



May 9, 2014

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
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(By Federal Express and)

Delivered via Email: commentletters@waterboards.ca.gov

Subj: Opposition To Proposed Amendment to the Los Angeles Regional Basin Plan To Revise the Total Maximum Daily Loads (“TMDL”) for Marina del Rey Toxic Pollutants

Board Members,

I am the Corporate Secretary of the California Yacht Club in Marina del Rey and we are a member of the Marina del Rey Lessees’ Association (the “Association”), which retained Alston & Bird to represent our interests. Our Club has approximately 1,000 members and 400 boats in Marina del Rey.

We ask the State Water Resources Control Board (the “State Board”) to reject the proposed TMDL Amendment. We further ask the State Board to instruct the Los Angeles Regional Water Quality Control Board (the “Board”) to delete all references to “responsible parties” in the TMDL, and to reconsider the Amendment for the reasons set forth in this letter and the comments submitted by stakeholders with similar views.

The following points have been raised by interested parties in opposition to the proposed Amendment in comment letters that were sent to the Board (including, but not limited to, those by our counsel, Alston & Bird, and the County of Los Angeles), and at the Los Angeles Regional Water Quality Control Board’s February 6, 2014 meeting (the “Meeting”). The Board’s responses to these points are inadequate and/or factually incorrect, as noted herein and in opposition comments and statements by others.

Unfortunately, as the stakeholders attempted to give meaningful input, it became readily apparent that the Board members and staff had already made up their minds as to what they were going to do. As noted on page 223 of the transcript of the Board’s Meeting, Ms. Jenny Newman, Chief, TMDL Unit 3, stated, “Once a draft approach *had been finalized*, Staff began outreach efforts to the boating community...” (emphasis added)

The Board systematically deflected, dismissed or disregarded the legitimate concerns of boaters, anchorages and others. Those concerns included the Board's use of flawed science, impracticality of the proposed regulations, unlawful responsible party designations and the severe economic consequences to boaters and anchorages. As a result, we must take strong exception with the resolution passed by the Board. Several critically important issues were raised to the Board when it considered the TMDL, and most of these remain unaddressed in the resolution now before the State Board.

The Notice and Process Itself Was Flawed.

An Inaccurate Mailing List. In November 2013, The Los Angeles Regional Water Quality Control Board mailed notices (the "Notice") to "Interested Parties" regarding the proposed Amendment to revise the TMDL. At the Board's Meeting, our Club's President, a number of the members of the Association, and our legal counsel spoke. Many speakers stated for the record that they never received a Notice, had inadequate opportunity to comment, and that their views were never thoughtfully considered by the Board.

Indeed, the Board immediately passed the Amendment at the Meeting, which was the only public hearing held on the Amendment, without serious consideration of the comments raised by the speakers, or due deliberation.

After hearing the concerns of so many affected parties, I made a Public Records Act request for the Board's mailing list. After receiving the Board's mailing list, our staff compared the Board's mailing list with the list of our own Club boaters and discovered that more than two-thirds of our boaters were not on the Board's mailing list. At the Essex Marina City Club, only 95 of 210 boaters were on the mailing list. Hundreds of boaters in Marina del Rey did not receive adequate notice of the TMDL.

Only 4 of the 21 anchorages in the Marina were on the Board's mailing list. Since the anchorages are designated "Responsible Parties," weren't they entitled to actual receipt of Notice from the Board? Absolutely. In every legal proceeding, actual service is a prerequisite before proceeding. **The Board failed to meet the standard of notice required before designating boaters and anchorages as "responsible parties."**

A Misleading Notice. Aside from the outdated, incomplete, inaccurate mailing list that the Board used, the Notice itself materially misrepresented the Board's proposed actions by omitting essential information. Nowhere in the Notice did it give boaters or anchorages any idea that they were about to have major financial burdens placed on them, or that they would be the designated "responsible parties" and held legally liable by the Board for "load allocation(s) assigned to discharges of dissolved copper" in Marina del Rey.

Instead, the Notice merely stated: "The purpose of this reconsideration is to re-examine certain technical issues based upon further data collection and analysis since the TMDL was originally adopted." This language is deliberately deceptive, particularly to the boaters and anchorages of Marina del Rey who have little or no experience in this area but were nonetheless designated as "responsible parties" by the Board. The actions by the Board in the TMDL go well beyond a mere re-examination of technical issues.

A Lot of Gobbledygook. Ordinary boaters and business owners could not even begin to understand what the Board was doing within the time frames for comment, even if they received timely notice. The proposed Amendment was not written in plain language, but rather riddled with acronyms and technical jargon and scientific criteria. It is replete with references to past actions, analysis based on conjecture and references to outside sources and scientific studies. The Draft Report itself was 57 pages long, with a technical attachment containing dozens of elements, findings and regulatory provisions.

Basic, fundamental rights of adequate notice and due process were breached by the Board.

The Responsible Party Designation in a TMDL is Improper and Unlawful. Specifically addressing this issue at the Meeting, our Club President stated that the Board was improperly attempting to make boaters and anchorages, both nonpoint sources, legally liable through the TMDL for “discharges” of dissolved copper passively leaching from boat hulls. There is no statutory or judicial authority for this.

The law provides that only point sources can be held liable for discharges of a pollutant. Thus, the Board’s action creates a legal impossibility and wrongfully implies that that an anchorage can be held responsible for discharges over which it has no control. The Board has no lawful authority to impose joint responsibility for load allocations to boaters or anchorages in a TMDL.

Additionally, while the Board recognized that urban storm water is a substantial source of copper in the Marina, particularly in the sediment, its resolution does not sufficiently address the non-point sources of urban storm water. The Oxford Basin is a major source of contaminants in the back basins of the Marina, and Ballona Creek is a pollutant source to the front basins. Boaters and anchorages have no control over these sources, yet the Board is trying to make them responsible for the overall pollutant levels. The Board’s solution is to impose unreasonable burdens on boaters, and on anchorages, the easiest targets and least culpable parties, notwithstanding the fact that other sources of pollution have significantly impacted the Marina.

The Board’s actions are unfair, illegal and inconsistent with the holdings of several court cases and the Porter-Cologne Act.

The “Responsible Parties” designation for boaters and anchorages must be deleted.

Compliance With the Amendment Is Impossible. The 85% reduction of copper in Marina del Rey in 10 years is unrealistic and unattainable, and the Board failed to consider a realistic, less burdensome, implementation plan.

The 10 year deadline imposed for compliance by the Board is impossible to meet.

The TMDL compliance period is much more aggressive than what was implemented in San Diego’s Shelter Island TMDL over a 17 year period. Shelter Island is a significantly smaller body of water, with fewer boats and its experience in the past 8 years is a clear indication that the regulatory mandate by this Board is completely infeasible. Only 232 boats at Shelter Island have been converted to non-copper hull paint in 8 years, out of approximately 2,000. Marina del Rey has more than twice as many boats, and only half as many boatyards. This Board did not consider the impossibility of meeting compliance deadlines. We did.

We and the Association have had extensive discussions with the two major boat yards in the Marina. They haul approximately 1,550 boats annually and they are currently operating near peak capacity. Each states that their yard could handle additional 1-2 boats per week for complete hull stripping and painting in the future. This means that an additional 100 to 200 boats could be stripped for conversion to biocide free paints by the two boat yards each year while maintaining the same level of existing work. At that rate, it would take 22 to 45 years to complete stripping and non-biocide repainting on the 4,500 boats in Marina del Rey.

The statements by the Board that boats in the Marina can be stripped and repainted with biocide free paints by the two boatyards in the 10 year mandate are false.

If the Board had done its proper due diligence and seriously considered the experience and knowledge of boat owners, anchorages and boatyards in Marina del Rey, it too would know that a 10 year compliance period is impossible... and far more expensive than what was characterized in the Board's Economic Analysis. Instead the Board used selective data to justify a result that it wanted and was preordained.

The Board has created a legal problem without a solution for the County of Los Angeles, boaters and anchorages.

The Economic Impact Will Be Significant. Marina del Rey has a boat slip vacancy rate in excess of 15%, most of which is in the under 35 foot category. Many of our small to mid-size boat owners are still recovering from the Great Recession and the monthly expenses of owning a boat weigh heavily on them, contrary to what the Board's economist contends.

The Board's 2½ page Economic Report is definitive in its conclusions, but short on data and even shorter on thoughtful analysis. It fails to address the impact to anchorages or businesses in the community at all. It also relies on wrong information about hull paints and boatyard capacities. It also fails to address the costs of dredging the Marina sediment and the impact that will have on boaters and anchorages. Who and how will those costs be allocated?

The Economic Report fails to address the impact on the small boater, who will be most harmed by the proposed regulations and compliance costs. The economic report states that the median boat sale listing in Marina del Rey is \$119,000. Yet most boats in the Marina are less than 35 feet and worth just a fraction of \$119,000. Anchorages in Marina del Rey are required by the California Coastal Commission to maintain at least 59% of their wet slips for boats 35 feet and under in length. The small boaters who are most impacted by the regulation and least able to bear the costs, were given short shrift in the "economic analysis."

Contrary to what the Board contends, boaters in Marina del Rey don't strip their boats every 7-10 years - it's more like 25-40 years, if at all. Our local boatyards have submitted a White Paper on "Marina del Rey Boat Yard Capacities" showing that the actual cost to an average boater of complying with the new regulations will be more than \$70,000 over 10 years. This is far above the figures the Board used, and it is more than the value of many of the boats. As a result, this regulation will end up driving small boaters out of Marina del Rey, destroying the essence of what Marina del Rey is supposed to be all about – a recreational boating harbor for all.

The Economic Report also ignores human psychology. Boaters won't use an unproven, less effective, more expensive non-copper hull paint over a less expensive, proven product without extraordinary reasons. A fundamental shift in behavior can only be accomplished through the presentation of sound science, education, compelling reasons, boater acceptance and time, none of which has occurred to date. One glaring omission is that the Board failed to provide for the use of low-biocide paints as a more practical and economic alternative.

Our dockmaster tells me that small boaters "would be the first to sell their boats" when faced with any additional expenses, such as permit fees and compliance expenses. For many of these boaters, the burdens imposed by the Board would be the deciding factor to leave Marina del Rey. In contrast, the Board's economist states that few boaters would leave Marina del Rey. Apparently he didn't bother to review what actually happened at Shelter Island. Shelter Island's vacancy rates have increased since its TMDL was implemented.

He also did not know that a new 600 slip anchorage in San Pedro opened in 2013. The economic analysis did not acknowledge the negative impact to our anchorages of a viable alternative in such close proximity to Marina del Rey. The San Pedro anchorage is already getting inquiries from Marina del Rey boaters alarmed over the TMDL Amendment.

Those of us in the Marina will be facing many economic challenges, which this Board conveniently chose to ignore. This Amendment will further depress the Marina del Rey boating community, anchorages, related businesses and the community at large.

When that happens, anchorages, such as ours, will lose slip revenues, membership dues, and other revenues such as food and beverage sales. Local restaurants and marine businesses will be hurt. And the County of Los Angeles will lose significant rental income which is based on our gross income. This Amendment would have a serious economic and operational impact on our business, and other businesses in the community.

Lastly, anchorages and other businesses in Marina del Rey are lessees of the County of Los Angeles, not landowners. We have been told that some businesses are seriously reevaluating their long term commitment to the Marina in light of the potential liabilities asserted by this Amendment.

Once again, the lack of due process, consultation and a thoughtful consideration is apparent: the author of the Regional Board's Economic Analysis did not seek input from the major anchorages and local businesses about their expected loss of business, their concerns and the economic viability of the local economy.

Additional Board Failures. The Regional Board wants to include the front basins in the TMDL, yet it underestimates the size of the Marina, and thus its loading capacity, by 25%. Further, it failed to conduct or direct any site specific studies of the actual water conditions throughout Marina del Rey. It failed to consider the design, historic purpose and recreational use of Marina del Rey as a man-made pleasure boat harbor where swimming and fishing are banned. The Board used highly questionable copper sampling methods and it adopted a TMDL load level that makes compliance with the Amendment impossible for those designated as responsible parties. The Board adopted the methodologies and analysis of the Shelter Island TMDL without addressing the important concerns raised in the peer review of that TMDL by Prof. Kenneth

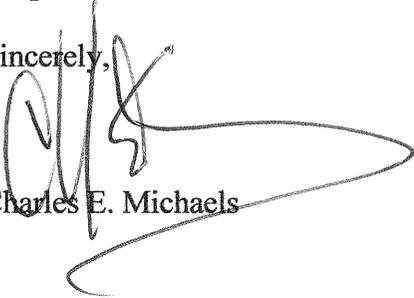
Bruland of UC Santa Cruz. Moreover, The Board did not have this TMDL Amendment peer reviewed by an independent third party.

The Board gave short shrift to material facts and the law, and took action without proper coordination with stakeholders and other governmental entities that would have yielded a reasonable, achievable plan. There are more than a half-dozen federal and state agencies that have jurisdiction over the water, boating, pollutants, paints and pesticides in Marina del Rey. Copper hull paints are approved for use by the State of California Department of Pesticide Regulation. Addressing copper contamination from antifouling paints requires a state wide solution, not a local regulation by a local agency that materially failed to coordinate and consider the views of stakeholders and other governmental entities.

The real world impacts to those of us in Marina del Rey simply haven't been thought through by the Board before it arbitrarily assigned disproportionate blame with serious financial consequences to the anchorages.

This Amendment sends the wrong message that California is over-regulated and a bad place for business. It needs to be remanded and reconsidered so as to reach a workable solution with boaters and anchorages.

The TMDL in its present form is destined to fail. We urge the State Board to reject the proposed TMDL Amendment.

Sincerely,

Charles E. Michaels

May 13, 2014

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor, Sacramento, CA 95814
Delivered via Email: commentletters@waterboards.ca.gov

Subj: Opposition To Proposed Amendment to the Los Angeles Regional Basin Plan To Revise the Total Maximum Daily Loads ("TMDL") for Marina del Rey Toxic Pollutants

Dear Ms. Townsend:

This is a supplement to my letter of May 9, 2014 that was sent to State Water Resources Control Board on the referenced subject.

Yesterday, I was talking with a prominent, successful businessman in Marina del Rey, who is both a lessee of the County of Los Angeles and an operator of a major facility in the marina. He told me that he was unable to secure loan financing for a major remodeling of his facility because of the proposed Amendment and its "responsible party" designation. He added that he was attempting to secure alternate financing, but that it was problematical at this point.

This businessman said that the lack of financing and combination of potential environmental liability for copper in the marina's water and sediment was enough for him to reconsider pursuing a lease extension with the County at this time.

The Regional Board's response and its economic analysis throughout this process has been to deny that there would be a major economic impact to Marina del Rey. It simply stated that it "is not anticipated that the cost of complying...will result in a flight of boaters" with a coinciding economic loss to businesses.

My conversation yesterday is more evidence that the Regional Board's analysis is flawed. Its economic analysis assumes the availability of grant funding, which is not guaranteed, but in any event there won't be grant funding to help businesses as I just described. If the Regional Board's economist had taken the time to actively pursue an informed process, meet with major businesses and anchorages in the marina, actively collaborate in the economic impact, the Board would have discovered the "real world" considerations facing Marina del Rey. Moreover, the economic report was not released to the public in time for citizens to make an informed analysis and rebuttal. This is but another example of a series of due process "oversights," which the Regional Board further fails to acknowledge or remedy through an extension of the process.

For the reasons stated in my letters and other with similar views, I am therefore asking the State Water Resources Control Board (the "State Board") to reject the proposed TMDL

Amendment in its current form. I further request that the State Board direct the removal of all wording in the TMDL Amendment that assigns responsibility and allocates liability to individual anchorages and boat owners.

Sincerely,

Charles E. Michaels
Secretary