

Brandes, Deborah@Waterboards

From: Arthur S. Pugsley <arthur@lawaterkeeper.org>
Sent: Friday, July 29, 2016 4:18 PM
To: Fordyce, Jennifer@Waterboards
Cc: Melissa Kelly
Subject: RE: questions regarding September 8 Public Meeting on North SM Bay EWMP appeal

Thank you for the thorough answers. I will get back in touch if I have any follow-up questions after talking with co-appellants. Have a nice weekend.

From: Fordyce, Jennifer@Waterboards [mailto:Jennifer.Fordyce@waterboards.ca.gov]
Sent: Friday, July 29, 2016 4:07 PM
To: Arthur S. Pugsley
Cc: Melissa Kelly
Subject: RE: questions regarding September 8 Public Meeting on North SM Bay EWMP appeal

Hello Arthur,

I apologize I haven't had the opportunity to return your call, but do appreciate you following up by email with your questions. Please find below my responses to your questions (my responses are in bold following your questions):

- 1) When will the Regional Board staff response to the Petition be released for public review **No later than August 29, 2016**, and what type of written comment period would be associated with it? **There will be no written comment period on the Regional Board staff response.** Or is the Sept. 8 meeting the only venue where Petitioners could raise issues in response to staff comments on the Petition? **Petitioners can make oral comments regarding the Regional Board staff's response at the September 8th meeting and, if the Regional Board decides to review the petition on its merits, at the subsequently scheduled Board meeting.**
- 2) If the Board votes to take the appeal, is there a chance they will then have the hearing on the merits at the same meeting, or is the matter definitely put off to a separate meeting? (The Notice seems to imply it will be at a future date, but I suppose you could notice a meeting for the merits on the same date at a later time, which would be consistent with the Notice. I might be unnecessarily confused having been staff counsel to the Coastal Commission, which would do both on the same day occasionally, so if you could clarify I would appreciate it.) **If the Regional Board decides to review the petition on its merits, it will definitely do so at a subsequently publicly-noticed meeting (i.e., not the same day). This is because our September agenda is very full. However, we did want to provide the Petitioners and the State Board with certainty as soon as possible as to whether the Regional Board would review the petition or not. Given my October vacation schedule and other items that need to be considered in October and November, if the Regional Board decides to review the petition on its merits, the merits proceeding would likely be scheduled in December.**
- 3) Does the Regional Board attach any significance to calling the Sept. 8 proceedings a "Meeting" as opposed to a "Hearing"? **Yes. The Regional Board is not required to hold an evidentiary hearing to determine whether to review a determination made by its Executive Officer, or to review the petition on its merits to determine whether the Executive Officer's approval was appropriate. In fact, there is no established process found in law for these types of actions. In deciding whether to review the petition or not, the Regional Board will not be considering additional evidence not previously provided to the Regional Board. The Regional Board will be looking at the record for the Executive Officer's approval of the NSB EWMP (i.e., the various iterations of the EWMP, comments, etc.), as well as the petition and responses prepared by Board staff, permittees, and interested persons. It is therefore appropriate to call the September 8th proceeding a meeting.**
- 4) Will there be separate legal counsel for the Board (since the Board is performing an adjudicatory function) and for staff (who presumably will have a more adversarial role advocating for upholding the staff approvals)? **There**

will not be separate legal counsel for the Board and for staff. There is no requirement that the Board separate functions in order for it to review its Executive Officer's action. As noted above, the Regional Board is not required to hold an evidentiary hearing and the proceeding(s) on the petition are not subject to Chapter 4.5 of the Administrative Procedure Act. Further, Regional Board staff will not have an investigative, prosecutorial, or advocacy role. Regional Board staff will not be advocating or recommending the Board take a particular action. Like the proceeding on the Regional Board's review of the petition on the WMPs, Regional Board staff's role will be limited to explaining the basis for the Executive Officer's action to approve the EWMP. And Regional Board counsel will advise the Board on its various options. It is entirely up to the Board whether it chooses to review the petition or not. Neither Regional Board staff nor counsel will be advocating one way or the other. If the legal roles are combined in one person, and petitioners wish to formally object and request separate counsel for staff and the Board, procedurally how would we get the issue raised in front of the Board? (for example, would another Petition be necessary, would a letter suffice, oral comments on the record, etc.) To avoid disrupting the proceedings for an already busy day, any objection should be raised to the Board prior to September 8th. However, I don't see a need for you to file another petition with the Regional Board on this. Therefore, if you wish to formally object, we prefer that you do so in writing by sending a letter to the Board by August 18, 2016. This would allow the Board to address the objection prior to or at the beginning of the proceeding. If needed, the Board can revise the public notice to provide this deadline for objections to the process to be used.

If you would like to discuss further or you have additional questions, please let me know and we can schedule an appointment early next week.

Jennifer

Jennifer L. Fordyce, Attorney III
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From: Arthur S. Pugsley [<mailto:arthur@lawaterkeeper.org>]
Sent: Tuesday, July 26, 2016 11:23 AM
To: Fordyce, Jennifer@Waterboards
Cc: Melissa Kelly
Subject: questions regarding September 8 Public Meeting on North SM Bay EWMP appeal

I had a few questions I wanted to chat with you about (I left a voice mail to that effect yesterday), but in case you find it easier to reply via e-mail (or to have a prior sense of what my questions are), here are the most important ones:

- 1) When will the Regional Board staff response to the Petition be released for public review, and what type of written comment period would be associated with it? Or is the Sept. 8 meeting the only venue where Petitioners could raise issues in response to staff comments on the Petition?
- 2) If the Board votes to take the appeal, is there a chance they will then have the hearing on the merits at the same meeting, or is the matter definitely put off to a separate meeting? (The Notice seems to imply it will be at a future date, but I suppose you could notice a meeting for the merits on the same date at a later time, which would be consistent with the Notice. I might be unnecessarily confused having been staff counsel to the Coastal Commission, which would do both on the same day occasionally, so if you could clarify I would appreciate it.)
- 3) Does the Regional Board attach any significance to calling the Sept. 8 proceedings a "Meeting" as opposed to a "Hearing"?
- 4) Will there be separate legal counsel for the Board (since the Board is performing an adjudicatory function) and for staff (who presumably will have a more adversarial role advocating for upholding the staff approvals)? If the legal roles are combined in one person, and petitioners wish to formally object and request separate counsel for staff and the Board, procedurally how would we get the issue raised in front of the Board? (for example, would another Petition be necessary, would a letter suffice, oral comments on the record, etc.)

Thanks,

Arthur



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18 Attorney for NATURAL
19 RESOURCES DEFENSE COUNCIL, INC.

20 **STATE OF CALIFORNIA**
21 **REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION**

22 Request of Los Angeles Waterkeeper and NRDC
23 for Appointment of Separate Counsel for
24 Adjudicative and Prosecutorial/Advocacy
25 Functions at the September 8, 2016 Meeting at
26 which the Members of the Regional Board will
27 Consider Whether to Review Petition
28 Challenging Executive Officer Approval of North
Santa Monica Bay Enhanced Watershed
Management Program Pursuant to the Los
Angeles County Municipal Separate Storm Sewer
System Permit, NPDES Permit No. CAS004001;
Order No. R4-2012-0175 as amended by State
Water Board Order WQ 2015-0075

) REQUEST TO APPOINT SEPARATE
) COUNSEL FOR ADJUDICATIVE
) AND PROSECUTORIAL/
) ADVOCACY FUNCTIONS
)
) AND
) POINTS AND AUTHORITIES IN
) SUPPORT THEREOF

1 **I. INTRODUCTION**

2 This Request seeks to ensure that the Los Angeles Regional Water Quality Control Board
3 (“Regional Board”) can fairly exercise its discretion, and be represented by counsel without
4 conflicts or appearance of conflicts, in reviewing a regional water pollution control plan. To allow
5 staff counsel to both advise and defend staff’s approval, and represent the Regional Board in
6 reviewing that approval, undermines the “neutral arbiter” function of the Regional Board and
7 denies Petitioners a fair administrative hearing.

8 On May 19, 2016, Los Angeles Waterkeeper (“LAW”) and the Natural Resources Defense
9 Council (“NRDC”) (collectively, “Petitioners”) filed a Petition pursuant to California Water Code
10 Section 13320 and 23 Cal. Code Regs. Section 2050 seeking review of the Regional Board’s
11 Executive Officer’s April 19, 2016 approval of the North Santa Monica Bay (“NSMB”) Enhanced
12 Watershed Management Program (“EWMP”) prepared by Los Angeles County, the Los Angeles
13 County Flood Control District (“County”), and the City of Malibu (“Malibu”) pursuant to the 2012
14 Los Angeles County Municipal Separate Storm Sewer System (“MS4”) Permit (NPDES No. CAS
15 004001) (“MS4 Permit” or “Permit”). (See Exhibit A.)

16 Petitioners appealed the Executive Officer’s approval because the EWMP fails to meet the
17 requirements for stormwater discharges to Areas of Special Biological Significance (“ASBS”), and
18 specifically ASBS 24, which runs from Laguna Point to Latigo Point. ASBS are subject to
19 heightened standards of protection. Petitioners made four specific claims concerning the failure of
20 the EWMP to comply with the MS4 Permit and the ASBS Exception:

- 21 1) The NSMB EWMP fails to consider stormwater data for discharges to ASBS 24
22 generated by the Permittees;
- 23 2) The NSMB EWMP fails to consider non-stormwater discharge data for ASBS 24
24 generated by the Permittees;
- 25 3) The NSMB EWMP fails to apply ASBS Exception standards to stormwater
26 discharges to ASBS 24; and

1 chooses to review the petition or not. Neither Regional Board staff nor counsel will be advocating one way or the
2 other.

3 Thus, Ms. Fordyce asserts that she may properly represent both Regional Board staff and
4 the Regional Board itself because:

- 5
- 6 1) The public forum before the Regional Board is a “meeting” rather than a hearing;
- 7 2) No evidentiary hearing is required to determine whether to review the EWMP, and
- 8 thus the Administrative Procedures Act does not apply;
- 9 3) Regional Board staff will take no position on the Petition, instead merely
- 10 “explaining” the basis for the Executive Officer’s approval of the EWMP; and
- 11 4) Counsel will only “advise” the Regional Board on its options.

12 Ms. Fordyce also advised Mr. Pugsley that if Petitioners wished to object to the lack of
13 proposed separation of staff attorney functions, objections should be lodged by August 18, 2016
14 to ensure that the objections could be addressed in the staff response to the Petition, which would
15 be released by August 29, 2016. This request follows.

16
17 **II. ARGUMENT**

18 **A. Petitioners’ Due Process Rights are at Stake**

19 Before the Board makes a decision on whether to review the Petition on the merits, it must
20 assure that the Petitioners’ due process rights are safeguarded. Doing so requires that the Board
21 ensure counsel is free from actual or apparent conflicts. Counsel advising the Board in its
22 adjudicatory capacity must be distinct and appropriately screened from counsel advising staff and
23 advocating on behalf of that approval.

24 Due process requires a fair hearing before a neutral or unbiased decision-maker. Withrow
25 v. Larkin, 421 U.S. 35, 46 (1975). Just as in a judicial proceeding, due process in an
26 administrative hearing also demands an appearance of fairness and the absence of even a
27 probability of outside influence on the adjudication. Nightlife Partners v. City of Beverly Hills,
28 108 Cal.App.4th 81 (2nd Dist. 2003). The “broad applicability of administrative hearings to the

1 various rights and responsibilities of citizens and businesses, and the undeniable public interest in
2 fair hearings in the administrative adjudication arena, [require an assurance] that such hearings are
3 fair.” *Id.* at 90. Due process rights in administrative proceedings are violated when an agency’s
4 prosecutorial and adjudicative functions are combined. *Howitt v. Superior Court*, 3 Cal.App.4th
5 1575, 1585 (1992).

6 **B. The Administrative Procedure Act Requires Separation of Adjudicative**
7 **Functions from Advocacy/Prosecutorial Functions**

8 California's Administrative Procedure Act (APA) states that “[t]he adjudicative function
9 shall be separated from the investigative, prosecutorial, and advocacy functions within the
10 agency”. (Gov. Code § 11425.10(a)(4)). This provision serves as binding authority on state
11 agencies such as the Regional Board. (Gov. Code § 11000(a)).

12 Here, at least a potential conflict arises by the failure to ensure separation of counsel’s
13 advocacy and adjudicative roles. The Regional Board delegated to staff the responsibility for
14 approving the EWMPs pursuant to Permit section VI.C.4.d. with the possibility that the staff level
15 approval could be appealed to the Regional Board (Permit section VI.A.6). Staff counsel for the
16 Regional Board advises the Executive Officer and staff during the staff review and consultations
17 leading to the EWMP approvals. Such advice is entirely appropriate and expected, especially in
18 consideration of the importance of the EWMPs to the Regional Board’s approach to implementing
19 the MS4 Permit, and the large public expenditures required to implement the EWMPs. However,
20 the appeal of the North Santa Monica Bay EWMP approval, or in fact an appeal to the Regional
21 Board of *any* staff action, creates conflicts for counsel that must be addressed at the resulting
22 hearing. Where staff counsel is advising staff on the merits of an approval, that staff counsel
23 cannot also advise the Regional Board on whether a colorable issue exists with that same approval,
24 warranting the Regional Board to potentially deny review of the Petition on the merits. The
25 appearance of a conflict, and thus the appearance of unfairness in the Regional Board’s quasi-
26 adjudicative proceeding, is clear. “The mental image comes to mind of a hearing in which [the
27 agency's lawyer, while representing the agency,] raises an objection and then excuses himself from
28

1 counsel table to consult with the [hearing officer] as to whether the objection should be sustained.”
2 Howitt v. Superior Court, 3 Cal.App.4th 1575, 1581 (1992). Such an analogous risk is present
3 here, where staff counsel has been given two tasks that potentially conflict. This potential conflict
4 exists whether the Regional Board calls the September 8 proceedings a “meeting” or a “hearing”
5 or any other term. (See Exhibit D.)

6 **C. Due Process Requires Separation of Advocacy and Adjudicative Functions,**
7 **and Courts Have Applied the APA Requirements in a Variety of Settings to**
8 **Protect Due Process Rights**

9 Assuming, arguendo, that the Office of Chief Counsel has correctly parsed the difference
10 between a “meeting” versus a “hearing”, the Regional Board must still nonetheless separate
11 adjudicative and prosecutorial/advocacy functions at the September 8th proceedings, regardless of
12 whether such separation is mandated by the Government Code. Due process requires such
13 separation. Case law applying the APA in situations not expressly called out in the statute is
14 instructive. Government Code Section 11425.10(a)(4) does not facially apply to local agencies,
15 but California courts have extended the APA’s separation of function requirements to local
16 agencies, citing due process concerns. Case law regarding local agencies is thus highly instructive
17 on how a court would likely interpret the responsibilities of the Regional Board even if the APA
18 were persuasive, rather than binding, authority.

19 California courts have held that when counsel performs as an advocate in a given case, he
20 or she is generally precluded from advising a decision-making body in the same case. Moreover,
21 dual representation issues arising when the same lawyer acts as both advocate for and adviser to a
22 decision maker do not disappear simply because different lawyers in the same office perform the
23 two functions. See Howitt v. Superior Court, 3 Cal.App.4th 1575, 1586 (1992); Nightlife Partners
24 v. City of Beverly Hills, 108 Cal.App.4th 81 (2nd Dist. 2003). Performance of both roles by the
25 agency is appropriate only if there are assurances that the advisor for the decision maker is
26 screened from any inappropriate contact with the advocate. Howitt v. Superior Court, 3
27 Cal.App.4th 1575, 1586 (1992). The agency has the burden of providing such assurances. *Id.*
28

1 The “meeting” to be held by the Regional Board similarly violates Petitioners’ due process
2 rights because of the conflation of advocacy and adjudicative functions in the same attorney. The
3 September 8th meeting is a proceeding in which significant legal rights are at stake. Regional
4 Board staff, advised by their counsel, will act as advocates for the decision made by the Executive
5 Officer. (See Exhibit D [“Regional Board staff’s role will be limited to explaining the basis for the
6 Executive Officer’s action to approve the EWMP”].) “Explaining the basis” for the decision
7 necessarily implies defending the merits of the approval, especially as agency staff will make
8 arguments, and possibly attempt to rebut the Petitioners’ arguments, in the staff comments due by
9 August 29th and/or at the September 8th proceedings. There would be a clear appearance of
10 unfairness should the Board fail to separate its prosecutorial and adjudicative functions, especially
11 if the Regional Board decide to *not* review the Petition on the merits based on the advice of the
12 same counsel for staff.

13 **D. A Los Angeles County Superior Court Previously Remanded a State Board**
14 **Decision Based Solely on the Lack of Separation of Counsel Functions in a**
15 **Factually Analogous Case**

16 Failure to separate advocacy and adjudicatory functions by itself can result in the
17 invalidation of an administrative agency action. Los Angeles County et. al. v. State Water
18 Resources Control Board, Los Angeles County Superior Court Case BS 122704, involved a
19 challenge by Los Angeles County to MS4 Permit amendments related to bacterial standards. The
20 County made a host of substantive claims, in addition to an APA/due process claim based on
21 failure to separate advocacy and adjudicatory functions of counsel at the Regional Board hearing
22 where the Order amending the Permit was approved. The Court issued a writ based solely on the
23 lack of separation between counsel functions, relying on *Nightlife Partners*. The Court reasoned
24 that “To allow an advocate for one party to also act as one party for the decision maker creates a
25 substantial risk that the decision will be skewed.” (See Exhibit E, p.8 L.22). As a result,
26 regardless of how even-handed staff counsel might try to be when playing a dual role, the Regional
27 Board will be biased “because it’s getting advice from the same person that is arguing the case for
28 one of the sides that is before the Board.” (Id. At p. 9 L. 26.) Here, thanks to the delegated staff

1 approval followed by an appeal, the same counsel is potentially being asked to advise the Regional
2 Board on whether the appeal of the EWMP has merit while also advising staff on defending that
3 very same EWMP approval.

4
5 **III. CONCLUSION**

6 In conclusion, to ensure Petitioners' due process rights are not violated, the Regional Board
7 must appoint separate counsel for the adjudicative and advocacy/prosecutorial functions at the
8 September 8, 2016 meeting.

9
10
11 

12
13 Dated: August 18, 2016

14 _____
15 Daniel Cooper
16 Lawyers for Clean Water, Inc.
17 Attorney for Plaintiff Los Angeles Waterkeeper

18
19 Dated: August 18, 2016

20 NATURAL RESOURCES DEFENSE COUNCIL, INC.

21 

22
23
24 _____
25 Becky Hayat

26 Attorneys for NATURAL RESOURCES
27 DEFENSE COUNCIL, INC.

1 Dated: August 18, 2016

LOS ANGELES WATERKEEPER

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5 _____
6 Arthur S. Pugsley
7 Attorney for LOS ANGELES WATERKEEPER
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Exhibit A

Petition of Los Angeles Waterkeeper and Natural Resources
Defense Council for Review of North Santa Monica Bay EWMP
Approval

1 ARTHUR PUGSLEY, Bar No. 252200
2 LOS ANGELES WATERKEEPER
3 120 Broadway, Suite 105
4 Santa Monica, CA 90401
5 (310) 394-6162

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14 NATURAL RESOURCES DEFENSE COUNCIL, INC.
15 1314 Second Street
16 Santa Monica, CA 90401
17 (310) 434-2300

18 Attorney for NATURAL
19 RESOURCES DEFENSE COUNCIL, INC.

20 STATE OF CALIFORNIA
21 REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION
22 AND
23 STATE WATER RESOURCES CONTROL BOARD

24 Petition of Los Angeles Waterkeeper and NRDC
25 for Review by the California Regional Water
26 Quality Control Board, Los Angeles Region, and
27 the State Water Resources Control Board, of the
28 Regional Board Executive Officer's Action to
Approve the North Santa Monica Bay Watershed
Management Group's Enhanced Watershed
Management Program Pursuant to the Los
Angeles County Municipal Separate Storm Sewer
System Permit, NPDES Permit No. CAS004001,
Order No. R4-2012-0175 as amended by State
Water Board Order WQ 2015-0075

) PETITION FOR REVIEW OF LOS
) ANGELES REGIONAL WATER
) QUALITY CONTROL BOARD
) EXECUTIVE OFFICER'S ACTION
) TO APPROVE THE NORTH SANTA
) MONICA BAY EWMP PURSUANT
) TO THE L.A. COUNTY MS4 PERMIT

1 Pursuant to Part VI.A.6 of the Los Angeles County Municipal Separate Storm Sewer
2 System (MS4) Permit (Order No. R4-2012-0175) (“2012 MS4 Permit” or “Permit”), Los Angeles
3 Waterkeeper (“LAW”) and the Natural Resources Defense Council (“NRDC”) (collectively
4 “Petitioners”) hereby petition the Los Angeles Regional Water Quality Control Board (“Regional
5 Board”) to review the Regional Board Executive Officer’s action in approving the North Santa
6 Monica Bay Watershed Management Group’s (“County and Malibu”) ¹ Enhanced Watershed
7 Management Program (the “NSMB EWMP” or “EWMP”) pursuant to the 2012 MS4 Permit.
8 Additionally, in accordance with Section 13320 of the California Water Code and Section 2050 of
9 Title 23 of the California Code of Regulations, Petitioners hereby petition the State Water
10 Resources Control Board (“State Board”) to review the Executive Officer’s action to issue this
11 approval.

12 The 2012 MS4 Permit regulates stormwater discharges from MS4s for Los Angeles
13 County, the Los Angeles County Flood Control District, and 84 incorporated cities within Los
14 Angeles County. The 2012 MS4 Permit is the fourth iteration of the MS4 permit for Los Angeles
15 County. Unlike the prior 2001 Permit, the 2012 MS4 Permit provides Permittees the option of
16 developing a Watershed Management Program or an Enhanced Watershed Management Program
17 as an alternative mechanism to comply with permit requirements.

18 On April 19, 2016, the Executive Officer, on behalf of the Regional Board, approved the
19 NSMB EWMP submitted by the County and Malibu. For reasons discussed below, Petitioners
20 request that the Regional Board invalidate the Executive Officer’s approval and remand the matter
21 with instructions to staff to require compliance with Permit conditions. Absent such action by the
22 Regional Board, Petitioners request that the State Board invalidate the Executive Officer’s
23 approval and remand the matter to the Regional Board with instructions to the Regional Board and
24 its staff to require compliance with Permit conditions. The State Board has jurisdiction over this
25 matter because the approval constitutes an abuse of discretion and was inappropriate and improper
26 pursuant to Cal. Water Code §§ 13220 and 13330.

27
28 ¹ The North Santa Monica Bay Watershed Management Group is a group of MS4 Permittees consisting of the City of Malibu, the County of Los Angeles, and the Los Angeles County Flood Control District.

1 1. NAMES, ADDRESSES, TELEPHONE NUMBERS, AND E-MAIL ADDRESSES OF
2 THE PETITIONERS:

3 Los Angeles Waterkeeper
4 120 Broadway, Suite 105
5 Santa Monica, CA 90401

6 Attention: Arthur Pugsley, Esq. (arthur@lawaterkeeper.org)
7 Melissa Kelly, Esq. (melissa@lawaterkeeper.org)
8 (310) 394-6162

9 Natural Resources Defense Council, Inc.
10 1314 Second Street
11 Santa Monica, CA 90401
12 Attention: Becky Hayat, Esq. (bhayat@nrdc.org)
13 (310) 434-2300

14 2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE
15 STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR
16 RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE
17 PETITION:

18 Petitioners seek review of the Regional Board Executive Officer's action to approve the
19 NSMB EWMP pursuant to the 2012 MS4 Permit. A Copy of the Executive Officer's letter of
20 approval is attached as Exhibit D.

21 3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT
22 OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

23 April 19, 2016. (Ex. D.)

24 4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR
25 FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

26 In approving the NSMB EWMP, the Executive Officer failed to act in accordance with
27 relevant governing law, acted inappropriately and improperly, and abused his discretion.

28 Specifically, but without limitation, the Executive Officer:

A. Improperly approved the NSMB EWMP despite its failure to comply with
the relevant terms of the MS4 Permit. (Ex. A.)

B. Improperly approved the NSMB EWMP despite its failure to comply with
the conditions of State Board Resolution No. 2012-0012 ("ASBS
Exception"). (Ex. F.)

1 C. Improperly approved the NSMB EWMP despite its failure to consider
2 relevant, available ASBS stormwater and non-stormwater data and to
3 comply with the ASBS Exception's prohibition against non-Stormwater
4 discharges. (Ex. B.)

5 5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED:

6 Petitioners are non-profit, environmental organizations that have a direct interest in
7 protecting the quality of Los Angeles County's aquatic resources, including Santa Monica Bay, the
8 portion of the Bay designated as an Area of Special Biological Significance between Laguna Point
9 and Latigo Point ("ASBS 24"), and other Los Angeles area waters, as well as the health of
10 beachgoers and other users. NRDC is a non-profit organization whose purpose is to safeguard the
11 Earth: its people, its plants and animals, and the natural systems on which all life depends. NRDC
12 represents approximately 70,100 members in California, approximately 14,029 of whom reside in
13 Los Angeles County. LAW is a non-profit organization dedicated to the preservation, protection,
14 and defense of the coastal and inland surface and ground waters of Los Angeles County from all
15 sources of pollution and degradation. LAW represents approximately 3,000 members who live
16 and/or recreate in and around the Los Angeles area.

17 Petitioners have members who regularly use and enjoy waters in the Los Angeles region
18 that are affected by the discharges authorized by the 2012 MS4 Permit. Those members depend on
19 clean water for a variety of sustenance-related, recreational, aesthetic, educational, and scientific
20 purposes, including drinking, hiking, fishing, swimming, boating, wildlife observation, scientific
21 research, photography, nature study, and aesthetic appreciation. Petitioners' members are impacted
22 by polluted stormwater runoff and its resulting health impacts, particularly by beach closures that
23 restrict the ability of residents and visitors in Los Angeles County to use the beach and local
24 waters for recreation and other purposes.

25 Petitioners' members are aggrieved by the Executive Officer's action to approve the
26 NSMB EWMP because such action is an obstruction to achieving the Permit's ultimate goal of
27 meeting Water Quality Standards ("WQSs"), as required by the Clean Water Act and Porter-
28 Cologne Water Quality Act. Specifically, the Executive Officer's failure to deny the NSMB

1 EWMP as required by the 2012 MS4 Permit has enormous consequences for Los Angeles County
2 residents and Petitioners' members. The NSMB EWMP is unique in that its geographical scope
3 includes ASBS 24, which requires special protection of species and/or biological communities.
4 The California Water Quality Control Plan, Ocean Waters of California ("Ocean Plan") prohibits
5 all discharge of waste to any ASBS, subject to narrow exceptions articulated in State Board
6 Resolution No. 2012-0012. The County and Malibu applied for and were granted an ASBS
7 exception in 2012, which requires them to abide by the ASBS Exception's conditions.

8 Unfortunately, the NSMB EWMP fails to protect ASBS 24 and to comply with the 2012
9 MS4 Permit and ASBS Exception. Monitoring data collected by the County and Malibu show
10 exceedances of Ocean Plan Instantaneous Maximum Limits for ammonia, cadmium, chromium,
11 copper, lead, nickel, zinc, and high concentrations of PAH, pyrethroids, and TSS at outfalls to the
12 ASBS. Thus, approval of the NSMB EWMP will only lead to the continued degradation of water
13 quality in ASBS 24. Both the Regional and State Board have defined the EWMP as the means by
14 which compliance with WQs is determined. By approving a clearly deficient EWMP, however,
15 the Executive Officer is allowing Permittees to defer compliance with applicable WQs, resulting
16 in zero improvement in water quality for North Santa Monica Bay.

17 All of these documented facts demonstrate the considerable negative impact on Petitioners'
18 members and the environment that continues today as a result of the Executive Officer's failure to
19 comply with the terms of the 2012 MS4 Permit by approving the NSMB EWMP.

20 6. THE SPECIFIC ACTION BY THE REGIONAL OR STATE BOARD WHICH
21 PETITIONERS REQUEST:

22 Petitioners seek an Order by the Regional Board or State Board that:
23 Invalidates the Executive Officer's approval of the NSMB EWMP and remands the
24 matter to the Regional Board and its staff with instructions to revise the EWMP to
25 bring it into compliance with the Los Angeles County Municipal Separate
26 Storm Sewer Permit, Order No. R4-2012-0175, NPDES Permit No. CAS004001,
27 and the requirements of State Board Resolution 2012-0012.

26 7. A STATEMENT IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

27 See, Section 4, above. Petitioners have also enclosed a separate Memorandum of Points
28 and Authorities in support of legal issues raised in this Petition.

1 8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE
2 REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT THE PETITIONER:

3 A true and correct copy of this petition was delivered by electronic mail to the State Board,
4 Regional Board and the NSMB EWMP Permittees on May 19, 2016. A true and correct copy of
5 this petition was also mailed via First Class mail to the State Board, Regional Board, and the
6 NSMB EWMP Permittees on May 19, 2016.

7 9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN
8 THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN
9 EXPLANATION OF WHY THE PETITIONER WAS NOT REQUIRED OR WAS
10 UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE
11 THE REGIONAL BOARD.

12 All of the substantive issues and objections raised herein were presented to the Regional
13 Board during the period for public comment on the draft EWMPs. Petitioners submitted written
14 comments regarding the NSMB EWMP on August 31, 2015. (Ex. C.) Petitioners presented
15 testimony before the Regional Board on the draft NSMB EWMP on November 5, 2015 and on the
16 revised EWMP on March 3, 2016.

17
18 Respectfully submitted via electronic mail and U.S. Mail,

19 Dated: May 19, 2016 LOS ANGELES WATERKEEPER
20

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24 _____
25 Arthur Pugsley
26 Attorney for LOS ANGELES WATERKEEPER
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Dated: May 19, 2016

NATURAL RESOURCES DEFENSE COUNCIL, INC.



Becky Hayat
Attorney for NATURAL RESOURCES
DEFENSE COUNCIL, INC.

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1004 O'Reilly Ave, San Francisco, California 94129.

On May 19, 2016, I served the within documents described as PETITION FOR REVIEW OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD EXECUTIVE OFFICER'S ACTION TO APPROVE THE NORTH SANTA MONICA BAY ENHANCED WATERSHED MANAGEMENT PROGRAM PURSUANT TO THE L.A. COUNTY MS4 PERMIT and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD EXECUTIVE OFFICER'S ACTION TO APPROVE THE NORTH SANTA MONICA BAY ENHANCED WATERSHED MANAGEMENT PROGRAM PURSUANT TO THE L.A. COUNTY MS4 PERMIT on the following interested parties in said action by submitting a true copy thereof via electronic mail to the email addresses below:

California Regional Water Quality
Control Board, Los Angeles Region
c/o Sam Unger
Executive Officer
samuel.unger@waterboards.ca.gov

State Water Resources Control Board,
Office of the Chief Counsel
c/o Adrianna Crowl
Staff Services Analyst
waterqualitypetitions@waterboards.ca.gov

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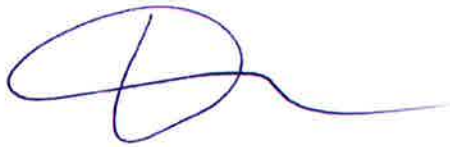
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RFeldman@malibucity.org

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 19, 2016, at San Francisco, California.



Daniel Cooper

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18 Attorney for NATURAL
19 RESOURCES DEFENSE COUNCIL, INC.

20 **STATE OF CALIFORNIA**
21 **REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION**
22 **AND**
23 **STATE WATER RESOURCES CONTROL BOARD**

24 Petition of Los Angeles Waterkeeper and NRDC)
25 for Review by the State Water Resources Control)
26 Board of the Regional Board Executive Officer)
27 Approval of North Santa Monica Bay Enhanced)
28 Watershed Management Program Pursuant to the)
Los Angeles County Municipal Separate)
Stormwater National Pollutant Discharge)
Elimination System (NPDES) Permit, Order No.)
R4-2012-0175, NPDES Permit No. CAS004001)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR REVIEW OF LOS
ANGELES REGIONAL WATER
QUALITY CONTROL BOARD
EXECUTIVE OFFICER APPROVAL
OF NORTH SANTA MONICA BAY
EWMP PURSUANT TO THE L.A.
COUNTY MS4 PERMIT

1 **I. INTRODUCTION**

2 This petition seeks review of the Los Angeles Regional Water Quality Control Board
3 (“Regional Board”) Executive Officer’s April 19, 2016 approval of the North Santa Monica Bay
4 (“NSMB”) Enhanced Watershed Management Program (“EWMP”) prepared by Los Angeles
5 County, the Los Angeles County Flood Control District (“County”), and the City of Malibu
6 (“Malibu”) pursuant to the 2012 Los Angeles County Municipal Separate Storm Sewer System
7 (“MS4”) Permit (NPDES No. CAS 004001) (“MS4 Permit” or “Permit”).

8 Petitioners’ appeal is necessary because the EWMP fails to consider relevant stormwater
9 and non-stormwater data, fails to apply the applicable standards to stormwater discharges, and fails
10 to apply a prohibition on non-stormwater discharges. To protect important aquatic resources,
11 permittees must fully comply with requirements of the EWMP development process and consider
12 all available data. The NSMB EWMP requires particular attention, because it addresses discharges
13 to the Laguna Point to Latigo Point Area of Special Biological Significance (“ASBS 24”). Areas of
14 Special Biological Significance (“ASBS”) are zones with special habitats, species or biological
15 communities— coastal ecosystem jewels. Consequently, the California Water Quality Control
16 Plan, Ocean Waters of California (State Water Resources Control Board, 2012) (“Ocean Plan”)
17 prohibits all discharge of waste to the ASBS—subject to a narrow exception via a State Board
18 resolution—which authorizes discharges only under specific conditions (“ASBS Exception” or
19 “Exception”). Yet the NSMB EWMP effectively ignores the requirements of the Ocean Plan and
20 ASBS Exception for discharges to ASBS 24. The NSMB EWMP fails to protect ASBS 24 and to
21 comply with the MS4 Permit and the ASBS Exception for at least four reasons:

- 22 1) The NSMB EWMP fails to consider stormwater data for discharges to ASBS 24
23 generated by the Permittees;
- 24 2) The NSMB EWMP fails to consider non-stormwater discharge data for ASBS 24
25 generated by the Permittees;
- 26 3) The NSMB EWMP fails to apply ASBS Exception standards to stormwater
27 discharges to ASBS 24; and
28

1 discharge or receiving water sampling data, stating that “no MS4 discharge monitoring data were
2 available at the time of this assessment.” NSMB EWMP at 43 (Ex. B). Similarly, the RAA for dry
3 weather discharges considers no data, and instead proposes a screening of outfalls for dry weather
4 discharges to be completed by December of 2017, and starting 180 days later, for the dischargers
5 to “strive to eliminate, divert, or treat significant non-stormwater discharges that are unauthorized
6 and determined to be causing or contributing to RWL/WQBEL exceedances.” *Id.* at 69. Finally,
7 for all ocean discharges, the RAA and EWMP consider and apply the Santa Monica Bay Beaches
8 Bacteria (“SMBBB”) TMDL standards *only*, which does not offer the heightened protections
9 necessary for ASBS 24 as the ASBS standards. *Id.* at ES-7.

10 On August 31, 2015, Petitioners commented on the draft EWMP, pointing out the failure to
11 incorporate ASBS protections and the lack of consideration of existing and available monitoring
12 data. LAWK/NRDC/HTB EWMP Comment Letter (August 31, 2015) at 19-20 (Ex. C). On April
13 7, 2016, the County and Malibu submitted a final EWMP. To address compliance with the Ocean
14 Plan, and its standards and prohibitions for discharges to ASBS 24, the final EWMP merely states
15 that its findings are consistent with a 2014 draft Compliance Plan for discharges to ASBS 24—also
16 generated by the County and Malibu—which concludes that no additional measures are necessary
17 to protect ASBS 24. NSMB EWMP at 6 (Ex. B). The ASBS Compliance Plan (discussed below) is
18 attached to the NSMB EWMP as Appendix D. On April 19, 2016, the Regional Board Executive
19 Officer approved the EWMP, but without addressing any of the ASBS-related deficiencies.
20 Regional Board NSMB EWMP Approval Letter (April 19, 2016) (“Regional Board Approval”)
21 (Ex. D). Specifically responding to Petitioners’ comment that the NSMB EWMP fails to consider
22 ASBS data or ASBS discharge standards, Regional Board staff wrote:

23 Finally, based on review of the draft EWMP, the Los Angeles Water Board determined that
24 applicable water quality standards were referenced and appropriate monitoring data were
25 reviewed, including those data presented in the ASBS Compliance Plan, which as noted
above, is incorporated by reference into the revised EWMP.

26 Response to Written Comments, NSMBCW Draft EWMP, at 29-30 (Regional Board, May 12,
27 2016) (“Response to Comments”) (Ex. E).

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B. ASBS Exception

1. Required Incorporation of Exception Terms into NPDES Permits

State Water Resources Control Board Resolution No. 2012-0012 allows discharges of waste into the ASBS only where:

- a. The discharges are covered under an appropriate authorization to discharge waste to the ASBS, such as an NPDES permit and/or waste discharge requirements;
- b. The authorization incorporates all of the Special Protections, contained in Attachment B to this resolution, which are applicable to the discharge; and
- c. Only storm water and nonpoint source waste discharges by the applicants listed in Attachment A to this resolution are covered by this resolution. All other waste discharges to ASBS are prohibited, unless they are covered by a separate, applicable Ocean Plan exception.

Exception at 3 (Ex. F).

Thus, any NPDES permit, such as the 2012 LA County MS4 Permit, can authorize discharges to the ASBS *but only* where the ASBS Exception requirements are *incorporated* into the NPDES permit terms and requirements.

2. ASBS Exception Standards and Prohibitions

a. Stormwater

The ASBS Exception prohibits discharges of stormwater to the ASBS, unless in compliance with the requirements of the Exception. Specifically, discharge of stormwater is allowed only when:

- The discharges:
- (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;
 - (ii) Are designed to prevent soil erosion;
 - (iii) Occur only during wet weather;
 - (iv) Are composed of only storm water runoff.

Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.

Exception at Att. B, A.1.E.

Thus, even where discharges to the ASBS fit into these narrow categories, discharges that alter natural ocean water quality in the ASBS are prohibited. The Exception requires sampling to

1 determine whether natural ocean water quality in the ASBS is being altered by the discharges:

2 If the initial results of post-storm receiving water quality testing indicate
3 levels higher than the 85th percentile threshold of reference water quality data and
4 the pre-storm receiving water levels, then the discharger must re-sample the
5 receiving water pre- and post-storm. If after re-sampling the post-storm levels are
6 still higher than the 85th percentile threshold of reference water quality data and the
7 pre-storm receiving water levels, for any constituent, then natural ocean water
8 quality is exceeded.

7 Exception at Att. B, B.3.E.

8 **b. Non-Stormwater Discharges**

9 The Exception does not allow non-stormwater discharges, except for six limited categories
10 of dry weather discharges:

- 11 1) Discharges associated with emergency fire fighting operations.
- 12 2) Foundation and footing drains.
- 13 3) Water from crawl space or basement pumps.
- 14 4) Hillside dewatering.
- 15 5) Naturally occurring groundwater seepage via a storm drain.
- 16 6) Non-anthropogenic flows from naturally occurring stream via a culvert or storm
17 drain, as long as there are no contributions of anthropogenic runoff.

16 ASBS Exception at Att. B, I.A.1.e.

17 In all events, these authorized non-stormwater discharges cannot cause or contribute to violations
18 of Ocean Plan objectives or contribute to alterations of natural ocean water quality. *Id.* Compliance
19 with the non-stormwater prohibition was required immediately upon adoption of the ASBS
20 Exception in 2012. *Id.* at Att. B, I.A.3.a.

21 **3. ASBS Compliance Plan and Pollution Prevention Plan¹**

22 The Exception provides six years to achieve compliance with the stormwater discharge
23 prohibitions. Exception at Att. B, I.A.3.e. To implement pollution controls on this compliance
24 schedule, the dischargers had to develop and submit a draft Compliance Plan (“CP”) by September

25 ¹ In their ASBS submissions, the County and Malibu inappropriately divided their plans into
26 Compliance Plans (point source) and Pollution Prevention Plans (non-point source) based on pipe
27 size (18 inches). While all pipes are point sources for purposes of the ASBS Exception and the
28 Clean Water Act, for purposes of this Petition, the Compliance Plan and Pollution Prevention Plan
are referred to collectively as “CP” or “Compliance Plan.”

1 2013. *Id.* at Att. B, A.3.b. The CP must include a strategy to comply with all special conditions,
2 including maintaining natural ocean water quality. *Id.* at Att. B, I.A.3.b; I.A.2, 2.d., and 2.g. The
3 Exception specifically requires that the CP include:

4 BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm
5 [that] shall be designed to achieve on average:

6 Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the
7 Ocean Plan; or

8 A 90% reduction in pollutant loading during storm events, for the applicant's total
9 discharges.

10 *Id.* at Att. B, I.A.2.d.(1)-(2).

11 Where receiving water monitoring indicates that storm water runoff is causing or
12 contributing to alteration of natural ocean water quality, the County and Malibu are required to
13 submit an additional report within 30 days of receiving the results. Exception at Att. B, I.A.2.h.

14 The report must:

- 15 1) identify the constituents in storm water altering natural water quality and the source
 of the constituents;
- 16 2) describe BMPs in place, proposed in SWMPs for future implementation, and any
 additional BMPs to prevent alteration of natural water quality; and
- 17 3) provide an implementation schedule.

18 *Id.* at Att. B, I.A.2.d.

19 The CP must describe a time schedule to implement structural controls to meet the special
20 conditions, and ultimately be included in the County and Malibu's EWMP submitted pursuant to
21 the MS4 Permit. Exception at Att. B, I.A.3.b. Further, a CP must "describe the measures by which
22 all non-authorized non-storm water runoff (e.g., dry weather flows) has been eliminated." *Id.* at
23 I.A.2.b. Dischargers were required to submit a final CP by September 2015, and where NPDES
24 permits issued by Regional Boards authorize discharges to the ASBS, the draft and final CPs are
25 subject to approval by the Executive Officer of the Regional Board, and incorporation into those
26 NPDES permits. *Id.* at I.2.

1 **4. LA County and Malibu Draft Compliance Plan Monitoring**

2 **a. Stormwater Discharge Data**

3 After being granted a one-year extension based on the drought, the County and Malibu
4 submitted a draft compliance plan in September 2014 (“Draft CP”). Draft CP, Cover Page (Ex.
5 G.). A copy of the Draft CP is attached to the NSMB EWMP as Appendix D. The Draft CP
6 includes some, but not all of the sampling required by the ASBS Exception. The Draft CP includes
7 sampling to evaluate alteration of natural ocean water quality by discharges to ASBS 24 primarily
8 at one location, S02. Samples at S02 were collected both at the discharge point of a 36 inch storm
9 drain and in the receiving water at Escondido Beach. *Id.* at ES-4. A single discharge event in 2013
10 was sampled at S01, at a 60 inch storm drain at Zuma Beach. S02 was sampled during storm
11 events on February 19 and March 8, 2013, and February 28, 2014. S01 was also sampled on
12 February 28, 2014. *Id.* at 61-70.² Using the analysis required by the ASBS Exception, the Draft
13 CP reports that stormwater discharges from S01 and S02 contributed to alteration of natural ocean
14 water quality for selenium, total PAH, and mercury. *Id.* at 67-69.

15 The County and Malibu also conducted end of pipe monitoring in 2013 and early 2014 at
16 21 outfalls to the ASBS, with smaller outfall samples analyzed for a limited range of constituents.
17 Draft CP at 71-75. In these samples, the County and Malibu reported repeated exceedances of
18 Ocean Plan Instantaneous Maximum limits, including ammonia, cadmium, chromium, copper,
19 lead, nickel, zinc, and high concentrations of PAH, pyrethroids, and TSS. *Id.* Further, the County
20 and Malibu collected and submitted to the State Board end of pipe monitoring data in ASBS 24 as
21 part of their original ASBS Exception application. This data also documented elevated
22 concentrations of copper, chromium, and PAH, and the State Board confirmed exceedances of
23 Ocean Plan standards of these parameters, as well as acute and chronic toxicity, in discharges to
24 ASBS 24. *See Program Final Environmental Impact Report, Exception to the California Ocean*
25 *Plan for ASBS Discharge Prohibition for Storm Water and Non-Point Source Discharges, with*

26 _____
27 ² This sampling scheme itself violates the Exception’s monitoring requirement that three samples
28 must be collected during “each storm season.” *See* Exception Att. B. at IV.B.2.b. February 2013
and February 2014 are different storm seasons. *See also* Ex __ (SWRCB Comment letter)

1 *Special Protections* (State Water Resources Control Board, Feb 21, 2012) (“ASBS Exception
2 EIS”) at 212-228 (Ex. H).

3 **b. Non-Stormwater Discharge Data**

4 Pursuant to ASBS Exception requirements, the County and Malibu conducted inspections
5 for dry weather discharges during January, February, March and April of 2012, and February,
6 March, May and July of 2013. Draft CP at 50-51, Table 3-3 and 3-4 (Ex F.). The County and
7 Malibu inspected 13 outfalls, and observed dry weather discharges on 73³ occasions during these
8 inspections, many of them repeat discharges. Some, but not all, of these discharges are
9 characterized as “Hillside dewatering,” or “Natural stream,” but the plan provides no data to
10 support these characterizations, nor does it categorize any of the discharges as permitted or
11 unpermitted. The Draft CP also distinguishes, without basis, between discharges that land on the
12 beach in ASBS 24, and those that flow to the surf line. *Id.* at 49. The Draft CP proposes no
13 measures beyond existing outreach programs to address these continuing violations of the
14 Exception and Ocean Plan standards—particularly the numerous dry weather flows that the plan
15 reports as not reaching the “surf.” *Id.* Finally, the Draft CP did not propose, and the County and
16 Malibu have not reported any additional inspections or monitoring of dry weather discharges.

17 **c. LA Waterkeeper and State Board Comments**

18 Both citizen stakeholders and the State Board raised concerns about the Draft CP. In
19 January 2015, LA Waterkeeper commented to the State Board on the deficiencies of the Draft CP,
20 and sent courtesy copies to the County and Malibu. LAWK Draft Compliance Plan Comment
21 Letter (January 13, 2015) (“LAWK Draft CP Comment”) (Ex. I). On March 17, 2015, State Board
22 staff commented on the Draft CP. State Board Draft Compliance Plan Comment Letter (March 17,
23 2015) (“State Board Draft CP Comment”) (Ex. J). State Board staff noted alteration of Natural
24 ocean water quality by ASBS discharges, and required additional sampling and a description of
25 structural BMPs to abate the pollution. *Id.* at 1-2. Staff further noted that: the Draft CP’s
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³ This total includes non-stormwater discharges from 10 outfalls that the CP identifies as
28 “ownership unknown.” CP at 19.

1 distinction between non-stormwater discharges reaching surf and those not reaching surf was
2 irrelevant, and that the Draft CP did not document that non-stormwater discharges would be
3 eliminated, or how measures to eliminate discharges would be maintained over time. Staff required
4 correction to both these gaps. *Id.* at 2-3. Finally, State Board staff required, consistent with the
5 extended ASBS Exception deadline, submission of a Final CP containing the corrections by
6 September 20, 2015. *Id.* at 3.

7 To date no Final CP has been approved by either the Regional Board or State Board. *See*
8 NSMB EWMP at Appendix D; *see also*

9 http://www.waterboards.ca.gov/water_issues/programs/ocean/asbs_general_exception.shtml

10 **II. STANDARD OF REVIEW**

11 Petitioners seek State Board review under both the terms of the MS4 Permit (MS4 Permit at
12 VI.A.6) and California Water Code § 13320, which states, “Upon finding that the action of the
13 regional board, or the failure of the regional board to act, was inappropriate or improper, the state
14 board may direct that the appropriate action be taken by the regional board, refer the matter to any
15 other state agency having jurisdiction, take the appropriate action itself, or take any combination of
16 those actions.” In reviewing the Executive Officer’s action pursuant to either the Permit process or
17 Water Code § 13320, the Board must exercise its independent judgment as to whether the action
18 was reasonable and in order to uphold the action, the Board must find that the action was based on
19 substantial evidence. *See* State Water Resources Control Board, *In the Matter of the Petition of*
20 *Stinnes-Western Chemical Corporation*, September 18, 1986, at 11.

21 Agency actions, such as approval of the EWMP, must be supported by findings. *See*
22 *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection*
23 (2008) 44 Cal. 4th 459, 520-521 (“*EPIC*”) (citing *Topanga Assn. for a Scenic Community v.*
24 *County of Los Angeles*, 11 Cal.3d at 518-522). The record supporting the decision “must set forth
25 findings that bridge the analytical gap between the raw evidence and ultimate decision” to survive
26 a challenge alleging an abuse of discretion. *See Topanga*, 11 Cal.3d at 514-516. Further, findings
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1 must provide “the analytic route [it] traveled from evidence to action” to satisfy this requirement,
2 so as to allow the reviewing court to satisfy its duty to “compare the evidence and ultimate
3 decision to ‘the findings.’” *Id.* at 515. “While the findings need not be ‘extensive or detailed,’
4 ‘mere conclusory findings without reference to the record are inadequate.’” *AGUA*, 210
5 Cal.App.4th at 1281 (citing *EPIC*, 44 Cal.4th at 516-517). Thus, in reviewing the Executive
6 Officer’s approval of the EWMP, the Regional Board, State Board, and Court may not speculate as
7 to the administrative agency’s basis for decision. *Topanga*, 11 Cal.3d at 514-516.

9 **III. ARGUMENT**

10 **A. The RAA and EWMP Fail to Consider Relevant, Available ASBS Stormwater** 11 **Data**

12 The MS4 Permit requires the County and Malibu to assemble all available, relevant
13 subwatershed data collected within the last 10 years. MS4 Permit at 65. If those data meet QA/QC
14 requirements, the County and Malibu must identify those data, and use them in the RAA. *Id.*

15 Since at least 2008, sampling data for metals, PAH, ammonia, and other pollutants have
16 been submitted to the State Board for direct discharges to the ASBS. ASBS Exception EIS at 214.
17 In 2007 through 2008, as part of the Exception application process, the County, Malibu, and State
18 Board collected discharge and receiving water data in ASBS 24. This data included documented
19 exceedances of Ocean Plan standards for chromium and copper. *Id.* at 200-208. In 2013 and 2014,
20 the County and Malibu also sampled 21 MS4 outfalls to the ASBS. Draft CP at 73-75. The County
21 and Malibu reported to the State Board repeated exceedances of Ocean Plan Instantaneous
22 Maximum limits, including ammonia, cadmium, chromium, copper, lead, nickel, zinc, and high
23 concentrations of PAH, pyrethroids, and TSS. *Id.*

24 Yet despite readily available and highly relevant data in the County’s, Malibu’s and State
25 Board’s files, and the 2013 and 2014 stormwater data attached to the NSMB EWMP itself as an
26 appendix, the EWMP states:

27 Stormwater and non-stormwater discharges have not yet been characterized within the
28

1 NSMBCW EWMP Area. No MS4 discharge monitoring data were available at the time of
2 this assessment, but discharge characterization will occur as part of the implementation of
3 the CIMP. Since outfall monitoring data from the CIMP were not available at the time of
4 EWMP development, information from regional MS4 land use studies (eg. Los Angeles
County, 2000) and/or TMDL technical reports were used in Section 2.2 for the water body
prioritization.

5 NSMB EWMP at 43.

6 Thus, rather than collecting all of the available and relevant data – or even considering data
7 that the County and Malibu themselves collected and attached to the EWMP – and including those
8 data in the RAA as required by the MS4 Permit, the EWMP simply denies that any such data exist.
9 Instead, the EWMP uses generalized land use data to conduct the RAA. *Id.* Itself a violation of
10 Permit requirements, this self-acknowledged refusal to consider available and highly relevant data
11 not only violates permit requirements but significantly undermines the ability of the RAA and
12 EWMP to protect ASBS 24.

13 Petitioners pointed out the failure to consider relevant and available data in the RAA and
14 EWMP to Regional Board staff in August 2015—yet the Regional Board Executive Officer
15 approved the NSMB EWMP without addressing the issue. In the subsequently issued Response to
16 Comments, Regional Board staff assert that appropriate data “were reviewed,” and the data
17 contained in the ASBS CP were “incorporated by reference” into the NSMB EWMP. Response to
18 Comments at 30 (Ex. E). The express language of the NSMB EWMP itself that *no* stormwater or
19 receiving water data for ASBS 24 were considered in the EWMP assessment directly contradicts
20 the staff claim; moreover, a simple review of the RAA reveals that the data were not considered.
21 NSMB EWMP at 43. Attachment of the CP as an appendix to the NSMB EWMP, and
22 “incorporation by reference,” is not equivalent to consideration of relevant and available data—
23 particularly when the NSMB EWMP states that no such consideration took place. Further,
24 Regional Board staff can point to no evidence in the EWMP or anywhere else that all the discharge
25 and receiving water data for ASBS 24 referenced in the ASBS Exception EIS were considered as
26 part of the NSMB EWMP. Regional Board staff’s “mere conclusory findings without reference
27 to the record,” both contradict the NSMB EWMP itself and fail to provide “the analytic route
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1 traveled from evidence to action.” (*AGUA*, 210 Cal.App.4th at 1281 (citing *EPIC*, 44 Cal.4th at
2 516-517).) The Executive Officer is bound by the unambiguous language of the EWMP when
3 considering whether to approve the document, and cannot rely on counterfactual post hoc
4 assertions that the EWMP considered data that the EWMP itself clearly states that it did not
5 consider. The self-serving statement in the Response to Comments that the EWMP included
6 review of relevant data is blatantly contradicted by the record and thus entitled to no weight. (See,
7 for example, *Scott v. Harris* (2007) 550 U.S. 372, 380 [reversible error to rely on “utterly
8 discredited” assertions].) As such, the Executive Officer acted inappropriately and improperly in
9 approving the NSMB EWMP as the decision was clearly not based on substantial evidence.

10 **B. The RAA and EWMP Fail to Consider ASBS Non-Stormwater Data**

11 As noted above, as part of the ASBS Draft CP monitoring program, the County and Malibu
12 conducted inspections for dry weather discharges during January, February, March and April of
13 2012, and February, March, May and July of 2013 at outfalls to ASBS 24. Draft CP at 50-51,
14 Table 3-3 and 3-4. The County inspected 13 outfalls, and observed dry weather discharges on 73
15 occasions during these inspections, many of them repeat discharges. The Draft CP containing these
16 dry weather inspection data was attached as an appendix to the NSMB EWMP.

17 Despite the considerable effort expended by the County and Malibu on its ASBS dry
18 weather discharge inspections, the NSMB EWMP nowhere mentions or considers the data
19 submitted by the County and Malibu in the Draft CP. In fact, rather than using these data to inform
20 the non-stormwater discharge program, the EWMP proposes to essentially repeat the process
21 conducted pursuant to the ASBS Exception. NSMB EWMP at 65-69. The EWMP proposes to
22 complete its initial screening and source identification of non-stormwater discharges by December
23 28, 2017, to begin monitoring of those outfalls within 90 days of completion of the screening, and
24 to strive to take some action 180 days thereafter. Thus, the NSMB EWMP proposes to delay
25 implementation of any BMPs to address non-stormwater discharges until September 2018 at the
26 soonest—six years after the Exception and the 2012 LA County MS4 Permit were adopted, five
27 years after the County and Malibu submitted data documenting non-stormwater discharges to the
28

1 ASBS, and more than two years from now.

2 The failure of the NSMB EWMP to consider the available and relevant data generated by
3 their own non-stormwater discharge survey violates the requirements of the MS4 Permit, creates
4 unnecessary and harmful delays in program implementation, and wastes public resources by using
5 data collection for delay rather than to inform decision-making. Regional Board staff's conclusory
6 statement in the Response to Comments that appropriate data were considered is contradicted by
7 the NSMB EWMP itself, which considered no existing non-stormwater field data in its analysis. In
8 approving the NSMB EWMP, the Executive Officer acted inappropriately and improperly, and
9 that approval must be overturned.

10 **C. The RAA and EWMP Fail to Utilize Applicable ASBS Stormwater**
11 **Standards**

12 The 2012 LA County MS4 Permit requires that EWMPs “[p]rovide for meeting water
13 quality standards and other CWA obligations by utilizing provisions in the CWA and its
14 implementing regulations, policies and guidance.” MS4 Permit at 49; *see also* 24 (“Pursuant to
15 California Water Code Section 13263(a) the requirements of this Order implement the Ocean
16 Plan.”). Further, the ASBS Exception allows discharges to the ASBS only where the special
17 protections of the ASBS Exception are incorporated into the authorizing NPDES Permit.
18 Exception at 3.

19 For the portion of the NSMB EWMP applicable to ASBS 24, the Ocean Plan standards for
20 stormwater discharges are those set out in the ASBS Exception. They are:

21
22 Prohibition of Alteration of Natural Water Quality--post-storm receiving water quality
23 with levels higher than the 85th percentile threshold of reference water quality data and
the pre-storm receiving water levels. Exception at Att. B, B.3.E; and

24 For CP (incorporation into EWMP, successor to SWMP, mandatory) BMPs sufficient
25 to meet Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the
26 Ocean Plan; *Id.* at I.A.2.d; or

27 For CP (incorporation into EWMP, successor to SWMP, mandatory) BMPs sufficient
28 to achieve a 90% reduction in pollutant loading during storm events, for the applicant's
total discharges. *Id.*

1 Ocean samples collected by the County and Malibu for the Draft CP confirm that the
2 County and Malibu ASBS stormwater discharges alter natural ocean water quality for at least
3 selenium, total PAH, and mercury. Draft CP at 71-75. Further, outfall samples collected by the
4 County and Malibu demonstrate exceedances of Ocean Plan Chapter II limits for ammonia,
5 cadmium, chromium, copper, lead, nickel, zinc, and high concentrations of PAH, pyrethroids,
6 TSS. *Id.* at 71-75; ASBS Exception EIS at 212-228. Given these documented exceedances, the
7 RAA and resulting NSMB EWMP must consider and apply ASBS Exception standards in order to
8 address these discharges, and to comply with the requirements of the MS4 Permit.

9 Yet the NSMB EWMP nowhere references any of these ASBS standards. In fact, for
10 discharges to the ASBS beaches, the RAA considers and applies the SMBBB TMDL standards
11 *only*. NSMB EWMP at ES-7. SMBBB TMDL standards limit indicator bacteria in the surf zone,
12 apply to all Santa Monica Bay beaches, and are based on an exceedance day determination. While
13 important for public health, the SMBBB TMDL does not achieve the heightened protections
14 required for ASBS – and fails to address the myriad additional pollutants (like metals) being
15 discharged to the ASBS in excess of background levels. Without consideration of these standards
16 in the RAA, the RAA and NSMB EWMP cannot ensure compliance with the Ocean Plan and
17 Exception ASBS standards, nor can BMPs be developed that achieve required compliance.
18 Because the EWMP fails to incorporate the proper standards from the ASBS Exception, there can
19 be no reasonable assurance that the EWMP will meet those standards. And by failing to consider
20 those standards, the EWMP violates the requirements of the MS4 Permit. Moreover, by failing to
21 incorporate those standards into the analysis and resulting program, the EWMP also violates the
22 requirements of the ASBS Exception.

23 Apparently in response to Petitioner's comments pointing to the lack of ASBS Exception
24 protections, the final NSMB EWMP includes a reference to the Draft CP, and attaches the Draft
25 CP as Appendix D. The EWMP defers to the analysis in the Draft CP, which concluded that no
26 structural BMPs were required. The EWMP's deferral to the Draft CP fails to meet the
27 requirements of the MS4 Permit and the ASBS Exception for at least three reasons: 1) the Draft
28

1 CP is a draft document, and to date, no Final CP has approved by the State or Regional Board; 2)
2 the Draft CP failed to conduct all required sampling, to propose measures to prevent alteration of
3 natural ocean water quality, or to prevent non-stormwater discharges—failures noted by State
4 Board staff; and 3) the MS4 Permit and the ASBS Exception require incorporation of ASBS
5 Exception standards into any NPDES Permit terms independent of the CP.

6 Because the NSMB EWMP fails to apply ASBS Exception protections, it violates the MS4
7 Permit and the ASBS Exception, and the Regional Board Executive Officer’s approval of the
8 NSMB EWMP was an abuse of discretion, inappropriate and improper, not based on substantial
9 evidence, contrary to law, , and thus should be overturned.

10
11 **D. The RAA and EWMP Fail to Utilize Applicable ASBS Non-Stormwater**
12 **Standards**

13 The ASBS Exception imposes a prohibition on non-stormwater discharges to ASBS, with
14 certain limited exceptions for firefighting and natural sources. Exception at Att. B, I.A.1.e. No
15 matter what the source, non-stormwater discharges cannot cause or contribute to violations of
16 Ocean Plan objectives or contribute to alterations of natural ocean water quality. *Id.*

17 The EWMP proposes a “semi-quantitative conceptual model” to evaluate non-storm water
18 discharges, using a four part test. NSMB EWMP at 63. Any one of the four elements would
19 establish compliance with the MS4 Permit’s qualified dry weather discharge prohibition. *Id.* at 64-
20 65. As an initial matter, the EWMP screening is inconsistent with the ASBS Exception’s dry
21 weather discharge prohibition, and would permit non-stormwater discharges beyond the six limited
22 categories set out in the ASBS Exception. *Compare* ASBS Exception, Att. B. at I.A.e. and NSMB
23 EWMP at 66-69.

24 Further, element three of the EWMP methodology states:

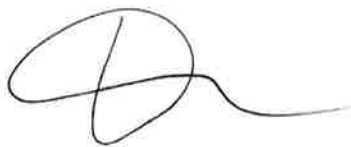
25 For the Santa Monica Bay Beaches Bacteria TMDL compliance monitoring
26 locations, if the allowed summer-dry and winter-dry singles sample exceedance days have
27 been achieved for four out of the past five years and the last two years, then the existing
28 water quality conditions at this compliance monitoring location are acceptable, and
reasonable assurance is demonstrated. *Id.* at 69.

1 As noted above, while the SMBBB TMDL provides important beach standards, it is not equivalent
2 to ASBS protection. In addition, the evaluation in the EWMP fails to even require strict SMBBB
3 TMDL compliance because the EWMP methodology allows additional exceedances to be deemed
4 acceptable. Finally, the EWMP ultimately commits the County and Malibu only to “strive to
5 eliminate, divert, or treat significant non-stormwater discharges that are unauthorized and
6 determined to be causing or contributing to RWL/WQBEL exceedances”—a standard falling far
7 short of the Exception’s prohibition on non-stormwater discharges. *Id.* at 69. Again, the Executive
8 Officer’s approval of the EWMP without application of the ASBS Exception prohibition on non-
9 stormwater discharges was inappropriate and improper, and not based on substantial evidence. It
10 must therefore be overturned.

11 **IV. REQUEST FOR RELIEF**

12 Petitioners seek an order by the Regional Board to invalidate the Regional Board Executive
13 Officer’s April 19, 2016 final approval of the NSMB EWMP, and an order remanding the matter
14 to the Regional Board with instructions for staff to require compliance with Permit requirements.
15 Further, should the Regional Board deny Petitioners’ request, Petitioners seek an order by the State
16 Board to invalidate the Regional Board’s Executive Officer’s April 19, 2016 final approval of the
17 NSMB EWMP, any approval by the Regional Board thereof, and an order remanding the matter to
18 the Regional Board with instructions for staff to require compliance with Permit requirements.

19
20 Respectfully submitted,

21
22
23 

24 Dated: May, 19, 2016

25 _____
26 Daniel Cooper
27 Lawyers for Clean Water, Inc.
28 Attorney for Plaintiff Los Angeles Waterkeeper

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Dated: May 19, 2016

NATURAL RESOURCES DEFENSE COUNCIL, INC.



Becky Hayat

Attorneys for NATURAL RESOURCES
DEFENSE COUNCIL, INC.

Dated: May 19, 2016

LOS ANGELES WATERKEEPER



Arthur S. Pugsley
Attorney for LOS ANGELES WATERKEEPER

Exhibit B

Regional Board Notice of July 19, 2016



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Los Angeles Regional Water Quality Control Board

**NOTICE OF OPPORTUNITY TO RESPOND TO PETITION
AND NOTICE OF PUBLIC MEETING**

**CONSIDERATION OF PETITION FOR REVIEW OF THE LOS ANGELES REGIONAL WATER
QUALITY CONTROL BOARD EXECUTIVE OFFICER'S ACTION TO APPROVE THE
NORTH SANTA MONICA BAY ENHANCED WATERSHED MANAGEMENT PROGRAM
PURSUANT TO THE LOS ANGELES COUNTY MUNICIPAL SEPARATE STORM SEWER
SYSTEM (MS4) PERMIT
(ORDER NO. R4-2012-0175; NPDES PERMIT NO. CAS004001)**

NOTICE IS HEREBY GIVEN THAT the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board or Board) will hold a public meeting to consider a petition for review of the Los Angeles Water Board Executive Officer's approval of the North Santa Monica Bay Enhanced Watershed Management Program (North Santa Monica Bay EWMP or NSMB EWMP) pursuant to the Los Angeles County MS4 Permit (Order No. R4-2012-0175). By this notice, the Los Angeles Water Board is also providing an opportunity for Permittees and interested persons to submit written responses to the petition prior to the meeting.

I. BACKGROUND

On November 8, 2012, the Los Angeles Water Board adopted Order No. R4-2012-0175, *Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, except those Discharges Originating from the City of Long Beach MS4* (hereafter, Los Angeles County MS4 Permit or Permit). Part VI.C of the Permit allows Permittees the option to develop, either individually or as part of a group, either a Watershed Management Program (WMP) or an Enhanced Watershed Management Program (EWMP) to implement permit requirements on a watershed scale through customized strategies, control measures, and best management practices (BMPs). Development of a WMP or EWMP is voluntary and allows a Permittee to address the highest watershed priorities, including complying with the requirements of Part V.A (Receiving Water Limitations) and Part VI.E and Attachments L through R (Total Maximum Daily Load Provisions), by customizing the control measures in Parts III.A (Prohibitions – Non-Storm Water Discharges) and VI.D (Minimum Control Measures), except the Planning and Land Development Program.

Pursuant to Part VI.C.4.c.iv of the Los Angeles County MS4 Permit, the City of Malibu (Malibu), the County of Los Angeles (County), and the Los Angeles County Flood Control District (LACFCD) (collectively, Permittees) submitted a draft EWMP for the North Santa Monica Bay Coastal Watersheds to the Los Angeles Water Board on June 29, 2015 for review. The Board then provided a 61-day public review and written comment period on the draft EWMP. On July 9, 2015 and November 5, 2015, the Board held workshops at its regularly scheduled Board meetings and provided an opportunity for oral comments on the draft North Santa Monica Bay EWMP, along with the other draft EWMPs submitted to the Board. Thereafter, in consideration of written and oral comments made by interested persons, the Board sent a comment letter to

IRMA MUÑOZ, CHAIR | SAMUEL UNGER, EXECUTIVE OFFICER

320 West 4th St., Suite 200, Los Angeles, CA 90013 | www.waterboards.ca.gov/losangeles

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the Permittees providing comments on the draft North Santa Monica Bay EWMP, identified the revisions that needed to be addressed prior to the Board's approval of the EWMP, and directed the Permittees to submit a revised draft EWMP addressing the Board's comments by January 19, 2016 for Board review. Both before and after submittal of the revised draft EWMP, Board staff participated in meetings, phone calls, and email exchanges with Permittees and interested persons. The Board held a third public workshop on March 3, 2016 for Permittees and interested persons to discuss the revised draft North Santa Monica Bay EWMP, along with the other revised draft EWMPs, with the Board's Executive Officer, Board members, and staff. Part VI.C.4.c of the Permit required that the Board or the Board's Executive Officer on behalf of the Board approve or deny the revised draft EWMP within 3 months of its submittal. On April 19, 2016, the Los Angeles Water Board's Executive Officer, on behalf of the Board, approved the North Santa Monica Bay EWMP pursuant to the Los Angeles County MS4 Permit.

Part VI.A.6 of the Los Angeles County MS4 Permit provides that any Permittee or interested person may request review by the Los Angeles Water Board of any formal determination or approval made by the Executive Officer pursuant to the Permit. A Permittee or interested person may request such review by the Los Angeles Water Board upon petition within 30 days of the notification of such decision to the Permittee(s) and interested parties on file at the Board. It is at the Los Angeles Water Board's discretion whether to review a petition and, if so, how to resolve it.

On May 19, 2016, pursuant to Part VI.A.6 of the Los Angeles County MS4 Permit, Los Angeles Waterkeeper and Natural Resources Defense Council (NRDC) (collectively, Petitioners) submitted to the Los Angeles Water Board a "Petition for Review of Los Angeles Regional Water Quality Control Board Executive Officer's Action to Approve the North Santa Monica Bay EWMP Pursuant to the L.A. County MS4 Permit."¹ The Petitioners allege that the Executive Officer improperly approved the NSMB EWMP despite its failure to: 1) comply with the relevant terms of the Los Angeles County MS4 Permit; 2) comply with the conditions of State Water Resources Control Board (State Water Board) Resolution No. 2012-0012 pertaining to exceptions to the California Ocean Plan for discharges into the Laguna Point to Latigo Point Area of Special Biological Significance ("ASBS Exception")²; and 3) consider relevant available ASBS stormwater and non-stormwater data and to comply with the ASBS Exception's prohibition against non-stormwater discharges. The Petitioners request that the Los Angeles Water Board invalidate the Executive Officer's approval of the NSMB EWMP and direct its staff to revise the EWMP to comply with the Los Angeles County MS4 Permit and State Water Board Resolution No. 2012-0012.³

¹ The petition filed by Los Angeles Waterkeeper and NRDC indicates that it also serves as a petition to the State Water Resources Control Board (State Water Board) pursuant to Water Code section 13320.

² The California Ocean Plan prohibits the discharge of waste to designated Areas of Special Biological Significance (ASBS). ASBSs are designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable. One ASBS is the Laguna Point to Latigo Point ASBS (ASBS Index No. 24), which is the largest of the mainland ASBS in Southern California.

The Ocean Plan authorizes the State Water Board to grant an exception to Ocean Plan provisions where the State Water Board determines that the exception will not compromise protection of ocean waters for beneficial uses and the public interest will be served. In Resolution No. 2012-0012, the State Water Board approved, subject to specific conditions, certain exceptions to the California Ocean Plan's prohibition against waste discharges to ASBS, including discharges of stormwater by Malibu, the County, and LACFCD for the Laguna Point to Latigo Point ASBS.

³ Absent such action by the Los Angeles Water Board, the Petitioners seek "an order by the State Board to invalidate the Regional Board Executive Officer's April 19, 2016 final approval of the NSMB EWMP, any approval by the Regional Board thereof, and an order remanding the matter to the Regional Board with instructions for staff to require compliance with Permit requirements."

The Los Angeles Water Board will hold a public meeting to consider the petition for review of the Executive Officer's action. Such consideration includes whether the Los Angeles Water Board will review the petition or not. The Los Angeles Water Board may either: 1) decide to review the petition on its merits or 2) decide not to review the petition. If the Los Angeles Water Board decides to review the petition on its merits, it will do so at a subsequent publicly-noticed meeting. If the Los Angeles Water Board decides not to review the petition, there will be no further Board proceedings on the petition.

II. DATE AND LOCATION OF MEETING

The Los Angeles Water Board is scheduled to consider the petition at its regularly scheduled meeting on:

Date: September 8, 2016
Time: 9:00 a.m.
Place: Metropolitan Water District of Southern California (Board Room)
700 North Alameda Street
Los Angeles, CA 90012

Please check the Board's website (<http://www.waterboards.ca.gov/losangeles/>) for the most up-to-date public meeting date and location as they are subject to change. If there is not a quorum on the scheduled date of the public meeting, all items will be automatically continued to the next scheduled meeting. A continuance of this item will not automatically extend any deadlines set forth herein.

Any person desiring to receive future public notices regarding this matter must sign up for the Lyris e-mail list. To sign up for the Lyris list, access the E-mail List Subscription form, check the box for "Storm Water – Los Angeles County MS4," and fill in the required information. The subscription form is available at:

http://www.waterboards.ca.gov/resources/email_subscriptions/reg4_subscribe.shtml

III. AVAILABILITY OF DOCUMENTS

The petition, as well as documents associated with the development and approval of the North Santa Monica Bay EWMP, is posted on the Los Angeles Water Board's website at:

http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/index.shtml

http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/santa_monica/north_santamonicabay/index.shtml.

Documents associated with the development and approval of the NSMB EWMP include the following: July 9, 2015 Draft Enhanced Watershed Management Program Presentation, draft Enhanced Watershed Management Program, Review of draft Enhanced Watershed Management Program, Revised Enhanced Watershed Management Program, Permittee Response to Comments, March 3, 2016 Public Workshop Revised EWMP Presentation, 2nd Revised Enhanced Watershed Management Program with Permittee Response to Comments, 3rd Revised Enhanced Watershed Management Program, and Approval of the Enhanced Watershed Management Program.

Public comments on the draft EWMP and responses to public comments are posted at:
http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/comments/9-3-2015/index.shtml.

These documents are also available for inspection and copying between the hours of 8:00 a.m. and 4:30 p.m. at the following address:

California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Arrangements for file review and/or obtaining copies of these documents may be made by calling the Los Angeles Water Board at (213) 576-6789. Appointments are encouraged so the documents can be readily available upon arrival. Responses to the petition and other subsequent relevant documents will be available online as they are generated.

IV. OPPORTUNITY TO SUBMIT WRITTEN RESPONSE TO PETITION FOR REVIEW BY LOS ANGELES WATER BOARD

Permittees and other interested persons may submit written responses to the petition for review by the Los Angeles Water Board. Responses may address the merits of the petition, as well as whether the Los Angeles Water Board should review the petition. Petitioners may not submit a response to their own petition.

To be evaluated by Los Angeles Water Board staff, included in the Los Angeles Water Board's agenda binder, and fully considered by the Los Angeles Water Board members in advance of the meeting, all written responses must be submitted to the Los Angeles Water Board, as provided in Section VII below, and received at the Los Angeles Water Board office by **5:00 pm on August 18, 2016**. Written comments should be submitted electronically, preferably as a PDF file with optical character recognition.

Permittees and interested persons should not include with their responses copies of documents that are already posted on the Los Angeles Water Board's website. The Los Angeles Water Board, however, does encourage reference and citation to such documents, including applicable sections.

V. EX PARTE COMMUNICATIONS PROHIBITED

This matter is subject to the prohibition on *ex parte* communications. An *ex parte* communication is a communication to a Los Angeles Water Board member from any person, about a pending matter, that occurs in the absence of other parties and without notice and opportunity for the parties to respond. Therefore, Petitioners, Permittees, and other interested persons may not communicate with Los Angeles Water Board members regarding the petition, or subject matter thereof, except through submission of timely written responses and during the meeting described in this notice.

VI. MEETING PROCESS AND PROCEDURES

The Los Angeles Water Board's consideration of the petition at its scheduled meeting will generally be conducted in the following order:

Administration of oath to persons who intend to testify
Los Angeles Water Board staff presentation
Petitioners' comments
Permittees' and other interested persons' comments
Petitioners' rebuttal
Questions from the Los Angeles Water Board
Deliberations
Los Angeles Water Board decision

Petitioners, Permittees, and other interested persons are invited to attend the meeting and present oral comments. Oral commenters are generally limited to 3 minutes each, but time limits can vary at the discretion of the Chair, depending on the number of persons wishing to be heard. Those entities or persons seeking more than 3 minutes to present oral comments at the meeting must contact the Los Angeles Water Board staff, as provided in Section VII below, no later than **5:00 pm on August 18, 2016** to request additional time. It is the Los Angeles Water Board's intent that reasonable requests be accommodated. Permittees and interested persons with similar comments are encouraged to choose one representative to speak and coordinate their comments to avoid redundancy. Each entity or person will be advised after the receipt of written responses, but prior to the date of the Board meeting, of the amount of time the entity or person will be allocated for its comments.

VII. LOS ANGELES WATER BOARD STAFF CONTACTS

Please email written responses to the petition for review, as well as additional requests for time to make oral comments, to losangeles@waterboards.ca.gov (with a copy to Deborah.Brandes@waterboards.ca.gov) with the subject line "**LA County MS4 Permit – Response to Petition for Review of NSMB EWMP Approval.**"

Any other communications with the Los Angeles Water Board concerning this matter should be directed to:

Ms. Renee Purdy, Chief, Regional Programs Section
Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Phone: (213) 576-6622
Email: Renee.Purdy@waterboards.ca.gov

Date: July 19, 2016

Exhibit C

July 26, 2016 E-mail from Arthur Pugsley to Jennifer Fordyce

Arthur S. Pugsley

From: Arthur S. Pugsley
Sent: Tuesday, July 26, 2016 11:23 AM
To: 'Fordyce, Jennifer@Waterboards'
Cc: Melissa Kelly
Subject: questions regarding September 8 Public Meeting on North SM Bay EWMP appeal

I had a few questions I wanted to chat with you about (I left a voice mail to that effect yesterday), but in case you find it easier to reply via e-mail (or to have a prior sense of what my questions are), here are the most important ones:

- 1) When will the Regional Board staff response to the Petition be released for public review, and what type of written comment period would be associated with it? Or is the Sept. 8 meeting the only venue where Petitioners could raise issues in response to staff comments on the Petition?
- 2) If the Board votes to take the appeal, is there a chance they will then have the hearing on the merits at the same meeting, or is the matter definitely put off to a separate meeting? (The Notice seems to imply it will be at a future date, but I suppose you could notice a meeting for the merits on the same date at a later time, which would be consistent with the Notice. I might be unnecessarily confused having been staff counsel to the Coastal Commission, which would do both on the same day occasionally, so if you could clarify I would appreciate it.)
- 3) Does the Regional Board attach any significance to calling the Sept. 8 proceedings a "Meeting" as opposed to a "Hearing"?
- 4) Will there be separate legal counsel for the Board (since the Board is performing an adjudicatory function) and for staff (who presumably will have a more adversarial role advocating for upholding the staff approvals)? If the legal roles are combined in one person, and petitioners wish to formally object and request separate counsel for staff and the Board, procedurally how would we get the issue raised in front of the Board? (for example, would another Petition be necessary, would a letter suffice, oral comments on the record, etc.)

Thanks,

Arthur

ARTHUR S. PUGSLEY STAFF ATTORNEY
ARTHUR@LAWATERKEEPER.ORG



120 BROADWAY, SUITE 105 • SANTA MONICA, CALIFORNIA 90401
PH: 310-394-6162 X102 • FX: 310-394-6178 • LAWATERKEEPER.ORG

RB-AR 6324

Exhibit D

July 29, 2016 E-mail Reply from Jennifer Fordyce to Arthur
pugsley

Arthur S. Pugsley

From: Fordyce, Jennifer@Waterboards <Jennifer.Fordyce@waterboards.ca.gov>
Sent: Friday, July 29, 2016 4:07 PM
To: Arthur S. Pugsley
Cc: Melissa Kelly
Subject: RE: questions regarding September 8 Public Meeting on North SM Bay EWMP appeal

Hello Arthur,

I apologize I haven't had the opportunity to return your call, but do appreciate you following up by email with your questions. Please find below my responses to your questions (my responses are in bold following your questions):

- 1) When will the Regional Board staff response to the Petition be released for public review **No later than August 29, 2016**, and what type of written comment period would be associated with it? **There will be no written comment period on the Regional Board staff response.** Or is the Sept. 8 meeting the only venue where Petitioners could raise issues in response to staff comments on the Petition? **Petitioners can make oral comments regarding the Regional Board staff's response at the September 8th meeting and, if the Regional Board decides to review the petition on its merits, at the subsequently scheduled Board meeting.**
- 2) If the Board votes to take the appeal, is there a chance they will then have the hearing on the merits at the same meeting, or is the matter definitely put off to a separate meeting? (The Notice seems to imply it will be at a future date, but I suppose you could notice a meeting for the merits on the same date at a later time, which would be consistent with the Notice. I might be unnecessarily confused having been staff counsel to the Coastal Commission, which would do both on the same day occasionally, so if you could clarify I would appreciate it.) **If the Regional Board decides to review the petition on its merits, it will definitely do so at a subsequently publicly-noticed meeting (i.e., not the same day). This is because our September agenda is very full. However, we did want to provide the Petitioners and the State Board with certainty as soon as possible as to whether the Regional Board would review the petition or not. Given my October vacation schedule and other items that need to be considered in October and November, if the Regional Board decides to review the petition on its merits, the merits proceeding would likely be scheduled in December.**
- 3) Does the Regional Board attach any significance to calling the Sept. 8 proceedings a "Meeting" as opposed to a "Hearing"? **Yes. The Regional Board is not required to hold an evidentiary hearing to determine whether to review a determination made by its Executive Officer, or to review the petition on its merits to determine whether the Executive Officer's approval was appropriate. In fact, there is no established process found in law for these types of actions. In deciding whether to review the petition or not, the Regional Board will not be considering additional evidence not previously provided to the Regional Board. The Regional Board will be looking at the record for the Executive Officer's approval of the NSB EWMP (i.e., the various iterations of the EWMP, comments, etc.), as well as the petition and responses prepared by Board staff, permittees, and interested persons. It is therefore appropriate to call the September 8th proceeding a meeting.**
- 4) Will there be separate legal counsel for the Board (since the Board is performing an adjudicatory function) and for staff (who presumably will have a more adversarial role advocating for upholding the staff approvals)? **There will not be separate legal counsel for the Board and for staff. There is no requirement that the Board separate functions in order for it to review its Executive Officer's action. As noted above, the Regional Board is not required to hold an evidentiary hearing and the proceeding(s) on the petition are not subject to Chapter 4.5 of the Administrative Procedure Act. Further, Regional Board staff will not have an investigative, prosecutorial, or advocacy role. Regional Board staff will be not be advocating or recommending the Board take a particular action. Like the proceeding on the Regional Board's review of the petition on the WMPs, Regional Board staff's role will be limited to explaining the basis for the Executive Officer's action to approve the EWMP. And Regional Board counsel will advise the Board on its various options. It is entirely up to the Board whether it chooses to review the petition or not. Neither Regional Board staff nor counsel will be advocating one way or**

the other. If the legal roles are combined in one person, and petitioners wish to formally object and request separate counsel for staff and the Board, procedurally how would we get the issue raised in front of the Board? (for example, would another Petition be necessary, would a letter suffice, oral comments on the record, etc.) **To avoid disrupting the proceedings for an already busy day, any objection should be raised to the Board prior to September 8th. However, I don't see a need for you to file another petition with the Regional Board on this. Therefore, if you wish to formally object, we prefer that you do so in writing by sending a letter to the Board by August 18, 2016. This would allow the Board to address the objection prior to or at the beginning of the proceeding. If needed, the Board can revise the public notice to provide this deadline for objections to the process to be used.**

If you would like to discuss further or you have additional questions, please let me know and we can schedule an appointment early next week.

Jennifer

Jennifer L. Fordyce, Attorney III
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
Phone – (916) 324-6682
Fax – (916) 341-5199
Email – Jennifer.Fordyce@waterboards.ca.gov



From: Arthur S. Pugsley [mailto:arthur@lawaterkeeper.org]
Sent: Tuesday, July 26, 2016 11:23 AM
To: Fordyce, Jennifer@Waterboards
Cc: Melissa Kelly
Subject: questions regarding September 8 Public Meeting on North SM Bay EWMP appeal

I had a few questions I wanted to chat with you about (I left a voice mail to that effect yesterday), but in case you find it easier to reply via e-mail (or to have a prior sense of what my questions are), here are the most important ones:

- 1) When will the Regional Board staff response to the Petition be released for public review, and what type of written comment period would be associated with it? Or is the Sept. 8 meeting the only venue where Petitioners could raise issues in response to staff comments on the Petition?
- 2) If the Board votes to take the appeal, is there a chance they will then have the hearing on the merits at the same meeting, or is the matter definitely put off to a separate meeting? (The Notice seems to imply it will be at a future date, but I suppose you could notice a meeting for the merits on the same date at a later time, which would be consistent with the Notice. I might be unnecessarily confused having been staff counsel to the Coastal Commission, which would do both on the same day occasionally, so if you could clarify I would appreciate it.)
- 3) Does the Regional Board attach any significance to calling the Sept. 8 proceedings a "Meeting" as opposed to a "Hearing"?

RB-AR 6327

- 4) Will there be separate legal counsel for the Board (since the Board is performing an adjudicatory function) and for staff (who presumably will have a more adversarial role advocating for upholding the staff approvals)? If the legal roles are combined in one person, and petitioners wish to formally object and request separate counsel for staff and the Board, procedurally how would we get the issue raised in front of the Board? (for example, would another Petition be necessary, would a letter suffice, oral comments on the record, etc.)

Thanks,

Arthur


ARTHUR S. PUGSLEY STAFF ATTORNEY
ARTHUR@LAWATERKEEPER.ORG



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Exhibit E

June 2, 2010 Reporter's Transcript of Proceedings, County of
Los Angeles et al. v. State Water Resources Control Board et al.
Los Angeles Superior Court Case BS 122704

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 86

HON. DAVID P. YAFFE, JUDGE

COUNTY OF LOS ANGELES, ET AL.,

PETITIONER,

VS.

BS 122704

STATE WATER RESOURCES CONTROL
BOARD, ET AL.,

RESPONDENT.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 2, 2010

APPEARANCES:

FOR THE PETITIONER:

BURHENN & GEEST
BY: HOWARD D. GEST
AND
DAVID W. BURHENN
624 S. GRAND AVENUE, SUITE 2200
LOS ANGELES, CA 90017
(213) 629-8788

FOR THE RESPONDENT:

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
BY: HELEN G. ARENS
DEPUTY ATTORNEY GENERAL
300 S. SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013
(213) 897-2607

FOR THE INTERVENER:

STEVE FLEISCHLI, ESQ.
2215 WILSHIRE BOULEVARD
SANTA MONICA, CA 90403
(310) 829-5568

CYNTHIA CRUZ, CSR 9095
OFFICIAL REPORTER

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LOS ANGELES, CALIF.; WEDNESDAY, JUNE 2, 2010; A.M. SESSION
DEPARTMENT NO. 86 HON. DAVID P. YAFFE, JUDGE

APPEARANCES:

(THE PETITIONER WITH THEIR COUNSEL,
HOWARD D. GEST AND DAVID W. BURHENN,
ATTORNEYS AT LAW; THE RESPONDENT WITH
THEIR COUNSEL, HELEN G. ARENS, DEPUTY
ATTORNEY GENERAL; THE INTERVENER WITH
THEIR COUNSEL, STEVE FLEISCHLI, ATTORNEY
AT LAW.)

(CYNTHIA S. CRUZ, CSR NO. 9095)

(THE FOLLOWING PROCEEDINGS WERE HELD IN
OPEN COURT:)

THE COURT: COUNTY OF LOS ANGELES AGAINST STATE WATER
RESOURCES CONTROL BOARD.

MS. ARENS: GOOD MORNING. HELEN ARENS, FOR
RESPONDENT, STATE WATER RESOURCES BOARD.

THE COURT: SPELL YOUR LAST NAME.

MS. ARENS: A-R-E-N-S.

MR. FLEISCHLI: GOOD MORNING. STEVE FLEISCHLI, F-L-E-
I-S-C-H-L-I, FOR INTERVENER, HEAL THE BAYS.

MR. GEST: GOOD MORNING, YOUR HONOR. HOWARD GEST OF
BURHENN AND GEST ON BEHALF OF PETITIONERS, COUNTY OF LOS
ANGELES AND LOS ANGELES COUNTY FLOOD CONTROL DISTRICT.

1 THE COURT: SPELL YOUR LAST NAME.

2 MR. GEST: G-E-S-T. AND WITH ME IS DAVID BURHENN OF
3 MY OFFICE, B-U-R-H-E-N-N.

4 THE COURT: B-U-R-H-E-N-N?

5 MR. BURHENN: THAT'S CORRECT, YOUR HONOR.

6 THE COURT: REPRESENTING THE PETITIONERS?

7 MR. GEST: RIGHT.

8 THE COURT: ALL RIGHT. THE TENTATIVE RULING IS TO
9 GRANT THE PETITION ON THE SOLE GROUND THAT THE HEARING
10 BEFORE THE REGIONAL WATER BOARD WAS NOT A FAIR HEARING
11 BECAUSE THE SAME PERSON ACTED AS COUNSEL FOR THE BOARD AS A
12 PARTY, AND ADVISED THE BOARD DURING THE HEARING AS ITS
13 COUNSEL, THE DECISION-MAKER AND TO NOT DECIDE ANY OF THE
14 OTHER ISSUES RAISED BY THE PETITION.

15 SO, MR. BURHENN OR MR. GEST, WHAT DO YOU WANT TO
16 TELL ME ABOUT THE TENTATIVE RULING?

17 MR. GEST: YOUR HONOR, WE'RE PREPARED TO SUBMIT ON THE
18 TENTATIVE.

19 THE COURT: ALL RIGHT. MS. ARENS.

20 MS. ARENS: YOUR HONOR, IF I MAY ADDRESS NIGHTLIFE
21 PARTNERS, WHICH APPEARS THE TENTATIVE RELIES ON.

22 THE COURT: YES.

23 MS. ARENS: NIGHTLIFE PARTNERS DID NOT REQUIRE A
24 SEPARATE COUNSEL AT THE PERMIT ISSUE LEVEL. NIGHTLIFE
25 PARTNERS IS ABOUT THE REVIEW OF AN AGENCY DECISION. IN
26 NIGHTLIFE PARTNERS, THE REJECTION OF THE RENEWAL OF THE
27 PERMIT WAS NOT AT ISSUE. WHAT WAS AT ISSUE WAS THE APPEAL
28 OF THAT REJECTION. AND IN NIGHTLIFE PARTNERS --

1 THE COURT: I DON'T UNDERSTAND WHAT DISTINCTION YOU'RE
2 MAKING. THE SAME PERSON IN NIGHTLIFE PARTNERS, IN BOTH
3 CAPACITIES AT THE FINAL ADMINISTRATIVE HEARING THAT THE
4 COURT WAS TO REVIEW. IS THAT NOT CORRECT?

5 MS. ARENS: THE FINAL ADMINISTRATIVE HEARING WE'RE
6 TALKING ABOUT IS THE APPEAL OF THAT AGENCY DECISION. THE
7 ATTORNEY FOR RICHARDS, WATSON AND GERSHON IN THAT CASE WAS
8 THE ATTORNEY FOR THE CITY AND WROTE THE LETTER DENYING THE
9 PERMIT RENEWAL. THEN WHEN THE NIGHT CLUB APPEALED THAT
10 DENIAL, THE HEARING OFFICER THEN TURNED TO THIS SAME
11 ATTORNEY FOR ADVICE ON HOW TO RULE ON THE APPEAL.

12 IN THIS CASE, THAT'S NOT WHAT HAPPENED. IN THIS
13 CASE, THE REGIONAL BOARD WAS JUST DEALING WITH ISSUING A
14 PERMIT AMENDMENT. IT WAS NOT AN APPEAL OF THAT PERMIT
15 AMENDMENT. THE APPEAL OF THE BOARD'S DECISION TO ISSUE
16 THAT PERMIT AMENDMENT WAS AT THE STATE BOARD LEVEL, AND NO
17 ONE IS ARGUING THAT THE STATE BOARD WAS ARGUING ON MR.
18 LEVY'S ADVICE.

19 THE COURT: BECAUSE THE STATE BOARD DIDN'T CONSIDER
20 THE ISSUE. THE STATUTE SPECIFICALLY SAYS WHEN THIS
21 HAPPENS, IT'S THE REGIONAL BOARD'S DECISION THAT'S REVIEWED
22 BY THE COURT.

23 MS. ARENS: RIGHT. THEN YOU BRING IT TO THE COURT TO
24 REVIEW.

25 THE COURT: I DON'T UNDERSTAND YOUR POINT. IF AT THE
26 HEARING, THEN IT'S BROUGHT HERE FOR THE COURT TO REVIEW IT,
27 IS NOT A FAIR HEARING, WHY SHOULDN'T A WRIT BE ISSUED?

28 MS. ARENS: YOUR HONOR, THE HEARING THAT WOULD BE

1 HERE, I ASSUME, WOULD BE FAIR. MR. LEVY IS NOT ADVISING
2 THIS COURT.

3 THE COURT: IF THE HEARING AT WHICH THE DECISION WAS
4 MADE THAT IS BEING REVIEWED BY THIS COURT WAS NOT A FAIR
5 HEARING, WHY SHOULD NOT A WRIT BE ISSUED BY THIS COURT?

6 MS. ARENS: BUT, YOUR HONOR, THE HEARING AT WHICH THIS
7 PERMIT AMENDMENT WAS ISSUED WAS FAIR. THERE IS NO REASON
8 TO SEPARATE COUNSEL -- TO HAVE SEPARATE COUNSEL AT THE
9 REGIONAL BOARD LEVEL BECAUSE THE REGIONAL BOARD STAFF AND
10 THE BOARD ITSELF ARE ONE IN THE SAME. TO SAY THAT THE
11 REGIONAL BOARD STAFF WAS SOMEHOW AN ADVERSARIAL PARTY
12 SEPARATE FROM THE REGIONAL BOARD ITSELF IS WRONG. BECAUSE
13 THEY ACT --

14 THE COURT: YOU DON'T SEEM TO WANT TO ANSWER THE
15 COURT'S QUESTION.

16 MS. ARENS: THE COURT'S QUESTION IS IF THE HEARING WAS
17 UNFAIR --

18 THE COURT: IF THE HEARING, ADMINISTRATIVE HEARING
19 THAT THIS COURT IS TO REVIEW UNDER SECTION 1094.5, TO SEE
20 WHETHER IT'S FAIR, THAT'S --

21 MS. ARENS: ABSOLUTELY.

22 THE COURT: -- THE PURPOSE. IF THE HEARING ISN'T
23 FAIR, WHY SHOULDN'T THE COURT ISSUE A WRIT? THAT'S THE
24 QUESTION. WHAT'S THE ANSWER?

25 MS. ARENS: OF COURSE YOU WOULD GRANT THE WRIT IF THE
26 HEARING WAS UNFAIR. BUT I WANT TO ADDRESS THE ISSUE OF
27 WHETHER OR NOT THE HEARING WAS UNFAIR, YOUR HONOR.

28 THE COURT: THANK YOU.

1 MS ARENS: AND THE HEARING HERE, THE BOARD HAS TO
2 ISSUE THOUSANDS OF PERMITS EACH YEAR. THE PERMIT ISSUANCE
3 PROCESS IS NOT AN ADVERSARIAL HEARING, THAT'S A COMPLETELY
4 DIFFERENT SITUATION. WHEN THEY'RE ENFORCING THE PERMIT,
5 THEY GET A SEPARATE COUNSEL IN TO ARGUE AND ADVOCATE FOR
6 ENFORCING THE PERMIT THAT THERE HAS BEEN A SORT OF
7 VIOLATION OF THE PERMIT. BUT WHEN THE REGIONAL BOARD IS
8 JUST ISSUING A PERMIT AMENDMENT THE PERMITEES WANT BECAUSE
9 THEY CAN'T DISCHARGE WITHOUT A PERMIT, IT'S NOT AN
10 ADVERSARIAL PROCEEDING.

11 CERTAINLY, IN THIS CASE IT WAS CONTENTIOUS AND IT
12 WAS A BIZARRE SYSTEM WHERE THEY INTRODUCED EVIDENCE LIKE IT
13 WAS IN A COURTROOM TRIAL. THIS IS NOT A FORMAL SITUATION.
14 THIS IS A VERY ABERRATIONAL HEARING AND IT WAS DONE AT THE
15 REQUEST OF THE PERMITEE'S COUNSEL, WHO APPARENTLY IS MORE
16 COMFORTABLE PRESENTING EVIDENCE IN A COURTROOM-STYLE
17 PROCEEDING WHERE HE IS MAKING OBJECTIONS AND MAKING OPENING
18 ARGUMENTS AND CLOSING ARGUMENTS AND THERE ARE DESIGNATED
19 PARTIES SO THAT TIME CAN BE PERFECTLY ALLOCATED BETWEEN THE
20 PARTIES AND NO ONE GETS MORE TIME THAN ANYONE ELSE.

21 NORMALLY, IT'S MUCH MORE INFORMAL. THE PARTIES
22 COME UP TO THE PODIUM AND GIVE THEIR EVIDENCE, THE STAFF
23 STATES THEIR EVIDENCE, AND THERE'S NO OPENING AND CLOSING
24 ARGUMENT. THEY JUST ISSUE A PERMIT OR THEY DON'T ISSUE A
25 PERMIT.

26 THE COURT: SUPPOSE A DEVELOPER WANTS A PERMIT TO
27 DEVELOP REAL PROPERTY, THINGS LIKE VARIANCES AND
28 CONDITIONAL USE PERMITS AND ALL THAT STUFF. I MEAN HE GOES

1 TO THE PLANNING COMMISSION, THE PLANNING DEPARTMENT OF THE
2 GOVERNMENT AGENCY AND HE ASKS FOR A PERMIT, AND THEY DENY
3 IT. SO HE APPEALS IT TO THE PLANNING COMMISSION, OR THE
4 CITY COUNCIL, OR WHATEVER THE BODY IS THAT REVIEWS THAT,
5 AND THEY HOLD A HEARING AND THEY UPHOLD THE DENIAL OF HIS
6 PERMIT. NOW, YOU'RE TELLING ME WHEN HE COMES TO THIS COURT
7 TO HAVE THAT DECISION REVIEWED, I SHOULD TELL HIM, WELL,
8 THAT WAS NOT AN ADVERSARY HEARING, ALL THAT WAS DECIDED IS
9 WHETHER YOU SHOULD GET A PERMIT OR NOT. SO YOU SHOULD GO
10 AHEAD AND TRY TO BUILD YOUR DEVELOPMENT WITHOUT THE PERMIT
11 AND WHEN THEY TRY TO ENFORCE THAT, THEN YOU COME IN. IS
12 THAT RIGHT, IS THAT WHAT YOUR ARGUMENT IS?

13 MS. ARENS: NO, YOUR HONOR.

14 THE COURT: HOW DOES IT DIFFER FROM THAT?

15 MS. ARENS: YOU JUST DESCRIBED TWO SEPARATE HEARINGS
16 IN YOUR EXAMPLE. THE FIRST PART WAS WHETHER HE GETS THE
17 PERMIT, AND THE SECOND PART WAS THE APPEAL. THIS APPEAL IS
18 THE ADVERSARIAL PROCEEDING, NOT THE ISSUANCE OF THE PERMIT
19 WHERE THE AGENCY IS JUST ACTING AS ONE WITH ITS STAFF. AND
20 IN NIGHTLIFE PARTNERS, THAT'S EXACTLY WHAT HAPPENED. IN
21 NIGHTLIFE PARTNERS, THE AGENCY SENT OUT THIS LETTER THROUGH
22 ITS COUNSEL OF RICHARDS WATSON STATING THAT THE RENEWAL WAS
23 REJECTED.

24 AND THEN IT WAS AFTER THAT, THAT THE COURT HAD A
25 PROBLEM WITH THIS DUAL AGENCY. AND THE TWO -- IT'S
26 IMPORTANT TO NOTE THAT THE COURT, THE TWO ROLES THAT THE
27 COURT WAS HAVING PROBLEMS WITH WAS NOT THAT THE RICHARDS
28 WATSON ATTORNEY WAS SENDING OUT THIS LETTER DENYING THE

1 PERMIT RENEWAL, IT WAS THE DUAL ROLES. AND IT'S AT PAGE 96
2 OF -- IN THE DUAL ROLES, THAT, NUMBER ONE, HE WAS ADVOCATE
3 FOR THE INITIAL DENIAL OF THE RENEWAL APPLICATION AND
4 ADVISOR TO THE DECISION-MAKER ON APPEAL.

5 THE COURT: THIS IS EVEN WORSE, 'CAUSE HE WAS DOING
6 THE -- TRYING TO FULFILL BOTH ROLES AT THE SAME HEARING.

7 MS. ARENS: WELL, THE REGIONAL BOARD NEEDS LEGAL
8 COUNSEL, ESPECIALLY IN A COMPLICATED, CONTENTIOUS --

9 THE COURT: AND IT'S ENTITLED TO LEGAL COUNSEL, BUT IT
10 CAN'T TAKE -- IT CAN'T LOOK TO THE LAWYER THAT IS
11 PROSECUTING HERE, DEFENDING THE CASE FOR IT IN THAT
12 PROCEEDING, FOR LEGAL ADVICE IN THAT PROCEEDING. HE'S NOT
13 TO BE ADVOCATE OR ADVISOR TO THE BOARD. HE CANNOT BE BOTH,
14 THAT'S THE RULE LAID DOWN BY THE COURT IN NIGHTLIFE
15 PARTNERS.

16 MS. ARENS: HE WAS NOT ADVOCATING A POSITION. HE WAS
17 THERE AS ADVISOR TO THE BOARD, AS TO PROVIDE LEGAL COUNSEL
18 TO THE BOARD AND HELP THEM WITH THIS LEGALISTIC HEARING
19 THAT WAS SET UP, THAT THE PETITIONERS INSISTED ON. AND IN
20 NIGHTLIFE PARTNERS, JUST CROSS-EXAMINING WITNESSES DOES NOT
21 AMOUNT TO --

22 THE COURT: WHAT IN THE WORLD DOES IT AMOUNT TO,
23 ADVISING THE BOARD WHEN YOU CROSS-EXAMINE A WITNESS THAT IS
24 HOSTILE TO THE BOARD'S POSITION?

25 MS. ARENS: ABSOLUTELY, YOUR HONOR. LET ME READ RIGHT
26 FROM NIGHTLIFE PARTNERS WHERE IT TALKED ABOUT THIS 12319
27 CORPORATION VERSUS BUSINESS LICENSE COMMISSION FOR THE L.A.
28 COUNTY. THE APPELLATE COURT HELD THAT "THE ATTORNEY

1 ASSISTED WITH THE EXAMINATION OF A WITNESS AND THAT DID NOT
2 EFFECT A FORFEITURE OF THE NEUTRAL POSITION HE HELD AS
3 COUNSEL TO THE COMMISSION BECAUSE THE TOTAL EXTENT OF SUCH
4 ASSISTANCE CONSISTED OF INQUIRING WHETHER THE WITNESS WAS
5 FAMILIAR WITH THE AUTHOR'S SIGNATURE, AND SO FORTH, TO MAKE
6 SURE THAT THE EVIDENCE WAS SUBMITTED PROPERLY AND THAT THE
7 EVIDENCE WAS PROPERLY BEFORE THE COMMISSION, AND THIS DID
8 NOT AMOUNT TO THE ADOPTION OF THE PROSECUTORIAL ROLE."

9 THE COURT: HOW ABOUT MAKING CLOSING ARGUMENT ON
10 BEHALF OF THE BOARD'S POSITION, THAT WASN'T ADVOCACY
11 EITHER?

12 MS. ARENS: YOUR HONOR, HE'S REPRESENTING THE BOARD
13 AND THE BOARD MEMBERS CAN'T ALL STAND UP AT THIS PODIUM
14 AND MAKE CLOSING ARGUMENT. THEY ARE ACTING THROUGH THEIR
15 STAFF AND THROUGH MR. LEVY, THAT IS THEIR VOICE AND HE'S
16 THE ONE PROVIDING THE INFORMATION THAT THEY NEED TO HEAR.
17 AND SO, --

18 THE COURT: SO HIS CLOSING ARGUMENT IS ON THE SAME
19 BASIS AS THE OTHER SIDE'S CLOSING ARGUMENT? IF HE'S ACTING
20 AS THEIR ADVISOR, THE OTHER SIDE'S CLOSING ARGUMENT IS NOT
21 BEING GIVEN TO THEM AS THEIR ADVISOR, RIGHT?

22 MS. ARENS: OF COURSE NOT.

23 THE COURT: TO ALLOW AN ADVOCATE FOR ONE PARTY TO ALSO
24 ACT AS ONE PARTY FOR THE DECISION-MAKER CREATES A
25 SUBSTANTIAL RISK THAT THE DECISION WILL BE SKEWED, THAT'S
26 WHAT NIGHTLIFE PARTNERS SAYS.

27 MS. ARENS: BUT THAT THE DECISION-MAKER IS THE PARTY,
28 THE DECISION-MAKER IS THE REGIONAL BOARD. THE DECISION-

1 MAKER IS BASICALLY MR. LEVY. MR. LEVY WORKED FOR THE
2 REGIONAL BOARD. THE BOARD MEMBERS --

3 THE COURT: SO WHO WAS THE NEUTRAL HERE?

4 MS. ARENS: THIS IS NOT AN ADVERSARIAL PROCEEDING.
5 THIS IS NOT A REVIEW OF A PERMIT. THE BOARD IS SIMPLY
6 ISSUING A PERMIT. AND THEN IF THAT IS REVIEWED AT THE
7 STATE BOARD LEVEL, YOU HAVE A NEUTRAL WITH SEPARATE
8 COUNSEL. AND IF THE BOARD DECIDES NOT TO REVIEW IT, THEY
9 CAN COME STRAIGHT TO THIS COURT AND, OF COURSE, THEY WILL
10 THEN GET A NEUTRAL --

11 THE COURT: ALL RIGHT. YOU WISH TO ADD ANYTHING ON
12 BEHALF OF INTERVENER?

13 MR. FLEISCHLI: YES, I DO, PLEASE, YOUR HONOR, WITH
14 REGARD TO THE ISSUE OF BIAS. IN NIGHTLIFE PARTNERS, I
15 THINK THIS IS CLEARLY DIFFERENT HERE. THE BIAS IN THAT
16 CASE OF THE LAWYER, THE RICHARDS WATSON LAWYER, WAS BECAUSE
17 THE LAWYER HAD ALREADY DENIED THAT PERMIT IN THE UNDERLYING
18 PROCEEDING. THEN WHEN IT WAS UP IN FRONT OF THE HEARING
19 OFFICER, HE ADVISED THE HEARING OFFICER WITH REGARD TO HOW
20 THAT PERMIT SHOULD PROCEED.

21 IN THAT CASE, THE LAWYER HAD A CLEAR BIAS BECAUSE
22 HE HAD ALREADY DENIED THAT UNDERLYING PERMIT. HERE, MR.
23 LEVY DID NOT HAVE ANY BIAS OF THAT NATURE. AS MS. ARENS
24 POINTED OUT, HE WAS MERELY ADVISING THE BOARD ON WHAT THE
25 STAFF RECOMMENDATION WAS FOR THE PERMIT ADOPTION.

26 THE COURT: IT'S NOT MR. LEVY'S BIAS THAT'S AN ISSUE
27 HERE, IT'S THE BOARD'S BIAS. IT'S THE BOARD'S BIAS BECAUSE
28 IT'S GETTING ADVICE FROM THE SAME PERSON THAT IS ARGUING

1 THE CASE FOR ONE OF THE SIDES THAT IS BEFORE THE BOARD.
2 THAT'S WHERE THE BIAS IS.

3 MR. FLEISCHLI: BUT, YOUR HONOR, THE PROBLEM IS
4 THAT -- IS THE REGIONAL BOARD STAFF IS NOT A SIDE IN THE
5 ARGUMENT, AND THE COUNTY HAS NOT CITED TO ANY CASE, THEY
6 HAVE NOT CITED TO ANY REGULATIONS THAT INDICATE THAT THE
7 STAFF FOR THE REGIONAL BOARD IS A SIDE FOR THE PROCEEDING,
8 OR A PARTY IN THE PROCEEDING. INSTEAD, THE REGIONAL BOARD
9 STAFF IS MERELY AN ADVISOR IN THE PROCEEDINGS.

10 IN ADDITION, YOUR HONOR, THE TENTATIVE CREATES
11 RIGIDITY IN A SYSTEM WHERE THE REGULATIONS PROVIDED
12 FLEXIBILITY. THE BOARD OF REGULATIONS GIVES THE HEARING
13 OFFICER DISCRETION IN THE MANNER IN WHICH THEY MAY CONDUCT
14 THESE HEARINGS. AS JUDGE CHANEY IN THE PHASE I DECISION
15 SAID IN THAT CONTEXT, THREE MINUTES, IN ADDITION TO THE
16 WRITTEN PUBLIC COMMENT PERIOD, PLUS OTHER INFORMAL HEARINGS
17 WERE HELD, WERE SUFFICIENT TO GIVE THE PERMITEES THE
18 OPPORTUNITY TO PRESENT THEIR INFORMATION TO THE BOARD ABOUT
19 THE PERMIT.

20 HERE WHAT THE COURT IS SAYING IS THAT BECAUSE THE
21 REGIONAL BOARD, AT THE REQUEST OF THE COUNTY, PROVIDED MORE
22 THAN THESE THREE MINUTES, PROVIDED THE FULL -- SORT OF FULL
23 PROCESS WITH ALL THE BELLS AND WHISTLES THAT THE COUNTY
24 WANTED, INCLUDING CLOSING STATEMENTS, WHICH THE REGIONAL
25 BOARD IS NOT REQUIRED TO INCLUDE UNDER 4 -- EXCUSE ME, 23
26 CCR, 648 AND 648.5, THE HEARING OFFICER HAS THE DISCRETION
27 OVER THAT.

28 INSTEAD, WHAT'S HAPPENING HERE, THE COURT IS

1 SAYING THAT BECAUSE THE REGIONAL BOARD ENTERTAINS THE
2 COUNTY'S WISHES, BY GRANTING A LENGTHY HEARING, NOW THE
3 REGIONAL BOARD HAS PUT ITSELF IN THE POSITION WHERE THEY'RE
4 FORCED TO HAVE THE LAWYERS AT ALL THESE HEARINGS WHEN THEY
5 HAVE A MASSIVE BACKLOG ON PERMITS ALREADY IN THE LOS
6 ANGELES REGION, THEY ISSUE THOUSANDS OF PERMITS IN THE LOS
7 ANGELES REGION.

8 NOW, BECAUSE THEY WENT OUT OF THEIR WAY TO TRY TO
9 ACCOMMODATE THE COUNTY BY PROVIDING ADDITIONAL TIME AND
10 ADDITIONAL OPPORTUNITY, THEY'RE BEING PUT IN THIS BOX OF
11 RIGIDITY, AND ESSENTIALLY YOU'RE PUTTING THE REGIONAL BOARD
12 AND EVERYONE ELSE IN THE SITUATION THE TENTATIVE IS, WHERE
13 THE REGIONAL BOARD, IN THE FUTURE, IS GOING TO SAY
14 EVERYBODY GETS THREE MINUTES, AND WE'RE NOT GOING TO PLAY
15 THESE GAMES, AND IT DISCHARGES AND DICTATES HOW THESE
16 PROCESSES PROCEED ON. THE REGIONAL BOARD IS GOING TO BE
17 PUT IN A SITUATION WHERE THEY HAVE A 10-HOUR HEARING ON ALL
18 THESE PERMITS AND THEY'RE GOING TO HAVE TWO LAWYERS, AND
19 NOTHING WILL EVER GET DONE, AND THE PUBLIC HEALTH IS NOT
20 GOING TO BE PROTECTED.

21 LET US NOT FORGET WHAT THIS REALLY IS ABOUT IS
22 PROTECTING THE PUBLIC HEALTH. AND THE REGIONAL BOARD IS
23 BEING PUNISHED UNDER THE TENTATIVE FOR TRYING TO
24 ACCOMMODATE A REQUEST FOR ADDITIONAL TIME.

25 THE COURT: MR. GEST.

26 MR. GEST: YES, YOUR HONOR. I THINK THE COURT
27 UNDERSTANDS THE ISSUES. THE CALIFORNIA ADMINISTRATIVE
28 PROCEDURES ACT APPLIES TO THE REGIONAL BOARD. APA PROVIDES

1 THAT THERE SHOULD BE THIS DECISION, AND THE REGIONAL
2 BOARD'S REGULATIONS PROVIDE THAT CHAPTER 4.5 OF THE
3 ADMINISTRATIVE PROCEDURE ACT APPLIES TO THESE REGIONAL
4 BOARD HEARINGS. THAT'S JUST THE LAW, AND THEY SHOULD
5 COMPLY WITH THE LAW AS THE COURT HAS FOUND. IF, FOR SOME
6 REASON, THEY FIND THAT THEY NEED TO SEEK A REVISION OF LAW,
7 THEY CAN GO TO THE LEGISLATURE AND DO IT. BUT THE REGIONAL
8 BOARD IS NO DIFFERENT THAN OTHER ADMINISTRATIVE AGENCIES
9 THAT HOLD ADMINISTRATIVE HEARINGS, AND THE COUNTY AND THE
10 FLOOD CONTROL DISTRICT ARE ENTITLED TO A, IF YOU WILL,
11 CONTROL DISTRICT.

12 THANK YOU.

13 THE COURT: MS. ARENS, YOU GET THE LAST WORD.

14 MS. ARENS: YES, YOUR HONOR. THE REGIONAL BOARD IS
15 VERY DIFFERENT IN THIS SITUATION BECAUSE IT DEALS WITH
16 LEGALISTIC ISSUES. IT'S DIFFERENTLY TREATED UNDER THE
17 GOVERNMENT CODE AND UNDER APA, IT'S PROVIDED A SPECIFIC
18 EXEMPTION TO THIS RULE UNDER GOVERNMENT CODE SECTION
19 11430.30, WHICH SPECIFICALLY ALLOWS THE REGIONAL BOARD TO
20 HAVE THIS STAFF COUNSEL AT THIS LEVEL ADVISING IT. IN
21 FACT, IN THE -- ALLOWING THEM TO HAVE EX PARTE
22 COMMUNICATIONS WITH THIS STAFF COUNSEL.

23 IN THIS SITUATION, THE STAFF COUNSEL WASN'T DOING
24 EX PARTE COMMUNICATIONS, HE WAS ADVISING THEM IN FRONT OF
25 EVERYONE.

26 THE COURT: WHAT DOES THAT STATUTE SAY THAT YOU'RE
27 CITING?

28 MS. ARENS: ALL RIGHT, IT'S 11430.30. "THE

1 COMMUNICATIONS" -- EXCUSE ME. "PERMISSIBLE COMMUNICATIONS
2 FROM EMPLOYEES OR REPRESENTATIVES OF AGENCIES" -- IT
3 SAYS "A COMMUNICATION OTHERWISE PROHIBITED BY SECTION
4 11430.10." -- WHICH IS WHAT THE COUNTY IS REFERRING TO --
5 "FROM AN EMPLOYEE OR REPRESENTATIVE OF AN AGENCY THAT IS A
6 PARTY TO THE PRESIDING OFFICER, IS PERMISSIBLE IN ANY OF
7 THE FOLLOWING CIRCUMSTANCES." THEN, UNDER SUBSECTION
8 (C) (2), IT SAYS "THE ADVICE INVOLVED AN ISSUE IN A
9 PROCEEDING OF THE SAN FRANCISCO BAY CONSERVATION AND
10 DEVELOPMENT COMMISSION, CALIFORNIA TAHOE REGIONAL PLANNING
11 AGENCY, DELTA PROTECTION COMMISSION, WATER RESOURCES
12 CONTROL BOARD, OR A REGIONAL WATER QUALITY CONTROL BOARD."
13 SO THIS ISSUE WAS SPECIFICALLY DEALT WITH BY THE
14 LEGISLATURE, BECAUSE IT KNEW THE REGIONAL BOARD NEEDED TO
15 HAVE COUNSEL AT THESE SORT OF CONTENTIOUS AND VERY
16 LEGALISTIC HEARINGS THAT DEAL WITH FEDERAL AND STATE LAW.

17 THE COURT: I DIDN'T HEAR COUNSEL BEING MENTIONED IN
18 THAT STATUTE AT ALL. DID I MISS IT?

19 MS. ARENS: IT SAYS "OTHERWISE PROHIBITED BY SECTION
20 11430.10, FROM AN EMPLOYEE OR REPRESENTATIVE." AND THAT IS
21 WHAT II IS REFERRING TO, THE COUNSEL FOR THE REGIONAL
22 BOARD. IN FACT, THAT --

23 THE COURT: I DON'T SEE ANYTHING IN THAT STATUTE.
24 MAYBE I'M MISSING IT, MS. ARENS, BUT I DON'T SEE ANYTHING
25 IN THAT STATUTE THAT ALLOWS THE SAME PERSON AT A HEARING
26 CONDUCTED BY THE REGIONAL WATER BOARD TO ACT AS ITS
27 ADVISOR, AND AS AN ADVOCATE FOR ONE -- AGAINST THE PARTY
28 THAT IS APPEARING BEFORE THE BOARD.

1 MS. ARENS: THE BOARD HAVE STAFF AND THAT'S WHO LEVY
2 WAS REPRESENTING.

3 THE COURT: ALL RIGHT, I'M GOING TO STICK WITH THE
4 TENTATIVE AND GRANT THE PETITION FOR WRIT OF MANDATE FOR
5 THE REASONS SET FORTH THEREIN.

6 COUNSEL FOR THE PETITIONER IS TO SUBMIT A
7 PROPOSED JUDGMENT AND PROPOSED WRIT TO THIS DEPARTMENT
8 WITHIN 10 DAYS WITH A PROOF OF SERVICE SHOWING THAT COPIES
9 HAVE BEEN SERVED UPON OPPOSING COUNSEL BY HAND DELIVERY OR
10 FAX. THE COURT WILL HOLD THE DOCUMENT FOR 10 DAYS BEFORE
11 SIGNING AND FILING THE JUDGMENT AND CAUSING THE CLERK TO
12 ISSUE THE WRIT.

13 MS. ARENS: YOUR HONOR --

14 MR. GEST: THANK YOU VERY MUCH, YOUR HONOR.

15 MS. ARENS: -- WE NEED TO ADDRESS --

16 MR. FLEISCHLI: WE'D LIKE TO REQUEST ON THE REMEDY,
17 YOUR HONOR, THAT THE COURT REMAND WITHOUT VACATUR BECAUSE
18 OF THE PUBLIC HEALTH ISSUES IN EFFECT HERE AND BECAUSE OF
19 THE --

20 THE COURT: WHAT DOES "REMAND IT WITHOUT VACATUR"
21 MEAN?

22 MR. FLEISCHLI: BECAUSE YOU RULED ON PROCEDURAL
23 GROUNDS, AS OPPOSED TO ON THE MERITS, THIS PERMIT WOULD
24 STAY IN PLACE, YOUR HONOR, UNTIL THAT HEARING IS HELD, SO
25 THAT THE PUBLIC HEALTH CAN BE PROTECTED IN THE MEANTIME.
26 ESSENTIALLY, BECAUSE THIS IS A PROCEDURAL VIOLATION THAT
27 YOU'RE FINDING AND BECAUSE THE PUBLIC HEALTH RISK CASE LAW
28 HAS FOUND REMAND WITHOUT VACATUR IS PROPER IN THESE CASES.

1 WE'D LIKE TO REQUEST --

2 THE COURT: THE REQUEST IS DENIED. IF YOU WANT A STAY
3 FROM THE COURT, YOU CAN SEEK THAT WITH THE APPELLATE COURT.

4 MS. ARENS: WITH REGARD TO THE REMAND, THE REGIONAL
5 BOARD WILL NOT BE ABLE TO HAVE ANOTHER HEARING UNTIL
6 SEPTEMBER, AT THE EARLIEST. THE JULY CALENDAR IS ALREADY
7 BOOKED. THERE'S NO HEARING IN AUGUST. THERE IS NO
8 REGIONAL BOARD MEETING IN AUGUST, SO THE WHOLE SUMMER IS
9 GOING TO GO BY WITH A TOXIC TRICKLE THAT COMES OUT OF THESE
10 STORM DRAINS NOT BEING ADDRESSED.

11 THE COURT: I THOUGHT YOU STARTED OUT YOUR ARGUMENT BY
12 SAYING THAT THIS DIDN'T ALLOW FOR NOTICE OF THIS PERMIT TO
13 TAKE PLACE ANYWAY. ISN'T THAT WHAT YOU TOLD ME AT THE
14 OUTSET OF THE HEARING?

15 MS. ARENS: THIS IS THE ENFORCEMENT, IN TERMS OF GOING
16 AFTER THEM FOR VIOLATIONS OF THE PERMIT.

17 THE COURT: RIGHT.

18 MS. ARENS: IF THIS PERMIT IS NOT IN PLACE, YOUR
19 HONOR, THEN NOT ONLY IN THE COUNTY, BUT 84 CITIES WILL
20 THROW UP THEIR HANDS. WE DON'T HAVE -- WE HAVE TO WORRY
21 ABOUT WORK ON THIS PERMIT. AND THERE'S 43 BEACHES THAT ARE
22 GOING TO BE POISONED THIS SUMMER. PEOPLE ARE GOING TO
23 THINK THERE'S NOTHING THEY NEED TO DO --

24 THE COURT: THE REQUEST FOR WHATEVER IT IS YOU'RE
25 ASKING FOR IS DENIED. THANK YOU.

26 MR. GEST: THANK YOU VERY MUCH, YOUR HONOR.

27 MR. BURHENN: THANK YOU.

28 (THE PROCEEDINGS WERE CONCLUDED.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 86 HON. DAVID P. YAFFE, JUDGE

COUNTY OF LOS ANGELES, ET AL.,)	
)	
PETITIONER,)	
)	
VS.)	BS 122704
)	
STATE WATER RESOURCES CONTROL)	
BOARD, ET AL.,)	REPORTER'S CERTIFICATE
)	
RESPONDENT.)	

I, CYNTHIA CRUZ, OFFICIAL REPORTER OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE
COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT I DID
CORRECTLY REPORT THE PROCEEDINGS CONTAINED HEREIN
AND THAT THE FOREGOING PAGES, 1 THROUGH 15 COMPRISE
A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS
HELD AND THE TESTIMONY TAKEN IN THE ABOVE-CAPTIONED
MATTER ON JUNE 2, 2010.

DATED THIS _____ DAY OF JULY, 2010.

_____, CSR 9095
OFFICIAL COURT REPORTER

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 120 Broadway Suite 105, Santa Monica CA 90401

On August 18, 2016, I served the within documents described as “*Request of Los Angeles Waterkeeper and NRDC for Appointment of Separate Counsel for Adjudicative and Prosecutorial/Advocacy Functions at the September 8, 2016 Meeting at which the Members of the Regional Board will Consider Whether to Review Petition Challenging Los Angeles Regional Water Quality Board Executive Officer’s Approval of North Santa Monica Bay Enhanced Watershed Management Program Pursuant to Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order R4-2012-0175; NPDES Permit No. CAS004001)*” on the following interested parties in said action by submitting a true copy thereof via electronic mail to the email addresses below:

California Regional Water Quality Control Board,
Los Angeles Region
c/o Sam Unger
Executive Officer
samuel.unger@waterboards.ca.gov

Howard Gest
Burhenn & Gest LLP
624 Grand Ave Suite 2200
Los Angeles, CA 90017
hgest@burhenngest.com

State Water Resources Control Board,
Office of the Chief Counsel
c/o Adrianna Crowl,
Staff Services Analyst
Adrianna.Crowl@waterboards.ca.gov
waterqualitypetitions@waterboards.ca.gov

Eric Conard
Senior Associate County Counsel
648 Kenneth Hahn Hall of Administration
Los Angeles, CA 90012-2713
econard@counsel.lacounty.gov

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///
///
///
///

POS Page 2

Request for Appointment of Separate Counsel

Christi Hogin
Jenkins & Hogin
Manhattan Towers
1230 Rosecrans Suite 110
Manhattan Beach, CA 90266
chogin@localgovlaw.com
llanger@localgovlaw.com

Reva Feldman
City Manager
City of Malibu
23825 Stuart Ranch Road
Malibu CA 90265
RFeldman@malibucity.org

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 18, 2016, at Santa Monica, California.



Arthur S. Pugsley

Brandes, Deborah@Waterboards

From: McChesney, Frances@Waterboards
Sent: Tuesday, September 06, 2016 12:11 PM
To: Arthur S. Pugsley; bhayat@nrdc.org
Cc: Fordyce, Jennifer@Waterboards; Coupe, David@Waterboards;
AGEORGE@dpw.lacounty.gov; JBrown@malibucity.org; KSusilo@geosyntec.com;
PALVA@dpw.lacounty.gov; BHAMAMO@dpw.lacounty.gov; tracy@egoscuelaw.com;
Unger, Samuel@Waterboards
Subject: Chair's Determination: Request of LA Waterkeeper and NRDC to Appoint Separate
Counsel regarding Petition Challenging Executive Officer Approval of EWMP
Attachments: Chair's Determination Re Request to Appoint Separate Counsel 9-6-16.pdf

Mr. Pugsley and Ms. Hayat,

On August 18, 2016, you submitted a "Request to Appoint Separate Counsel for Adjudicative and Prosecutorial/Advocacy Functions and Points and Authorities in Support Thereof" to the Los Angeles Regional Water Quality Control Board. Your request was in relation to the Regional Board's consideration of your petition challenging the Executive Officer's approval of the North Santa Monica Bay Enhanced Watershed Management Program.

Attached is a copy of the Chair's determination regarding your request. If you have any questions, you may contact me as follows:

Frances L. McChesney, Attorney IV
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828
Phone: 916.341.5174
Fax: 916.341.5199
Email: frances.mcchesney@waterboards.ca.gov

Los Angeles Regional Water Quality Control Board

DENIAL OF PETIONERS'
"REQUEST TO APPOINT SEPARATE COUNSEL FOR
ADJUDICATIVE AND PROSECUTORIAL/ADVOCACY FUNCTIONS
AND
POINTS AND AUTHORITIES IN SUPPORT THEREOF"

IN THE MATTER OF
PETITION TO REVIEW EXECUTIVE OFFICER APPROVAL OF
NORTH SANTA MONICA BAY ENHANCED WATERSHED
MANAGEMENT PROGRAM
PURSUANT TO LOS COUNTY MS4 PERMIT
ORDER NO. R4-2012-0175
(NPDES PERMIT NO. CAS004001)

On November 8, 2012, the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board or Board) adopted Order No. R4-2012-0175, *Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, except those Discharges Originating from the City of Long Beach MS4* (MS4 Permit).

The MS4 Permit allows Permittees the option to develop an Enhanced Watershed Management Program (EWMP) and provides that the Los Angeles Water Board itself or the Board's Executive Officer, on behalf of the Board, may approve or deny an EWMP. Pursuant to the MS4 Permit, the City of Malibu, the County of Los Angeles, and the Los Angeles County Flood Control District submitted a draft EWMP for the North Santa Monica Bay Coastal Watersheds to the Board for review. On April 19, 2016, the Executive Officer, on behalf of the Board, approved the North Santa Monica Bay EWMP.

On May 19, 2016, the Los Angeles Waterkeeper and Natural Resources Defense Council, Inc. (Petitioners) submitted to the Los Angeles Water Board a "Petition for Review of Los Angeles Regional Water Quality Control Board Executive Officer's Action to Approve the North Santa Monica Bay EWMP Pursuant to the L.A. County MS4 Permit." At its regularly scheduled meeting on September 7, 2016, the Los Angeles Water Board will consider whether or not to review the petition. If it chooses to review the Executive Officer's approval it will do so at a future Board meeting.

On August 18, 2016, Petitioners submitted to the Los Angeles Water Board a "Request to Appoint Separate Counsel for Adjudicative and Prosecutorial/Advocacy Functions and Points and Authorities in Support Thereof". As explained below, the Chair of the Los Angeles Water Board denies the request to appoint separate counsel.

Petitioners' Request:

The Petitioners request that the Regional Board assign separate counsel to advise the Regional Board in its consideration of the petition and assert several bases for this request. They contend that Petitioners' due process rights are at stake, asserting that due process requires a fair hearing before a neutral or unbiased decision-maker. Petitioners point out that California's Administrative Procedure Act (APA) states that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency." (Gov. Code § 11425.10(a)(4)). Based on this provision of the APA, they argue that there is "at least a potential conflict by the failure to ensure separation of counsel's advocacy and adjudicative roles." They assert that the "appeal" of the "North Santa Monica Bay EWMP approval, or in fact an appeal to the Regional Board of any staff action, creates conflicts for counsel that must be addressed at the resulting hearing." They also assert that due process requires the separation of adjudicative and prosecutorial/advocacy functions regardless of whether such separation is mandated by the APA. Petitioners also state that the failure to separate advocacy and adjudicatory functions by itself can result in the invalidation of an administrative agency decision, citing to *County of Los Angeles and Los Angeles County Flood Control District v. State Water Resources Control Board and Los Angeles Regional Water Quality Control Board*, Los Angeles County Superior Court Case No. BS122724.

Chair's Determination:

Petitioners' request is DENIED.

The Petitioners fundamentally misunderstand or misstate the provisions of the MS4 Permit and this proceeding before the Los Angeles Water Board in considering their petition. In the MS4 Permit, the Board delegated to the Executive Officer the authority to approve the EWMPs and allowed a permittee or member of the public to seek the Board's review of the determinations made by the Executive Officer. Pursuant to California Water Code section 13223(b), actions that can be taken by a regional board include such actions by its executive officer pursuant to powers and duties delegated to him by the regional board. In other words, delegated actions of the executive officer are considered actions of the regional board. Thus, in this case, the proceeding before the Board is a meeting for the Board to consider whether or not to review the Executive Officer's action taken on its behalf, i.e., it is a reconsideration of a Board action. It is not an "appeal".

Government Code section 11400.10, states that this chapter is applicable to an adjudicative proceeding commenced on or after July 1, 1997. Government Code section 11405.20, defines an "adjudicative proceeding" as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." The Board's proceeding whether to consider the petition is not an adjudicative proceeding because the Board will not be taking evidence or issuing a decision regarding the petition. Further, nothing in the Porter-Cologne Water Quality Control Act or the Clean Water Act requires an adjudicative proceeding for this matter.

Although the APA does not apply to this proceeding, even if it did there would be no obligation or due process requirement to appoint separate counsel. Government Code section 11425.10 provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency...." (emphasis added.) This proceeding involves none of these functions. This is a proceeding to consider a petition to review a determination by the Executive Officer on behalf of the Regional Board. The proceeding is not an investigation. No

investigative order is under consideration, and no investigation functions are involved in this proceeding. Likewise, the proceeding does not involve a prosecution. Neither sanctions, liability, nor criminal, civil, or administrative penalties of any sort are being sought during this proceeding. There is nothing to prosecute, and, therefore, no prosecutorial function is involved.

Board staff and attorneys also have no advocacy function in this proceeding. Board staff will present and explain the action taken by the Executive Officer and similar to the underlying permit proceeding, neither staff nor attorneys have or will act as an advocate as if they are a party. Typically, the Board does not designate its staff as a party for permit proceedings. Here, as in virtually all permit proceedings, staff's proposals, recommendations, and their participation exists for the purpose of advising and assisting the Board. Likewise, attorneys for the Board advise and assist the Board, which includes the Board members and its entire staff. *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585, held that, "[b]y definition, an advocate is a partisan for a particular client or point of view." It is possible that the Board might determine that an advocative approach could assist the Board its determination. That seldom occurs and is certainly not the case here. Given the nature of this proceeding, assigning a separate staff to "advocate" on behalf of a particular position would not further the development of the issues before the Board. In the end, attorneys for the Board cannot be serving as a representative for both the decision maker and the "advocacy staff" if there is no advocacy staff to begin with. Absent specific Board direction to create an advocacy staff, in a non-prosecutorial, non-investigative proceeding, staff's role is well-settled. Staff and attorneys merely advise the Board members.

Assuming arguendo that some limited advocacy function takes place (which is expected not to occur), it would still be true that these proceedings involve a non-prosecutorial proceeding. Government Code section 11430.30 expressly allows Board staff to advise the presiding officer on issues in non-prosecutorial adjudicative proceedings. The provisions of Government Code sections 11430.10-11430.80 obviate the need for a separation of functions in non-prosecutorial proceedings. Subject to limited exceptions, Government Code section 11430.10 generally prohibits communications concerning issues in a pending adjudicative proceeding between the presiding officer and an employee of the agency. One such limited exception is found at Government Code section 11430.30, which provides in relevant part:

A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

...(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is non-prosecutorial in character:

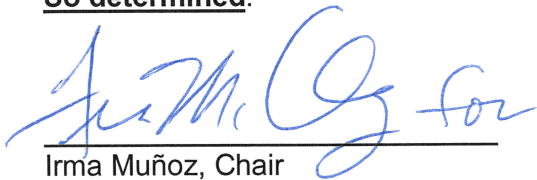
...(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

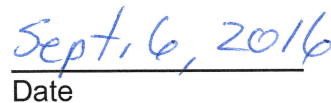
This exception indicates that the Legislature has recognized that communications that would customarily be prohibited are appropriate for Board staff during a non-prosecutorial adjudicative proceeding. (Gov. Code, § 11430.30, subd. (c)(2).) By the same token, a separation of functions in such circumstance is not necessary.

In addition, Petitioners' reliance on *Nightlife Partners, LTD. V. City of Beverly Hills* (2003) 108 Cal.App.4th 81, is misplaced and easily distinguishable. *Nightlife Partners* involved a city attorney who served in conflicting functions in different phases of a proceeding about the plaintiff's application for a cabaret license. The attorney advocated to the decision maker (executive staff) that it should determine that the application was incomplete, and the decision maker rejected the application on that basis. Thereafter, the same attorney also served as the advisor to the hearing officer during the plaintiffs' subsequent administrative appeal of that ruling. Unlike the city attorney in *Nightlife Partners*, the Board's attorneys are not tasked with an advocacy function in the proceeding. *Nightlife Partners* did not even involve the exercise of dual functions in the same proceeding. It certainly did not rule that a public body was required to task its staff with an advocacy function when it reviews an Executive Officer's action made under its delegated authority. Perhaps most significantly, however, unlike the Board staff, the city attorney in *Nightlife Partners* did not have the benefit of an express grant of statutory authority to advise the presiding officer off the record on any issues in a non-prosecutorial adjudicative proceeding. As Board staff is not tasked with an advocacy function in the instant proceeding, and because Government Code section 11430.30, subdivision(c)(2) allows for such communications and is expressly limited to the Board (and a very small number of other agencies), *Nightlife Partners* has no application to this proceeding.

Following the Los Angeles Water Board's adoption of the MS4 Permit in 2012, multiple parties to that proceeding, filed petitions seeking review by the State Water Resources Control Board (State Water Board). Some petitioners contended, among other assertions, that their rights to due process of law were violated because of the Los Angeles Water Board's failure to appoint separate counsel to advise the Board. In its Order, the State Water Board concluded that in a permitting proceeding, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. The State Water Board further stated that "[b]ecause counsel and staff are advisors to the Board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings." See State Water Board Order WQ 2015-0075, at p. 71. It follows that in a non-adjudicative and non-investigatory or prosecutorial proceeding involving the Board's review of actions its Executive Officer takes under the Board's delegated authority, there is even less basis for assigning separate counsel in this matter.

So determined:


Irma Muñoz, Chair


Date