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April 18, 2014

No.:	14-80055
D.C. No.:	2:09-cv-04045-DMG-PLA
Short Title:	Environmental World Watch, Inc, et al v. The Walt Disney Company, et al

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Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under 1292(b).

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The file number and the title of your case should be shown in the upper right corner of your letter to the clerk's office. All correspondence should be directed to the above address pursuant to Circuit Rule 25-1.

CASE NO. [ ]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL WORLD WATCH, INC., *et al.*

Respondents-Plaintiffs,

v.

THE WALT DISNEY COMPANY; WALT DISNEY ENTERPRISES, INC.; DISNEY WORLDWIDE SERVICES, INC.

Petitioners-Defendants.

On Appeal from the United States District Court for the
Central District of California
Civil Case No. 2:09-cv-04045 DMG (PLAx)

DEFENDANTS' PETITION FOR PERMISSION TO APPEAL THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER PURSUANT TO 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner-Defendant The Walt Disney Company states that no parent corporation or publicly held corporation owns 10% or more of its stock.

Respectfully submitted,

Dated: April 18, 2014 By: /s/ Garrett L. Jansma
GARRETT L. JANSMA
Counsel for Petitioners-Defendants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner-Defendant Disney Enterprises, Inc. discloses the following parent corporation or publicly held corporation that owns 10% or more of its stock: The Walt Disney Company.

Respectfully submitted,

Dated: April 18, 2014 By: /s/ Garrett L. Jansma
GARRETT L. JANSMA
Counsel for Petitioners-Defendants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner-Defendant Disney Worldwide Services, Inc. discloses the following parent corporation or publicly held corporation that owns 10% or more of its stock: Disney Enterprises, Inc.

Respectfully submitted,

Dated: April 18, 2014 By: /s/ Garrett L. Jansma
GARRETT L. JANSMA
Counsel for Petitioners-Defendants

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Pursuant to 28 U.S.C. § 1292(b), Petitioners-Defendants The Walt Disney Company, Disney Enterprises, Inc.,[1] and Disney Worldwide Services, Inc. ("Disney" or "Petitioners") respectfully seek leave to file an interlocutory appeal from an order of the District Court originally dated September 23, 2013 (D.E. # 378), which was amended by the District Court on April 9, 2014 to certify such Order for interlocutory review pursuant to 28 U.S.C. § 1292(b). (D.E. # 429, the "Amended Order.") The Amended Order concluded that the Disney Studio Lot in Burbank, California ("Studio Lot") is a commercial facility—*i.e.*, not an industrial facility—and granted Disney's motion for summary judgment as to Respondents'-Plaintiffs' claims under the Clean Water Act ("CWA") regarding Disney's *storm* water discharges. But the Amended Order denied Disney's motion concerning certain *non-storm* water discharges—specifically, discharges of runoff from landscape irrigation and fire-line flushing from the Studio Lot. On April 2, 2014, the District Court ruled that the question presented by this portion of its ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that interlocutory appellate review will materially advance the termination of this litigation.[2] This petition is timely filed within ten

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[1] Disney Enterprises, Inc. was improperly named in the complaint and amended complaints as Walt Disney Enterprises, Inc.

[2] *See* D.E. # 428. The District Court granted Disney's Motion to Amend the Court's September 23, 2013 Order Denying Part Defendants' Motion for Summary

days of the Amended Order. *See* 28 U.S.C. § 1292(b).

INTRODUCTION

The issue certified by the District Court and raised in this petition concerns whether landowners must have a National Pollutant Discharge Elimination System ("NPDES") permit for landscape-irrigation runoff and certain other non-storm water discharges that EPA describes as "commonly occurring," "characteristic of human existence in urban environments," and of a type that does "not typically pose significant environmental problems."[3]

To avoid the "administrative nightmare" of requiring federal NPDES permits for every parking lot, gas station, store, business, industry or home in America—a specter that Congress expressly warned against when adopting the CWA's storm water provisions[4]—the EPA adopted regulations that reasonably distinguish between prohibited and conditionally-authorized non-storm water

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Judgment to Certify Such Order for Interlocutory Appeal Pursuant to U.S.C. § 1292(b) (D.E. # 396) and stayed the action pending appeal. Copies of the September 23, 2013 Order ("Original Order"), the April 2, 2014 Order ("Order Granting Disney's Motion to Amend"), and the April 9, 2014 Order ("Amended Order") are attached to this petition as Exhibits 1-3, respectively.

[3] Preamble to EPA's Phase I Rule, 55 Fed. Reg 47990; 47995, 48037 (Nov. 16, 1990).

[4] *NRDC, Inc. v. County of L.A.*, 673 F.3d 880, 894 at n.6 (9th Cir. 2011) (citing 131 Cong. Rec. 15616, 15657 (June 13, 1985) (Statement of Sen. Wallop), *rev'd*, *L.A. County Flood Control Dist. v. NRDC, Inc.*, 133 S. Ct. 710 (U.S. 2013), *remanded to NRDC, Inc. v. County of L.A.*, 725 F.3d 1194, 1197 (9th Cir. 2013)).

discharges.[5] Whereas most non-storm water discharges must be "effectively prohibited" by municipal permittees under the Act[6] and its implementing regulations and are illegal under CWA Section 301(a)[7] without an NPDES permit, a small universe of non-storm water discharges are conditionally authorized and do not require NPDES permit coverage unless and until the municipal permittee (*e.g.*, the City of Burbank) or the permit-issuing agency (*e.g.*, the Los Angeles Regional Water Quality Control Board ("Regional Board")) formally designates them as "significant sources of pollutants" and thereby removes their conditionally-exempt status.[8] Because Petitioners' runoff from landscape irrigation and fire-line flushing fall within the category of conditionally-authorized non-storm water flows, and because these flows are not identified as significant sources of pollutants by the Regional Board or Burbank, Disney does not require an NPDES permit for them.

In the Amended Order, the District Court held that "*all* non-storm water discharges containing pollutants" that flow through a municipal storm drain into a

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[5] The terms "conditionally-authorized," "conditionally-exempt," and "allowed" are each used in regulations or related guidance to describe certain types of non-storm water discharges that are generally innocuous and not subject to the effective prohibition requirement of the CWA. All three terms are used interchangeably herein to describe those types of flows.

[6] CWA § 402(p)(3)(B)(ii); 33 U.S.C. § 1342(p).

[7] 33 U.S.C. § 1311(a).

[8] The term "pollutant" is defined broadly under the CWA, and includes heat, sand, and even cellar dirt. 33 U.S.C. § 1362(6). As runoff flows over landscaping, roads and other surfaces, it necessarily will entrain "pollutants."

jurisdictional water—including landscape-irrigation runoff and other non-storm water flows that generally are exempt from the CWA's "effective prohibition" requirement—are subject to an "independent permitting requirement." (Amended Order at 28:3-17) (emphasis added). The District Court further held that the conditional authorization allowing these particular non-storm water discharges apply only to municipal permittees, not to individual dischargers. *Id.*

Each of the criteria for interlocutory review is satisfied in this case. As the District Court recognized, whether EPA regulations conditionally authorizing these routine discharges benefit the landowner whose irrigation water reaches the storm drain as well as the municipal permittees that operate the storm drains is a pure question of law as to which there is substantial ground for difference of opinion. The District Court's holding also is without precedent; it runs counter to long-standing interpretations of the CWA by the federal and state agencies charged with implementing the non-storm water provisions—agencies whose interpretations demand deference under *Chevron.*[9] Immediate appeal also may materially advance the ultimate termination of this litigation. Should this Court conclude that the conditionally-authorized non-storm water flows at issue may be discharged to a permitted municipal separate storm sewer system ("MS4") without a separate NPDES permit, there will be no need for a complex trial concerning whether

[9] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (U.S. 1984).

pollutants entrained in these flows reach jurisdictional waters.

In addition to satisfying each of the Section 1292(b) criteria for interlocutory review, this petition presents the exceptional circumstances of the sweeping policy consequences inherent in the Amended Order. The Amended Order would fundamentally—and, Disney respectfully submits, improperly—overhaul the existing regulatory regime by requiring millions of commercial businesses throughout the United States to obtain federal NPDES permits for the first time.[10] Whereas EPA's regulations contemplate that these routine and unavoidable discharges will be regulated by local governments under municipal NPDES permits, the Amended Order threatens to create exactly the administrative nightmare that Congress warned about and which the EPA regulations were specifically meant to prevent.

Respondents have suggested that this case represents a run-of-the-mill application of the CWA confined to Disney and its Studio Lot. But the parties are not aware of *any* instance, in the more than 40-year history of the NPDES program, where *any* agency issued *any* person or commercial facility an NPDES permit solely for landscape-irrigation runoff. And since the Amended Order is not limited in scope by the volume of a given discharge, the concentration of pollutants

[10] As discussed in Disney's Motion for Summary Judgment (D.E. # 189 at 3:9-15), the Studio Lot is one of approximately 600 commercial facilities in Burbank alone that could be subject to such a ruling.

in the discharge, or the category of property making the discharge, schools, churches, homeowners, government entities—indeed, anyone who waters lawns and sends some "pollutants" into a municipal storm drain and on into a jurisdictional water—will face the Hobson's choice of shelling out the hundreds of thousands of dollars that Plaintiffs' own expert opined would be required to cover the costs of obtaining and complying with an NPDES permit, or simply allowing their landscaping to die once the water is turned off.[11] This is the nightmare that Congress and the EPA deliberately avoided when legislating the CWA's storm water provisions and creating the regulatory regime. Disney respectfully requests that the Court grant this petition to resolve this controlling legal issue.

QUESTION ON APPEAL

As set forth in the Order Granting Disney's Motion to Amend, the District Court certified the following question for immediate appeal:

> Under the CWA, if non-storm water discharges—specifically, irrigation runoff and fire line flushing—generate runoff that flows through a "point source" into a municipal storm drain, must the discharger obtain a federal National Pollutant Discharge Elimination System ("NPDES") permit if the runoff entrains "pollutants" that ultimately are conveyed to "waters of the United States," even if the

[11] The District Court recognized the substantial policy implications of the September 23, 2013 Order during the hearing on certification: "I am certifying the question" because the Amended Order would send "Disney down the path to get a permit that nobody else has when we're all sitting here without a binding case telling us that it's required for this." (March 21, 2014 Hearing Transcript (Exh. 4) at 14:11-15:2.)

discharge is into a municipal separate storm sewer system ("MS4") for which another entity holds an NPDES permit?

FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

Disney's Studio Lot consists primarily of office buildings, motion picture production facilities and supporting infrastructure. Storm-sewer management practices at the Studio Lot are similar to those at commercial facilities throughout California. Runoff from rain ("storm water"), and landscape-irrigation water that occasionally seeps beyond the facility's lawns and gardens ("non-storm water"), each flow into the Studio Lot's storm sewer system and ultimately discharge into Burbank's MS4. In turn, the Burbank MS4 connects to the Los Angeles River—a water of the United States. Burbank is a signatory to the LA MS4 Permit[12]—an NPDES permit issued by the Regional Board pursuant to the EPA's storm water regulations and the CWA's storm water provisions.

Disney's discharges from the Studio Lot are regulated by Burbank's storm water ordinance, which is incorporated into a waste water discharge permit issued to Disney by the City of Burbank ("Permit 1168"). Disney's compliance with Permit 1168 is enforced through regular reporting and City of Burbank inspections.

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[12] *See* Exh. 8 to Disney's Compendium of Exhibits iso of Motion for Summary Judgment (D.E. # 195). On November 8, 2012, while the parties' cross-motions for summary judgment were pending, the Regional Board adopted a revised MS4 Permit (Order No. R4-2012-0175), which also provides conditional exemptions for runoff from landscape irrigation and fire-line flushing.

Permit 1168 is not an NPDES permit, and Disney is not a co-permittee to the LA MS4 Permit.

The "pollutants" at issue here are copper and zinc. These metals were detected in several on-site samples in facility storm drains, including primarily in parking lots where one would expect to find them given their presence in tires and brake pads. The first conclusion of EPA's comprehensive Nationwide Urban Runoff Program ("NURP") study of urban storm water pollution across the United States was that "[h]eavy metals (especially copper, lead and zinc) are by far the most prevalent priority pollutant constituents found in urban runoff.").[13] To the extent Disney's sprinkler water reaches storm drains containing some zinc and copper from automobiles, these pollutants are incidental to urban transportation activities in Disney's parking lots or on nearby streets and unremarkable.

On May 11, 2012, the parties filed cross-motions for summary judgment. (D.E. ## 189, 193.) In response to Plaintiffs' contention that Disney's *storm* water discharges require an NPDES permit, the District Court held that the Studio Lot "does not discharge storm water associated with industrial activity under [Clean Water Act] Section 402(p), and [thus] Defendants are not required to obtain an

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[13] *See also* 132 Cong. Rec. S16424, October 16, 1986 ("EPA's National Urban Runoff study found 63 toxic pollutants, including all 13 toxic metals in the discharge from municipal separate storm sewers. Of these, lead, copper, and zinc were the most pervasive; EPA found these in at least 91 percent of its samples.").

NPDES permit for their storm water discharges." (Amended Order at 23:20-23.)

With regard to *non*-storm water discharges, Disney asserted that landscape-irrigation runoff and certain other non-storm water discharges that are specifically identified in EPA's Phase I Regulations and Part 1(A)(2) of the LA MS4 Permit (Order #01-182) as "conditionally exempt" from the CWA's "effective prohibition" requirement do not require a permit.[14] The District Court disagreed, finding that *all* non-storm water discharges—even landscape irrigation—violate the discharge prohibition under CWA Section 301(a) if they are from point sources, contain pollutants, and flow to jurisdictional waters. (Amended Order at 28:15-17.)

RELIEF SOUGHT

Disney asks that the Court grant this petition and permit an interlocutory appeal under Section 1292(b). If this petition is granted, Disney will ask the Court

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[14] Respondents have erroneously described the scope and nature of Disney's arguments in prior briefing. Disney reiterates that its defense and this appeal are not premised on the notion that Disney can rely on Burbank's LA MS4 Permit as a "shield" to avoid CWA liability for any type of discharge to Burbank's MS4. *See, e.g., S.F. Baykeeper v. W. Bay Sanitation Dist.*, 791 F. Supp. 2d 719, 772 (N.D. Cal. 2011) (NPDES permits cover only permittees). Disney cited language in the LA MS4 Permit that incorporates exemptions for conditionally-authorized non-storm water discharges (see Part 1(A)(2)) because it demonstrates that, consistent with EPA regulations, the Regional Board has not taken formal action to remove these exemptions. The LA MS4 Permit and the exemptions it provides for landscape-irrigation runoff reflect the Regional Board's reasonable interpretation that the applicable statutes and regulations exempt a small set of innocuous non-storm water discharges (*e.g.*, landscape-irrigation runoff) from NPDES-permitting requirements.

to hold that landscape-irrigation runoff and the other conditionally-authorized non-storm water discharges are exempt from NPDES-permitting requirements unless and until they have been specifically prohibited by a municipal permittee (*e.g.*, Burbank) or the NPDES-permitting agency (*e.g.*, the Regional Board). Disney will further ask to have the case remanded with instructions that Disney's motion for summary judgment be granted in its entirety, thereby terminating the litigation.

REASONS WHY THE APPEAL SHOULD BE ALLOWED

Certification of an interlocutory appeal under 28 U.S.C. § 1292(b) is "a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions, which, if decided in favor of the appellant, would end the lawsuit." *U.S. v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). A court may certify an order for interlocutory review pursuant to Section 1292(b) "in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). Certification is warranted if the Court determines that: (1) the issue to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal of the issue may materially advance the ultimate termination of the litigation. *See* Section 1292(b); *In re Cement Antitrust Litig.*, 673 F.2d at 1026. As the District Court held in its Order Granting Disney's Motion to Amend, each of these requirements is

satisfied in this case.

A. The Certified Question is a Controlling Question of Law

It is generally understood that a "'question of law' under Section 1292(b) means a 'pure question of law' rather than a mixed question of law and fact or the application of law to a particular set of facts." *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 U.S. Dist. LEXIS 22647, *6-7 (D. Or. Mar. 9, 2010) (citing *Ahrenholz v. Board of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675-77 (7th Cir. 2000)). Put differently, "a question of law under Section 1292(b) is a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine that the court of appeals could decide quickly and cleanly without having to study the record." *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1089 (E.D. Cal. 2008) (internal citations and quotations omitted). A question of law is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Id.* at 1088. If appellate resolution might terminate the action in the district court—such as by resolving whether a claim exists as a matter of law—the question necessarily is "controlling" under Section 1292(b). *See, e.g., Palmer v. Sanderson*, 9 F.3d 1433, 1434 (9th Cir. 1993) (denial of summary judgment reviewed).

Here, the question presented for interlocutory review raises a pure question of law, requiring no factual analysis, concerning the appropriate legal construction

of provisions in CWA Section 402(p) and the EPA's implementing Phase I and Phase II regulations.[15] If this Court agrees with interpretations advanced by Disney and agencies responsible for administering the applicable statutory and regulatory provisions, appellate review would establish that Plaintiffs' non-storm water claim fails as a matter of law, thereby terminating the action.

B. There is Substantial Ground for Difference of Opinion

To determine whether "substantial ground for difference of opinion" exists under Section 1292(b), "courts must examine to what extent the controlling law is unclear." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Lack of precedent may be an important factor in determining whether a substantial ground for difference of opinion exists, especially where appeal "involves an issue over which reasonable judges might differ [as] such uncertainty provides a credible basis for a difference of opinion on the issue." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (internal quotations omitted).[16]

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[15] To frame this as a legal issue in its motion for summary judgment, Disney did not dispute that runoff from the Studio Lot's storm sewer, including landscape-irrigation runoff, may entrain pollutants that are discharged to Burbank's MS4, and that some of those pollutants may ultimately flow to the Los Angeles River. Disney continues to reserve the right to litigate these factual issues at trial.

[16] *See also*, *Ass'n of Irritated Residents*, 634 F. Supp. 2d at 1091 ("[T]he Second Circuit persuasively holds that substantial doubt may arise if the relevant issue is one of first impression.") (citing *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2nd Cir. 1990)); *Marsall v. City of Portland*, 2004 U.S. Dist. LEXIS 15976, at *19-20 (D. Or. Aug. 9, 2004); *Chen v. Allstate Ins. Co.*, 2013 U.S. Dist.

As discussed in Disney's summary-judgment briefing, numerous authorities support Petitioners' contention that the CWA's implementing regulations conditionally exempt certain non-storm water discharges (*e.g.*, landscape-irrigation runoff and fire-line flushing) from the NPDES-permitting requirements. Such authorities include the EPA's Phase I and Phase II regulations, EPA guidance materials, and the LA MS4 Permit, to name just a few. The preamble to EPA's Phase I rule identifies water-line flushing, landscape irrigation and other "commonly occurring" discharges "characteristic of human existence in urban environments"—which do not typically pose "significant environmental problems"—as being generally exempt from the effective prohibition requirement.[17] EPA's Phase I Rule similarly distinguishes between water-line flushing, landscape irrigation and other conditionally-authorized non-storm water discharges, on the one hand, and other "types of illicit discharges" on the other.[18]

LEXIS 107732, at *5 (N.D. Cal. July 31, 2013) ("Substantial grounds for a difference of opinion required to certify an order for interlocutory review arise when an issue involves one or more difficult and pivotal questions of law not settled by controlling authority.").

[17] Preamble to EPA's Phase I Rule, 55 Fed. Reg. 47990, 47995, 48037 (Nov. 16, 1990).

[18] 40 C.F.R. §122.26(d)(2)(iv)(B)(1). *See also* Exh. 22 to Disney's Compendium of Exhibits iso of Motion for Summary Judgment (D.E. # 195) ("EPA Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from MS4s (November 1992) (excerpts) (distinguishing between "illicit" discharges which must be prohibited and water-line flushing and landscape irrigation which "need only be prohibited by the MS4

The preamble to EPA's Phase II rule maintains the distinction between prohibited and conditionally-authorized non-storm water flows: EPA explains that landscape irrigation and "other sources of non-storm water *that would otherwise be considered illicit discharges*, do not need to be addressed unless the operator of the MS4 identifies one or more of them as a significant source of pollutants into the system."[19] Where an MS4 operator identifies landscape-irrigation runoff or "one or more of these categories of sources to be a significant contributor of pollutants to the system," EPA's Phase II Rule provides that the municipality "could require specific controls for that category of discharge or prohibit the discharges completely." 64 Fed. Reg. 68756. Unless and until this case-by-case designation has been made, EPA has clarified that landscape irrigation and other conditionally-authorized non-storm water flows are "allowable." 64 Fed. Reg. 68758. Meanwhile, state and local agencies charged with implementing federal requirements recognize that landscape-irrigation runoff and certain other conditionally-authorized non-storm water flows do not require NPDES permits.[20]

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when they are identified by the MS4 as sources of pollutants to waters of the United States.")

[19] Preamble to EPA's Phase II Rule, 64 Fed. Reg. 68756 (Dec. 8, 1999) (emphasis added).

[20] *See* Exh. 8 to Disney's Compendium of Exhibits iso of Motion for Summary Judgment (D.E. # 195) (LA MS4 Permit at 64) (defining the term "illicit discharge" to include all non-storm water discharges <u>*except*</u> "discharges pursuant to an NPDES permit, discharges that are identified in Part 1, 'Discharge

Considered together, these authorities provide the necessary context for interpreting the following passage in the preamble to the Phase I Rule—a passage that was central to the District Court's holding in the Amended Order at 24:

> [M]unicipalities will not be held responsible for prohibiting some specific components or discharges or flows [including fire hydrant flushing and landscape irrigation] through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed. However, *operators of such nonstorm water discharges* need to obtain NPDES permits for these discharges under the present framework of the CWA (rather than the municipal operator of the municipal separate storm sewer system).[21]

This passage should be construed in a manner consistent with the distinctions that EPA and other implementing agencies have drawn between non-storm water flows that are *per se* prohibited and those that are conditionally exempt, and means that operators of conditionally-exempt non-storm water discharges do not "need to obtain NPDES permits for these discharges under the present framework of the CWA" unless they have been "specifically identified on a case-by-case basis as needing to be addressed." In other words, the case-by-case

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Prohibitions' of [the LA MS4 Permit, <u>*including*</u> landscape-irrigation runoff], and discharges authorized by the Regional Board Executive Officer]); *see also* City of Burbank Illicit Storm Water Program (identifying landscape irrigation and potable water-line flushing as "conditionally exempted discharges…that are ALLOWED") (original emphasis).

[21] 55 Fed. Reg. 47990; 47995 (Nov. 16, 1990) (emphasis added).

designation of an otherwise exempt non-storm water discharge makes the discharge "illicit" and subject to NPDES permitting.

By emphasizing the sentence beginning with the word "however," the Amended Order adopts an alternative interpretation of this language, contradicting the implementing regulations as well as the approach that EPA and other implementing agencies have taken for more than two decades. Specifically, the Amended Order construes this language to mean that "operators" of landscape irrigation or other conditionally exempt flows "need to obtain NPDES permits for these discharges under the present framework of the CWA." (Amended Order at 24:14-25:5.)

As discussed above, neither EPA nor California's Regional Boards have interpreted the Phase I Rule in such a way. Instead, the implementing regulations and agency practices require NPDES permits for these non-storm water flows only if they have been "specifically identified on a case-by-case basis as needing to be addressed."

Under the rule established in *Chevron*, where Congress has delegated to an agency like the EPA the power to speak with the force of law, and the agency has, in the course of exercising that power, interpreted a statute that it administers, the reviewing court must afford deference to the agency's statutory interpretation. *Chevron*, 467 U.S. at 865. Here, the Court should defer to EPA's "reasonable" and

"permissible" interpretation of the CWA, which provides limited permit exemptions for innocuous non-storm water discharges. *Id.* Under *Auer v. Robbins,* 519 U.S. 452, 461 (1997), the EPA's interpretation should be given even greater deference because it concerns the agency's construction of its own Phase I regulations. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000).

Given that the District Court's interpretation of a portion of the Phase I regulation runs contrary not only to EPA's interpretation of its regulations, but also to implementation of those regulations by the California Water Board and municipal permittees, the District Court's interpretation represents a minority, if not unprecedented view. The fact that neither the Regional Board nor Burbank has ever determined, on a case-by-case basis, that *any* of the conditionally-authorized non-storm water categories (from the Studio Lot, or more generally) constitute "significant sources of pollutants" underscores the novelty of this construction.

In its Order Granting Disney's Motion to Amend, the District Court found that the question proposed for certification presents just the sort of difficult legal issue that interlocutory appeals under Section 1292(b) are intended to address. To begin, Disney's motion for summary judgment presents a question that has not been encountered, let alone resolved, in the federal judicial system. Indeed, neither the District Court nor the parties are aware of any other case involving a CWA citizen-suit claim based on alleged discharges of landscape-irrigation runoff (or

any of the other conditionally-authorized non-storm water flows) to municipal storm drains.[22] Nor is either party aware of any instance where the applicable agency has issued an NPDES permit for such a discharge.[23] By accepting Respondents' novel CWA theory, the District Court has entered uncharted territory and ruled on an issue of first impression as to which there is substantial ground for difference of opinion.

While a question of first impression "standing alone" may be insufficient to establish that a controlling question of law presents substantial ground for difference of opinion,[24] the question presented for certification falls within the context of a well-established regulatory framework that runs counter to the District

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[22] Amended Order at 26:8-10 ("There is little case law interpreting the scope and effect of municipal NPDES permits, and what does exist offers neither clarity nor consensus on the obligations of private entities that discharge to NPDES-permitted MS4s.").

[23] *See, e.g.*, Disney's Motion for Summary Judgment (D.E. # 189) at 19:12-17. Respondents' cite to CWA cases concerning the discharge of other waste streams, (*see, e.g.,* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Certify Order for Interlocutory Appeal (D.E. # 399) at 3:9), but neither side has identified any authority addressing whether a NPDES permit is required for landscape-irrigation runoff or other conditionally-authorized non-storm water discharges.

[24] *Couch*, 611 F.3d at 634; *but see Reese*, 643 F.3d at 688 ("Our interlocutory appellate jurisdiction does not turn on a prior court's having reached a conclusion adverse to that from which appellants seek relief. A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.")

Court's decision and demonstrates that there is a reasonable contrary interpretation of the applicable law and regulations. Furthermore, based on their contrary construction, the agencies have developed extensive storm sewer management programs in California and throughout the rest of this country that generally authorize non-industrial facilities to discharge landscape-irrigation runoff to municipal storm drains without obtaining NPDES permits. Thus, the administrative interpretation of the regulations indicates that there is substantial ground for difference of opinion regarding this legal question over which reasonable jurists might disagree. The District Court ultimately agreed, concluding that "its Summary Judgment Order addressed novel questions of first impression upon which a substantial ground for difference of opinion exists." (Order Granting Disney's Motion to Amend at 7:12-15.)

C. An Immediate Appeal May Materially Advance the Litigation

Section 1292(b) provides that the interlocutory appeal need only "materially advance" the litigation; it need not have "a final, dispositive effect" on the case. *Reese*, 643 F.3d at 688. If immediate appellate review results in the complete disposition of a matter, however, the third criterion for interlocutory review is satisfied because the appeal leads to "the ultimate termination" of the action.

If this Court concludes that the conditionally-authorized non-storm water discharges that are at issue in this case may be discharged to the Burbank MS4

without a separate NPDES permit, appellate review will avoid a trial concerning the fate and transport of entrained pollutants in these non-storm water flows through Burbank's storm sewer system. Further, whatever judgment the District Court renders at trial would likely face appeal. The certification of an order for interlocutory appeal is appropriate in cases such as this where the parties are likely to appeal the case after trial "in any event" and guidance from the Ninth Circuit will help focus and limit the legal issues and factual arguments that the parties will otherwise have to advance in order to present their cases. *See, e.g., Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1323 (D. Or. 1997) (certifying for interlocutory appeal complex issues under the CWA).

CONCLUSION

Disney respectfully requests that the Court grant this petition and allow this interlocutory appeal of the District Court's September 23, 2013 Order, as amended by the District Court's April 9, 2014 Order, to proceed under 28 U.S.C. § 1292(b).

Respectfully submitted,

Dated: April 18, 2014 By: /s/ Garrett L. Jansma
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