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Chamber of Commerce



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ASSOCIATION

February 22, 2011

Mr. Samuel Unger, Executive Officer
Dr. L.B. Nye, Senior Environmental Specialist
Ms. Thanhloan Nguyen, TMDL Unit
California Regional Water Quality Control Board, Los Angeles Region
320 W. 4th Street, Suite 200
Los Angeles, CA 90013

Mr. Peter Kozelka
U.S. EPA, Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: Proposed Total Maximum Daily Loads ("TMDL") for Toxic Pollutants in the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters, and Implementation Plan

Dear Mr. Unger, Dr. Nye, Ms. Nguyen and Mr. Kozelka:

Our organizations appreciate the opportunity to provide comments regarding the proposed amendment to the Water Quality Control Plan for the Los Angeles Region Basin (Basin Plan) to establish TMDLs for toxic pollutants in the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters, and an implementation plan to achieve these TMDLs. (Please see the attached Statement of Interests of the signatory organizations.)

Our organizations believe we need to work constructively with regulatory agencies in order to develop policies – including the development of TMDLs – that protect the quality of our waters, while at the same time enabling the State to prosper. The TMDL as proposed in this case may fall short of these goals. This is not inevitable; there are alternative, lawful approaches employed in other jurisdictions, both here in California and in other states, that we urge the agencies to consider before they adopt this TMDL. For example, the TMDL could focus on the bioavailable portion of the compounds it proposes to regulate (because these compounds are known to be locked up to a large degree, and not available to the ecosystem), and the TMDL could focus on setting water column and water discharge targets and allocations, as many other states have in their TMDLs, instead of setting numeric values for bottom sediments, which is atypical and

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raises significant legal questions. The short comment period did not give us sufficient time to fully develop such alternative approaches, or to propose specific, alternative TMDL language that would address certain of our concerns. We are working on such language, and will contact you to arrange a mutually convenient time to discuss it.

The atypical approaches to this TMDL have resulted in proposals for massive remedial dredging of the harbors (up to 35.5 million cubic yards, and up to a cost of \$2.16 billion), and a massive region-wide stormwater treatment program (covering 75,144 acres and up to a capital cost of \$225 million). The proposed measures themselves will result in great environmental impact, as dredging on this scale is known to cause its own problems, such as dramatically increasing water column concentrations of the very compounds the TMDL proposes to control. The TMDL is not a common-sense and economically reasonable solution to improve water quality. Our concerns are heightened as these TMDL measures are proposed for one of the largest port complexes in the world, which operates as a central artery of domestic and global commerce, and national infrastructure integral to our nation's economy and the shipping and rail industries. While we support efforts to protect and improve water quality in a meaningful way through attainable implementation measures, the proposed TMDL is not consistent with fundamental regulatory rulemaking principles.

A very different TMDL would have been proposed had the agencies followed TMDL precedent, state-wide policy for contaminated sediments, and been informed by technically sound analysis and modeling. In revising the TMDL, we urge the agencies to revisit the technical underpinnings, as the modeling for the TMDL is not supported by a proper calibration, and there is no validation of model performance whatsoever. These and other technical problems described in this comment package leave the agencies with an inaccurate understanding of the compounds that the agencies propose to regulate, and deny a basis on which to make sound management decisions. Our expert analysis (submitted herewith) provides an important contribution towards meeting the agencies' technical goals and addressing the unusual uncertainty with the draft TMDL. As associations representing business interests in the State, we request that the TMDL be revised to avoid undue economic impacts on the business community without commensurate environmental benefit. Such negative impacts foster a climate unfavorable to the growth and competitiveness of the Southern California economy, and to these critical ports. Revisions to the draft TMDL should address the following principal concerns with the current approach:

- **Inconsistencies with State-Wide Policies and Relevant TMDL Precedent** — The draft TMDL is contrary to state-wide policy regarding regulation of contaminated sediment, as well as numerous TMDLs elsewhere in California and the nation, yet does not explain these material departures.
 - *State-Wide Policy.* The TMDL contradicts the, “California Water Quality Control Plan for Enclosed Bays and Estuaries Plan – Part 1 Sediment Quality,” the state-wide policy set in August 2009 by the California State Water Resources Control Board for the regulation of contaminated sediment, including the bottom sediments that are a principal focus of the draft TMDL. The TMDL sets sediment targets based on screening values from the literature – an approach rejected by state-wide policy. The

TMDL uses parts of the state-wide policy in isolation from the balance, when the state policy requires an integrated approach using all three of its major components. These significant inconsistencies drive the unprecedented scope and cost of the draft TMDL's proposed massive dredging program, which never would have been recommended had the TMDL followed the State Board's August 2009 sediment management strategy.

- *Regional Board Precedent.* The draft TMDL is significantly more stringent than the TMDL for Upper Newport Bay, an ecological reserve of special value, set by the Santa Ana Regional Board in September 2007. The TMDL also is inconsistent with the TMDL for PCBs in San Francisco Bay set by the San Francisco Regional Board in February 2008. While the draft toxics TMDL proposes a sediment target for PCBs, the TMDL for San Francisco Bay considered, but rejected, that approach. The proposed sediment targets, which are not required by law, and which we believe violate state and federal law, are fundamental to the TMDL's dredging proposal.
- *National Precedent.* The contaminated sediments approach taken by the draft TMDL significantly departs from TMDLs in jurisdictions outside of California, including Delaware, Mississippi, Alabama, Washington and Oregon, which take a water-column approach to the establishment of TMDLs for the subject compounds, and do not develop numeric TMDL targets and allocations for bottom sediments. This lawful approach, available to the agencies, avoids the specter of massive, irrational sediment remediation proposals.
- **Impermissible Stringency** — The TMDL proposes cleanup targets for the bottom sediments of the harbors that correspond to virtually no risk, while imposing excessive cost. The proposed standards are based on extremely low screening values from a 1995 paper, intended simply to rule out non-impacted sediments from further study. These screening levels are to be contrasted with dose-response studies upon which rational water quality standards can be set under the federal Clean Water Act. For a number of the compounds included in this TMDL, the authors of the 1995 paper caution that the statistics supporting the screening levels are "relatively weak."¹
- **Unintended Adverse Environmental Impact** — A problem with requiring unnecessary stringency is that the methods to achieve those levels can sometimes themselves result in adverse environmental impact. The draft TMDL is a classic case of that. Remedial dredging on this scale can re-introduce sequestered contaminants buried at the bottom of the harbor, increase water column concentrations, kill the existing benthic community, cause significant air pollution, impact local neighborhoods through which the dredged spoils may be trucked, and use valuable landfill space. Post-dredging studies in other places where dredging of these compounds has been attempted (e.g., the United Heckathorn site in the Richmond, California area, and the Hudson River in upstate New York) have shown that re-contamination of the bottom is a material risk, further placing a cloud over the prudence of this invasive approach.

- **Lack of Proven Benefits to Human Health** — The TMDL is addressing theoretical risks, and is intended to protect a segment of the fishing population that probably does not even exist (e.g., hypothetical extreme anglers who eat large quantities of bottom fish loaded with DDT every week over a lifetime). For example, even if the TMDL would result in attainment of the 21 parts per billion (“ppb”) DDT fish-tissue target, and even if such hypothetical anglers existed, such anglers would be able to legally buy and consume fish from markets and at restaurants that meet the federal Food and Drug Administration’s national tolerance level of 5,000 ppb DDT, a value more than 200 times greater than the proposed fish-tissue target. The TMDL does not take into account the health benefits of eating fish, or the fact that this large industrial port complex is not the locus of significant commercial fishing or recreational activity.
- **Lack of Material Benefits to the Ecosystem** — The TMDL is not likely to result in material benefit to the ecosystem as current levels of the subject compounds are not placing fish or wildlife at great risk, and the TMDL implementation plan likely would make matters worse. According to peer-reviewed literature, the screening levels used in the TMDL “never should be taken, by themselves, to mean that sediment is exerting a toxic effect . . . or that there would be any benefit to decreasing its chemical content.”² There are no designated areas of biological significance or ecological reserves in the harbors – not because of any toxic effects from the compounds that are the subject of the draft TMDL – but, rather, because other beneficial uses to which the harbors are legally designated, including navigation and industrial, are of such an intensity that they crowd out the opportunity for ecological services. Thus, the great expense of this draft TMDL may not provide material ecological benefit. Underscoring the absence of a rational connection between the draft TMDL and ecological services is the fact that this TMDL is much more stringent than the TMDL for Upper Newport Bay, where there are such ecological services and there is a designated ecological reserve.
- **Adverse Economic Consequences** — Despite costs that may exceed \$2 billion, the draft TMDL makes no serious effort to examine the adverse economic consequences of the proposed implementation plan, including interfering with the substantial commerce in the ports, and potential ripple effects through the domestic and global economy. Nor does the TMDL establish a case that the massive investments which it requires are proportional to any environmental or ecological benefit. While we are not calling for a formal cost/benefit litmus test, the TMDL must produce significant, if not dramatic, benefit to justify these substantial investments, and pass legal muster. The TMDL, however, is virtually silent on the benefit side of the equation, with no effort to estimate the value of any such benefit. The TMDL calls for millions of dollars to be spent on removal of toxics in stormwater, down to levels in the parts per quadrillion range. The economic and technological feasibility of these proposed requirements is without any demonstration in the TMDL. Additional huge sums would be necessary to physically remove the subject compounds through dredging, without regard to any risk reduction benefit that might accrue.
- **Adverse Consequences to Harbor Management** — The TMDL will make it more difficult and expensive to manage sediment in the harbors, whether that entails removing it from places where it impedes navigation and commerce, handling it as part of waterfront

redevelopment, or utilizing it as a resource for habitat restoration or the construction of wetlands. The TMDL will adversely affect maintenance dredging, the ability to keep the ports open for business and the costs of, and options for, disposal of dredged material. The TMDL may also adversely affect waterfront development and redevelopment since such economic activity will encounter sediment with levels greater than the proposed targets. The TMDL may affect adversely, and increase the cost of, projects to restore or reclaim habitat, or construct wetlands, given that such projects typically rely on the availability of sediment that can be used as a resource.

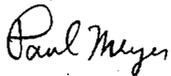
- **Lack of Reasonable Cost-Benefit Balance** — Given the potentially huge costs of the TMDL, and the very minimal benefits associated with it, the TMDL does not reflect a reasonable balance between costs and benefits, as called for by the Board's governing statute, the Porter-Cologne Act. Adoption of the TMDL would frustrate a stated priority of the Administration to avoid excessive regulation, while also impeding economic recovery in Southern California, and violating the reasonable balance requirement.
- **Absence of Proper Technical Conditions** — The TMDL has serious errors in its data, modeling, and analysis that leave the agencies without an accurate understanding of the subject compounds in the harbors. These problems are not just sources of uncertainty that can be addressed by using "conservative" assumptions. Rather, they are inherent mistakes in the TMDL's data, modeling, and analysis that obscure a true understanding of the processes controlling the levels of the subject compounds in the harbors, yielding results that are contrary to observed, empirical data. For example, there is no uncertainty that measured DDT and PCB concentrations in mussels, the water column, and sediment have been declining, and that natural recovery at meaningful levels is occurring; but the TMDL does not account for these facts. Both U.S. EPA and the United States Geological Survey accept science proving that DDT in local bottom sediments is biodegrading, yet the TMDL assumes that biodegradation is not happening. The TMDL relies on the leghorn chicken to set a bird-egg target, and terns in Texas and seals in Europe to set other targets. None of these animals are known to be relevant to the harbors; the TMDL's biological targets lack foundation.
- **Inadequate Analysis of Alternatives** — Feasible alternatives might avoid the environmental and economic costs of the proposed TMDL. Monitored natural recovery coupled with institutional controls would protect any persons consuming harbor-caught fish from any theoretical risk to which they might be exposed, without causing the significant environmental impacts that an unprecedented dredging and stormwater treatment program would entail. The agencies must identify the feasible alternatives to the proposed plan and analyze these alternatives fully, so as to properly identify the superior environmental alternative. We request the agencies to seriously consider less costly, more environmentally sensitive alternatives to the proposed TMDL, such as monitored natural recovery with an education and outreach program for any subsistence fisherman.

California law requires the Board to put the TMDL through a thorough review of economic and environmental consequences, to define the project with specificity, and to examine feasible alternatives to it. Federal law imposes similar obligations on U.S. EPA. These requirements are especially important here, as the proposed plan for reduction of the subject compounds from

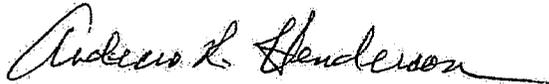
runoff and mass removal of the compounds from sediments, although not adequately defined, likely would entail the construction of stormwater capture and treatment facilities, large-scale dredging, and the use of diesel-emitting heavy equipment, among other measures. Despite the pressing need for economic and environmental review, however, the TMDL contains no economic analysis that can be recognized as such, and the environmental review of the remediation proposal is not adequate.

Our organizations are interested in working with the agencies to find economically-feasible and environmentally-beneficial solutions to address toxics in the harbors. As proposed, however, the TMDL is an unsound regulatory proposal that is not supported by science and that likely will impose very significant costs on California in general, and the economy of Southern California specifically, without commensurate environmental benefit. We urge the agencies to re-work the TMDL in light of these concerns, and with the assistance of our input.

Sincerely,



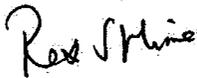
Paul Meyer
American Council of Engineering Companies California



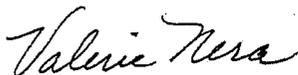
Andrew R. Henderson
Building Industry Legal Defense Foundation



Richard Lyon
California Building Industry Association



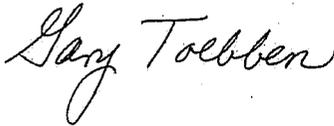
Rex S. Hime
California Business Properties Association



Valerie Nera
California Chamber of Commerce



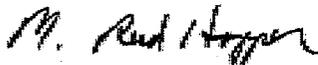
Mark Grey
Construction Industry Coalition on Water Quality



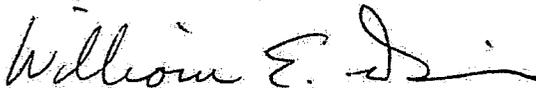
Gary Toebben
Los Angeles Area Chamber of Commerce



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National Association of Industrial and Office Properties – SoCal Chapter



Reed Hopper
Pacific Legal Foundation



William Davis
Southern California Contractors Association

¹ Long, E.R., D.D. Macdonald, S.L. Smith, and F.D. Calder. (1995) Incidence of adverse biological effects within ranges of chemical concentrations in marine and estuarine sediments, *Environmental Management* 19(1): 81-97 at 95. (“[F]or a few chemicals (especially mercury, nickel, total PCBs, total DDT and p,p’-DDE) there were relatively weak relationships between their concentrations and the incidence of effects.”).

² O’Connor, T.P., K.D Daskalakis, J.L. Hayland, J.F. Paul and J.K. Summers. (1998) Comparisons of sediment toxicity with predictions based on chemical guidelines. *Environ. Toxicol. Chem.* 17: 468-471, at 471.

Statement of Interests

American Council of Engineering Companies California

ACEC California is a 50 plus year-old, nonprofit association of private consulting engineering and land surveying firms. As a statewide organization, we are dedicated to enhancing the consulting engineering and land surveying professions, protecting the general public and promoting use of the private sector in the growth and development of our state. Our members provide services for all phases of planning, designing and constructing projects. Member services include civil, structural, geotechnical, electrical and mechanical engineering and land surveying for all types of public works, residential, commercial and industrial projects.

Building Industry Legal Defense Foundation

The Building Industry Legal Defense Foundation is a non-profit mutual benefit corporation, wholly-controlled affiliate, and litigation arm of the Building Industry Association of Southern California. The Foundation has over 1,400 member companies, including a significant number of residential builders who are responsible for building over 70 percent of the homes in the Southern California region.

California Building Industry Association

The California Building Industry Association is a statewide trade association based in Sacramento representing more than 5,000 companies, including homebuilders, trade contractors, architects, engineers, designers, suppliers and other industry professionals.

California Business Properties Association

The California Business Properties Association (CBPA) is the recognized voice of all aspects of the commercial, retail and industrial real estate industry in California — representing the largest commercial real estate consortium with over 10,000 industry members. CBPA proudly serves as the legislative and regulatory advocate for property owners, tenants, developers, retailers, contractors, land use attorneys, brokers, and other professionals in the industry by representing their interests at the State Capitol and in Washington, D.C

California Chamber of Commerce

The California Chamber of Commerce is the largest, broad-based business advocate, working at the state and federal levels to influence government actions affecting all California business.

Construction Industry Coalition on Water Quality

CICWQ was created in 2001 to protect the construction industry from the potentially devastating impact of lost revenues and reduced wages that may be caused by the rapidly evolving set of water quality regulations. Its members include the Engineering Contractors Association,

I received the following at the offices of the California Regional Quality Control Board, Los Angeles Region on February 22, 2011:

- Latham & Watkins, LLP's comment package on the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants Total Maximum Daily Loads Draft, Draft Basin Plan Amendment, and Draft Substitute Environmental Document.
- This package consisted of:
 - 2 boxes of documents
 - A cover letter
 - 9 bound volumes, including a volume entitled "Legal And Expert Comments" and 8 volumes of Appendix A to the Legal and Expert Comments

Received by CLopez On February 22, 2011

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