

**California Regional Water Quality Control Board  
Santa Ana Region**

**RESOLUTION NO. R8-2022-0012**

**Resolution Amending the Water Quality Control Plan for the Santa Ana River Basin to Incorporate Copper (Cu) Total Maximum Daily Loads for Newport Bay, Orange County, California**

**WHEREAS, the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board), finds that:**

1. An updated Water Quality Control Plan for the Santa Ana River Basin (Basin Plan) was adopted by the Santa Ana Water Board on March 11, 1994, approved by the State Water Resources Control Board (State Water Board) on July 21, 1994, and approved by the Office of Administrative Law (OAL) on January 24, 1995. Subsequent amendments to the Basin Plan have been similarly adopted and approved.
2. The Basin Plan specifies the following beneficial uses (existing or potential) for Upper Newport Bay: water contact recreation (REC1); non-contact water recreation (REC2); commercial and sportfishing (COMM); preservation of habitats of special biological significance (BIOL); wildlife habitat (WILD); rare, threatened, or endangered species (RARE); spawning, reproduction, and development (SPWN); marine habitat (MAR); shellfish harvesting (SHEL); and estuarine habitat (EST).
3. The Basin Plan specifies the following beneficial uses (existing or potential) for Lower Newport Bay: navigation (NAV); water contact recreation (REC1); non-contact water recreation (REC2); commercial and sportfishing (COMM); wildlife habitat (WILD); rare, threatened, or endangered species (RARE); spawning, reproduction, and development (SPWN); marine habitat (MAR); and shellfish harvesting (SHEL).
4. In 2000, the United States Environmental Protection Agency (USEPA) promulgated numeric water quality criteria for toxic pollutants, including dissolved copper (Cu) and other dissolved metals, for the State of California in the California Toxics Rule (CTR) (40 CFR § 131.38). The CTR established criteria for both salt and fresh waters. Under the California Porter-Cologne Water Quality Act, water quality criteria are referred to as water quality objectives. The water quality objectives established by the CTR are incorporated into the Basin Plan.

5. The Basin Plan also specifies the following narrative water quality objectives for toxic substances in enclosed bays and estuaries, including Upper and Lower Newport Bay: 1) Toxic substances shall not be discharged at levels that will bioaccumulate in aquatic resources to levels which are harmful to human health; and 2) The concentrations of toxic substances in the water column, sediments or biota shall not adversely affect beneficial uses.
6. Section 303(d) of the Clean Water Act requires each state to identify the waters within its boundaries that do not meet water quality standards. Those waters are placed on the state's Section 303(d) List. The Water Board is required and authorized to establish a total maximum daily load (TMDL) for those pollutants identified as causing impairment of waters on the 303(d) list. Additionally, under Water Code section 13242, the Water Board is authorized to develop an implementation program to achieve water quality objectives.
7. In 1998, Upper and Lower Newport Bay were listed on the Section 303(d) List as impaired for metals.
8. On June 14, 2002, in response to a consent decree, USEPA established TMDLs for Toxic Pollutants for Newport Bay and San Diego Creek, the major tributary to the Bay. These include copper (Cu), zinc (Zn), and lead (Pb) TMDLs for Lower Newport Bay and Cu, Zn, Pb, and cadmium (Cd) TMDLs for Upper Newport Bay. USEPA's TMDLs were based on an impairment assessment conducted by USEPA. The purpose of TMDLs is to correct impairment and ensure that water quality standards, which include beneficial uses and narrative and numeric water quality objectives, are achieved.
9. In 2006, Upper and Lower Newport Bay were specifically listed as impaired for Cu and remain listed for Cu. Upper and Lower Newport Bay were delisted for the general metals category in 2014 and 2006, respectively. Santa Ana Water Board staff subsequently conducted a Metals Impairment Assessment for Newport Bay and San Diego Creek and used newer data from 2002–2014. The results of this assessment were first reported in August 2016 in the *Staff Report – Basin Plan Amendments for Copper TMDLs and Non-TMDL Metals Action Plans for Zinc, Mercury, Arsenic and Chromium in Newport Bay, California* (Staff Report 2016); and are reported again in the revised *Staff Report – Metals Impairment Assessment and Copper (Cu) Total Maximum Daily Loads for Newport Bay, Orange County, California* (Staff Report 2022). The data show continued impairment of Upper and Lower Newport Bay due to copper (Cu) in the water column. Thus, Cu TMDLs for Upper and Lower Newport Bay continue to be necessary.

10. Based on the results of Santa Ana Water Board staff's Impairment Assessment, Water Board staff proposed a Basin Plan amendment to incorporate Cu TMDLs and Non-TMDL Action Plans for zinc (Zn), mercury (Hg), arsenic (As) and chromium (Cr) for Newport Bay in 2016. The Santa Ana Water Board circulated the proposed Basin Plan amendment along with a draft Substitute Environmental Document (SED) and Staff Report 2016 in August 2016 in anticipation of a Water Board hearing in October 2016. Comments on the proposed 2016 Basin Plan amendment and draft supporting documents were solicited in accordance with public participation requirements.
11. The Santa Ana Water Board revised the proposed 2016 Basin Plan amendment and the draft supporting documents in response to: 1) new policy direction and information, in particular, the State Water Board's *Water Quality Control Plan for Enclosed Bays and Estuaries Plan – Sediment Quality Provisions* (Sediment Quality Provisions); and 2) comments received on the proposed amendment. The Santa Ana Water Board recirculated the revised 2018 Basin Plan amendment, the draft SED, and other supporting documents for public comment in June 2018 (in anticipation of a Board hearing in August 2018 that was cancelled). The Santa Ana Water Board revised the 2018 Basin Plan amendment, draft SED, and other documents based on new information and policy and comments received, and recirculated the 2021 Basin Plan amendment on June 29, 2021, for written comments. The documents were considered, together with public comments, at the September 17, 2021 workshop after which further revisions were made in response to the written and oral comments.
12. The nature of and the scientific and technical basis for the revised proposed Basin Plan amendment (revised from the June 29, 2021 Basin Plan amendment) are described in the *Staff Report – Metals Impairment Assessment and Copper Total Maximum Daily Loads for Newport Bay, Orange County, California* (Staff Report 2022). The revised proposed Basin Plan amendment includes only Cu TMDLs for Newport Bay (consistent with the 2021 Basin Plan amendment). The revisions include the following: The sediment targets and analyses have been modified. This includes the addition of an alternative sediment target based on the Sediment Quality Provisions. The environmental analysis in the draft SED 2021 has also been revised (SED 2022). The SED 2022 includes the Staff Report 2022 (Appendix A) and the Responses to Comments documents (Appendix B).
13. As described in the Staff Report 2022, Santa Ana Water Board staff reviewed additional data submitted by Anchor QEA (2015, 2016, 2019) (for the City of Newport Beach) and the Department of Pesticide Regulation (DPR) (2019), which were more recent than those evaluated in Water Board staff's Impairment Assessment. These data show continued impairment of Upper and Lower

Newport Bay due to dissolved copper (Cu) in the water column. Accordingly, Cu TMDLs for the Bay remain appropriate and necessary.

14. In accordance with Clean Water Act section 303(d) and Water Code section 13240 *et seq.*, Santa Ana Water Board staff developed the proposed Basin Plan amendment shown in Attachments A and B (underline version) to this Resolution. The Basin Plan amendment is proposed for incorporation in “Chapter 6 – Total Maximum Daily Loads,” in the Basin Plan. The proposed amendment specifies Cu TMDLs for Upper and Lower Newport Bay. The proposed amendment includes an Implementation Plan and schedule to achieve the TMDLs.
15. If also approved by the State Water Board, the Office of Administrative Law, and USEPA, the Cu TMDLs will supersede the Cu TMDLs established by USEPA in the Toxics TMDLs (USEPA 2002). The adoption and implementation of the proposed Cu TMDLs will achieve water quality standards in a scientifically and legally defensible manner.
16. The Basin Plan amendment to incorporate Copper (Cu) TMDLs will ensure the reasonable protection of the beneficial uses of Newport Bay.
17. The Basin Plan amendment is consistent with state and federal antidegradation policy (State Water Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality Waters in California" and 40 CFR § 131.12). The proposed amendments are expected to improve water quality with respect to Cu to protect beneficial uses.
18. Pursuant to Public Resources Code section 21080.5, the California Natural Resources Agency has approved the Santa Ana Water Board’s basin planning process as a “certified regulatory program” that adequately satisfies the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 *et seq.*) requirements for preparing environmental documents. (Cal. Code Regs., tit. 14, § 15251(g); Cal. Code Regs., tit. 23, § 3782.) Accordingly, no Environmental Impact Report, Negative Declaration, or Initial Study is required to consider the proposed Basin Plan amendment. However, an environmental analysis must be presented in a SED.
19. The Santa Ana Water Board’s environmental analyses are presented in the SED 2022. The analyses of the potential environmental effects of the proposed amendment were conducted on a programmatic level. The dischargers subject to the Cu TMDLs, if approved, are responsible for identifying specific compliance strategies and conducting any required project-level CEQA analyses of the implementation of those strategies.

20. Based on the environmental analyses described in the SED 2022 the Santa Ana Water Board finds that the proposed amendments may have potentially significant effects on the environment with respect to hydrology/water quality (X. a.) and biological resources (IV. a, b). Mitigation measures are available to reduce these impacts. Implementation of these mitigation measures is within the authority and jurisdiction of the parties who implement site-specific projects in Newport Bay to comply with the TMDLs. Those agencies can and should employ these mitigation measures to reduce impacts as much as feasible (California Code of Regulations, tit. 15, § 15091(a)(2)).
21. As described in the Findings and Statement of Overriding Considerations in Section 8.0 of the SED 2022 and based on consideration of the scientific, technical, and legal record of this matter in its entirety, the environmental benefits of the proposed Cu TMDLs outweigh their potential adverse environmental effects. Therefore, such potential adverse effects are acceptable under the circumstances.
22. Pursuant to Health and Safety Code section 57004, proposed rules that have a scientific basis or components, such as the proposed Basin Plan amendment, must be submitted for scientific peer review. Additional peer review is not required if a new application of an adequately peer reviewed product does not depart significantly from its scientific approach. The scientific approach used for the Basin Plan amendment has been previously peer reviewed and does not depart significantly from that approach.
23. The proposed amendment meets the necessity standard of the Administrative Procedures Act, Government Code section 11353, subdivision (b). The proposed amendment is necessary to ensure conformance, in the most scientifically defensible manner, with state and federal law and implementing regulations that require that surface water quality standards be achieved and protected.
24. Public participation requirements, including those pertaining to CEQA, have been met, as described in Findings 25-30.
25. Two CEQA Scoping Meetings were held on July 23, 2015, to provide interested parties the opportunity to comment on the appropriate scope and content of the draft SED to be prepared for the proposed Basin Plan amendments. An informational presentation was also made to the Santa Ana Water Board regarding the proposed amendments on July 24, 2015, during the Board's

regularly scheduled public meeting. Public and agency participation in the consideration of the proposed amendments was actively sought.

26. A Notice of Public Hearing/Notice of Filing regarding the recommended adoption of the proposed 2016 Basin Plan amendment and the posting of relevant documentation (Staff Report – August 2016, draft Basin Plan amendment and environmental checklist and analysis document (SED – August 2016)) was published in newspapers of general circulation in the affected area, posted on the Santa Ana Water Board website, and distributed to interested individuals and public agencies for review and comment. The hearing proposed for October 28, 2016, was conducted instead as a public workshop due to the large number of comments received. Written responses to comments received prior to and at the October 28, 2016 workshop are included in the Response to Comments documents (Appendix B-1a and Appendix B-1b of the SED 2022).
  
27. In light of revisions to the initially proposed 2016 Basin Plan amendment and the draft SED, a second Notice of Public Hearing/Notice of Filing for a Santa Ana Water Board hearing scheduled for October 19, 2018, to consider adoption of a revised proposed Basin Plan amendment was published in newspapers of general circulation in the affected area, posted on the Santa Ana Water Board website, and distributed to interested individuals and public agencies for review and comment. Comments on the proposed amendment and supporting documentation were required to be submitted by August 24, 2018. Written responses to the comments received are included in the Responses to Comments document (Appendix B-2 of the SED 2022). Due to the large number of comments received, the October 19, 2018 Santa Ana Water Board hearing was postponed, and two additional public workshops were held on May 9 and 10, 2019. Responses to the oral comments received at those workshops are included in the Responses to Comments document (Appendix B-3 of the SED 2022).
  
28. On June 29, 2021, Santa Ana Water Board staff published a Notice of Public Hearing/Notice of Filing for a Water Board meeting scheduled for September 17, 2021. The further revised Draft Basin Plan Amendment, and a revised Draft Substitute Environmental Document, which included a revised Staff Report (Appendix A to the SED), were made available to interested parties. Written comments on the revised documents were due by August 16, 2021. Subsequently, the Santa Ana Water Board adoption hearing scheduled for September 17, 2021, was changed to a workshop and the deadline for submittal of written comments was extended to August 30, 2021. Written responses to the comments received by the August 30, 2021 deadline and to the oral comments received during the September 17, 2021 workshop are included in Appendix B4 of the SED 2022.

29. Following the September 17, 2021 workshop, the County of Orange and the City of Newport Beach requested an opportunity to propose an alternative Implementation Plan for the proposed TMDLs. The Santa Ana Water Board granted that request and a proposal was submitted by the County, on behalf of the County, the City of Newport Beach, and other dischargers on January 28, 2022. The proposal included two documents: a “Proposed Alternative Implementation Plan” and “Supplemental Fact Sheet Language for the Proposed Alternative Implementation Plan”. Santa Ana Water Board staff reviewed this documentation and found that it was not acceptable since it would not meet the fundamental purpose of correcting water quality impairment due to Cu and achieving water quality standards in the Bay within a reasonable timeframe (Appendix B-5).
  
30. Written and oral comments on the June 29, 2021 proposed amendment and supporting documents resulted in revisions as set forth in the proposed Basin Plan amendment, SED 2022 and supporting documents (Appendix A: Staff Report 2022, Appendix B: Responses to Comments). The nature and scope of the revisions to the June 2021 documents were a logical outgrowth of the public comment process and did not necessitate recirculation and initiation of an additional written comment period. The public also had the opportunity to make oral comments on the revisions during the public hearing and staff provided oral responses to any significant new issues raised during the hearing.
  
31. A Notice of Public Hearing and Notice of Opportunity to Provide Oral Comments (Notice) was published on October 21, 2022, in newspapers of general circulation, posted on the Santa Ana Water Board’s web site, and distributed to interested parties. The Notice advised interested parties of the availability of the recommended Basin Plan amendment, shown in Attachments A and B to this Resolution, and relevant documentation, including the SED 2022 and its appendices (Appendix A - Staff Report 2022, and Appendices B - Response to Comments documents).

**NOW THEREFORE BE IT RESOLVED THAT:**

1. The Santa Ana Water Board has reviewed and considered the entire record of this matter, including the information contained in the SED 2022 and all oral testimony on this matter provided at the Santa Ana Water Board’s September 17, 2021 workshop and at the public hearing on December 2, 2022.
  
2. The Santa Ana Water Board approves and adopts the SED 2022, including the Findings and Statement of Overriding Considerations contained therein (Section 8.0).

3. The Santa Ana Water Board hereby adopts the Basin Plan amendment delineated in Attachments A and B (underline version) to this Resolution.
4. The Executive Officer is directed to forward copies of this resolution with the attached Basin Plan amendment to the State Water Board in fulfillment of the requirement of Water Code section 13245.
5. The Santa Ana Water Board requests that the State Water Board approve the Basin Plan amendment in accordance with the requirements of Water Code sections 13245 and 13246 and, thereafter, forward the amendment to OAL and USEPA for their approval.
6. If during its approval process Santa Ana Water Board staff, the State Water Board, or OAL determine that minor, non-substantive corrections to the language of the amendments are needed for clarity or consistency, the Executive Officer may make such changes and shall inform the Board forthwith.
7. The Executive Officer is directed, at the time of filing and posting the Notice of Decision, to take steps to promptly ensure payment of the applicable fee to the Department of Fish and Wildlife for its review of the Copper TMDLs SED or to file a Certificate of Fee Exemption, whichever is appropriate.

I, Jayne Joy, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Santa Ana Region, on December 2, 2022.

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Jayne Joy, P.E., Executive Officer