

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
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RE: Opposition to Proposed Amendment to the Los Angeles Regional Basin Plan to Revise the Total Maximum Daily Loads for Marina del Rey Toxic Pollutants

We operate Marina Harbor Anchorage located in A basin with 319 slips on 12 separate docks in the Marina del Rey harbor. Marina Harbor Anchorage was one of the first anchorages in Marina del Rey to make the effort to go through the “Clean Marinas” designation process. We are proud of our environmental record, and believe that the Regional Board’s action is both wrong, as well as a bureaucratic over-reach.

We are firmly opposed to the LA RWQCB proposed TMDL Amendment and ask the State Water Control Board to reject the Amendment for the reasons stated in this letter, and by other commentators.

1. The Board’s Notice Fails The Due Process Test

The original notice from the Los Angeles Regional Water Quality Control Board referenced only “technical changes.” There was never any indication that the anchorages, or boaters, or the County of Los Angeles were going to individually named as “Responsible Parties,” who would be liable for copper pollution in the Marina.

Moreover, in recently reviewing the Board’s notice mailing list, we found that 100% of our boaters were not even on the Board’s mailing list.

As a result, the Notice mailing itself was inaccurate, disingenuous, incomplete, and poorly handled.

By failing to ensure that affected parties were adequately and timely notified, the Board denied stakeholders the right to be heard. This is a fundamental denial of due process and it denied boaters, anchorages and other interested parties to a fair and impartial hearing at the Regional Board level in developing the TMDL Amendment.

2. The Responsible Party Designation is Illegal

The Board would have us to believe that it has the legal authority in a TMDL Amendment to name and hold anchorages responsible for copper pollutants in the Marina. It does not. We have been further advised that this is the first time that the Board has ever tried to hold a private party responsible for a load allocation in a TMDL.

There is no statutory or judicial authority under either federal or California law that recognizes a load allocation in a TMDL as retroactively and prospectively creating, by itself, joint liability for non-point sources.

The Marina del Rey TMDL Amendment is an unauthorized and unlawful means to assign legal responsibility to a nonpoint source.

Finally, The Board wrongly attempts to make boaters and anchorages, both nonpoint sources, legally liable for “discharges” of dissolved copper passively leaching from boat hulls when the law provides that only point sources can be held liable for discharges of a pollutant. This creates a legal impossibility and it wrongfully implies that that an anchorage can be held responsible for discharges over which it had no control. This contravenes the holdings of several court cases and the Porter-Cologne Act.

3. Invasive Species

The Regional Board failed to do a meaningful site specific environmental analysis of the increase in invasive species that will result from eliminating copper bio-cide paints. The Board stated that “adverse environmental effects are acceptable” including the “increased growth of fouling organisms and invasive species” as a result of using non-copper based paints. Copper biocides have worked well over the decades to reduce the transport of invasive species. Eliminating this protection could have disastrous consequences. Non copper paints will foster the growth of biofilms on hulls, which harbor harmful bacteria and carbon, and which cause increased drag, resulting in the burning of more fuel and discharge of more emissions into the marina. Marina Harbor is located next to the only operating fuel dock in Marina del Rey, and the water quality in our anchorage would be irreparably harmed.

Should the Regional Board ultimately insist upon dredging the harbor, that could seriously threaten the delicate ecosystem of our marina, create new, unknown risks and outweigh the potential benefit from banning copper paint.

4. The Economic Impact Is Uncertain at Best and Destructive At Worst

By naming anchorages as “Responsible Parties,” the Board, by fiat, creates potential legal liability for the named parties, and economic uncertainty for businesses and the community at large.

Marina Harbor was one of the first anchorages to go through the voluntary “Clean Marina” process, and we believe there are many ways to improve water quality in Marina del Rey without resorting to such draconian regulations.

Our customers, our boaters, in Marina del Rey will have a choice to make. Get a \$1,094 waste discharge permit, pay \$8,000 or more to strip and paint their boats, incur more frequent cleaning costs, and still be named a “Responsible Party,” or move to another marina where they won’t be subject to the same risks.

The Board states that there will be no loss of business in the Marina. None of us believe that.

Some boaters will, in fact, leave; some will choose to sell their boats; others will choose not to comply with the regulations, therefore creating greater legal risks to the anchorages whose involvement with the discharge of pollutants is remote and passive.

We estimate that we could lose 10% of our boaters, perhaps more. And then what happens when the load allocation is not met and third parties sue the “Responsible Parties?” What will happen to our businesses then? Most do not have pollution insurance coverage.

The Board’s Economic Analysis is incomplete and doesn’t adequately discuss the costs of compliance, enforcement or litigation, nor does it discuss the increased costs of insurance or the inability to secure financing because of the cloud of potential pollution liability, or the loss of business, in general, within the community.

This Amendment is a potential negative tipping point that the Board ignores in its "Economic Analysis."

In San Diego, that Board adopted a phased program to give the boating community and businesses an opportunity to deal with the potential impact before incurring serious economic and legal risks and they provided for a 17 year compliance period. This Board is tone deaf and hasn't done that.

5. Compliance Is Impossible

A 10 year deadline imposed for compliance by the Board is impossible to meet and much more aggressive than what was implemented in San Diego's Shelter Island, a significantly smaller body of water.

Why?

- a. Because boaters in Marina del Rey don't strip their boats every 7-10 years as claimed by the Board---it's more like every 20 years.
- b. Boaters won't choose an unproven, less effective, more expensive non-copper hull paint over a less expensive, proven product without good reason and a fundamental shift in behavior---and this can only be accomplished through sound science, education, boater acceptance and time, all of which this Board turns a blind eye.
- c. We understand that the boatyards in Marina del Rey can't strip and repaint all the boats in Marina del Rey in the 10 year deadline mandated by the Board.

We formally request that the State Board reject the TMDL Amendment as currently drafted. Attached please find our prior letters to the Regional Board and to the State Board on this issue.

Sincerely,

Copy to:
Concerned Citizens of Marina del Rey
cmichaels@gmail.com

RE: Marina del Rey Harbor Toxics TMDL Reconsideration

Dear Mr. Unger:

Marina Harbor Anchorage is located in A Basin of Marina del Rey. With 319 slips on 12 separate docks, our anchorage is the closest marina to the Pacific Ocean. In 2002, the California Coastal Commission issued a Coastal Development Permit for the reconfiguration of our Anchorage, and included among the conditions of the permit was our adoption of the Best Management Practices developed by the California Coastal Commission. We are proud to run a state-of-the-art facility, and do our best to be—and to encourage our boater tenants to be—a environmentally-responsible steward of the Marina.

Our experience has prompted this letter of opposition to the Regional Water Quality Control Board's proposed TMDL Amendment for Marina del Rey.

At its meeting of February 6, 2014, the Regional Water Quality Control Board will consider a proposed amendment to the TMDL for toxic pollutants in the Marina del Rey Harbor that will set unrealistic and unattainable goals for the elimination of copper bottom paints on boats docked in Marina del Rey.

Marina del Rey was designed to be the recreational boating center for the Los Angeles Region and the implementation of the proposed TMDL regulations will place the entire Marina in jeopardy of fulfilling its mission to encourage the use of the water.

The proposed regulations seek to protect beneficial uses of the water that are not permitted in Marina del Rey Harbor in the first place. Regulations to protect sport fishing, shell fishing or swimming (outside the shallow waters of Marina Beach) are unnecessary because these activities are not permitted.

Similar programs to regulate pollutants in harbor waters have failed. San Diego's Shelter Island, with half as many boats as Marina del Rey, was granted 17 years to achieve a 75% reduction of copper in its harbor. Now, 8 years later only a 10% reduction has been achieved, mostly attributable to fewer boats in slips due to the recession.

The Marina del Rey Harbor is vital to the economic well-being of our community and we support all reasonable efforts to improve the water quality of our marina. Nevertheless, the Water Board should not impose requirements that would put Marina del Rey Harbor at a competitive disadvantage with other marinas in the region.

Our boaters have already expressed great concern about their ability to stay in our harbor if they must incur significant costs to strip and repaint their boats with alternative paints that have not been proven to be effective.

Our anchorages and thousands of boaters are seriously impacted by these proposed regulations. I respectfully request that the Regional Water Quality Control Board delay adoption of any new regulations until there is a balanced approach based upon sound science and financially feasible mechanisms to improve water quality without major impairment to the premier recreational facility of the County of Los Angeles.

Thank you for your consideration of the concerns of the Marina del Rey community.

Sincerely,

David O Levine

On behalf of Marina Harbor Apartments & Anchorage