

EXHIBIT “41”

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQO 2005-0004

In the Matter of Own Motion Review of
Failure to Modify Recreational Use Standards for

BALLONA CREEK

by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILE A-1622

BY THE BOARD:

In this order the State Water Resources Control Board (State Board or Board) reviews on its own motion the Los Angeles Regional Water Quality Control Board's (Regional Board's) decision in June 2003 to reject its staff proposal to revise recreational use standards for Ballona Creek's two upper reaches. For the reasons explained below, the Board concludes that the Regional Board erred. The Board, therefore, amends the standards in a separate resolution, Attachment A to this Order, which the Board adopts concurrently with this Order.

I. BACKGROUND

Ballona Creek is the largest drainage tributary to Santa Monica Bay in Los Angeles County. The watershed covers an area of about 130 square miles. About 85 percent of the area has been urbanized, and more than 1.6 million people live within its boundaries. The watershed includes most of the City of Los Angeles west of downtown, the cities of Beverly Hills, Culver City, West Hollywood, parts of the cities of Santa Monica and Inglewood, and portions of the Hollywood Hills and Santa Monica Mountains.

Before urbanization, Ballona Creek was a meandering perennial stream fed by numerous tributary streams. Between 1935 and 1939, following an earlier flood, the United States Army Corps of Engineers channelized the creek's upper reaches in concrete and lined the lower portions with large rocks. Except for the creek's estuarine portion, which has grouted rip-

rap side slopes and an earthen bottom, the creek is now entirely lined in concrete. Starting in the 1950s, the major tributaries to the creek were also channelized. Today, most of the creek's tributary streams flow in underground culverts or open concrete channels.

Ballona Creek emerges from an underground storm drainage network at Cochran Avenue and flows for almost 10 miles to the Pacific Ocean at Playa del Rey. The creek is divided into three reaches. Reach 1 is a two-mile stretch, which begins at Cochran Avenue in the City of Los Angeles and ends at National Boulevard in Culver City. Reach 2 is about four miles long. It begins at National Boulevard and ends at Centinela Avenue where the Ballona Creek Estuary begins. Reach 3 extends from the estuary to the Pacific Ocean for 3.5 miles, ending at Playa del Rey.

Reach 1 is a concrete box channel with vertical, 20-foot high walls and no banks. The channel is entirely fenced, and the access gates are permanently locked. Only personnel from the Los Angeles County Department of Public Works (LACDPW) and other authorized agencies are allowed access to the channel. There are no adjacent, available recreational facilities.

At National Boulevard the vertical channel walls transition to sloping walls that end in a box culvert at the base of the channel. A bike path runs adjacent to the creek, beginning at National Boulevard and extending to the estuary. The bike path is separated from the creek by a fence. At two locations, however, the fencing is discontinuous, and direct access to the creek is possible. Two parks in Culver City provide direct access to the bike path, and three other parks are in close proximity to the creek. People can also come in contact with creek water by climbing over or through the fence. The creek flows in proximity to residences, parks, office buildings, and other facilities.

Although flows in both Reaches 1 and 2 are significant even during dry weather, water levels are quite low, except during storm events. For most of the year, average daily water levels are below six inches. Flows consist primarily of urban runoff and groundwater dewatering discharges. For storm events of 1.0 inch or greater rainfall, LACDPW personnel lock all access gates to the bike path due to high-flow, high-velocity conditions in the channel.

The water quality control plan for the Los Angeles region¹ (Basin Plan) currently designates both Reaches 1 and 2 for REC-2 and potential REC-1 uses.² REC-2, or non-contact water recreation, means water uses for recreational activities that involve proximity to water but not normally body-contact with water, where water ingestion is reasonably possible.³ REC-2 uses include hiking, tidepool and marine life study, sightseeing, picnicking and other uses. REC-1 uses involve body contact with water, where water ingestion is reasonably possible.⁴ These uses include, for example, swimming, wading, surfing, fishing, and other uses. Reach 3 is designated for both REC-1 and REC-2 uses as existing uses.⁵

In the summer of 2002, Regional Board staff began a focused review of the recreational use designations for Reaches 1 and 2 of the creek, as they pertain to the “swimmable” goal reflected in the federal Clean Water Act⁶ section 101(a)(2).⁷ In this subsection Congress declared a national goal “that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.” These water uses are typically referred to as “fishable/swimmable” uses.

Staff had several reasons for undertaking the review. In the 2001 Basin Plan triennial review⁸ the Regional Board identified as a high priority the need to review and, if appropriate, modify selected beneficial uses and water quality objectives. The following year, this Board requested the Regional Board to review the propriety of REC-1 use designations for concrete-lined inland channels. This concern arose during the Board’s review of updated bacterial objectives adopted by the Regional Board. In addition, the Regional Board was

¹ Water Quality Control Plan, Los Angeles Region, Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (1995), as amended.

² Basin Plan, Table 2-1 at 2-10.

³ *Id.* at 2-2.

⁴ *Ibid.*

⁵ *Id.*, Table 2-1 at 2-10.

⁶ 33 U.S.C. § 1251 et seq.

⁷ *Id.* § 1251(a)(2).

⁸ See 33 U.S.C. § 1313(c)(1).

scheduled to develop a TMDL (total maximum daily load)⁹ for bacteriologic contamination in the creek; and staff wanted to ensure that the Basin Plan accurately reflected the water body's existing and potential recreational uses. Ballona Creek was selected as a test case for review because it is an engineered flood control channel with low water levels and restricted access.

To assess the extent of recreational use in Reaches 1 and 2, Regional Board staff conducted field surveys, handed out recreational use questionnaires, and sent out an e-mail survey to members of the Ballona Creek Watershed Task Force (Task Force), a watershed group. The surveys did not indicate any REC-1 use, pertaining to the swimmable goal, in Reach 1 and very limited recreational activities in Reach 2. Reach 2 activities included biking, walking, roller-blading, bird-watching, and model boating. Also, staff observed a woman and her dog crossing the channel in Reach 2, and an e-mail respondent had observed children playing in the channel in this reach.

Based on the physical conditions in Reaches 1 and 2 and the survey results, staff recommended deleting the potential REC-1 use, as it pertains to swimming-related activities, from both reaches. For Reach 2, staff concluded that a fully-realized REC-1 use, pertaining to the swimmable goal, was constrained by the low water levels and hydrologic modifications. However, because there is creek access, albeit limited, in this reach and adjacent recreational facilities, staff recommended changing potential REC-1 to an existing Limited REC-1 (LREC-1). This use was defined as "uses of water for recreational activities involving body contact with water where full REC-1 use is limited by physical conditions such as very shallow water depth and restricted access; and as a result, ingestion of water is incidental and infrequent."

In addition, staff proposed to amend the Basin Plan to add bacteria objectives to protect the new Limited REC-1 use. The proposed objectives differ from the REC-1 objectives only with respect to the single sample values for the pathogen indicator, E. coli.¹⁰ The geometric mean values for E-coli and fecal coliform are the same for both REC-1 and Limited REC-1.¹¹

⁹ See 33 U.S.C. § 1313(d)(1)(C). A TMDL is the sum of waste load allocations for point sources, load allocations for nonpoint sources, and natural background sources of an impairing pollutant. 40 C.F.R. § 130.2(i).

¹⁰ The single sample value for E-coli for REC-1 is 235/100 milliliters (ml); for Limited REC-1 it is 576/100 ml.

¹¹ The geometric mean for E-coli is 126/100 ml and for fecal coliform is 200/100 ml.

The Regional Board conducted a public hearing in June 2003 to consider staff's proposal. In general, the discharger community supported the proposal and environmental groups did not. A United States Environmental Protection Agency (U.S. EPA) representative unequivocally supported the proposed amendments. He testified that Regional Board staff had fully addressed regulatory requirements for dedesignation and that the case was "very compelling."¹²

The Regional Board ultimately voted against the proposal based on several concerns. Perhaps the most significant was the concern that the proposal was contrary to the Ballona Creek watershed effort, spearheaded by the Task Force. The Task Force was slated to develop a watershed management plan with restoration alternatives in about a year. Given this, some board members felt that dedesignating uses was premature and perhaps a step backward.¹³ In addition, they noted that the proposed changes would have little practical effect on waste dischargers.¹⁴ Permit requirements were unlikely to change significantly because the dischargers would still have to meet downstream bacterial standards for the estuary.

Los Angeles County (County) and the Los Angeles County Flood Control District (District) later petitioned the Board to review on its own motion the Regional Board's failure to adopt its staff proposal. The County and the District also requested the State Board to go beyond the staff proposal by further downgrading the recreational use designations for the two Ballona Creek reaches. In February 2004 the County, District, and other interested persons were notified that the State Board would review the matter on its own motion and that review would be limited to the Regional Board's failure to adopt its staff's recommendations.

II. CONTENTIONS AND FINDINGS

The County and District contend that the Regional Board's decision was arbitrary, capricious, and contrary to law because the decision lacked evidentiary support. They stress that accurate use designations are critical given that a TMDL for bacterial contamination must be developed shortly for Ballona Creek. The Regional Board, on the other hand, maintains

¹² Reporter's Transcript for Regional Board Hearing on June 5, 2003, at page 184 (RT:184).

¹³ RT:213-231.

¹⁴ RT:221.

that the Regional Board did not actually reject its staff proposal. Rather, the Regional Board properly exercised its discretion in deferring a decision on use attainability until the Task Force's management plan was available. Finally, Heal the Bay and Santa Monica Baykeeper (Baykeeper) argue that the Regional Board could not legally dedesignate recreational uses associated with the Clean Water Act's swimmable goal because the requirements for dedesignation were not satisfied.

In the following discussion, the Board will first address the legal requirements for recreational use dedesignation. The Board will then analyze Heal the Bay's and Baykeeper's contentions that the Regional Board could not legally remove or modify the potential REC-1 use for Reaches 1 and 2. The Board will next address the Regional Board's characterization of its action. Finally, the Board will explain why the Board has concluded that the Regional Board's decision must be reversed.

A. Legal Requirements for Dedesignation

Under the Clean Water Act, the states are primarily responsible for adopting water quality standards to protect surface waters.¹⁵ Water quality standards include the designated uses for a water body, as well as criteria (referred to as water quality objectives in California) to protect those uses and an antidegradation policy.¹⁶

Designated uses include both existing and potential uses.¹⁷ At a bare minimum, the states must designate all existing uses, that is, uses that have actually occurred in the water body since November 28, 1975.¹⁸ In addition, the Clean Water Act and implementing U.S. EPA regulations provide special protection for "fishable/swimmable" uses, including recreation.¹⁹ The statute and regulations create a rebuttable presumption that all waters support these uses.²⁰ To overcome this presumption, the states must conduct a use attainability analysis (UAA) and

¹⁵ 33 U.S.C. § 1313.

¹⁶ *Id.* § 1313(c); see 40 C.F.R. § 131.6.

¹⁷ See 40 C.F.R. § 131.3(f). Designated uses "are those uses specified in water quality standards for each water body or segment whether or not they are being attained."

¹⁸ See *id.* §§ 131.3(e), 131.10.

¹⁹ See 33 U.S.C. § 1251(a)(2); 40 C.F.R. § 131.10(j).

²⁰ *Idaho Mining Assoc., Inc. v. Browner* (D. Idaho 2000) 90 F.Supp.2d 1078, 1087-1092; see 40 C.F.R. § 131.10(j)(1).

demonstrate that attaining the uses is not feasible based on at least one of six use removal factors.²¹ A UAA is a rigorous scientific assessment regarding the use's attainability, which can include physical, chemical, biological, and economic factors.²² The states must also make this demonstration when they designate a subcategory of a fishable/swimmable use that requires less stringent criteria or objectives. Uses cannot be removed if they are existing or can be attained through application of required effluent limits for point sources or best management practices for nonpoint sources.²³

Two use removal factors are relevant in this case. They are:

Factor 2: "Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met."²⁴

Factor 4: "Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use."²⁵

Although the regulations do not expressly preclude using Factor 2 to dedesignate recreational uses, U.S. EPA has stated in guidance that this factor cannot be used for this purpose.²⁶ The agency's rationale is that, for public health reasons, the states must consider a water's incidental use for swimming even though the water is not ideally suited for this activity due to the water's flow, depth, or velocity.²⁷ U.S. EPA's current view is that physical factors, alone, should not be used to dedesignate primary contact recreational uses consistent with the Clean Water Act "swimmable/fishable" goal.²⁸ Rather, the states should consider other important

²¹ See 40 C.F.R. § 131.10(g).

²² *Id.* § 131.10(j).

²³ *Id.* § 131.10(h).

²⁴ *Id.* § 131.10(g)(2).

²⁵ *Id.* § 131.10(g)(4).

²⁶ U.S. EPA Water Quality Standards Handbook (2d ed.), EPA 823-B-93-002 (September 1993) (Handbook) at 2-3.

²⁷ *Ibid.*

²⁸ 63 Fed. Reg. 36741-36806 (July 7, 1998) at 36756.

factors, in conjunction with physical factors, in determining whether the use is attainable.²⁹ These include the water's actual use, access, recreational facilities, location, safety considerations, the water body's physical conditions and quality, and other relevant factors.³⁰

B. Legality of Regional Board Staff's Proposal

As required by the U.S. EPA regulations, Regional Board staff prepared a UAA to support removal of the potential REC-1 use from Ballona Creek's two upper reaches and to establish Limited REC-1 for Reach 2, a use subcategory. Staff justified these recommendations under use removal factors 2 and 4.

For Factor 2, Regional Board staff followed U.S. EPA's recommended approach and considered both the low flows as well as other factors that preclude attainment of REC-1 pertaining to swimmable uses for Reaches 1 and 2. For Reach 1 these factors included, in addition to the low water levels, the hydrologic modifications, fencing, prohibitions on public access, lack of available recreational facilities, and lack of evidence of any water contact. For Reach 2, they included the low water levels, hydrologic modifications and access restrictions. In addition, staff testified at the Regional Board hearing that there is no additional effluent source to add to the existing creek flows that would change the low-flow regime.

Likewise for Factor 4, Regional Board staff considered the hydrologic modifications, low-flow regime, and other factors in assessing whether REC-1 was attainable for Reaches 1 and 2. Regional Board staff concluded that, absent significant changes in land use in the watershed, it was not feasible to restore the creek to its original condition. Since the creek was channelized in the 1930's, the area surrounding the creek has been built-up and become highly urbanized. Absent an alternative flood control strategy, the Ballona Creek watershed is dependent on the creek's flood control function to prevent flood damage to the surrounding developed areas.

As stated above, a U.S. EPA representative stated at the Regional Board's hearing that the staff proposal "fully address[ed] all of EPA's requirements for these kinds of analyses" and that "EPA supports this [UAA]."³¹ The representative informed the Regional

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ RT:184.

Board that the proposal was consistent with EPA's draft bacteria guidance and all previous guidance, and that it "fully protects the uses and doesn't foreclose future options should conditions change."³²

1. REACH 1

Heal the Bay, nevertheless, contends that neither Factor 2 nor Factor 4 applies to Reach 1. Heal the Bay argues that Factor 2 does not apply because the UAA states that the creek has about 4 inches of water, on average, in the dry season. Heal the Bay states that this is sufficient to allow wading, and that the County has failed to demonstrate that wading does not occur in this reach. Uncontroverted evidence in the record, however, indicates that wading does not occur in Reach 1. The Regional Board staff investigation did not find any instances of water contact recreation in Reach 1 by the public. This finding was consistent with evidence of factors that preclude public access in Reach 1, including the 20-foot high, vertical concrete creek walls, lack of banks, fencing, permanently locked access gates, and lack of available recreational facilities.

Heal the Bay also contends that dedesignation of potential REC-1 for Reach 1 was not authorized under Factor 4 because the hydrologic modifications to Reach 1 do not prevent wading. The record, however, indicates that Regional Board staff did not rely solely on the modifications but rather considered the modifications together with other important factors, especially the low flow regime, that justify dedesignation. In any event, the Board notes that the Regional Board is required to justify dedesignation based on only one of the six use removal factors mentioned above. The State Board concludes that Regional Board staff demonstrated that the proposed dedesignation was fully justified under Factor 2.

Both Heal the Bay and Baykeeper allege that the County inaccurately described conditions in Reach 1. They contend that the entire reach is not fenced. Rather, at Reach 1's terminus, there is a bike path entrance gate that is accessed via National Boulevard. In addition, Baykeeper alleges that 300 yards of Syd Kronenthal Park borders Reach 1 and the bike path. Neither the Regional Board record nor the Basin Plan clearly indicate where the actual dividing

³² *Ibid.*

line between Reach 1 and Reach 2 is located.³³ Regional Board staff assumed that it is at National Boulevard where the vertical concrete wall transitions to a sloping wall. There is some question whether the dividing line is located slightly downstream of National Boulevard, however. The Board concludes that the appropriate dividing line is that assumed by Regional Board staff because that is the point at which hydraulic conditions change. The Board will clarify the Regional Board staff proposal accordingly.

2. REACH 2

Heal the Bay likewise contends that Reach 2 cannot be dedesignated for potential REC-1 because wading, a REC-1 activity, occurs in this reach. Heal the Bay misses the import of Regional Board staff's proposal, however. A fully-realized REC-1 use includes activities involving body contact with water, such as swimming, surfing, wading, and other uses. It is undisputed that swimming and surfing do not occur in Reach 2. Regional Board staff proposed to remove the potential full REC-1 use, which does not exist, and replace it with an *existing* use, Limited REC-1. This use includes wading and other body contact uses where water ingestion is incidental and infrequent due to very shallow water depths and restricted access.

Baykeeper maintains that the Regional Board could not properly dedesignate the potential REC-1 use from either reach based on Factor 4. Baykeeper argues that the County has not shown that the hydrologic modifications to Ballona Creek preclude the use. As stated previously, however, the Regional Board did not rely solely on the modifications. Baykeeper also contends that the County has failed to demonstrate that the creek cannot feasibly be restored to its original condition or be operated in a manner to achieve REC-1. As discussed above, Regional Board staff testified at the hearing that it was infeasible to restore the creek to its condition prior to the 1930's when the creek was channelized. Staff also indicated that the creek's low flow regime is the principal factor restricting full REC-1 use in Ballona Creek. It is not apparent that the channel can be operated in any manner that will address the lack of flows for full body contact recreation. There are also obvious public safety issues involved in operating a flood control channel to attain full body contact recreation. In any event, only one factor is necessary to justify dedesignation, and dedesignation was fully justified under Factor 2.

³³ The Basin Plan indicates only that Reach 1 is in Hydrologic Unit No. 405.15 and Reach 2 in Unit No. 405.13. Table 2-1 at 2-10.

Finally, Heal the Bay contends that the County and District have failed to address how dedesignation will affect downstream bacterial water quality. This issue was, in fact, fully addressed at the Regional Board hearing. Staff explained that dischargers would get very little, if any, relief from the proposed standards change because the Ballona Creek Estuary's existing REC-1 use must be fully protected.³⁴ Rather, staff recommended the change to ensure that the Basin Plan accurately identifies uses for each reach and to set the stage for the upcoming bacteriological TMDL for Ballona Creek.

C. Regional Board Action

The Regional Board contends that the Regional Board properly exercised its discretion by, in essence, deferring a decision in this matter. The Regional Board asserts that deferral was reasonable because important additional information directly bearing on the feasibility of attaining primary contact recreation in Ballona Creek in the future would be available in only a few months. This information, the Ballona Creek watershed management plan, would enable the Regional Board to make an informed policy decision on recreational use attainability based on a complete record. In this regard, the Regional Board requested that the State Board supplement the existing record with a copy of the most recent draft management plan. The management plan was, in fact, finalized in September 2004, and the Board has included it in the record for this action.

The State Board would agree with the Regional Board that deferring a final decision pending receipt of the management plan was a reasonable decision had the Regional Board actually done so. As U.S. EPA has stated, it is in designating uses that the states "establish the environmental goals for their water resources"³⁵ Often, the states must weigh environmental, social and economic factors in deciding whether specific uses are attainable.³⁶ Further, "reaching a conclusion on the uses that appropriately reflect the potential for a water body, determining the attainability of those goals, and appropriately evaluating the consequences of a final action can be a difficult and controversial task."³⁷ The Ballona Creek watershed

³⁴ See, e.g., RT:221-222, 223.

³⁵ 63 Fed. Reg. at 36748.

³⁶ *Id.* at 36748-36749.

³⁷ *Id.* at 36749.

management plan was intended to reflect the community's goals for the watershed and, hence, was relevant to a decision on whether it is feasible to attain primary contact recreational use in the future.

The State Board is unable to accept the Regional Board's characterization of its action, however. The record reflects that the Regional Board was clearly concerned about the timing of the proposed dedesignation, given the watershed effort. The Regional Board, nevertheless, voted to reject the staff proposal rather than table it until the watershed management plan was available. The Regional Board also made it clear that, although staff could bring the matter back to the Regional Board, the Regional Board did not want the plan's completion to automatically trigger reconsideration.³⁸

D. Propriety of Regional Board Decision

Given that the Regional Board rejected the staff proposal, rather than deferred a final decision on the matter, the Board will consider whether the Regional Board's decision was appropriate. The Board concludes that it was not.

As stated by U.S. EPA, reaching a decision on a water body's uses that appropriately reflects the water's potential can be a difficult and controversial task. Whatever the outcome, the decisions must be based on evidence. In this case, uncontroverted evidence in the record indicates that a fully-realized REC-1 use associated with swimming does not exist in Ballona Creek's two upper reaches. While the State Board whole-heartedly supports urban creek restoration and, in fact, provides significant funding to further this cause, there is no evidence in the record that it is feasible to restore either reach to attain full REC-1 use pertaining to swimming-related activities at least within the next several decades. The record indicates that the creek was converted to a concrete-lined flood control channel many years ago. Since then, the surrounding area has become highly urbanized. Restoring full REC-1 uses associated with swimming in the Ballona Creek watershed would require addressing both the creek's existing low-flow regime as well as reconciling the creek's function as a flood control channel with public access for fully body contact recreation. As Regional Board staff observed, restoring the creek's use for full REC-1 uses associated with swimming would require substantial changes in

³⁸ RT:234-235.

existing land use patterns. These types of changes require extensive time, planning, funding, and construction. They are likely to occur over very long time periods.

The final Ballona Creek Watershed Management Plan (September 2004) (Management Plan) does not change this conclusion. The Management Plan sets forth an exciting vision for the future of a watershed severely impacted by urbanization. It envisions activities to transform the watershed into a valuable community asset by improving and expanding open space, optimizing water resources, preserving and restoring habitat, and creating an integrated network of trails and bike paths. The Management Plan implements the Task Force's overarching goal to set forth pollution control and habitat restoration actions to achieve ecological health in the Ballona Creek watershed. At the same time, the Management Plan recognizes that it may take decades to realize this goal.

The Management Plan includes more detailed goals and objectives, adopted by the Task Force, under the general themes of water, land, and planning.³⁹ For water, the Task Force identified maintaining flood protection as one of five specific goals.⁴⁰ The goals and objectives address perceived environmental, recreational, and economic problems in the watershed; the overarching goal to restore ecological health; and issues of interest identified by the Task Force. The latter include, in descending order of priority, flood protection (3d) and contact recreation (15th).⁴¹

In addition to the goals and objectives, the Management Plan identifies actions for each objective that will improve the watershed's ecological health. The actions include restoring riparian habitat along a tributary stream and along Ballona Creek, where feasible.⁴² While no urban stream restoration projects are pending at the present time, several are proposed.⁴³ The Management Plan also describes several conceptual demonstration projects to restore parts of tributary streams.⁴⁴ Accompanying the descriptions is a caution that any urban

³⁹ Management Plan, pp. 4-6.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 55.

⁴² *Id.* at 76.

⁴³ *Id.* at 127.

⁴⁴ See, e.g., *id.* at 141. The proposed demonstration project would convert a tributary storm drain running through Ladera County Park to a "daylighted" creek.

stream restoration proposals must be undertaken only when consistent with the adopted goal to maintain flood protection.⁴⁵

No projects are proposed or contemplated that address primary contact recreation in Ballona Creek. Nothing in the Management Plan indicates that this use will be feasible in the near future. Again, as stated before, recreational uses associated with swimming are constrained primarily by low creek flows in addition to the creek's existing flood control function. If, in future years, modifications are proposed in the watershed that will allow body contact recreation in Ballona Creek's upper reaches, the Regional Board can, and legally must, reconsider the creek's recreational uses.

The Regional Board staff proposal did not conflict with the Ballona Creek watershed effort. It was very narrowly crafted. The proposal recognized existing limited body-contact recreation activities in Reach 2 and recommended bacterial objectives that only minimally differ from the REC-1 bacterial objectives. The staff proposal will result in insignificant, if any, water quality changes in the creek, yet the proposal accurately reflects the existing recreational uses in the two creek reaches and the potential for full body contact recreation in the next several decades. Adoption of the staff proposal will not prevent any of the activities identified in the Management Plan to improve the Ballona Creek watershed's ecological health from going forward.

Further, in developing the proposal, Regional Board staff heeded this Board's directive to the Regional Boards that they initiate basin plan amendment procedures whenever they conclude that designated uses do not exist and are not likely to exist in the future. Defensible use designations are critical for many reasons. Designated uses and water quality criteria or objectives, together with an antidegradation policy, form the foundation for regulation of waste discharges and for TMDL development, for example. Further, accurate and defensible use designations are important to ensure that the Basin Plan is a useful and credible document. The Board concludes that watershed restoration and maintaining updated and accurate basin plans are harmonious goals that can co-exist.

⁴⁵ *Id.* at 117.

III. CONCLUSION

For the reasons explained above, the Board concludes that:

1. Dedicatign of potential REC-1 associated with swimming activities from Ballona Creek Reaches 1 and 2 is consistent with the U.S. EPA water quality standards regulations.
2. The Regional Board erred in failing to adopt its staff proposal to dedesignate potential REC-1 pertaining to swimming-related activities from the two reaches, to adopt Limited Rec-1 for Reach 2 and to adopt revised bacteriological objectives for Limited Rec-1.
3. The boundary between Reach 1 and Reach 2 should be clarified as the point at which concrete vertical channel walls transition to sloping walls.

IV. ORDER

IT IS HEREBY ORDERED that Resolution No. 2005-0015 is adopted.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 20, 2005.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board