

2006

The Slippery Slope: Urban Runoff, Water Quality, and the Issue of Legal Authority, Lunch Panel: “Insights into the Day-to-Day Practicalities of Controlling Urban Runoff and Coping with Regulation

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Recommended Citation

The Slippery Slope: Urban Runoff, Water Quality, and the Issue of Legal Authority, Lunch Panel: “Insights into the Day-to-Day Practicalities of Controlling Urban Runoff and Coping with Regulation, 9 CHAP. L. REV. 527 (2006).

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CHAPMAN UNIVERSITY SCHOOL OF LAW

**THE SLIPPERY SLOPE:
URBAN RUNOFF, WATER QUALITY,
AND THE ISSUE OF LEGAL AUTHORITY**

FRIDAY, JANUARY 27, 2006

**LUNCH PANEL: "INSIGHTS INTO THE DAY-TO-DAY
PRACTICALITIES OF CONTROLLING URBAN RUNOFF
AND COPING WITH REGULATION"**

MODERATOR:

JUDGE MICHAEL HAYES

SPEAKERS:

RICHARD G. MONTEVIDEO, RUTAN & TUCKER, LLP

PAUL N. SINGARELLA, LATHAM & WATKINS LLP

MICHELE A. STAPLES, JACKSON, DEMARCO, TIDUS &
PECKENPAUGH

GARRY BROWN, ORANGE COUNTY COASTKEEPER

DAN LAFFERTY, WATERSHED MANAGEMENT
DIVISION, LOS ANGELES COUNTY DEPARTMENT OF
PUBLIC WORKS

Professor Melissa Berry:

All right, everyone. I think we're going to go ahead and get started. Thank you. My name is Melissa Berry, and I'm a professor here at Chapman. I actually oversee our environmental law, land use and real estate program, the ENLURE program some of you have been hearing about.

And I'm here to introduce our moderator for our panel, for our lunchtime panel. So as you're all munching, we will be talking up here. And our moderator is Judge Michael Hayes, who is a judge on the Orange County Superior Court, where he's been since 1998. He's currently with the Central Justice Division. He was formerly the supervising judge in the North Justice Division. Before being appointed to the Superior Court, he was a judge on the Orange County Municipal Court for a number of years, and before that in private practice. Judge Hayes earned his law degree from Pepperdine University and his B.S. from B.Y.U. He is also an instructor here at Chapman in trial practice and has been doing so since 1997.

We're pleased to have him here today to moderate. He's been praised on the bench for his even disposition and balance. So we'll see how he does as moderator here. Thank you very much.

Judge Michael Hayes:

Thank you for the introduction. I'd like to indicate, though, for those of you that are familiar with where Pepperdine is located, I think it has a lot to say about what we're doing here today. And I never got one minute of that ocean view. My time was in Orange County.

Ladies and gentlemen, I'd like to welcome you this afternoon to the Chapman University School of Law Symposium. And the topic of this panel will be "Insights into the Day-to-Day Practicalities of Controlling Urban Runoff and Coping with Regulation." The Law School has assembled an excellent and prestigious panel to help you with the extremely valuable information on this topic that they have, and at the end we're going to give you a chance, if we do our jobs right, to ask a series of questions. However, in order to do that, I must go over the ground rules with you. For those of you that can't see, I have brought my Iron Man watch. That watch is there because the rules of the panel are I have no more than five minutes to do the introductions, and each of the panel members will have no more than ten minutes. And my Iron Man watch has a stopwatch on

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it. And so you will see me making various hand signals to make sure that we can give everybody a fair chance to present their materials.

I'm going to do a short introduction on each of the panel members. Folks, look at their C.V.'s. This is just a small introduction for highly qualified people. I could spend a whole hour going over their qualifications, and I just don't have the time.

We're going to start off with Ms. Michele Staples. Ms. Staples is a shareholder in the Law Firm of Jackson, DeMarco, Tidus & Peckenpaugh, and she's located in the Irvine office. Michele concentrates her practice in advising and representing developers, large land owners, agricultural businesses and private water suppliers in water and land use matters throughout the State of California. She is a member of the editorial board of the "California Water Law and Policy Reporter." Ms. Staples will speak first on the topic of the regulatory landscape in this area. She's going to give you an overview. This important information allows all the providers in this area to do their work, and she will explain the different boards that govern the work and the environmental protection agency. She will try to explain the permitting scheme and the regulatory approaches of the different regulatory agencies.

The next speaker will be Mr. Richard Montevideo. Mr. Montevideo is a partner with the law firm of Rutan and Tucker, who is sponsoring this event here today. And they are represented. And he is located in the Orange County office. Mr. Montevideo is currently the chair of the Orange County Bar Association section on environmental law. And for you students who want to get involved, this is the guy to talk to. He practices in the area of environmental law and specializes in Clean Water Act issues, Superfund and cost recovery litigation under the Comprehensive Environmental Response, Compensation and Liability Act, for us amateurs, CERCLA, the Resource Conservancy Act, RCRA, and the Hazardous Substance Account Act, known as the Superfund. Mr. Montevideo will talk on the genesis of the Clean Water Act and how it has, as he describes it, morphed into something that it was not necessarily intended to be; that is, as it applies to urban runoff and storm water. Further, he will talk about the intent of the Act as amended in 1987 so as to treat municipalities different than industries. And I was surprised to learn this. This was apparently a result of the recognition that cities and counties are not-for-profit entities and that all of our knowledge will lead us to a conclusion I didn't

know: They cannot stop the rain from falling in California.

Our third panelist will be Mr. Paul Singarella. Mr. Singarella is a partner with the Law Firm of Latham and Watkins and is assigned to the Orange County office. His practice focuses primarily on water quality and natural resources, as well as hazardous substances, contaminated properties, sediments, water rights, hydrology and environmental impact analysis and documentation. He will address the underlying sources of conflict in the legal arena in this area. He will include a discussion of what forces the regulated community to litigate. Mr. Singarella will also discuss how even in litigation the permit holders are made a part of the solution.

And he will then be followed by Mr. Dan Lafferty. Mr. Lafferty is employed with the Watershed Management Division for the County of Los Angeles Department of Public Works. Mr. Lafferty will provide us all with information on the local government perspective and amplify on the challenges of meeting regulatory demands when there are no technologies available to assist.

And last, but not least, is Mr. Garry Brown. Mr. Brown is the founder and executive director of the Orange County Coastkeeper. Mr. Brown will give us an overview of the Keeper movement, which is one of the most powerful environmental movements in the country. The Keeper groups used the citizen suit divisions of the federal Clean Water Act among other laws to promote change in industry and municipal practices with an eye toward water quality protection. It is anticipated that Mr. Brown will provide a pragmatic and practical view of his efforts in achieving improved water quality progress. We tried to get a good cross-section here for you. I think that the symposium organizers have done an excellent job. And I will turn the table over to Michele.

Michele A. Staples:

Thank you.

We wanted to start the panel with a discussion of who the players are in the storm water regulatory context. My presentation today will discuss first the storm water regulatory framework; second, who the players are and the stake holders; and third, the perspectives and tools of the Regional Board, the local agency permittees, the regulated developers and, of course,

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the environmental interests.

I'll also be talking a little bit about the special vocabulary that's used in this area of the law.

First, the regulatory framework. We heard a little bit about the regulatory framework this morning in the first panel, and we will learn more about it. The storm water recovery program really began in 1987 when Congress adopted Section 402(p) of the Clean Water Act to regulate municipal and industrial storm water dischargers under the national pollutant discharge elimination system.

The thinking was that a lot of storm water discharges through municipal facilities, like the open flood control channels that we've all probably seen throughout Southern California. Therefore, Congress decided that discharges could be regulated similar to discharges under NPDES permits that were applied to permit sources like municipal sewer treatment plans.

As a result, concepts developed in the 70's and 80's to regulate municipal sewer systems are now being applied to regulate storm water pollution. But there are significant differences. With treatment plants, the discharges are more predictable and the sources of pollutants are more predictable, while storm water occurs suddenly and in very large amounts. The pollutants in storm water differ depending on whether the storm water is flowing over streets and parking lots or agricultural fields and dairies or construction sites cleared of vegetation.

Municipalities use combined systems to capture and treat sewer discharges and separate systems to capture but not treat storm water. So storm water systems are known as municipal separate storm sewer systems, or MS4's.

Under the Clean Water Act, MS4 permits must require implementation of best management practices (BMP's) to reduce the discharge of pollutants to the maximum extent practicable. So another term that you hear in this area of the law is MEP. And MEP is essentially the performance standard that applies under the Clean Water Act to MS4's.

The MS4 permits require municipalities to develop a storm water management plan with the goal of reducing pollutants to the maximum extent practicable. The municipalities' plans specify the best management practices, or BMP's, that they will use to regulate discharge, such as public education and outreach, illicit discharge detection and elimination, and construction and

post construction inspection and monitoring.

Okay, next topic. Who are the major players and the stake holders?

The NPDES program is administered by the U.S. Environmental Protection Agency. E.P.A. has permitted almost all of the states, including California to issue NPDES permits. However, the states are subject to EPA's continuing oversight.

California established a water quality regulatory system even before the Federal Clean Water Act came into play. Under California's Porter-Cologne Water Quality Control Act, the State Water Resources Control Board has overall authority over water quality throughout the State.

Nine Regional Water Quality Control Boards have front line responsibility for implementing the NPDES program. The geographical boundaries of the nine Regional Boards have been drawn to consider differences throughout the State in terms of climate, topography, geology and hydrology.

Each Regional Board has nine part-time period members appointed by the Governor and confirmed by the State Senate. We heard from one of them today, Professor Minan, who sits on the San Diego Regional Water Quality Control Board.

The Regional Boards develop water quality plans for their hydraulic areas, issue NPDES permits, and undertake enforcement actions, among other activities. The Regional Boards each have an executive officer who is appointed by the Board. Communications with the Board members are restricted by ex parte communication rules so it's really important to know who the executive officer is, because they will be your primary point of communication.

The second major group of stake holders is the municipal permittees. In Southern California, NPDES permits for MS4's are commonly issued to groups of municipalities that comprise metropolitan areas, for example, the county and the cities within the county.

In Southern California, there is a lot of development occurring in the San Diego and Santa Ana Regional Boards, the fastest growing area in the country. And as Professor Minan mentioned, construction sites are regulated under both the MS4 permit structure and general permits, general construction permits.

Also because the MS4 permitting process is a public process, environmental groups and the public are also active in the

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Regional Board's permitting processes.

Third, what are the perspectives and tools of the different players? In the context of

regulating storm water, the primary tools of the Regional Boards are the basin plans that establish the beneficial uses and water quality standards for the water bodies within their jurisdiction and the MS4 storm water permits.

As MS4 permits are issued and renewed, it seems that each Regional Board starts with the last-issued MS4 permit, and then improves or makes the next one more stringent. So the rules in this area are continually tightening.

The municipality's principal compliance document is their storm water management plan. In Orange County, it's called their Drainage Area Management Plan, or DAMP. The Management Plans are essentially watershed based planning documents detailing how the municipalities will use best management practices to achieve storm water compliance.

Municipalities want the Regional Board to consider their local funding constraints in regulating storm water. They would like more time for implementing some of the requirements under their permits and consideration of costs versus benefits, the tremendous cost in relationship to sometimes intangible benefits of the program elements.

They also want more consistency in program implementation, both in terms of consistency between their last MS4 permit and their next one, and in terms of consistency between how different Regional Boards interpret certain requirements such as MEP.

This is particularly important for counties such as Orange and Riverside that straddle two or more Regional Boards.

From the developer's perspective, the most recent MS4's focused quite a bit on construction discharges. As a result, many of my developer clients are experiencing significantly, stepped-up enforcement for the first time, and even six figure fines are not uncommon.

In Orange County, for example, over 1,000 sites were reported out of compliance in 2003 and 2004 compared with just 400 the year before. The key compliance document for developers is the storm water pollution prevention plan. These are generally plans developed in-house or by consultants, and they're kept on the construction site. It's different from a document such as an environmental impact report that is developed in a very

public process with lots of public input.

Developers are finding that the one-size-fits-all storm water pollution prevention plan does not work. Individual construction sites are, of course, different from one another. But the construction site itself changes over time as the property develops. And so storm water pollution prevention plans, and the best management practices evaluated in them, should be updated from time to time.

The primary tools of the environmental groups are litigation and public input during the rule making and permitting processes.

As we heard, environmental litigation is successful in continuing to tighten and strengthen control over construction and municipal discharges.

Environmental interests also participate in the MS4 permitting process, pushing for more stringent regulations each time as part of the permits.

In conclusion, water quality regulation is extremely controversial because there is so much at stake; water quality of the public waters, the ability for municipalities to prioritize and use constrained public resources, and the ability of private developers to construct cost effective housing.

Every ambiguity in the law or regulation either has been or will be litigated as a result. Knowing the regulatory framework, the players involved, the tools available to them, and their concerns is critical to complying and improving upon the storm water regulatory system.

Thank you.

Richard G. Montevideo:

Good afternoon, everyone. This is for Garry. I was hoping he'd give me a little sympathy next time I see him in court.

All right. The Clean Water Act. Many of you may remember the Cuyahoga River catching fire in 1969. It actually got a lot of press. I think "Time" had a major article on it. It was in large part because of that event and other similar events which led to the development of the Clean Water Act in 1972.

Well, how did the Cuyahoga River catch fire in 1969? It wasn't the first time, frankly, it caught fire. You had a 100-mile-long river running through Northeastern Ohio with industrial operations lined up and down the river. And these industrial

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operations would have pipes, point sources, tying directly into the Cuyahoga River, discharging all kinds of terrible stuff. So you then had solvents and chemicals and petroleum kind of sitting there floating on top of the river. It caught fire and there was no good way to put out the fire.

So Congress decides to develop the Clean Water Act. I mean there was a precursor, obviously, but to deal with that type of situation, to deal with the industrial discharger who's got a pipe that's tied into the water discharging bad stuff into water that had been used for navigable purposes, for boating, swimming, et cetera.

And what Congress did was they imposed numeric limits, basically saying, "Hey the stuff that's coming out of your pipe, we want you to reduce the amount of bad stuff that's going into the river."

And they imposed—or had some provisions providing for States to develop water quality standards, which would apply at the front end and through TMDL's at the back end on industrial discharges.

You now have this same framework of the Clean Water Act that's being applied to municipalities, who are—as Justice Hayes indicated, are not-for-profit organizations, who really have no control or literal control—I know Garry would take issue with me—over the stuff that's eventually ending up in our nation's rivers and in lakes, et cetera, and who don't really have a conveyance system. They have a system of streets and private property and sidewalks that tie into a storm drain system, and these water quality standards are now being applied to municipalities, and they're being required to strictly comply with these water quality standards, in many cases for stuff that's just going into engineer flood control channels, concrete-lined flood control channels, which are now being given the same status as the Cuyahoga River.

It really in my mind is attempting to take this model which—in which the Clean Water Act was developed for these industrial discharges, it's attempting to put a square peg, frankly, in a round hole. It just doesn't fit.

Now, Michele had indicated that we have nine Regional Boards within the State of California. We—in your packet, I don't know if you have your information with you, but we had actually included a basin plan lawsuit that was filed in L.A. County just last month. And the premise of that lawsuit is really to say—Xavier I'm sure is very familiar with it. But the purpose

of the lawsuit is to say that municipalities are to be treated differently than industrial dischargers. And when States, in this case the L.A. Regional Board and the State Board develop water quality standards, they have to keep in mind who the discharger is and what control they have over the discharge.

It's our belief that municipalities do have to be treated differently under the law. And I say that based on several cases and some authority under the Porter-Cologne Act, as well as the Clean Water Act itself.

First you have the 1999 case of *Defenders of Wildlife versus Browner*. In that case the Ninth Circuit basically said, "Look, Municipalities—the Clean Water Act does not require Municipalities to strictly comply with water quality standards." It then went on to say, "However, for municipalities either E.P.A. or the States have the discretion to require municipalities to strictly comply with water quality standards."

You then have *BIA of San Diego versus State Water Resources Control Board*, which is a December, 2004 case, a State Appellate case, that took the *Defenders* case and effectively said, yes, municipalities can be required to strictly comply with water quality standards. It then took *Defenders* and went a little step further in my mind and said and they can be required to comply strictly with water quality standards, even if that means going beyond the maximum extent practicable standard under the Clean Water Act.

All right. Then you have the *Burbank versus State Water Resources Control Board* case, which is an April, 2005 case out of the California Supreme Court. And that Court looked at a POTW NPDES permit and looked at the arguments that were made by the City of Burbank and the City of L.A. where they argued that in issuing an NPDES permit for a POTW, the State is required to consider the economic impacts on the discharger.

In that particular case, the California Supreme Court said, all right, if you're looking at compliance with State law, the Regional Boards and the State Board have to comply with the requirements under State law if State law really goes beyond what the Federal law is trying to do. In effect, if it's not a Federal mandate that is being asked to be complied with, then, yes, State law has to be complied with.

The Court in that case actually remanded the case back down to the trial court for the trial court to determine whether or not the water quality standard in that case was a—was required by the Clean Water Act or was a State standard. And if the

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Court concludes that it's a State standard, then, in fact, the Regional Boards have to consider economic considerations in developing the—requiring compliance with the water quality standard.

So you have these three cases. You have the Defenders case, you have the BIA case and you have the Burbank case, and when you put them all together they basically say, look, the Clean Water Act doesn't require that municipalities strictly comply with water quality standards. Yes, according to the BIA case, they can be required to go beyond the MEP standard, but then when you throw in the Burbank case, in effect, you have the result that if they do go beyond what is required by federal law, i.e., the MEP standard, and then you actually have to comply with State law.

Now, State law, when you look at the Porter-Cologne Act that Michele had talked about, it's, in my mind, anyway, very clear. If the State is going to be issuing a water quality standard, it has to consider a number of factors, one of which is whether the water quality condition that you're attempting to achieve could reasonably be achieved. And there is this reference to reasonableness throughout the Porter-Cologne Act in various sections of the Porter-Cologne Act.

So if the State is issuing a water quality standard that exceeds the MEP standard under the Clean Water Act, then the Porter-Cologne Act is going to kick in, and you have to look at whether the standard is reasonably achievable in light of the discharger. You also have to consider the economic consequences of that decision. And beyond that you have to look at other factors, such as the impact on housing within the region.

So where does that leave us, then? Well, under the Clean Water Act, I think we have clear authority that the Act only requires compliance with the MEP standard when you're dealing with municipalities, and that under the Defenders case, that municipalities are to be treated differently, that Congress intended to treat municipalities differently than the Cuyahoga River dischargers.

Under the Clean Water Act it is still, I think, subject to debate whether a municipal can be required to comply with—strictly comply with water quality standards if that means going above and beyond the MEP standard. Can municipalities be required to unreasonably comply with water quality standards, to comply with impracticable best management practices?

I think at the end of the day we're going to see additional

cases on that, and my guess is at that point we're going to have a decision that says you can't make them in effect strictly comply if it means that you can impose unreasonable requirements on them.

And then finally State law, there isn't any decision on this yet, but, frankly, I think that at least for now in California I am comfortable that if a Regional Board seeks to impose requirements that require municipalities to strictly comply with water quality standards, that in that instance because municipalities are different than Cuyahoga River dischargers, you're going to get kicked into the Porter-Cologne Act, and the reasonableness requirements, economic factors, et cetera, are going to have to be considered.

Thank you.

Paul N. Singarella:

Good afternoon. I'm Paul Singarella from Latham and Watkins.

Just quickly going through my notes here, I think I can get through my ten minutes with the introduction of only one additional acronym. I make no promises, but I'll give it my best shot. And that acronym is ASBS. ASBS stands for an Area of Special Biological Significance.

I want to tell you a quick little war story about ASBS's. There are several dozen ASBS's up and down the State of California along the coast. They were designated by the State Water Resources Control Board back in the 1970's. ASBS's cover about one third of our California coast. In the 1970's when the State Water Board designated these special areas, the State Water Board didn't regulate storm water through a permitting approach.

And so when California Ocean Plan with respect to these ASBS's areas had a rule introduced in 1970's that said there shall be no waste, no waste whatsoever, discharged into ASBS's, the State Water Board was not thinking that that would ever be applied to storm water. This is fairly well accepted. The State Water Board thought that the prohibition, this outright prohibition would apply to industrial discharges or municipalities discharges from treatment works directly into ASBS's. But I think it's safe to say that the State at the time understood that as one of the themes has been this morning, when the rain falls, that water has that nasty tendency to roll downhill, has that

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nasty tendency to intercept that which is in its way, and, quite frankly, when it comes out of the sky it is not pollutant free. So it was recognized that what was going to enter into these ASBS's water sheds along the State of California would not be pristine storm water.

So flash forward to this decade. And this waste prohibition in the California Ocean Plan governing these special areas has been a sleeping giant. Because until recently, it never occurred to the State Water Board that oh, my gosh, with the 1987 change in the Federal Clean Water Act bringing storm water under the National Pollutant Discharge Elimination System, the permitting program, Section 402 of the Clean Water Act, by doing that in 1987 that means that we're going to have to apply this waste prohibition to storm water entering into one third of the State's coastline.

That's a bit of a problem, depending on how you interpret the waste prohibition. Now, the way we're seeing the interpretation coming out of the Central Coast Regional Board last year in the issuance of some orders in its cities like Carmel, what we're hearing from staff at the State Water Board up in Sacramento—we're not quite hearing it yet as official statewide policy because the State Water Board is going to rule on this probably later this year. But what we're hear is that no waste means no storm water, or at least no storm water with any molecules of those pollutants that are picked up along the way.

Well, that is breathtaking. And it's created some very significant controversy over this one particular runoff issue. And to me, it illustrates the tension that we have in the urban runoff area, runoff into the water quality area dealing with storm water of the lofty goals that the legislature often sets out when it enacts legislation. Look at the Clean Water Act. You know what the broad purposes of the Clean Water Act are. They are to preserve, protect, and restore the biological physical chemical integrity of the Nation's waters. My goodness, as someone said earlier, to eliminate the introduction of pollutants from point sources into waters of the United States by 1985? Well, we know that that didn't happen. But that is certainly and obviously a broad purpose of the Clean Water Act.

What's happening at least in the ASBS area—and I wanted to use that as an illustration, I could give you many others—is that in this area where it's our water quality, it's very emotional, it's visceral. Regulators want to do the right thing. Judges want to do the right thing. You know, you read the broad purposes in

the statute, and you think my goodness, stricter regulation seems to be better regulation. But the reality is that our legislatures in D.C. and here in California, they lay out the high-minded broad purposes. But then there is a debate, there is a legislative debate and out of that legislative debate comes policy. And what does the policy say with respect to urban runoff, with respect to storm water. The policy says do everything you practically can, get as many of the molecules out. But we recognize that we've got a big problem here, and we recognize that no matter what you do in terms of the best management practices that we've been talking about, no matter what you do, you're not going to get compliance with water quality standards 24/7, 365 days a year. That's a reality that the legislators had to deal with. So they said to the cities, they said to the dischargers of the storm water, do the maximum extent practicable.

Now, let me give you a quote from a Supreme Court case, 1986. It's a banking case, but it illustrates the difference between the precatory language, the broad purposes language and the underlying plain statutory language reflecting policy decisions. In the Supreme Court in 1986, with a banking issue in front of it, the Court was able to distinguish one from the other, and the Supreme Court said: "Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address, and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." 474 U.S. 361, 373-74.

Here's the thing. When you move over into water quality, something that's a little more visceral than banking, it's much harder to ask regulators, it's much harder to ask jurists to draw this distinction. But unless they're willing to draw that distinction, we're going to be left where we are today. From the perspective of the practitioner representing the regulated community, we don't have today a meaningful compliance opportunity with respect to urban runoff. Because everything you've heard about today, everything that anybody can think of asking us to do, other than capturing all of the storm water and taking all of the pollutants out of it, will not get you to that state

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of compliance with the water quality standards.

And that, my friends, is a public policy problem and challenge of great dimensions. And we're going to be continuing to wrestle with this for I think probably at least the next five to ten years as we try to define how you can get the compliance. My clients, Rich's clients, Michele's clients, we want to comply, but simply by implementing best management practices, even if they're big and beefy, restoring constructed wetlands through entire watersheds, that's happening right now in the Newport Bay watershed, doesn't get you there, doesn't get you to a place where regulators can say with confidence that if you keep doing that, you're in compliance. And that's the problem.

Dan Lafferty:

My name is Dan Lafferty. I work for the Los Angeles County Department of Public Works in the Watershed Management Division. We've heard a lot today about the regulations and what makes for a good regulation, some of the things we should be thinking about when we create those regulations.

My agency gets to live with it when it's all said and done. We get tasked with doing the work that will bring compliance with those regulations. So I thought what I'd do is try to give you a sense of what it is that we do. The level of effort that we expend trying to comply with those regulations, some of the difficulties that we see sort of looming on the horizon as these regulations become more and more stringent, and just sort of a sense of where we think some of the things are a little too far a field in terms of the scope of these regulations.

Los Angeles County is a political entity. We have an NPDES MS4 permit. It regulates the County of Los Angeles, the Flood Control District and the 84 municipalities within the County as permittees. The Flood Control District is the principal permittee on that permit. My agency is the sort of embodiment of the Flood Control District within a County department. So in a sense, we represent two of those permittees at the same time, the County and the Flood Control District.

The County as an entity spends \$65 million a year just on permit compliance. The region as a whole, the County region as a whole, when you consider all the permittees, spends \$225 million a year on permit compliance activities. We've had a permit in place for about 15 years now.

And despite all of those expenditures, we really haven't seen

a very significant improvement in water quality. Now, what does that say?

First, we are doing a really bad job of spending the money; or, second, what we are doing is not addressing the problem and the regulations that we are being asked to do are not providing the benefit that everybody expects from us. I think what that tells us is that there is a very good reason and there are some signs in the TMDL process that if we go out and establish the TMDL's that those are probably going to be a more effective approach in terms of trying to get the water quality we're looking for. Now, having said that, I would not in any way, shape or form advocate that you support TMDL's on top of my agency, but I do think that it does make some sense.

Okay. So let's talk about TMDL's for a second. There is a trash TMDL that is effective in L.A. County. There is a Santa Monica Bay Beaches bacteria TMDL that is effective. There is a metals TMDL. There is a trash TMDL in the San Gabriel River. So that is just a handful that have been passed, developed and adopted to date.

Let me give you a little insight as to what it takes to comply with some of these provisions. The Santa Monica Bay Beaches bacteria TMDL has two components: dry weather and wet weather; dry weather running from April 15 to October 15th, and wet weather the other part of the year. In order for us to comply with the dry weather prohibition, what that says is there can be zero days where there is bacterial level above the water quality objective. Now, we say that, but what that really means for us is we cannot have a discharge that contributes to an exceedence. There may be bacteria out there that cause an exceedence, but we can't be the cause of that. We can't be a contributor to that. So the knee jerk response from an engineering organization is to stop the flow.

Now, in the South Bay in the southern portion of the Santa Monica Bay, we have options available to us for that. Basically, that means developing an inter-tie between the MS4 system and the municipal separate MS4 sewer system into the sanitary sewers. So you build a cross-connection. You build up the flows in your pipe during the nighttime hours where there's capacity available in the sewage treatment plants, you pump it into the sewer lines and lo' and behold, there is no charge in the MS4 system into the beach habitat. That's great when you have sanitary sewers.

But this TMDL also applies in the Malibu area. The entire

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reason there is a City of Malibu is because they did not want the County of Los Angeles building a sewage treatment plant. Therefore, there are no sewers.

There is also very little geology that that is conducive to infiltration. Some of the more innovative engineering approaches that we are familiar with simply do not work; this is because you do not have the geology necessary in place.

So the—most of those diversions that we are building, one of those costs about a million dollars for design and construction. There is a grand total—when you add up what the County has done and what the City of L.A. has done, there's going to be 32 of those low flow diversions, so that's \$32 million of investment.

There is also up in the Malibu region what we're doing for one of the canyons that is truly problematic. It is the one canyon where we get consistent spikes in bacteria counts. We're building a pocket plant. In essence, it is taking all of the summer flows and treating them and then discharging them to the ocean. That's another million dollars for that particular project. And that's just the dry weather compliance costs.

The wet weather is anybody's guess as to how we're going to get there. When you start thinking of the L.A. River during flood stage and try to grab hold of some of that water to treat it, it becomes a truly daunting problem in terms of volumes. Now, granted we have—the bacteria TMDL exception allows us during flood stage to not be subjected to those requirements, because it's unsafe for anybody to be in there and have body contact. So that sort of drives that bacterial TMDL. But that's bacteria only. The estimated cost for wet weather compliance for us in that TMDL is about \$175 million. And that's the low end from our perspective.

That brings us then to the metals TDML. L.A. River metals TMDL has recently passed, let's see, the State board. It hasn't yet been adopted by E.P.A. but it's coming. The limits in that particular TMDL from any of the constituents are well below the limits that we would allow in drinking water. Now, there's a reason for that. Fish are more susceptible to the toxic effects of heavy metals than human beings are.

But from a public policy standpoint, if you are a public agency and you have to go to your constituents and explain to them why you need more money and you're saying you have to build treatment facilities that will treat the storm water at levels above drinking water standards, that is a very difficult concept to tell people that they need to pony up the money for it. But that's what we're confronted with.

Now, the true challenge here is that in addition to having those sorts of levels to treat to, the technology does not exist today for us to do that. There aren't any means for us to employ to get those levels down to what we're being asked to get to.

Part of the rationale for is that is if you invest the money, then the private sector will come forward and meet those market demands. I think the question ought to be asked, though, is that the public agency responsible to drive that process? As has been said, we are not a for-profit entity. Is it appropriate for us to take those scarce public dollars and drive the market to achieve the technologies necessary for these pollutant reductions? I throw that out there, I can see arguments on both sides of that issue.

The other thing is from an agency perspective, how are we going to be held accountable for those things? You know, we have the permit in place. Now we have TMDL's. Down the line we have the ASBS issues staring us in the face, as well. The provisions in the TMDL's that get adopted during the five-year circle of our permits, in the next permit cycle those provisions that are going to take place in the next five years get rolled in. Now, we don't have much of a problem in terms of that being an approach, because the way that we are complying with the TMDL's is a computer-adapted TMDL approach.

However, there still needs to be, in my opinion, that limit of MEP. At some point in time we're done. At some point in time the next incremental dollar that's going to get spent cannot be justified in terms of the benefit that you're going to get. So if you keep going through your computer playing cycles, you keep putting in BMP's, at some point you've got to say you know what, that's enough. We're at 80 percent reductions, we can't get to 100. It's just too costly. We have other things that we need to spend the money on. But that's not the way our permits are set up. You heard in terms of there is progress that is being made in the legal arenas in trying to define what all those—those standards are. We don't have MEP solidly in place in terms of a limit. You couple that with the limitation of the safe harbors language in our permits, which used to say if you were doing everything that you're supposed to be doing under this permit, you are deemed to be in compliance with your water quality objectives, that provision is no longer in our permits. And I don't think it will ever again reappear in our permit, which now says if you are out of compliance, you can be potentially subjected to third-party lawsuits. So I think that if you look at all of those, that the challenges in front of us are extreme.

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In terms of raising money. It's hard in California to raise new money. All the efforts to date are there is no new money for that. And if these new regulations come forth, it's going to be just that much more costly.

Thank you.

Garry Brown:

Good afternoon. I appreciate the opportunity to be here.

And I always like to start by reminding people why we are having this discussion. And you know, Orange County, for an example—and it's a fact that I love to remind people that not that many years ago, in 1950, the population of Orange County was 204,000 people for the entire County. 56 years later, we're at 3 million. In our watershed, including the Inland Empire, which is one of the fastest growing areas, we're close to five million. And so we're talking about this because the casualty of the rapid development we've had is impaired waterways, impaired harbors, and certainly our near-shore waters.

I think, though, to—what really motivates me and what got me to found the organization we do and to actively use third-party lawsuits and the Clean Water Act to effect change is, you know, I am a native of Orange County, and I grew up here. And, you know, the things that I did as a kid growing up here my sons in one generation cannot do, because the things I used to do and experiences I had don't exist anymore.

I think when you look at—you know, when I grew up in Anaheim there were so many abalone around that every ashtray in a restaurant was an abalone shell. People had them in their gardens. The man down the street from me had so many abalone shells, he embedded them in the wall around his house, because you could free dive and get them. When I was growing up we would go down to either pier and we could bring in as many halibut and bonita. I remember way back in the Backbay in Newport I caught a barracuda one time. And I remember as a young guy following my dad on the beach pulling a gunny sack full of clams we dug up on 41st Street. And so in my generation all of that disappeared. And so it makes you think.

You know, nobody's going to stop development. We're obviously going to have more development. And I think a lot of us, or most of us are proud of what Orange County represents and is today. But there have been casualties along the way.

So what we do and how we change policy to look at the

future and virtually plan it better. And so I think that is what we're about. But I want to get into in a second that there has to be a reasonableness of the process, and that's something that's certainly what we have tried to do.

A little background on the Keeper organization as a whole. It started on the Hudson River. And there was a group of fishermen, some second and third generation fishermen that were going broke and losing their fishing vessels because the fish were disappearing. They got into it one night they agreed to meet at the gentleman's house, John Cronin, and they floated all kinds of interesting ideas how to stop polluters, most of which were illegal and felonies.

There happened to be a gentleman in the audience who was the editor of "Field and Stream Magazine" and he pointed out that not too many years prior the Clean Water Act had been signed, there was a provision for third-party lawsuits; and maybe using the law, maybe they could effect change.

So they banded together and started observing what was going on the Hudson River. They collected evidence and identified who owned pipes that were draining into the river. They put a boat on the water and observed what was going on in the water. And if I had more than ten minutes, I'd tell you some of the stories, because they're interesting. What they did is collect a body of evidence. They went to their attorney who reminded them that since they were doing so bad economically, as was he, he couldn't afford to do any legal work for them.

So at the time Robert Kennedy basically had left New York and had been assigned to go up to Pace University Law School to lead the environmental clinic. And they took their body of evidence to Bobby, and he went to a federal judge and got permission to use his senior students, allow them to—under his supervision to file environmental cases in real court under his supervision. And as Bobby likes to say, and it was really easy to judge. Those that won the cases got A. And those that didn't got an F. And so that was the beginning of the Keeper movement.

When I got involved and started, we were the 29th Keeper in the country. And now we're international. And as of last month, we have 157 Keeper programs. And it has been one of the fastest growing organizations in the country. And a lot of people haven't heard of us because we really shot ourselves in the foot, granted, because unlike Surfrider, unlike NRDC, where everybody has the same name, we have 156 Keepers and 156 different names. But somewhere in it, you'll find Keeper because we identify by a

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water body.

But basically to be a Keeper—we're all independent, but we can set our own agenda. But one of the criteria is you have to be willing to litigate and have the capacity to litigate.

And certainly we—let me take it to Orange County. We have found—we have a number of programs, education programs, we have restoration programs, we do a lot of water monitoring. We have become one of the water monitoring arms, I guess, through a number of programs with the Regional Water Quality Control Board. All of our data goes to them. And that's what they're using in several areas to establish TMDL's. And we have our own water lab. And so we do a lot of protocol, and we work well with that. We don't really depend on volunteers. We pay people to do it. Because we want to have credibility in the evidence and in the numbers and data we get.

But just take Orange County. We've been able to effect quite a bit of change through third-party lawsuits. And certainly it's something that there is a role and certainly it has elevated our organization to be a player in this debate as you see it.

When we were very young, we weren't even a year old, we basically filed a Federal Clean Water Act lawsuit against the Irvine Company in Crystal Cove for the ASBS, and we were basically challenging the right to drain all those, as we used to refer to them, as the McMansions, across the beach and into an area of special biological significance. We were the first to ever really use that in the State, to ever use that 35-year-old law. And we found that—what that did, we not only prevailed there, and we found a reasonable solution to the ASBS problem. We wish the State of California and the rest would follow suit and find a reasonable solution, because we feel we have a model for it.

As far as the construction permit, we have enforced the construction permit on a number of developers, and we've seen a vast improvement. And when we first got involved, we saw very little sandbagging, very little ground protection on the hillsides. And then we graduated from that, we feel the industry graduated from that to—to where they would install it when they started construction but would forget to maintain it after a few rainstorms. And it pretty much lost its effectiveness.

We did a few other lawsuits after that, and now in our more recent inspections—of course when we get better rain we'll know—we found that the industry has in this region done an excellent job, and definitely those areas have improved.

Certainly we're involved with the storm water permit. The MS4 permit has been discussed. We have a problem sometimes with MEP. We think maximum extent practicable; some people interpret that as do the least for the cheapest. And so we are prone to more numeric standards on discharges. And we feel with this next round of permits, that's an area that we're real anxious to open up and to—but again, it's got to be reasonable, and it's got to be practicable. And we contend that impossible goals really get us nowhere. And that's something that we're trying to lead our side of the table to basically become a little more practicable. And it's great to be passionate, it's great to want the maximum, but, yet, you know, if it's not achievable and if it's not at all affordable—and in many cities it's virtually impossible in the near future, then, you know, we have got to lower our standards and be a little more patient and we've got to work for reasonable goals. And that's something that we have done and demonstrated I think in a number of cases.

Well, I'm out of time, but I would like to introduce—because the Inland Empire is such a growth area and the upper watershed is certainly integral to what happens down in our watershed, that is our upper watershed, we just this year opened up and got licensed in a new program, and it's called the Inland Empire Waterkeeper. And that program is going to replicate so much of what we're doing in its chapter, and we're funding it. And I'd like to introduce her. We're proud to announce that in November we hired Mandy Revelle as our Inland Waterkeeper. And she's an alum of Chapman both an undergraduate and Chapman Law School here. So we're glad to have Mandy onboard. Thank you.

Judge Michael Hayes:

First I think we ought to give the panel a big round. I was sitting here and some of you may not realize that apparently these proceedings are being taken down by the court

reporter. Am I correct? Let's give the court reporter a hand.

Now, while we do that I want to make sure if you ask any questions, you stand, speak quickly and slur your words and that will help her. Does anybody have any questions for the panelists? And I'm going to go half of everybody in front of me, and I'm going to look over and get some of the students that are sitting in the cheap seats over there. Anybody have any questions?

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Voice:

Yes, sir. Well, I suppose I have some observations about the presentations. One is I don't think that we have a complete understanding of what water quality standards are. Paul made an argument that water quality standards can't be met. It seems to me that it's important for us to appreciate that the structure of the Clean Water Act is contained in Section 301 of the Act, and it deals with point source dischargers. Congress said we're going to impose certain limits on the discharge, but Congress also said that we're going to have water quality standards as a back-up or insurance policy. We're going to require the States to designate certain beneficial uses, and those beneficial uses are going to be protected. Congress recognized the fact that you can place limits on the discharge point sources, and ultimately at the end of the day have a compromised water system, because it doesn't take into account the ambient effects of the discharge. So water quality standards I think are an essential part of the Clean Water Act. And the permits in our region provide that water quality standards cannot cause or contribute to an exceedence of the standard. So we don't want—if the beneficial use that we're interested in protecting is swimming, we don't want to say, well, we can't meet it through the storm water permit, so we're going to have to disregard the beneficial use of swimming. We need solutions. And I think the water quality standards are an important component of the storm water program so that I suppose I would express a contrarian view to that expressed by Paul Singarella.

The other point is about money. It's taken us 150 years, depending on how you want to count, to create the problem. The—in the past our founding fathers and mothers and those who preceded us thought that dilution was the solution to pollution. We could dilute the pollution. So we've had this long period of time in creating the problem. And I don't think that we can expect immediate results.

And I suppose I would ask the question rhetorically. What would our water quality look like if we hadn't spent the money in the last number of years to administer MS4 permits and the other storm water permits? And I think the answer to that is it would be terribly more compromised than it is today. So that the argument that we don't see an immediate return on the investment of monies for storm water regulation doesn't take into account what the water quality would be like if we didn't make that expenditure, nor does it consider the fact that over the long term we've created this problem, it's going to take us a long

period of time in order to work our way out of the problem. So those are just some comments.

Richard G. Montevideo:

I wouldn't mind throwing in a tidbit. I would actually agree with the commenter. The only thing I would point out is the mold that we have is designed to deal with something coming out of a pipe. And most of my clients' concern is that mold really doesn't work.

We need to look at—we can't simply have a municipality start constructing large treatment plants throughout the Country. I'm not even sure people really want that. I didn't hear Gary say he really wanted that.

So my view is that we got to come up with a—some changes. And whether it's through MEP or actual legislative changes by Congress to come up with a better way to deal with the storm water urban run-off problem, to me it's a different problem than the Cuyahoga River problem.

But yet we're using the Cuyahoga River framework to deal with the municipal problem. And if we keep doing that, we're going to be spending money not only on lawyers and litigation, but on programs that don't really fit. Now, I'm not saying that we have the answers, but I think that we need to work together to come up with a solution, to come up with BMP's to start addressing the urban run-off problem.

I don't think the Clean Water Act was designed to deal with the urban run-off problem.

Judge Michael Hayes:

I'll take one more question, and then we have to cut it. I'm sorry.

Xavier Swamikannu:

I have a comment to what was just said. I think what's important is really the receiving model. ASBS, for example, there's an objective you want to protect. And whatever the source of the pollutant, you have to deal with it within the legal frame that you have. What you have right now is the NPDES Program. It treats storm water as a pipe because the conveyance system in the end is a pipe that out-falls to an ASBS or a water

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body. I think in terms of solution and time, perhaps we ought to comprehensively think about how we get there. But I don't agree that the framework doesn't apply. I think the framework applies because it is objectively oriented. It is outcome oriented.

Richard G. Montevideo:

Well, actually—and today there's something to do with the Los Angeles Regional Water Quality Control Board. Are you still in charge of the permitting program with the Regional Board?

Xavier Swamikannu:

Yes.

Richard G. Montevideo:

And Xavier and I have had discussions, let's put it that way, in the past.

I actually don't disagree with you except for my client's point is the fix that's in place under the Act is just—it doesn't fit the mold for municipal storm water.

Yes, you are as a regulator charged with the responsibility of looking at the receiving waters, looking at the beneficial uses to determine whether or not those beneficial uses are being repaired. And whether it's coming from storm water versus the Cuyahoga River dischargers, you're right. In your mind there's really no difference.

And that's the point. The point is Congress, generally speaking, in 1987, 25 years after the Act was adopted said, hey, oh, by the way, we need to apply this to municipal storm water discharges. But what did they do to the Act? Virtually nothing other than to say yeah, it applies now.

So you have the same water quality standard restrictions that are now being imposed by your Regional Board and Regional Boards up and down the State. It's just now taken—that were developed to apply to industrial dischargers. They're just slapping them down and saying, okay, how can we comply.

Something else has to be done. What it is I don't know.

But the present system just isn't working. That's why we have all this litigation. I think it requires a further analysis of what MEP is supposed to be, maybe some additional regulations, probably, frankly, having Congress look at it. But God knows

when that will happen.

In the meantime we're going to have additional litigation, hopefully some additional Federal Court decisions that are going to help us all along the way until we raise the level enough where Congress finally says all right, we need to get into the mix of this and figure it out.

Paul G. Singarella:

Just to impose, the challenge here is the compliance or the lack thereof. If discharges from municipal public treatment works, big waste water plants it's pretty clearly defined what you've got to do. You go to second free treatment. Waste water treatment has been around since the turn of 1900's, over 100 years old. And the storm water arena, whether it's right or wrong, exception of the regulated community is that there is no available compliance kit. That creates uncertainty, it creates tension, and it creates conflict. I'd love to have my compliance kit presented to me by the Regional Board, take it to the—my client and then say, you know what, I'll go fishing.

Judge Michael Hayes:

Ladies and gentlemen, it's my sad duty to report that we have not reached a comprehensible report or solution to the problem, but hopefully we'll take some of the tools of information we've got and we'll get closer to that solution. At a future symposium maybe we can declare it a—one achieved gold. Thank you for coming and enjoy the rest of your program.