

**Responses to Heal the Bay's Oral Comments at 4-27-2012 Regional Board Meeting – Item 9<sup>1</sup>**

<b>Comment</b>	<b>Response</b>
1. We are concerned that there has been an inadequate effort put forth towards effectively trying to meet the actual water quality standards prior to implementing a UAA. Specifically, documentation on actual BMP implementation and subsequent performance criteria is lacking.	Considerable effort has been and continues to be made to achieve recreation water quality standards. These efforts are documented in reports submitted by responsible parties in the watershed. See responses to comments # 3, 18, 26 and 27 in the "Responses to Heal the Bay's Supplemental Comments (4-20-12) Concerning the Use Attainability Analyses".
2. Dry weather diversions are stated as 100 percent effective. Yet, as quoted in the UAA, that treatment agencies do not like them. Simply not liking a BMP is an unacceptable reason not to meet bacteria objectives.	None of the UAA reports states that treatment agencies "do not like" dry weather diversions. Rather, the UAA reports identify constraints on the use of dry weather diversions; these constraints are noted in the response to comment #4 in the "Responses to Heal the Bay's Supplemental Comments (4-20-12) Concerning the Use Attainability Analyses". It is recognized nevertheless that dry weather diversions are likely to be a key component of achieving recreation standards.
3. An additional factor that should have been considered is how will receiving water bodies downstream from the UAAs achieve recreational water quality standards.	Board staff responded to this comment orally at the April 27, 2012 meeting (see transcript, p. 58-59). It is well recognized that downstream recreational water quality standards must be achieved and protected. See also response to comment #6 in the "Responses to Heal the Bay's Supplemental Comments (4-20-12) Concerning the Use Attainability Analyses".
4. Why not wait to explore de-designation until December 2015, the compliance deadline for the middle Santa Ana River bacteria TMDL, to see if bacteria standards could actually be met by that deadline?	It is important to consider whether revisions to recreation water quality standards (including beneficial use designations) are appropriate and justified so that control measure expenditures and efforts are likewise appropriate and justified. Waters for which the REC1 use is de-designated, through a Use Attainability Analysis, must be reviewed at least once every three years to determine whether conditions (including water quality conditions)

<sup>1</sup> A verbatim transcript of the April 27, 2012 proceedings was prepared and includes Heal the Bay's oral comments, which are summarized in this response document. The oral comments focused on Use Attainability Analyses (UAAs). Heal the Bay had earlier expressed concerns regarding the Use Attainability Analyses in supplemental written comments dated April 20, 2012. Board staff prepared written responses to these supplemental comments; these responses were part of the documentation prepared, posted and distributed for the April 27, 2012 Regional Board meeting on the recreation standards amendments.

	<p>have changed such that the REC1 designation has become appropriate. If so, the Basin Plan would need to be modified accordingly.</p>
<p>5. According to Clean Water Act Section 131.10(g), the State must be able to demonstrate that attaining the water body's beneficial use is not feasible due to one of six factors before implementing a UAA. However, all efforts to uphold a water body's highest beneficial use must be exhausted. This includes the implementation and performance analysis of actual BMPs, explored integrated water management opportunities, and low impact development.</p>	<p>Some clarification of terminology may be appropriate here. A Use Attainability Analysis is conducted to determine whether a designated beneficial use (e.g., REC1) is not attainable due to one or more of the six factors identified in the federal water quality standards regulations at 40 CFR 131.10(g). The legal/regulatory basis for UAAs is described in detail in the January 12, 2012 staff report for the proposed recreation standards amendments (see Sec. 5.6.2.1).</p> <p>It is not clear whence the concept of "highest" beneficial use derives, nor is it clear whether Heal the Bay believes that recreational use constitutes the "highest" beneficial use. Federal regulations (40 CFR 131.11(a)) make clear that the most <i>sensitive</i> beneficial use must be protected when establishing and implementing water quality criteria. There is nothing in the UAAs or proposed amendments implementing them that violates this requirement.</p> <p>It may be noted that there is no explicit statement in the UAA regulations of the specific controls or actions that must be taken to achieve standards. As stated above (see response to comment #1), substantial efforts have been and are being made to achieve water quality standards.</p>
<p>6. Moreover, it is critical to seriously consider section 101(a) and (b) of the Clean Water Act, which states that the objective of this act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters, as well as it is the primary responsibility and rights of states to prevent, reduce and eliminate pollution before removing a water's beneficial use.</p>	<p>These provisions of the Clean Water Act, including the "fishable/swimmable" goal expressed in 101(a)(2), are well understood. It is in the context of these (and other) provisions of the Clean Water Act that the federal water quality standards regulations were written, including regulations pertaining to Use Attainability Analyses. These regulations essentially create the rebuttable presumption that "fishable/swimmable" uses, including REC1, should be designated for surface waters. The UAA</p>

	<p>regulations were established to provide the framework whereby that rebuttable presumption may be reviewed and reversed. The UAAs conducted and reported as part of the development of the proposed recreation standards amendments conform to the applicable regulations. As the administrative record for this matter makes clear, very serious consideration has been given to the goals and requirements of the Clean Water Act and implementing regulations.</p>
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