

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

WEDNESDAY, MAY 8, 2013

ITEM 9, VOLUME I

WATER QUALITY CONTROL BOARD

BOARD MEETING ROOM

9174 SKY PARK COURT

SAN DIEGO, CALIFORNIA

1 APPEARANCES:

2 CHAIRPERSON: Tomas Morales
3 VICE CHAIR: Gary Strawn
4 BOARD MEMBERS: Eric Anderson
Henry Abarbanel
Sharon Kalemkiarian

5 EXECUTIVE STAFF: David Gibson, Executive Officer
6 James Smith, Assistant Executive
Officer
7 Chris Witte, Executive Assistant

8 STATE BOARD STAFF
9 COUNSEL: Catherine Hagan

10 ALSO PRESENT: Roger Mitchell
11 Julie Chan
12 Christina Arias
13 Kristin Schwall
Michelle Mata
Christina Arias
David Barker
Barry Pulver

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1 San Diego, California, Wednesday, May 8, 2013

2 3:10 p.m.

3

4 CHAIRMAN MORALES: Item 9 for the San Diego
5 Region, Tentative Order R9-2013-001, this is the time and
6 place for the continuation of two days' worth of a public
7 hearing on this tentative order.

8 At the public hearing that began on April 10th,
9 the Board heard most of the testimony and cross-
10 examination by the designated parties. The Board also
11 heard from elected officials and members of the public
12 who wanted to address issues raised in the tentative
13 order.

14 As outlined in the order of proceedings dated
15 May 1, today, we will allow the designated parties who
16 want to use their remaining time to complete rebuttal
17 testimony. Designated parties can save all or part of
18 their remaining time for closing statements instead.
19 Please let me know when I call on you whether you want to
20 save time for closing statements and how much.

21 As a reminder, for rebuttal testimony and
22 closing, the copermitttees have 36 minutes, the
23 environmental group 5 minutes, and the BIA Coalition 13
24 minutes.

25 In the interest of efficiency, at the same time

1 that we take up any rebuttal testimony, we will also hear
2 from staff, USEPA, the designated parties, and interested
3 persons on the written errata circulated by staff. These
4 errata were summarized by staff orally at the end of the
5 hearing on April 11th and were circulated in writing in
6 more detail after the April hearing.

7 We will also at the same time hear testimony or
8 comments on the City of San Diego's Cost Budget Benefit
9 Report dated April of 2011. For this aspect of the
10 hearing, there are time limits that apply; and we will
11 proceed in the following manner: Staff will be asked to
12 introduce their written errata, comment on the City of
13 San Diego's report, and respond to any issues that were
14 raised at the April hearing.

15 USEPA will follow staff with its comments.
16 Then we'll hear from the parties, starting with the
17 copermittees, who will have 45 minutes to address the
18 errata and cost issues. The environmental groups follow
19 the copermittees for 15 minutes, and then the BIA
20 Coalition gets 15 minutes.

21 Finally, we'll allow interested persons to
22 speak on these issues. These comments will be limited to
23 15 minutes. And, in that group, we'll first hear from
24 Clean Water Now, who requested to be heard first.

25 As a reminder, during testimony or comments,

1 board members or counsel may ask questions at any time,
2 but time for the questions and responses stop the clock
3 and won't be counted against you.

4 After all the comments, I will ask for closing
5 statements from the Building Industry Coalition, the
6 environmental groups, copermittees, USEPA, and staff.

7 With that, we are going to get started. And
8 since this is a new hearing date on a continued item,
9 with respect to persons that were not present last time,
10 I would like to again administer the oath to all persons
11 who intend to testify. So if you will please stand and
12 raise your right hand.

13 (Whereupon, the group of people testifying in
14 Item 9 were duly sworn to testify truthfully by
15 Chairman Morales.)

16 CHAIRMAN MORALES: With that, staff will begin.
17 And I will ask that, when you come up, please introduce
18 yourself and name who you represent and that you have
19 taken the oath.

20 MS. HAGAN: Mr. Chairman, just real briefly, a
21 housekeeping matter. I wanted to state for the record
22 that, at the two-day hearing in April, at various times,
23 Board Member Abarbanel, yourself, and Ms. Kalemkiarian
24 were absent for portions of time; and you were all
25 provided audiotape so that you could familiarize

1 yourselves with what you missed. And I just wanted to
2 make that known for the record.

3 CHAIRMAN MORALES: Thank you for that. Before
4 we start, I think Dr. Abarbanel would like to . . .

5 MR. ABARBANEL: I only wanted to point out
6 that, on the Executive Officer's Summary Report on this
7 item, on page 3, it says: "The cost benefit analysis
8 report prepared by the City of San Diego." It was
9 prepared for the City of San Diego, not by.

10 Thank you. That's all.

11 MS. WALSH: Good afternoon, Mr. Chairman and
12 Members of the Board. My name is Laurie Walsh. I'm a
13 water resource control engineer in the Southern Watershed
14 Unit. I would like to give you a brief introduction of
15 the item today. Item 9 before you today is a
16 continuation of the public hearing on the issue of
17 Tentative Order R9-2013-0001, the NPDES permit for
18 discharges from municipal separate storm sewers within
19 the San Diego region.

20 At the conclusion of the hearing on April 11th,
21 the Board did continue the public hearing to today's
22 meeting to allow more time for discussion on the proposed
23 tentative order. The San Diego Water Board staff was
24 directed to prepare the remaining revisions to the
25 tentative order based on the testimony at the April 10th

1 and 11th hearing.

2 Supporting Documents 12 and 13 contain
3 suggested revisions to the tentative order in the form of
4 two options. These options are identical in all
5 respects, except Option 1 removes the discharge
6 prohibition and receiving water limitations compliance
7 option of Provision B.3.c.

8 The compliance option is a set of requirements
9 that a copermitttee could choose to use to demonstrate
10 compliance with the prohibition and receiving water
11 limitations requirements in Provision A of the tentative
12 order. Option 2 retains the compliance option and makes
13 language adjustments to address the testimony provided
14 during April's meeting.

15 As a matter of housekeeping, you'll notice that
16 Supporting Documents 12 and 13 are the corrected versions
17 of the errata, and these versions were corrected for
18 typographical errors we discovered as well as some
19 necessary changes to the fact sheet that were
20 inadvertently omitted in our first errata submittal to
21 you.

22 Staff recommends that the Board adopt the
23 tentative order with either Option 1 or Option 2. We can
24 support either option.

25 Additionally, at the April hearing, the Board

1 allowed the City of San Diego's cost benefit analysis
2 report into the record on this item and invited the
3 designated parties to submit written comments by April
4 26th. Written comments received by the deadline are
5 included in your supplemental agenda package as
6 Supporting Document 5.

7 To assist the Board's discussion on cost, the
8 supplemental agenda package includes two spreadsheets,
9 the regional stormwater program expenditures for fiscal
10 year 2011 and '12 -- that is Supporting Document 6 -- and
11 the spreadsheet on the comprehensive load reduction plan
12 estimated cost, which is Supporting Document 7.

13 This cost information is provided by the
14 copermittees in their annual reports as well as
15 comprehensive load reduction plans. All of this
16 information is already in the record and was provided to
17 the Board during the December 2012 public workshop.

18 The cost benefit analysis is specific to the
19 costs of programs for the City of San Diego to meet the
20 terms of the bacteria TMDL at San Diego beaches and
21 creeks. This report is not relevant to the adoption of
22 the tentative order. Consideration of this report is
23 more appropriately placed during potential future
24 hearings to either change the TMDL or amend the Basin
25 Plan as related to this TMDL, which must occur under

1 separate board processes.

2 Lastly, at the April hearing, the Board also
3 allowed into the record letters on the tentative order
4 from the United States Congress to USEPA and the
5 California Legislature to the San Diego Water Board. The
6 response letter from EPA is included in your supplemental
7 agenda material. And an example of the Board's response
8 letter to the California State legislative senators and
9 assembly members was provided to the Board today. Copies
10 are provided on the back table, and we also posted the
11 response on our website.

12 Again, staff supports the adoption of Tentative
13 Order 2013-0001 today with either Option 1 or 2. We can
14 support both, and we are prepared to answer any questions
15 you have at this time.

16 MR. ANDERSON: I have just a question on the
17 adaptive management process. In the EPA's letter, they
18 referred to a change in Provision B.5 of the permit. And
19 one of them or someone had suggested that all programs
20 should be adaptable, including especially C, D, and E.

21 Does the part in B.5 kind of cover that pretty
22 well or did you guys make the changes in C, D, and E? I
23 just didn't see it.

24 MS. WALSH: Provision C, D, and E? I mean,
25 because the Provision E, the reporting, that is the

1 TMDLs. But the adaptive management portions of the
2 permit are throughout the permit for all of the
3 provisions, you know, basically driven by the Water
4 Quality Improvement Plan.

5 MR. ANDERSON: I have a second question. I'm
6 sorry. I almost forgot. My bigger question was: The
7 economic analysis makes an assumption of the cost of
8 re-complying with the bacteria TMDL, and there is not any
9 real supporting documents to explain to us how they
10 arrived at those costs.

11 Do you agree that those costs are what we
12 imposed when we passed that bacterial TMDL?

13 MS. WALSH: I think I'm going to ask Wayne to
14 come up, because he was, you know, the one who read the
15 TMDL and went through those, so he is better to answer
16 that.

17 MR. CHIU: I'm sorry. Could you repeat the
18 question for me.

19 I'm sorry. Wayne Chiu, Water Resource Control
20 Engineer with the Southern Watershed Unit; and I have
21 taken the oath.

22 MR. ANDERSON: The economic analysis talks
23 about a cost of complying with that bacterial TMDL at
24 three point-something billion dollars as that is the way
25 to -- that what we passed is and that is how they would

1 have to comply.

2 Do you agree with that number and with the
3 analysis that that is how you achieve it?

4 MR. CHIU: Well, first of all, I would say that
5 it falls within the range of costs that we had estimated
6 within the TMDL. We only provided ranges of potential
7 costs for different types of BMPs. What they provided in
8 the cost benefit analysis, you know, obviously relied
9 upon some assumptions and a plan they looked at to base
10 some of their calculations on. So I wouldn't disagree
11 with, you know, their calculations; but I wouldn't
12 necessarily agree with the analysis itself.

13 CHAIRMAN MORALES: Anyone else from staff?

14 Next up, copermittees. Oh, sorry about that.
15 USEPA. My apologies.

16 JOHN KEMMERER: Good afternoon, Board Members.
17 My name is John Kemmerer. I'm the Acting Water Director
18 for EPA Region 9. I think you probably know, EPA Region
19 9 covers the States of California, Arizona, Nevada, and
20 Hawaii. And I have taken the oath.

21 I just wanted to briefly say this afternoon
22 that EPA is very supportive of the approach your staff
23 has taken, and we encourage you to adopt the proposed
24 permit this afternoon. This would be an important step
25 forward in addressing urban runoff, the primary cause of

1 water quality impairments in this region.

2 As noted by my colleague, Doug Liden, who was
3 here on April 10th, your staff has made incredible
4 efforts to involve interested stakeholders in the
5 development of this permit. Over a year ago, they began
6 holding public workshops on the development of the
7 permit, and they provided many opportunities for input
8 and helped in sharing flexibility on how permit language
9 has been updated to reflect stakeholder input. So we are
10 very impressed with the job that has been done here.

11 In evaluating the two errata options that are
12 being presented here today, we prefer the adoption of
13 Option 1 for compliance with receiving water limits.
14 Option 1 retains the approach used in previous MS4
15 permits issued by this Regional Board and most MS4
16 permits across California since the issuance of State
17 Water Board Resolution 9905.

18 As you know, the issue is being considered by
19 the State Water Board. EPA is participating in the State
20 Board's reevaluation of how receiving water limits are
21 set in MS4 permits; and, of course, all of the involved
22 stakeholders in California are very interested and
23 involved in that process.

24 We believe the best permit, best option for
25 this permit is to maintain language consistent with

1 Resolution 9905 and to reopen the permit if the State
2 Board establishes a new approach for their evaluation of
3 new receiving water limit language.

4 However, as we testified on April 10th, we
5 believe your staff has done a good job in drafting an
6 alternative approach to receiving water limitation
7 compliance, and it is given here as Option Number 2.
8 This alternative calls for a quantitative analysis
9 demonstrating that the stormwater control actions
10 implemented will achieve numeric goals and schedules for
11 protecting water quality and attaining water quality
12 standards.

13 While we would prefer that the receiving water
14 limitation language included in Option 1 be adopted
15 today, we would not object if you chose Option 2, given
16 that it does establish a process intended to ensure that
17 measurable water quality improvements are achieved.

18 So I'd next like to move to the proposed
19 permit's development planning section. Given EPA's
20 interest nationally in facilitating the use of low-impact
21 development -- we also sometimes refer to it as "green
22 infrastructure" -- we have been very involved in this
23 section of the permit. We have been working closely with
24 your staff on the development and planning language
25 beginning over a year ago before the public workshops

1 were begun.

2 And we were completely supportive of this
3 section in our April 10th testimony. The section is
4 still very effective in establishing the use of
5 low-impact development tools to address new and
6 redevelopment projects.

7 Unfortunately, we didn't get a chance to
8 discuss all of the changes made in the errata with your
9 staff before they were posted, and we have concerns with
10 one specific change made in the errata. And that issue
11 we have is with the provisions on the use of
12 biofiltration; when retained, the full capture volume is
13 not technically feasible. So if you have a new
14 development project, the requirement is to try to fully
15 retain; and if it is not feasible, biofiltration is an
16 option.

17 As currently drafted, the criteria for
18 biofiltration systems in Section E.3.c.(1), which is on
19 page 6 of 19 in Option 1, allows for the use of these
20 systems if specific volumetric criteria are met.

21 As drafted, biofiltration systems may be used
22 if they have a total volume, including pore spaces and
23 pre-filter detention volume to hold 0.75 times the
24 portion of the design capture volume not reliably
25 retained on the site.

1 While we agree that properly designed and
2 operated biofiltration systems can provide benefits
3 approaching other LID BMPs, we don't the believe that it
4 is appropriate to establish criteria solely based on
5 volume of the biofiltration system. So in order for a
6 biofiltration system to provide the LID-like benefits
7 that I believe we are trying to achieve here, the system
8 should provide a reasonable level of retention and
9 pollutant removal. By solely defining the volume of the
10 system, there is no assurance that these benefits will be
11 achieved.

12 We are therefore suggesting that the permit
13 facilitate the preparation of sound design specifications
14 for biofiltration systems. This includes development of
15 appropriate loading rates, soil specifications, and other
16 design criteria. And to this end, we are suggesting a
17 revision to the permit text, which I will pass out in a
18 minute here, which would state that biofiltration BMPs
19 must be designed to maximize stormwater retention and
20 pollutant removal. The permit should also state that the
21 permittee's updated BMP design manuals must provide
22 guidance for these design considerations. So, again, I
23 have brought copies of the suggested language; and I will
24 pass it out in a minute when I'm through with my
25 testimony here.

1 It's our position that the existing language by
2 not including this additional level of detail on how
3 biofiltration is implemented creates a loophole that
4 could potentially allow the use of ineffective filtration
5 methods that bear really no resemblance to low-impact
6 development BMPs.

7 So, moving on from that, as we noted in the
8 April 10th hearing where we are supportive of the
9 proposed permit's approach for incorporating TMDLs, just
10 to reiterate, Finding Number 5 in the draft permit
11 regarding TMDLs appropriately references EPA regulations,
12 including the regulation that NPDES permits incorporate
13 limits consistent with TMDL waste load allocations.

14 Again, urban runoff is the primary contributor
15 to water quality impairments addressed by the six TMDLs
16 at this pore that are being implemented by this permit.
17 In order to achieve the water quality improvements mapped
18 out by these waste load allocations in the TMDLs, which
19 you have adopted, it is vitally important that this
20 permit include a clear, measurable, and enforceable
21 approach for TMDL implementation.

22 The proposed permit's TMDL provisions achieve
23 this objective, and we support the fine-tuning that was
24 done in the errata provisions on how the TMDLs are
25 expressed.

1 So, in closing, I want to emphasize our support
2 for the inclusion of the watershed Water Quality
3 Improvement Plans in the proposed permit. Under these
4 plans, the direction taken in water quality monitoring
5 and stormwater control measures should be prioritized to
6 those areas of greatest importance and the plans provide
7 the framework for efficient and strategic use of
8 resources to control urban runoff and achieve measurable
9 water quality improvements. And we are really enthused
10 about the approach that your staff has taken with these
11 Water Quality Improvement Plans to really get to the
12 measurable improvements.

13 So we support the proposed permit as the
14 necessary step to address the primary contribution --
15 contributors to water quality impairments in your region.
16 And we strongly urge you to adopt the permit as proposed
17 in Option 1 with the one suggested revision to the
18 development planning section that I'm about to give you.

19 Thank you for your time.

20 MS. KALEMKIARIAN: I have question. I'm sorry.
21 I didn't catch your name.

22 MR. KEMMERER: John.

23 MS. KALEMKIARIAN: John, there was a lot of
24 discussion last session about this Section B.3.c, which
25 the NGOs were saying was a safe harbor they don't want to

1 have in there and that government officials/copermittees
2 were saying, well, we are afraid after this Browner
3 decision that we are going to get sued just strictly for
4 noncompliance with the TMDLs. So that is the Option 1
5 versus Option 2 difference that we are looking at.

6 In your experience with the EPA, I don't know
7 whether you feel qualified to answer this, but are you
8 fearful or do you see that there is some type of rash of
9 strict liability litigation that is going to come about
10 after the Ninth Circuit opinion; that all of a sudden, we
11 are going to see municipalities being sued because they
12 don't meet the TMDL standards?

13 MR. KEMMERER: Well, I guess, with this
14 clarification, it is my understanding that Option 1 and
15 Option 2 are looking not so much at the TMDL wastewater
16 allocations but the recieving water limits.

17 MS. KALEMKIARIAN: I'm sorry. That is right.

18 MR. KEMMERER: Yet, putting the --

19 MS. KALEMKIARIAN: But same problem?

20 MR. KEMMERER: Right. Yeah. Yes, I get the
21 gist of your point. Yes. So the Ninth Circuit decision
22 in L.A. Flood Control District and NRDC's litigation was
23 considered by the Supreme Court and then remanded back to
24 the Ninth Circuit.

25 Based on your question, I mean, we have not

1 seen historically a lot of litigation over this
2 provision. It has been in all of the California permits,
3 and it has been in permits around the country in
4 different forms for many years. And, specifically, in
5 California, really, in the last 12 years or so, this has
6 been in there. We have not seen a lot of litigation over
7 that.

8 I do think that, you know, there are
9 opportunities, even if we stick with Option 1, of really
10 the copermittees making strong efforts towards achieving
11 water quality standards. I also think that, again, the
12 statewide process is underway to look at how this might
13 be changed statewide. And so, you know, our view is, I
14 guess, to directly answer your question, we don't
15 necessarily see that there is a rash of new litigation on
16 this matter.

17 We do think that, again, your staff have come
18 up with a good approach with Option 2. We think the
19 better way to go would be with Option 1 and then to
20 follow up with what the State Board ends up developing.
21 I hope that answers your question.

22 MS. KALEMKIARIAN: It does. And I'm sorry, but
23 I was searching through my notes from the last series to
24 see what the name of the case was, but I think I
25 misstated it. The case you are talking about is the one

1 that I was thinking about.

2 MR. ANDERSON: John, before you go, I really
3 want to thank you and your office for authoring a very
4 good response to the letter from a congressional
5 delegation. It was very right on point, and I was very,
6 very impressed.

7 MR. KEMMERER. Thank you.

8 CHAIRMAN MORALES: Now we'll go to the
9 copermittees. And I think we were given an order that
10 you guys decided amongst yourselves.

11 MR. SNYDER: Good afternoon, Chairman, Members
12 of the Board. My name is Todd Snyder. I'm a watershed
13 planning manager for the County of San Diego. I have
14 taken the oath.

15 What I want to do today is to re-introduce Ken
16 Susilo from Geosyntec Consultants. Due to time
17 constraints at the hearing on April 11th, Ken was unable
18 to complete his full presentation on our concerns with
19 the bacteria TMDL. So we appreciate the opportunity for
20 him to be able to complete that presentation today.

21 As a reminder, Ken is a principal in
22 Geosyntec's Los Angeles office. He's an accomplished
23 engineer with many years of experience in stormwater
24 quality and has participated in a number of TMDL
25 offerings in southern California and beyond. One of

1 Geosyntec's important roles is as co-principal
2 investigator of the international BMP database.

3 So there is really no better person than Ken to
4 get to know what BMPs are capable of doing based on real
5 world data and what they are not capable doing. So Ken
6 will present on behalf of the County a number of our
7 technical concerns with the bacteria TMDL, including some
8 of its outdated science, and questions about the
9 attainability of its targets.

10 His comments are made in the context of the
11 County's continued recommendation to exclude the bacteria
12 TMDL for beaches and creeks from the permit at this time
13 until the TMDL can be brought up to date with more
14 current data and the best available science that is out
15 there today.

16 You heard in April from Jim O'Day from our
17 County Counsel's office that we believe you have the
18 discretion to keep the TMDL out of the permit at this
19 time; and we renew our request today that you do that.
20 We do appreciate the fact that board staff, having
21 knowledge that there is a TMDL reopener, and that is
22 actually written into the permit now, but as we have been
23 told many times by regional board staff, the permit is
24 not the place to obligate the Regional Board to do
25 anything. It obligates the copermitees with

1 responsibilities.

2 And so our concern is that it's not good
3 policy, good public policy, to knowingly move forward
4 with a bacteria TMDL that most people think is flawed and
5 out of date and to rely on a fix somewhere down the road
6 through a reopener process. We just think that's the
7 wrong approach.

8 So, at this point, in our opinion, there are no
9 guarantees that the reopener will actually happen. So by
10 including the bacteria TMDL in the permit today, you'll
11 make it significantly more difficult for it to be amended
12 in the future. And that is our position.

13 So with that, I will turn it over to Ken.

14 MR. ABARBANEL: If the cost for enforcing the
15 TMDL were free, it cost the County of San Diego nothing,
16 would you support it?

17 MR. SNYDER: I don't know how to answer that
18 question.

19 MR. ABARBANEL: Well, yes or no would do.

20 MR. SNYDER: I would need to think about it a
21 little more before I answer the question.

22 MR. ABARBANEL: Well, I have another 30
23 microseconds for you to answer yes or no later.

24 MR. SNYDER: One of our primary concerns, as
25 you will hear Ken address, is that --

1 MR. ABARBANEL: If you are not going to answer
2 the question, you might as well . . .

3 MR. SNYDER: Well, I'm answering your question
4 you asked. You gave me 30 seconds.

5 So one of the things that is our primary
6 concern is that, even with the limits that are in place
7 for the wet weather portion of the TMDL -- and that is
8 really our primary concern, is the attainability of these
9 limits during wet weather -- is it good policy to ask our
10 taxpayers to fund projects that might not result in the
11 ultimate goal.

12 And so we are not just concerned about the cost
13 to the County. We are concerned about the cost to the
14 taxpayers as well. And so, on the wet weather side of
15 the TMDL, I think I would have concerns with this TMDL,
16 even if it cost the County nothing, because it will cost
17 the taxpayer something.

18 MR. ABARBANEL: I'm a taxpayer in the County of
19 San Diego. My question was if it cost me nothing.

20 MR. SNYDER: I didn't hear that.

21 MR. ABARBANEL: If it cost the County nothing,
22 would you attempt -- what would your position be?

23 MR. SNYDER: If it is free to the taxpayers and
24 the County, we would be much less concerned about this
25 TMDL.

1 MR. ABARBANEL: So that is a "yes," you would
2 do it? Pardon me if I'm putting words in your mouth, but
3 I would like a "yes" or "no," because I'm a county
4 taxpayer. The County doesn't exist without me or you.

5 MR. SNYDER: Agreed.

6 MR. ABARBANEL: So it costs you and me nothing.

7 MR. SNYDER: Right. The Board of Supervisors
8 ultimately makes decisions for the County, so I would
9 probably on that question defer to them.

10 MR. SUSILO: Good afternoon, Chairman Morales
11 and Members of the Board. My name is Ken Susilo, and I
12 have taken the oath. I'm a professional civil engineer
13 in the State of California and have been one for 20
14 years. I'm a certified professional in stormwater
15 quality and was a founding diplomat with the American --
16 available diplomat water resources engineer with the
17 American Academy of Water Resources Engineers.

18 In April, I provided an abbreviated and
19 accelerated version of this presentation. I appreciate
20 the opportunity to finish the presentation today.

21 The four major concerns regarding the bacteria
22 TMDL were: Number 1, the TMDL bacteria limits do not
23 reflect the current science, creative thinking or most
24 current data; Number 2, the TMDL requirements are not
25 consistently attainable; Number 3, no rigorous benefit

1 cost analysis was performed and a contextual review of
2 the analyses that have been performed with surprising
3 results. Number 4, the technical concerns raised
4 previously by the County of San Diego have not been
5 adequately addressed.

6 The basis for my opinion is my review of staff
7 reports, data extracted from the Arroyo Sequit-referenced
8 watershed, research by nationally recognized experts, and
9 information presented at the 2012 State of the Science
10 Workshop.

11 The first point relates to the referenced
12 watershed and specifically that the permit-referenced
13 watershed approach is inappropriately applied to the TMDL
14 compliance sites. Receiving water limitations are
15 expressed as bacteria densities and allowable exceedance
16 frequencies or AEFs. The reference: The permit AEFs for
17 wet weather and dry weather are 22 percent and zero
18 percent respectively.

19 However, we know that large San Diego regional-
20 referenced watersheds have exceedance frequencies of
21 about 30 percent in wet weather, and even the Arroyo
22 Sequit-referenced watershed exceeds 28 percent of the
23 time. So 22 percent is too low. Dry weather exceedances
24 are typically about 10 percent and can be up to 20
25 percent. And so a zero exceedance criteria is also not

1 appropriate.

2 In April, I presented this plot of actual data
3 collected between 2004 and 2011 in the Arroyo Sequit
4 watershed. The take-away message here is that the
5 referenced watershed itself, had that watershed been
6 subjected to the TMDL, it would be in violation 50
7 percent of the time in wet weather and 85 percent of the
8 time in dry weather. So having the basis of a regulatory
9 requirement and routinely violate the same requirement
10 presents a conflict in logic.

11 The point of this slide is to address the TMDL
12 with respect to metrics appropriate to protect public
13 health. USEPA 2012 rec criteria raises two points.

14 First, EPA states that scientific advancements
15 have demonstrated that E. coli for fresh water and
16 enterococcus for marine sites are better indicators of
17 health than the previous indicators: total coliform and
18 fecal coliforms. Our tentative permit and TMDL, however,
19 used total fecal and enterococcus for beaches and fecal
20 and enterococcus for creeks and not E. coli.

21 Secondly, EPA also expressed that single
22 sampling maximums, maximum values are over-conservative
23 and do not correlate with the same level of risk
24 associated with the geometric mean criteria. They
25 recommend a statistical threshold value or 98 percentile

1 value to better correspond to health protection levels of
2 the geometric mean. The bacteria TMDLs in this permit
3 use the single sample maximum value and are therefore
4 inconsistent with recent USEPA guidance.

5 My opinions on whether TMDL limits can be
6 attained are based on the following data.

7 MR. ABARBANEL: If I may ask you, the EPA sent
8 a letter to my congress member, Mr. Issa. And in it, it
9 referred to the quality of the scientific background of
10 this TMDL. It says: "That process included review of
11 the science underlying the TMDL by third-party peer
12 reviewers and extensive analysis of the TMDL
13 implementation costs prior to stated option of the TMDL.
14 We also carefully reviewed the basis for the TMDL and
15 believe the science and analysis are sound."

16 Do you disagree with EPA on this?

17 MR. SUSILO: I think, it appears to be a
18 conflict in terms of the guidance of the 2012 rec
19 criteria and in that letter. So that is where, you know.

20 MR. ABARBANEL: It's all right with me if you
21 disagree. I just want to know.

22 MR. SUSILO: Well, I'm not providing my opinion
23 on this one, I'm saying.

24 So attainability: My opinions on whether TMDL
25 limits can be attained are based on the following data

1 sources: Actual monitored land use data; BMP performance
2 data and in-stream data; predicted performance of
3 non-structural BMPs; and SBPAT, which is a tool that
4 utilizes actual monitored land use and BMP performance
5 data.

6 We have said that TMDLs are not consistently
7 and reliably attainable. This slide shows some of the
8 factors that impact attainability. On the left are
9 favorable conditions under which you could possibly meet
10 the TMDL metrics.

11 To the right, you see unfavorable conditions
12 that can make TMDL compliance nearly impossible. As you
13 see, the variabilities are a function of runoff quality,
14 storm event sizes, antecedent conditions, BMP performance
15 opportunities, and direct loadings and contributions.

16 In April, I also presented this box and lister
17 plot, which presents results from the international BMP
18 database, which was partially funded by EPA and the Water
19 Environment Research Foundation. The take-away message
20 here is that, when you compare the peer-reviewed
21 database, BMP performance to the TMDL standard, the only
22 technology that reliably attains water quality-based
23 effluent limits is disinfection. It is generally
24 accepted that plaintive infection technologies for wet
25 weather flows is problematic.

1 While the previous set of plots represented
2 control monitored data, it's also important to look at
3 real projects. This is an example of a good project not
4 achieving attainment. Sandbar restraint is well known
5 for its innovative, highly effective and targeted source
6 tracking. They identify key infrastructure points of
7 weakness and exfiltration from sanitary systems,
8 infiltrate into the storm drain systems.

9 The famous dog that tracked human signatures
10 was employed in this process; and despite these efforts
11 and improving improvements, the subject area is still
12 subject to noncompliance with the bacteria standards.

13 Another example of a good project not achieving
14 attainment was in Santa Monica, the Santa Monica Pier.
15 This is an example of a focused and aggressive structural
16 and non-structural BMP implementation, including
17 disinfection, bird source exclusion, and the elimination
18 of cross connections; yet, high levels of enterococcus
19 remain.

20 The third major area of concern has to do with
21 the benefit cost analysis. The basis for the following
22 cost opinions are the San Diego County Copermittees'
23 comprehensive flood reduction plans, or CLRPs, that were
24 submitted to the Regional Board in October of 2012. The
25 regional cost estimate for all San Diego Copermittees

1 range from 2.8 billion to 5.1 billion, which were divided
2 by an 18-year time frame. And the take-away message here
3 is that these costs are significant.

4 The purpose of this slide is simply to
5 illustrate that, for the two CLRPs, specific analyses
6 were conducted to develop specific project lists for both
7 wet weather and dry weather conditions. Not all
8 jurisdictions planned on implementing the exact same
9 suite of opportunities. And each responsible party
10 carefully and thoughtfully considered their need,
11 opportunities, and specific projects in developing the
12 CLRPs.

13 This slide breaks down the cost from the
14 combined watersheds for wet weather, dry weather, special
15 studies, and compliance monitoring. Without going into
16 detail, the key items noted here is that wet weather
17 costs are estimated to be 60 to 66 percent of the total
18 and dry weather 33 to 39 percent of the total cost.

19 Slide 24 was presented in April as well. It
20 relates to the potential health benefits to wet season
21 and dry season conditions. The 2006 study by Gibbon,
22 Pendleton & Bane present an estimated annual public
23 health impact attributable to excess gastrointestinal
24 illness caused by swimming.

25 The key conversion here is to translate the

1 seasonal information to wet weather and dry weather
2 metrics, which is how the TMDL is expressed, and how
3 pollutant controls are categorized. While these data are
4 not San Diego-specific, the ratios are assumed to be
5 representative for this discussion.

6 And the take-away message there on the bottom
7 line is that wet weather activities would realize 2 to 4
8 percent of the benefit; whereas, dry weather BMPs could
9 produce 96 to 98 percent of the benefit.

10 This slide illustrates relative wet weather and
11 dry weather implementation or BMP cost as it compares to
12 just that human health cost metric. And while avoidance
13 of public health costs are not the only metric of
14 benefit, as this shows 63 percent of the cost, it
15 provided only 3 percent of the benefit.

16 The Regional Board did not quantify the
17 benefits of this particular TMDL. The given studies
18 showed a number of uncertainties and limitations;
19 although, the authors in the end expressed a high degree
20 of confidence, saying that, despite these limitations,
21 the results reported here represent the best estimates
22 possible in light of imperfect information. That said,
23 they also included the interesting conclusion, stating
24 that the cost of eliminating all beach contamination may
25 outweigh the marginal public health benefits of doing so.

1 The City of San Diego-commissioned study by the
2 economist at Point Loma Nazarene University in April 2011
3 has been entered into the record. As previously noted,
4 they estimated costs would outweigh the benefits by six
5 to one.

6 Before concluding, the final point that
7 remains, it pertains to the issue that the County's
8 technical concerns were not adequately addressed. Some
9 of these concerns were described in the original peer
10 review comments, in addition, in preparing the CLRPs for
11 the San Diego River Watershed.

12 Geosyntec utilized SBPAT, which, again, is the
13 GIS-based public domain peer-reviewed water quality model
14 that was specifically named by the Los Angeles MS4 permit
15 as a model to conduct reasonable assurance analyses. It
16 also used the most currently available monitoring data.
17 SBPAT was used to estimate target loads based on
18 allowable exceedance criteria, baseline 2001 loading
19 rates, and target load reduction.

20 The required load reduction listed in Table 6.3
21 of Attachment E of the permit was based on a 10-year-old
22 model, 10-year-old modeling studies, and results in
23 significantly higher target load reductions. A
24 discrepancy of this order of magnitude has potentially
25 significant cost implications, particularly when costs

1 countywide are on the order of billions.

2 For the San Diego River Watershed, for example,
3 we filled it with numeric limits, and the program
4 significantly overestimated the load reduction required
5 to attain the TMDL waste load allocation.

6 So, in conclusion, the critical TMDL water
7 quality model should be made current and should include
8 appropriate sensitivity and uncertainty analyses,
9 particularly where new evidence, data, and model studies
10 are available as they are now.

11 Thank you. I believe Todd Snyder has one final
12 comment.

13 MR. SNYDER: Thank you. So that concludes our
14 presentation on the TMDL issue. I just would like to
15 read one additional point into the record. That is the
16 fact that the County of San Diego supports the points
17 raised by BIA and SDG&E back in the April hearings
18 related to the necessary revisions in the permit to deal
19 with the inclusion of the linear underground and overhead
20 utility projects in the permit's post-construction BMP
21 requirements. Thank you.

22 MR. ABARBANEL: First of all, I would like to
23 thank you for the website, which is down here at the
24 bottom. I have consulted it frequently in the last
25 month. I really appreciate it. I think what you and

1 your staff have done is very, very helpful.

2 Then I have a question. If this board decided
3 to not change the MS4 permit whatsoever but simply
4 re-adopt the previous one, what would be the cost of that
5 permit over the 18-year period we are talking about, to
6 not just the County but to all the copermittees?

7 MR. SNYDER: So you are asking what the cost of
8 what the current permit implementation is?

9 MR. ABARBANEL: Over the next 18 years, so I
10 have something to compare these other numbers with.

11 MR. SNYDER: I'm not that good at math, but the
12 County currently spends, depending on --

13 MR. ABARBANEL: Not just the County, but all
14 the copermittees, including Orange County and Riverside.

15 MR. SNYDER: So based on the documentation in
16 the record on this issue, it was documented that the 21
17 San Diego Copermittees, and I can't speak to the other
18 counties, the San Diego Copermittees spend, I believe
19 it's \$119 or \$120 million per year, which is the
20 estimates pulled from our annual reports. So I would
21 take that number and multiply it by 18.

22 MR. ABARBANEL: So no cost of living
23 incremental?

24 MR. SNYDER: I'm not an economist either. I'm
25 a history major, like a couple of you up there.

1 MR. ABARBANEL: Thank you.

2 MR. STRAWN: We are at County of Orange.

3 MR. BOON: Good afternoon, Chairman Morales,
4 Members of the Board. I'm Richard Boon with the County
5 of Orange. I'm speaking on behalf of the Orange County
6 Stormwater Program. I'm the first of a number of
7 presentations by the municipal programs. I'm going to
8 speak for ten minutes.

9 So I'm going to cover three -- essentially, two
10 items. I want to talk a little bit about the structure
11 and the foundation of MS4 permits within the NPDES
12 permitting system. Then I'm going to talk very
13 specifically about the need for the Compliance Option
14 Section B.3.c, why we need it, why we support it, and
15 then conclude with any questions you may have.

16 So, first off, I just wanted to point out that,
17 in 1987, when Congress passed the Water Quality Act, it
18 drafted large discharges of stormwater into an existing
19 NPDES program that was governing discharges from
20 manufacturing and sewage treatment plants. In effect,
21 they put a non-point source problem in a point source
22 framework, and they put a square peg in a round hole.
23 And that is a square peg in a round hole.

24 So, nonetheless, throughout the history of
25 rule-making on stormwater, and we passed the 25-year mark

1 last year, it has always been recognized that there is a
2 fundamental difference between the episodic discharges of
3 runoff from the urban landscape and compared to the
4 continuous or periodic batch discharges from industry.

5 In 1999 when EPA had its last rule-making, the
6 Phase II permit rule-making, they were very explicit
7 about the fundamentally unique nature of stormwater.
8 They state: EPA envisions application of the MEP
9 standard as an iterative process over a number of permit
10 terms. They go up, successive iterations of the mixed
11 BMPs and measurable goals driven by objective of ensuring
12 water quality standards. They also considered numeric
13 effluent limits and determined that they were simply too
14 complicated to derive and too complicated to verify.

15 Later on in 2006, we seemed to periodically
16 want to drive this peg a little more rigorously, a little
17 deeper into this round hole. As the State looked at
18 numeric effluent limits, they convened a blue ribbon
19 panel, and they determined in 2006 -- and I don't think
20 anybody's view has changed -- that it was infeasible to
21 develop numeric effluent limits for MS4 permits of water
22 quality standards that could and should be achieved
23 through the implementation of best management practices.

24 Simply rebuilding the urban landscape and
25 affecting societal change, which I think is at the core

1 of what we are trying to do here, is a long-term process.
2 The permit and the findings recognize that. It is talked
3 about in Finding 18. The San Diego Water Board,
4 yourselves, recognized that a decade or more may be
5 necessary to realize demonstrable improvement to the
6 quality of the waters in the region.

7 The order includes a long-term planning and
8 implementation approach that will require more than a
9 single permit term to complete. And I acknowledge, also,
10 that the change in the errata sheet acknowledges that,
11 yes, it is a long-term endeavor; and, yes, we have
12 already made significant progress.

13 However, if we are going to continue to sustain
14 the momentum, we need to be creative, and we need to be
15 diligent in how we continue to craft the regulatory
16 framework for stormwater and ultimately define compliance
17 for MS4s -- we think your staff have been both in
18 conceiving of B.3.c -- and I'm here to advocate for the
19 continued inclusion of this option in the permit.

20 So the need: Provision A right now, the
21 receiving water limitations provisions and the discharge
22 prohibitions, will require instantaneous attainment of
23 water quality standards for every pollutant everywhere at
24 the time the permit goes into effect. So we need B.3.c,
25 because it creates an achievable basis for compliance

1 with the order. Without this provision, we are in
2 immediate noncompliance at the point the permit becomes
3 effective.

4 So we support it, but we have a number of
5 clarifications, too, that we would like to see. We
6 support it because we think it creates an auditable
7 compliance pathway. It links the BMP approach to
8 attainment of water quality standards per everything that
9 has been written previously about the way this program
10 should be regulated. It establishes an outcome-based
11 approach, which will support the watershed planning. And
12 I think it will also kick start your own staff's
13 practical vision document.

14 And it is supported by 39 permittees. This is
15 the high point of my career. I will never ever speak
16 again on behalf of 39 separate jurisdictions. Without
17 the compliance, without the compliance option, there is a
18 disconnect between the Water Quality Improvement Plan,
19 the watershed planning approach, and how compliance with
20 the permit is ultimately measured.

21 So now, to the small print and the
22 clarifications. We have two. We are very keen and
23 certain about how the phrase "numeric goals" is used in
24 the permit. This footnote, which occurs in B.3.a(1),
25 defines your staff's and our understanding of what a

1 numeric or an interim or a final numeric goal could be.
2 And there are a number of different expressions of the
3 goal. This is consistent with all of the conversations
4 we have had with your staff over the stakeholder process
5 over the last 18 months. It is also entirely consistent
6 with the conversation that I and my colleague, Nancy
7 Palmer of the City of Laguna Niguel, had with Wayne last
8 week.

9 So the concern for us is, when you get to the
10 following section, numeric goals appear to be only
11 concentration-based or load-based effluent limitations.
12 This is inconsistent with prior assurances. It is
13 inconsistent with the prior definition. And these terms
14 have particular regulatory significance for us. So what
15 we would like is to see numeric goals defined as they are
16 defined in the footnote, and that can be accomplished
17 simply by striking out those phrases that are in the
18 middle of that section.

19 So next, the second clarification, and we have
20 talked about this previously, again, it gets to the heart
21 of compliance with this permit. Currently, the
22 compliance option, there is explicit language that links
23 back to Section A. What we need is language that links
24 forward from Section A to the compliance option.

25 Per the Ninth Circuit decision, each provision

1 in this order is separately enforceable. And it was
2 discussed: Are there other cases out there, lawsuits
3 teed up to take advantage of this provision in the
4 permit?

5 The City of Stockton case in 2009 is the most
6 egregious, when a group of water districts in the Central
7 Valley thought they could get additional allocations of
8 water, and they sued the City of Stockton for
9 contravention of the water quality standards.

10 There is also the NRDC-L.A. County case, the
11 City of Malibu case, and I believe there may be a case
12 out of the County of Santa Barbara. So they are there.
13 They are real. They are a threat. We take them very
14 seriously.

15 So this is my only means of getting this into
16 the record, but we would offer language that would
17 restore that linkage or create that linkage between the
18 two sections. Some references: "A," we would put the
19 references forward to be three discharge prohibitions
20 and, again, the same language referencing B.3.c as the
21 basis for the compliance in the receiving water
22 limitations.

23 So, to conclude, we think that B.3.c, the
24 compliance option, provides necessary and auditable
25 compliance pathways for the permit for the permittees.

1 We would look to get clarification of numeric goals per
2 the footnote. We would want to see the nexus between
3 Provision A back to B.3.c and vice versa. And we would
4 advocate very strongly for the inclusion of this
5 compliance option with the clarifications. And I say
6 that on behalf of 39 copermittees. Thank you.

7 MS. KALEMKIARIAN: Let me ask a question.
8 Maybe this is grammar, but when I look at the section you
9 are referring to as Clarification Number 1,
10 B.3.c.(1)(a)(ii).

11 MR. BOON: Yes.

12 MS. KALEMKIARIAN: I was just trying to read
13 back and forth, and maybe staff can clarify; but it
14 seemed to me that, when you read that provision, if it
15 was adopted, and I realize it is still an issue, it is
16 saying: "Numeric goals and schedules developed pursuant
17 to Provision B.3.a include the following numeric goals."
18 So it is not saying you have to have all three of them.
19 It is saying these are the kinds of numeric goals we want
20 you to include.

21 So I don't actually see the need to strike the
22 expressed as concentration-based or load-based effluent
23 limitation language, because, in three, you have those
24 other numeric goals. I mean, it is a pretty broad set of
25 three categories.

1 I see a staff head being nodded. Was that the
2 intention? So I just don't want us to be meddling with
3 something that doesn't need to be meddled with. I
4 understand your point. But if this is broad enough to
5 encompass all different ways that copermittees are going
6 to show alternative compliance, basically, it's pretty
7 broad.

8 MR. BOON: It's broad in the footnote, but by
9 not referencing that footnote when you next use that term
10 and only picking two of the options, two off that list,
11 you seem to be saying: Here, we are looking at the grand
12 scheme of things; there may be biological outcomes; there
13 may be problematic outcomes, and you might want to
14 express it as a delisted water body, the attainment of an
15 IDI score. But when you get to B.3.c(1)(a)(ii), there
16 are only two goals that you can contemplate: the
17 concentration-based load, a concentration-based or a
18 load-based effluent limitation.

19 MS. KALEMKIARIAN: I guess I just read it
20 differently. It seems to me, this "numeric goals" can be
21 one of the following three things, one, two or three, so
22 that the whole footnote is encompassed by all of that
23 Section A. That is how I read it, but I guess I would
24 like to see how staff is reading it. That is how I read
25 it. I mean, I don't know that they would dispute that

1 the footnote could be mimicked, but it seems to me the
2 footnote is mimicked. But I guess that is what I'm
3 saying; the language is different.

4 So Wayne may want to address that. I don't
5 know.

6 MR. CHIU: I would say your interpretation is
7 correct. The way it is written, it is one or more of the
8 following, and it does say "and/or." Ideally, they would
9 have all of them. But, you know, the numeric goals that
10 would apply to effluent would primarily be measured in
11 terms of a load or concentration.

12 In terms of receiving water, that could be
13 expressed in several ways, in terms of an IDI score or
14 maybe some sort of measurement of number of species of
15 something. But, you know, the idea is that the
16 flexibility to choose the numeric goals in the receiving
17 water would be where you have maximum ability to choose
18 different types of targets or goals. But then, effluent,
19 you know, primarily would be expressed with a
20 concentration or a load for a pollutant specifically.

21 MR. BOON: So I think Wayne's explanation gets
22 to the heart of my concern, and I want to offer one
23 example of why this is important. Selenium is a concern
24 for us. It occurs in surface waters. It periodically
25 exceeds the acute criteria. It is coming out of geologic

1 formations from subsurface flow. It is not anything that
2 has been done in terms of the disturbance of the
3 landscape through urbanization.

4 There are currently no technologies that we
5 know of that can take selenium out of the water column
6 with any sort of cost effectiveness. So, in that
7 instance, simply participating in a research project, a
8 collaboration with a UC system university, to figure out
9 how we deal with selenium might be a numeric or interim
10 goal. It doesn't lend itself to an effluent limitation.

11 MR. CHIU: I'm sorry. I misspoke earlier. I
12 was looking at the wrong section of the permit. I was
13 looking under the water compliant improvement plan where
14 it can set numeric goals. But if we are talking about
15 Provision B.3.c, where they are setting the numeric goals
16 there, actually, all three have to be included.

17 So, you know, there needs to be concentration
18 or load-based effluent limitations for TMDLs,
19 concentration-based or load-based effluent limitations
20 for 303(d)-listed pollutants, and then also a component
21 within the receiving water to demonstrate that, you know,
22 the discharges from the effluence spore are not causing
23 or contributing to an exceedance of water quality
24 standards.

25 So it is the third component, really, that

1 definition in the footnote that Richard was referring to,
2 where you could have that maximum flexibility. But like
3 I was saying before, for a discharge from a pipe, we
4 would be primarily looking at a concentration for load to
5 demonstrate to us that it is not causing or contributing
6 to an exceedance of water quality standards.

7 Does that make sense?

8 MR. BOON: To Henry.

9 MS. KALEMKIARIAN: Yes. I don't know right now
10 whether it's semantics or not. I understand the point
11 that is being made, that that footnote 6 is defining what
12 can make up interim and final numeric goals for the Water
13 Quality Improvement Plan. Okay. And then the compliance
14 option says: Numeric goals and schedules developed
15 pursuant to B.3.a, which I was just reading, include the
16 following numeric goals. It does seem . . .

17 Should those mirror each other? I guess that
18 is the question. It seems like they should.

19 MR. CHIU: I don't think they should. For the
20 compliance option we are talking about, basically, the
21 copermittee must demonstrate that their discharge is not
22 going to cause or contribute to an exceedance of water
23 quality standards. They must also show that the
24 receiving water itself is not being impacted by that
25 discharge. So, you know, that's why all three of those

1 need to be included as part of the compliance option.

2 We believe it's a fairly high bar, and that is
3 probably why they would like to see the bar lowered a
4 little bit. But we purposely set that bar high because
5 we believe that, if you have all three of these goals in
6 there, the copermittee can in fact demonstrate to us that
7 they are not causing or contributing to an exceedance of
8 water quality standards.

9 CHAIRMAN MORALES: You know, we are talking
10 about the compliance option. This is partially a
11 rhetorical question. But am I losing my mind? The
12 recollection I had from the last two days was that the
13 copermittees thought the compliance option wasn't going
14 to do a whole heck of a lot for you. And you said that
15 you needed more; in your estimation, it wasn't going to
16 protect you from anything.

17 I mean, I won't prejudge or anything, but you
18 almost convinced me. And now, you know, you are saying
19 that we have got 39 copermittees that are in support of
20 it. What changed in the last month?

21 MR. BOON: I think that it comes down to
22 wanting to see alternatives and options, and we will
23 grasp anything that is out there, because, right now, we
24 are all of us out of compliance with our permits, because
25 when it rains, there are levels -- there are

1 concentrations of constituents that exceed water quality
2 standards.

3 This starts to get us towards a basis of
4 attainable compliance. It may work very well where you
5 have a small watershed area where you have very little
6 inputs into the system other than urban services. So I
7 think some people think that it is going to work well for
8 them in some very specific instances; in which case, it
9 is much better to have an option than no option at all.

10 The other part of this is, I think that last
11 time we were in front of you, we had only had I think
12 seven or eight business days to look at the permit. And
13 now we have had a much better opportunity to digest the
14 language, to talk to your staff, to talk between the
15 three counties. And the consensus is that people want
16 with these clarifications this option to be retained.

17 MR. ANDERSON: So I'm asking you: You support
18 the Option 2?

19 MR. BOON: Option 2, retaining this alternative
20 compliance thing -- module in the tentative order, yes.

21 MR. ANDERSON: I have a quick question. Did
22 you see the amount offered by the Region 9, John?

23 MR. BOON: John Kemmerer's tweet, we are happy
24 to accept that. On his biofiltration language?

25 MR. ANDERSON: Right.

1 MR. BOON: That is not a problem for us.

2 MR. ANDERSON: I do have a comment about the
3 round peg, just to digress a second, a minute of levity.
4 My interpretation was that it was the Regional Board and
5 the EPA that turned the Clean Water Act into that type of
6 thing, because the only way they knew how to do water
7 cleanup was through NPDES point source. I don't think
8 the Clean Water Act actually contemplated doing it the
9 way it is being done.

10 MR. BOON: It was an act of regulatory
11 expediency, yes. Thank you.

12 MR. STRAWN: So we are up to Riverside County
13 or do we have somebody else from Orange?

14 MR. OGAWA: San Diego County Copermittees.

15 MR. STRAWN: Go ahead. We have 19 minutes left
16 for the copermittees; and then there is a 30-something-
17 minute rebuttal. And we need to discuss where to use
18 that.

19 You are not the man with the silky horse, are
20 you?

21 MR. OGAWA: Not silky, buttery.

22 Honorable Chair and Board Members, my name is
23 Mikhail Ogawa, and I'm the Clean Water Manager for the
24 City of Del Mar. However, today, I'm here as a
25 representative of the San Diego County Regional

1 Copermittees. My statements represent the general
2 consensus of the San Diego Copermittees.

3 First, the copermittees thank the Regional
4 Board and your staff for acknowledging and initiating
5 eratta sheets, taking into consideration the comments and
6 recommendations that were provided at the April hearings.

7 I'd like to start anecdotally. It is tough to
8 follow Richard, so I have got a little story that I would
9 like to tell. It is coincidental that, today, my
10 five-year-old son is also making a pretty big
11 presentation at his school this evening.

12 This morning, we were comparing notes and
13 feelings of nervousness. And I was expressing, you know,
14 I'm a little bit nervous. I have got to get up in front
15 of lot large audience with my back to a lot of them, and
16 they are probably making faces and whatnot.

17 He expressed no nervousness, and he said that
18 he's very confident in what he's going to say. So I wish
19 I could share some of the fun facts about the black
20 jaguar that he's going to be sharing this evening, its
21 preferred habitat, its eating habits, and how it chases
22 down and kills its prey. But I'm going to be talking
23 about some of the technical issues that still remain for
24 the San Diego Copermittees in the MS4 permits.

25 However, before moving into those technical

1 comments, the San Diego County Regional Copermittees
2 support the testimony and presentation provided by
3 Richard Boon of the Orange County Copermittees regarding
4 the compliance option identified in Provision B.3.c.

5 The first item, technical issues related to the
6 TMDL compliance language, we appreciate the board staff's
7 proposed revisions through the eratta to Attachment E
8 based on our comments in April and where we change the
9 "copermittees" from a plural to a possessive singular.
10 This more accurately puts the copermittees in a position
11 to be accountable for their actions.

12 However, changes were not made in all cases
13 where the plural form of "copermittees" is used. We
14 remain concerned about being held accountable for the
15 actions or, more importantly, the inactions of other
16 copermittees. While we are committed to work together
17 and support each other's water quality improvement goals
18 in each watershed, compliance should be determined on a
19 jurisdictional by jurisdictional basis.

20 So we would request you make minor
21 modifications to the errata sheet and the tentative order
22 as expressed to you on this slide. What we are
23 recommending is replacement of the plural form of
24 "copermittees" with a singular possessive form of
25 "copermittee's" into a few more of the compliance

1 provisions in Attachment E.

2 The second and last technical issue, the
3 pre-development baseline requirement of the
4 hydromodification management requirements, this topic has
5 been discussed previously. The requirements as currently
6 stated are for jurisdictions to require that
7 redevelopment projects mitigate for hydromodification
8 impacts that are not caused by the redevelopment project.

9 At previous workshops and hearings, you have
10 heard the engineering principles as to why this is an
11 inappropriate requirement. We would also like to
12 reiterate that this requirement presents significant
13 legal liability to the copermittees. We believe that the
14 pre-project terminology or standard should be used
15 instead of pre-development. It is still the most
16 appropriate standard for this provision.

17 However, to pick up on one of the board
18 member's comments at the last -- at the April hearings,
19 if we cannot, if we are not successful in obtaining the
20 pre-project standard, we'd like to offer a footnote that
21 would allow the copermittees the discretion to address
22 the legal concerns.

23 And that footnote would be proposed into
24 provision E.3.c(2)(a). And that footnote would read:
25 "The pre-development runoff condition standard shall be

1 applied to the extent allowable under state and federal
2 law. A copermittee may modify the standard for a
3 particular project where the copermittee finds that
4 application of the standard would exceed the
5 copermittee's authority under applicable state or federal
6 law as applied to that project."

7 With that, I will answer any questions.

8 CHAIRMAN MORALES: On the footnote, the four
9 words that jump out at me are "where the copermittee
10 finds." What does that mean?

11 MR. OGAWA: Where our legal counsels determined
12 that a particular project, the pre-development
13 requirement would exceed our authority to require
14 mitigation; where there is no nexus for the impacts, that
15 we would be allowed the discretion to modify those
16 requirements.

17 CHAIRMAN MORALES: You put five lawyers in a
18 room, and they all come out with five different opinions.

19 MR. OGAWA: And I'm no lawyer.

20 MR. ANDERSON: 39.

21 MR. MORALES: Yes, 39. All right.

22 MR. OGAWA: Thank you.

23 MR. ANDERSON: Thank you for your constructive
24 suggestions.

25 MR. STRAWN: Are there other copermittees from

1 San Diego County or are we up to Riverside?

2 MR. UHLEY: I believe we are up to Riverside.
3 If I may ask, if you could let me know when there is
4 about six minutes left on the clock.

5 Good afternoon, Chairman Morales and Members of
6 the Board. My name is Jason Uhley, Chief of Watershed
7 Protection, Riverside County Food Control, providing
8 comments on behalf of the Riverside County Copermittees.

9 I just real quickly want to reiterate that, in
10 Riverside County and the cities in Riverside, we are
11 always facing multiple mandates and expectations for
12 police, fire, social services, as well as expectations
13 from our residents for clean water, clean lakes, rivers
14 and streams. So we are always looking for innovative and
15 cost effective ways to try to address those competing
16 mandates.

17 So I would like to lead off by first thanking
18 board staff for listening to our testimony that was
19 provided at the April hearing and addressing several
20 comments that were raised by us. I have identified a few
21 of them here. I didn't provide an exhaustive list. But
22 as a result of their recognition of some of the issues
23 that we raised, we will be able to do a little bit better
24 job and be able to be a little more innovative and be
25 able to be a little bit more cost effective. And so,

1 thank you for that.

2 I'd also like to support the comments made by
3 Richard Boon on behalf of the 39 copermittees. We need a
4 pathway to compliance. We desperately need a pathway to
5 compliance, and it needs to be incorporated into these
6 stormwater permits. And so we do support Compliance
7 Option 2. We do have some reservations. I will talk
8 about that in a second. But we need something. So, from
9 that perspective, we are supportive. We also support the
10 modifications that were mentioned by Richard Boon from
11 the County of Orange in his testimony, the two issues
12 that were discussed.

13 I'd like to additionally note, on the issue of
14 liability and risk for third-party litigation, I think
15 some of the older permits were structured in a way that
16 did make that litigation more challenging to bring forth.
17 But the way the monitoring is structured in this permit,
18 I think it is going to make it much easier to bring
19 litigation forward, because it addresses some issues that
20 were raised in the NRDC versus L.A. lawsuit.

21 And so, we may not have seen litigation here in
22 the past, but we have an increased liability moving
23 forward. That is part of the reason why we very much
24 need this compliance option, so that we can continue to
25 do a good job with protection for the recommendation of

1 doing a good job.

2 And I know there was a lot of comments last
3 time about safe harbor, and this permit is not. This
4 permit receiving water limitation and compliance option
5 is not a safe harbor. As was previously discussed, this
6 sets a very high bar for the copermitees and asks for a
7 lot in terms of study, in terms of monitoring and data
8 collection, in terms of assessment of receiving waters.

9 We have to do separate studies for each
10 pollutant water body combination for which we want
11 coverage, and it is going to be very costly and
12 time-consuming. This is not a walk in the park.

13 And we also have to commit to plans and
14 schedules. We only have coverage as long as we are
15 compliant with the plans and schedules that we put forth
16 in our compliance option. And we are very much concerned
17 about our ability to do this and the costs that could be
18 associated with doing this, particularly for a small
19 region like southwest Riverside County where we have got
20 fewer than 400,000 residents right now.

21 And so, as we move forward, we are very
22 carefully going to be watching how San Diego County and
23 San Diego City address the receiving water limitation
24 compliance options. We are also going to be following
25 very closely what's happening with the State Board in

1 L.A. And based on what we see there and based on what we
2 find as far as facts on the ground from Riverside County,
3 in terms of our efforts to try to figure out how to move
4 this forward, we may come back with additional
5 recommendations when we submit our report of waste
6 discharge. But I want to be clear that we support
7 inclusion of this option now, because we need a path of
8 compliance.

9 I also would like to thank board staff for
10 attempting to address our comments on the critical
11 sediment yield area provisions in the permit related to
12 hydromodification. At that time, we had asked to make
13 sure that those provisions focused on impacts to
14 receiving waters as opposed to just the sediment yield
15 areas themselves.

16 They did make an accommodation, but the way
17 they accommodated it, I'm still concerned it is going to
18 be challenging to address, because they are asking us to
19 determine or to verify that there will be no net impact
20 to receiving waters.

21 In the science of assessing sediment movement
22 and management and impact on receiving waters, it is very
23 challenging. And I'm very nervous that, ultimately, this
24 is going to result in a lot of problems that the plant
25 encounters, really.

1 So, instead of talking about whether this can
2 or can't be done or how it can be done, what I'd like to
3 simply ask today is that the Board consider adding to
4 this provision a pathway for the permittees to propose an
5 alternative compliance program. Maybe outside of the
6 crucible or the pressure cooker of this permit adoption
7 hearing, we might be able to find a more innovative and
8 cost-effective way to address this requirement. So we
9 simply ask that you address that as part of your
10 direction to staff today.

11 The other comment -- there are two more
12 comments. These were issues that weren't addressed in
13 the errata sheet that was produced in May. This has to
14 do with -- the first has to do with flood control
15 projects being regulated as development projects. The
16 development planning regulations are really meant for
17 land uses, residential areas, commercial areas,
18 industrial areas.

19 But our flood control project is the receiving
20 waters themselves. So we need the time to take these
21 regulations that are really intended for regulating land
22 use and try and apply them to the receiving waters. You
23 end up with some really strange problems about how to
24 apply hydromodification and how to do the BMP-sizing
25 criteria in kind of the same way that you run into

1 problems with road projects, because part of the problems
2 with roads is the MS4. So it is kind of the same issue
3 on a bigger scale.

4 And so, you know, our understanding is that
5 what the Board is really looking for is trying to ask us
6 to try to minimize the amount of the produce area that we
7 are putting in our receiving waters, and we understand
8 that. We are supportive of that. I would remind you
9 that our mission is not only to provide flood protection
10 but to protect the beneficial uses of receiving water.
11 That is part of our mission statement. And so we are
12 very supportive of that.

13 Unfortunately, we think the way that the Board
14 is trying to get at this in the development provisions is
15 inefficient, and it kind of interferes with our effective
16 implementation of our regulatory mandate or our statutory
17 mandate. And so, we think there are better ways to do
18 this. I think the right way to do it would actually be
19 through the Board's existing authorities, through 401
20 Certification.

21 But, as a compromise, what we provided here is
22 an additional exemption for flood control projects that
23 basically asks us to minimize impervious areas where
24 feasible and where it doesn't impact public health and
25 safety. And so we are trying to provide a middle ground

1 here to try to address this issue.

2 We are also concerned with the redevelopment
3 language, because the redevelopment language may trigger
4 the development requirements for some of our maintenance
5 activities. From time to time, we have to replace
6 concrete panels in our slope paving or do other
7 activities like that. So we were additionally going to
8 ask that the language I read at the bottom of this page
9 be added, which is actually from the L.A. permit and
10 exists in other permits in the State of California. That
11 would just clarify that our regular types of maintenance
12 activities are not subject to development requirements.

13 And then, finally, Chair Morales, at the last
14 meeting, I believe you had asked for an offer of proof of
15 additional items we might raise if we had more time to
16 discuss them. And I would point out that we would
17 probably have discussed two things.

18 The first is the change to the definition of
19 "illicit connections." The new definition of "illicit
20 connections" doesn't seem to differentiate between legal
21 and illegal connections. And it also seems to expand the
22 scope of the definition beyond the federal regulatory
23 requirements. So we would want to see that definition
24 brought back to what was proposed prior to March.

25 And the second thing I think we would talk

1 about would be the changes to the WQIP provisions that
2 were included in the March revisions to the permits. The
3 WQIP provisions became much more prescriptive in March
4 and we think less flexible, kind of contrary to the goals
5 that have been stated in terms of what we were trying to
6 accomplish with the permit. And so we would have spent
7 time talking about that. That gets back also to the
8 issue that you raised, Board Member Anderson, earlier
9 about the C, D, and E. We would spend more time talking
10 about that.

11 But in the interest of trying to make some
12 immediate changes that would be helpful, we did propose
13 on these next two slides some very minor modifications to
14 Provision B.3, which is the WQIP provisions, and B.2 that
15 we think would help to either clarify flexibility that we
16 think the board staff intended, but maybe wasn't clear in
17 the writing of the permit, or make clear that, for
18 provisions where there are long lists of things that you
19 must do that you only must do them where they are
20 applicable to the specific watershed management area.

21 And so, with that, I would like to thank you
22 for your time; and I would be glad to any answer
23 questions you may have.

24 MR. ANDERSON: So you are supporting Option 2
25 as well?

1 MR. UHLEY: Yes, sir.

2 MR. STRAWN: That brings us to the City of
3 San Diego, Kris.

4 MR. McFADDEN: Good afternoon, Board Members.
5 I'm Kris McFadden. I'm the Deputy Director for the City
6 of San Diego Stormwater Division, Transportation and
7 Stormwater Department. I've submitted a green card
8 today. And that might be different from what you have
9 seen before, but this is in full support of Option 2. To
10 be clear, it is not for Option 1. The support for the
11 green card came only because of the Option 2.

12 I do want to thank again the staff. Up to the
13 last minute, they have been communicating with us, really
14 taking it into consideration. And we have gone through,
15 and we have been cutting bait for a long time, and maybe
16 it's time to fish. And we would like to get started.

17 I do think that the Water Quality Improvement
18 Plans are the right approach. Like we have mentioned
19 before, they do give us a pathway to compliance. It is
20 very clear. Also, I think we have worked diligently with
21 the board staff and EPA to get their concurrence that
22 Option 2 is a viable option, and it's really coming down
23 to your decision if you are going to allow that, for the
24 cities to use it.

25 I think this ultimately provides a really

1 viable compliance method and goals for all of us to
2 actually understand. And this slide you have probably
3 seen before, but I still love it, and it came from the
4 City of Carlsbad again. Could you imagine if I went to
5 the Mayor's office and saying I need money for this. I
6 would get laughed out of the room.

7 Of course, we have a lot of different options
8 worth looking at here. But, really, to me, when I can
9 take the Water Quality Improvement Plans and
10 comprehensive load reduction plans and roll all of these
11 issues into one, and this is what really got me a lot of
12 attraction when I started talking to elected officials
13 and our budget director: "What is it going to take to
14 comply with all of these regulations?"

15 We are able to take these comprehensive load
16 reduction plans that have numbers associated with them.
17 Maybe they are not perfect, but we needed a starting
18 point, and it really got people's attention. And what we
19 were able to do is incorporate these into our annual
20 budget and even into the City's five-year financial plan,
21 where we are seeing incremental increases every year over
22 the next five years.

23 I go into budget deliberations this Friday. So
24 I am going to be getting a lot of questions about
25 compliance options and how much is this going to cost us.

1 So the CLRPs and the Water Quality Improvement Plans have
2 been extremely helpful for me to be able to communicate
3 this information to my elected officials.

4 Also, a lot of these costs are being rolled up
5 into bond-financing options. At the City, we are
6 actually going out for \$5 million of bonds for water
7 quality improvement projects in fiscal year '14. We are
8 looking at about \$20 million that we are getting in
9 fiscal year '14 as well for deferred capital just for
10 storm drain maintenance.

11 So a lot of these cost figures are going into
12 our debt management department, too, to make sure that we
13 are able to meet our bond demands in the future. So I
14 really feel that this is a really clear link for water
15 quality compliance. And it helps us communicate to our
16 elected officials the importance of this.

17 It also helps us to annualize funding for
18 really long-term efforts, like TMDLs that do have a
19 20-year time frame, and also start working on those
20 projects that maybe we won't need as many TMDLs in our
21 future, or hopefully any, so that we can just improve
22 water quality based on the permit alone.

23 So I will close and be brief. Really, the
24 Option 2 is the City's most significant issue. It has
25 been a long road to get here, but we do support Option 2

1 to be included. And with that, you will have the support
2 of the City of San Diego. Clearly, this is not an easy
3 way out financially or workload for the City. The CLRPs
4 have indeed required us to adjust our five-year budget
5 projections up significantly, millions of dollars each
6 year.

7 So I do really hope that you will give us the
8 option of using the Option 2. And I will be happy to
9 answer any questions you have.

10 MR. ABARBANEL: I have a question, if I may,
11 Kris. How does the City of San Diego -- what is the
12 funding source for the City of San Diego in meeting these
13 obligations?

14 MR. McFADDEN: Currently, we have about a \$34
15 million budget. Six million of that is generated from
16 our storm drain fee, which hasn't been raised since Prop
17 218 passed past back in '96. And the remainder is from
18 the general fund and some from parking citations related
19 to street sweeping.

20 MR. ABARBANEL: So the storm drain fee was
21 what?

22 MR. McFADDEN: It is 95 cents a month for
23 single-family homes, and it generates just under 6
24 million a year.

25 MR. ABARBANEL: So what percentage?

1 MR. McFADDEN: Oh. Of the \$34 million, 6
2 million comes from the storm drain family.

3 MR. ABARBANEL: And you haven't raised that
4 since 1904, you are saying?

5 (Laughter.)

6 MR. McFADDEN: 1996, Prop 218.

7 MR. ABARBANEL: And the rest, more or less,
8 from the general funds?

9 MR. McFADDEN: Correct.

10 MR. ANDERSON: Does some of that general fund
11 allocation include bond for infrastructure with it?

12 MR. McFADDEN: On top of that \$34 million, in
13 fiscal year '14, we are bonding for 5 million for water
14 quality improvement projects and approximately \$20
15 million for deferred capital money that is going to storm
16 drains, which do indeed have a water quality benefit.

17 MR. ANDERSON: That adds up to \$50 million.

18 MR. McFADDEN: Correct. And that is not
19 accounting for the cost to other city departments for
20 their compliance.

21 MR. ANDERSON: Parks?

22 MR. McFADDEN: Correct, parks and rec, fire
23 stations.

24 MR. MORALES: The City of San Diego, you guys
25 do a great job. And you even get compliments from "the

1 Indios," you know, first thing in the morning. And were
2 it just the City of San Diego that we gave a compliance
3 option to, I would have zero concerns. It is not at all
4 that I would worry about it. It is just, I'm not
5 thinking of a jurisdiction in particular, but you give an
6 alternative compliance option to a municipality or
7 copermittee that isn't genuinely interested in exercising
8 it, and they could, I think, find creative ways to do
9 perhaps do less than they should.

10 MR. McFADDEN: If I may offer, when we work on
11 the Water Quality Improvement Plans, they are, of course,
12 watershed based. And I have seen a positive response
13 when we can go to other municipalities and say, if you do
14 participate in this in dual posture with the City and the
15 other municipalities in the watershed, I think it gives
16 us a better argument to say you have this as a compliance
17 option. Therefore, I would say that they would be more
18 likely to actually fund that option, instead of taking
19 the alternative of potentially being out of compliance.
20 That would be -- just from some conversations I have had
21 before, that's my experience.

22 CHAIRMAN MORALES: Thanks.

23 MR. ANDERSON: I worry more about the City than
24 the other guys.

25 (Laughter.)

1 MR. McFADDEN: I won't take that personally.

2 MR. STRAWN: I think we have the Port of
3 San Diego, Mr. Brown.

4 MR. BROWN: Good afternoon, Chair and Board
5 Members. I don't have a PowerPoint. I submitted a red
6 card, but perhaps our card should have been green as
7 well. We submitted a red card last time because we had
8 some other technical issues with the permit.

9 But we are here primarily to raise only one
10 point today, which is that we support Option 2. We
11 believe that Option 2 is fair and reasonable. We believe
12 it does give the parties a path to compliance, and the
13 Port is very committed to doing that.

14 I will speak briefly about one of the questions
15 from one of the board members about whether the
16 litigation threat is real. I work locally at a local
17 environmental law firm, and we see a lot of the
18 stormwater litigation going on, and it is very real.

19 I will give some examples. The NRDC case
20 against County of Los Angeles, even though the Supreme
21 Court has heard it and it has been remanded and it is
22 still going on and NRDC and the County are still at it,
23 the County has now sued the County of L.A., and we are
24 trying to straighten that out, but that is going on.
25 That is very real.

1 Locally, the shipyards case here in San Diego,
2 the primary reason that the City and the Port are in the
3 shipyards NASSCO litigation is allegations that our MS4
4 system is feeding the problem. The Port has tried to
5 look at this. We know we have spent well in excess of \$5
6 million on litigation in that case and probably close to
7 \$10 million. And none of that money has been used for
8 cleanup. This is a litigation machine.

9 The next case is the Teledyne Ryan case, which
10 is still going on. It has been going on in this city for
11 more than a decade. That case is also primarily about
12 the storm drains and what is going on with that, feeding
13 it from the Teledyne Ryan case and the facility. And
14 that has also been in the multiple million dollars of
15 litigation costs and still under continuing jurisdiction.

16 We also have the Lake San Marcos litigation
17 that is now going on, which is primarily about stormwater
18 drains feeding Lake San Marcos. As I mentioned, this is
19 only one small law firm. And we are in the middle of at
20 least five or six litigation matters dealing with storm
21 compliance and these permits. The Supreme Court in their
22 footnotes have made it clear that these will be the
23 drivers of what is coming at us.

24 In addition to that, I believe that there is
25 probably at least a dozen administrative matters before

1 this Board where the key to it will be the storm drains
2 feeding San Diego Bay. And so, this has a very big
3 potential impact for litigation.

4 MR. STRAWN: We are out of presentation time.
5 There is still 36 minutes of rebuttal time. I don't know
6 if we want to go ahead to eat into that to finish up.

7 MR. BROWN: I think we are viewing this as kind
8 of a block, and I only have got one minute left, which is
9 to say: We think this is by far the best option. We
10 think that one of the reasons why we really need this
11 help of having some additional time is because TMDLs are
12 new. They were not in the prior permits. That is like
13 pouring gasoline on the fire. We are going to have a
14 whole bunch of compliance issues that we never had
15 before. We see more administrative actions. We see more
16 litigation. All we want is a chance to comply.

17 And we apologize that we didn't get this
18 message through clearly enough the time before, but we
19 strongly and desperately support Option Number 2.

20 THE REPORTER: I didn't get your name.

21 MR. BROWN: I'm Bill Brown for the Port of
22 San Diego. I did take the oath.

23 CHAIRMAN MORALES: Mr. Brown, that litigation
24 that you are talking about -- and I know a little bit
25 about litigation -- you mentioned five cases for a number

1 of different municipalities and agencies. I would
2 venture to guess that, before every single case that an
3 agency or municipality is having to argue with respect to
4 stormwater issues, they are dealing with at least 100 or
5 a couple 100 others. I mean, it is a very small part of
6 that portfolio.

7 When I hear concerns about litigation, it
8 always reminds me of what my first-year civil professor,
9 "civ pro teacher," in law school said, which was, you
10 know, somebody said: Well, how do you prohibit
11 litigation? And he said: You can't. You can sue the
12 Bishop of Boston for bastarding, but you have to prove
13 it.

14 I don't know that there is anything that we can
15 do to keep you all from being sued. I mean, that is
16 maybe more of a legislative thing. And I hate for
17 somebody to think that, you know, this is the answer for
18 that concern. Regardless of what we do, it is going to
19 be a concern.

20 MR. BROWN: I agree with you, Chair. But the
21 difference is, with Option 2, we will not be in immediate
22 violation the minute you adopt the permit. If you adopt
23 the permit without Option 2, as has been said here
24 before, we will be in immediate violation and subject to
25 strict liability that day.

1 With Option 2, we can say we are marching
2 forward with compliance. The case is not ripe. We are
3 going down the path of Option 2. And then, although you
4 mentioned that, what municipalities are facing, this is
5 only a small part of the case, actually, it's part of
6 their budget. It is huge, I would say, for the Port
7 San Diego, 80 to 90 percent of their litigation costs and
8 litigation exposure.

9 And I will just talk about costs, because I've
10 been involved in those. And I know what the Port is
11 spending on outside attorneys these days in litigation.
12 80 to 90 percent of the Port's costs for litigation are
13 arising out of environmental problems, and almost all of
14 that comes from stormwater. And that litigation money
15 may be great for lawyers and law firms, but it is not
16 helping get these problems solved.

17 And by setting us up for strict liability the
18 minute you pass this measure, we are looking at a really
19 bad scenario. If you give us Option 2, we have time to
20 try to explain to the courts and everybody that we are
21 marching forward on the path, and these lawsuits aren't
22 ripe. And that is a very, very big issue for us; and it
23 is protection that we feel you can give us.

24 MS. KALEMKIARIAN: I want to address this
25 question not so much to the Board as to the staff in

1 response and really to ask speakers to address this. I
2 understand what Chairman Morales was saying.

3 I just finished doing a cross-stitch for my
4 nephew, who is graduating from law school next week, from
5 Abraham Lincoln, which says: "Discourage litigation.
6 Persuade your neighbors to compromise." And I believe in
7 that as an attorney.

8 To me, the question is: Are you going to get
9 sued or not? You are going to get sued if someone wants
10 to sue you. To me, the question is: How do we get a
11 permit that everyone can agree on and that our staff
12 feels they can hold the copermittees accountable for
13 their obligation under the law?

14 So my question to the staff and to the NGOs and
15 the other copermittees is: By including Option 2, are we
16 so eviscerating the power of the agency that we are not
17 going to get compliance or be able to seek compliance or
18 do we offer a compromise that some people will like and
19 some people won't like?

20 I guess I'm sort of showing my hand. That is
21 what I think that staff was trying to do. But I'm not
22 going to be in favor of that if the staff is going to
23 step forward and say: Oh, my gosh. We included this
24 because we got hammered, but it is going to really take
25 away every power we have to enforce.

1 Now, I don't read our staff as doing that. And
2 I guess I need to the hear from the NGOs why you think
3 that might be what happened here or whatever you do think
4 happened here, because I want to know that. But I see
5 this Option 2 as a compromise. And whether it protects
6 you or not, I don't know; and, frankly, that is not my
7 job. Whether it will enforce regulation and get us
8 toward compliance with the Clean Water Act, that is our
9 job.

10 And I want to hear whether this can do that or
11 not, not necessarily right now, but over the course of
12 the next hour or however long we are going to be here.

13 MR. BROWN: No. I have something to say, but I
14 think Mr. Gibson was going to speak, and I always
15 appreciate what he has to say.

16 MR. GIBSON: I will gladly defer to Mr. Brown.

17 (Laughter.)

18 MR. BROWN: Okay. But I already deferred to
19 you, but I will go first.

20 I don't think that this will eviscerate the
21 ability of compliance. You heard USEPA today say that
22 this is a reasonable plan that would allow us to go
23 forward. It is not letting us out. It is just saying
24 you get some time. There has to be a plan. It has to be
25 approved. We have to march forward. We have guidelines,

1 but we won't be in violation tomorrow; and that would be
2 a wonderful thing.

3 I want to applaud the staff and Mr. Gibson. I
4 think they did a wonderful job of coming up with this
5 Option 2. It came a little late in the game; but, boy,
6 we are happy to have it on the table. We want to make
7 sure that we understand, that everybody understands how
8 much we appreciate this, and that we really do endorse
9 Option 2. I do apologize if we didn't make it clear the
10 last time how much we want this, but we really do want
11 this.

12 CHAIRMAN MORALES: You made it clear, you
13 thought.

14 MR. GIBSON: Mr. Chairman, if I can. Thank
15 you, Mr. Brown. I sincerely appreciate your comments. I
16 do want to offer, though, I think, one important
17 clarification in disagreement with this statement.

18 Option 2 is only operative if the Board adopts
19 that Water Quality Improvement Plan and makes those
20 specific findings. And so, adoption of this tentative
21 order today with or without that option, the receiving
22 water limitations obligation is already in place. The
23 receiving water quality objectives are already being
24 exceeded. That condition of vulnerability exists today,
25 even without this tentative order, and that condition

1 will most likely continue for some time. It is really a
2 question of how do we address those pollutants of
3 concern.

4 I do think we should hear additional testimony
5 before we go on with this discussion much farther. I
6 think that that will help round out our discussion. But
7 I just wanted to offer that one quick clarification.

8 MR. BROWN: I agree, but I do think this: As
9 you have heard from all of the people who have come up
10 here and talked about this recently, this is a much
11 better option, and we really endorse it.

12 MS. WITTE: Excuse me, Chairman. Can we take a
13 short break so we can switch out reporters, please.

14 CHAIRMAN MORALES: Yes, we can.

15 (Whereupon, at 4:53 p.m., a recess
16 was taken to change reporters.)
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1 I, Bonnie G. Breen, Certified Shorthand
2 Reporter for the State of California, do hereby certify:

3
4 That the meeting was taken by me in machine
5 shorthand and later transcribed into typewriting under my
6 direction and that the foregoing contains a true record
7 of the meeting.

8
9 Dated this 21st day of May, 2013,
10 at San Diego, California.

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Bonnie G. Breen
CSR No. 5582