penalties based on the superseded permit were moot. The court found that "where the relevant governmental authorities have *relaxed* the NPDES standards, a plaintiff's claims for violations of the superseded permit do indeed become moot. The key factor is that the terms in the new permit have been relaxed . . ." 777 F. Supp. at 1035) (emphasis in original).

Those holdings apply here. The 2012 permit has relaxed or eliminated the provisions of the 2001 permit on which plaintiffs rely and on which the Ninth Circuit based its decision.

Moreover, plaintiffs' prayer for injunctive relief is subject to all the principles that govern equitable relief. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 306, 311-14 (U.S. 1982) (court has discretion not to issue injunction in CWA case). Injunctive relief is not a remedy that issues as a matter of course. An injunction should issue only where intervention is necessary to protect against irreparable injury and there is an inadequacy of legal remedies. *Id.* at 311-12. In exercising its discretion, a court of equity "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. Here the conduct that plaintiffs' seek to enjoin is now fully authorized under the 2012 permit. It would be an abuse of discretion to enjoin permitted conduct.

Defendants' conduct that plaintiffs seek to enjoin is now permitted under the 2012 permit. Plaintiffs' prayer for injunctive relief under their Second and Third Claims for Relief should be stricken or dismissed as moot. *NRDC v. Texaco Ref. & Mktg.*, 2 F.3d at 502; *Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, 777 F. Supp. at 1035.

B. Plaintiffs' Fifth Claim for Relief is Moot

The same rule applies to plaintiffs' Fifth Claim for Relief, alleging that defendants have discharged stormwater containing "waste" into the ASBS. In 2001,

there was no exception to the Ocean Plan's prohibition against the discharge of waste into the ASBS.

Defendants' stormwater discharges and conditionally exempt non-stormwater discharges into the ASBS are now permitted under the 2012 permit and the Ocean Plan exception. RJN Ex. 4, State Board Resolution No. 2012-0012, at 3. Defendants are authorized to discharge now, and are given 6 years to bring their stormwater discharges into compliance with all requirements. (*Id.* at 3 and Attachment B, Part I.A.3.c.)[9]

The waste discharge prohibition, on which plaintiffs based their claim, no longer applies to defendants' discharges into the ASBS. It would be an abuse of discretion to enjoin defendants' discharges as those discharges are now permitted under the exception. Plaintiffs' prayer for injunctive relief should be stricken or dismissed as moot. *NRDC v. Texaco Ref. & Mktg.*, 2 F.3d at 502; *Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, 777 F. Supp. 1032 at 1035.

IV. THE 2012 PERMIT AND THE OCEAN PLAN EXCEPTION RENDER PLAINTIFFS' PRAYER FOR CIVIL PENALTIES MOOT

The Supreme Court has not resolved the issue of whether subsequent events can also moot a citizen suit claim for civil penalties under the CWA, and there is a split in the circuits. In *Gwaltney*, the Supreme Court held that long standing principles of mootness apply to CWA citizen suits without distinguishing between the type of relief sought. 484 U.S. at 66-67. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc., ("Laidlaw"), supra*, the Supreme Court noted that civil penalties might be moot where it is absolutely clear that the permit violations could not reasonably be expected to recur and remanded the case for further proceedings. 528 U.S. at 193. In *Mississippi River Revival, supra*, the Eighth Circuit, following *Gwaltney* and *Laidlaw*, held that the issuance of a permit rendered moot both injunctive relief and

[9] Defendants have filed all Compliance and Pollution Prevention Plans and have met all conditions required by the exception (George Dec., ¶¶ 7and 8).

the claim for civil penalties. 319 F.3d at 1016-17. *See also Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, 777 F. Supp. at 1035.

All courts agree that the citizen suit is solely "forward-looking," and its purpose is to supplement, not supplant government enforcement. *Gwaltney*, 484 U.S. at 59-60, *Mississippi. River Revival*, 319 F.3d at 1018. Civil penalties for past violations that are no longer occurring do not further this purpose.[10]

The Ninth Circuit has held that, where there is an allegation of unlawful conduct, civil penalties attach at the time the violations occurred, not at the time of the judgment. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000) In that case a new, stricter permit was issued, and the court found that "civil penalties, if appropriate on the merits, would serve their deterrent purpose in this case." 230 F.3d at 1153. *See also Atlantic States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993) (post-complaint compliance may moot injunctive relief but not civil penalties); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990) (same); *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 890 F.2d 690, 696 (4th Cir. 1989) (civil penalties attach at the time of violation).

This is not a case in which civil penalties would serve a deterrent purpose. In *Ecological Rights Foundation*, the plaintiffs alleged that defendants had discharged without a permit and failed to comply with programmatic provisions of their NPDES permit. 230 F.3d at 1146. Thus in *Ecological Rights Foundation*, it was alleged that defendants' conduct had violated its permit and the court found that civil penalties may be appropriate to deter future conduct. Id. at 1153. Similar reasoning was cited by the courts in *Atlantic States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d at 1020-21 (citing language of statute and deterrent effect on defendants' conduct) and *Atlantic*

[10] The federal and where appropriate state governments retain the ability to seek criminal as well as civil and administrative penalties for solely past violations. 33 U.S.C. § 1319.

States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d at 1136-37 (deterrent effect and discourage litigation delay).

By contrast, in this case the Ninth Circuit did not base its finding of liability on any conduct by defendants. The Ninth Circuit left unchanged the District Court's finding that there was no evidence that the County or District caused or contributed to the alleged violations of the 2001 permit's receiving water limitations on which plaintiffs based their claims (Dkt. No. 295 at 3-4). Instead the Ninth Circuit held defendants liable solely based on their status as permittees and the court's construction of the terms of 2001 permit's monitoring program. 725 F.3d at 1205-07. In fact, under the Ninth Circuit's liability calculus, all upstream permittees are liable under the 2001 permit regardless of their conduct.

Civil penalties in this case thus would not serve to deter defendants' future conduct because, if they were to be assessed, they would not be based any conduct by defendants, but simply defendants status as permittees under the 2001 permit. In this circumstance, the Ninth Circuit's decision in *Ecological Rights Foundation* is distinguishable, and the approach set forth in the Supreme Court decisions in *Gwaltney* and *Laidlaw*, and the Eighth Circuit in *Mississippi River Revival.* should be followed.

Similarly, civil penalties would serve no deterrent effect with respect to the ASBS. Defendants had an application pending for an exception at the time of the discharge, and those discharges are now permitted under the 2012 Ocean Plan exception.

The 2012 permit and the Ocean Plan exception render moot not only plaintiffs' prayer for injunctive relief but also their prayer for civil penalties. That prayer should also be dismissed or stricken as moot.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Second, Third and Fifth Claims for Relief should be dismissed as moot. In the alternative, plaintiffs' prayer for injunctive relief should be dismissed or stricken.

Dated: January 14, 2015

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By: /s/ Howard Gest
Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on January 14, 2015, I electronically filed Defendants' Memorandum of Points and Authorities in Support of Motion To Dismiss the Second, Third, and Fifth Claims For Relief in Plaintiffs' First Amended Complaint or, In the Alternative, Dismiss or Strike Plaintiffs' Prayer For Injunctive Relief with the Clerk of the Court for the United States District Court for the Central District of California by using the CM/ECF system. Counsel for the plaintiffs were served by the CM/ECF system.

/s/ Howard Gest