RESPONSES TO PUBLIC COMMENTS

Comments from three organizations were received on or before the public comment deadline of May 1, 2017, on the Draft Basin Plan Amendment, staff report, and associated documents, to incorporate Draft Total Maximum Daily Loads for Selenium in Freshwater, Newport Bay Watershed, Orange County, California. The organizations that provided comments are:

Ray Hiemstra
Associate Director
Orange County Coastkeeper  [OCCK]

Chris Crompton
Manager, Water Quality Compliance
Orange County Public Works  [OCPW]

Edwin William Galvez
City Engineer
City of Santa Ana  [SA]

The following table includes the comment number, which identifies the specific reviewer by the appropriate acronym, as provided above, then followed by the comment number. Some comments addressed more than one subject or required more than one response; those are identified by the addition of a lower case letter (e.g., a comment by the City of Santa Ana that required more than one response is identified as SA1a and SA1b). In some cases, the comments included background information or information not directly pertinent to the review comment. In these instances, Regional Board staff condensed the comment to the portion requiring response.

Regional Board staff note here that OCPW’s letter states that “…the following entities are identified as concurring entities to these comments: the Cities of Tustin, Santa Ana, and Irvine; and The Irvine Company”. The City of Santa Ana’s letter states the following: “The City is also aware that the County of Orange has prepared and submitted comments thereon. The City expresses its support for and joins in the submission of the County's comments. The comments in this letter supplement the County's comments and are intended to allow the City to continue working toward the common goal of improving water quality in the region efficiently.”

The original comment letters have also been annotated with the corresponding comment numbers and can be found in Attachment B2.1 to this document.
<table>
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<th>COMMENT NO.</th>
<th>COMMENT</th>
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<tr>
<td>OCCK1</td>
<td>Orange County Coastkeeper opposes the adoption of the basin plan amendment based on the compliance schedule. First of all the amendment compliance schedule does not contain any date certain requirements. All dates in the compliance schedule are based on arbitrary statements including “as soon as possible”, “(some time period after) after TMDL effective date”, “from approval of Phase I BMP Strategic Plan” and (some time period from Reconsidered TMDL effective date. This lack of date certain requirements leaves the compliance schedule open to interpretation by the various stakeholders and eliminates the ability to hold the dischargers accountable to meeting the requirements of the TMDL’s in a timely manner.</td>
<td>The proposed TMDLs would become effective, and subject to enforceable implementation, upon approval by the Regional Board, the State Water Resources Control Board, the Office of Administrative Law and, finally, the US Environmental Protection Agency (USEPA). Given the necessity of these multiple agency review and approval processes, it is not possible to identify a specific effective date. The approach utilized in the proposed TMDLs, and in other TMDLs adopted by the Regional Board and since fully approved, is to specify allowable maximum time periods for implementation from the effective date, once that date is known. This approach is not open to interpretation and is well known to the stakeholders and is a standard approach used by all of the Regional Boards in California. The Regional Board will implement the TMDLs, once approved and effective, through appropriate waste discharge requirements issued to dischargers. Those requirements will articulate the requirements that must be met to implement the selenium TMDLs, and the compliance schedule, if appropriate. Failure to meet the waste discharge requirements subjects the dischargers to appropriate enforcement action. As recommended by the USEPA, the compliance schedule in the proposed TMDLs also incorporates language requiring implementation to be completed as soon as possible. Disagreements as to what constitutes implementation “as soon as possible” may arise; any such disagreements would be discussed and resolved through a Regional Board public hearing process, if necessary.</td>
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<td>OCCK2</td>
<td>Our second concern is the lengthy time from for compliance. While the confusing nature of the compliance schedule makes it difficult to determine a final compliance date, it does state that final waste load allocations must be met 30 years after the effective date of a “reconsidered TMDL”. In the schedule the reconsidered TMDL is to be completed no later than 8 years after the effective date of the initial TMDL. Assuming that the initial TMDL becomes effective in 2018 this means the reconsidered TMDL would be effective in 2026 (or later) and final waste load allocations would not need to</td>
<td>The proposed compliance schedule is based on the time deemed necessary to implement the first Phase of the TMDLs, collect and analyze sufficient data to determine the efficacy of the TMDLs and the measures taken to implement them, to develop and seek approval of a revised TMDL, as appropriate, and to implement the revised TMDL. The schedule is based on experiential evidence of the time required to implement selenium reduction projects, to collect and analyze receiving water and management practice data, and to process</td>
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be met until 2056. This is 39 years after the adoption of the initial TMDL and is unacceptable.

revisions to the TMDLs, including the implementation plan.

Appendix S (Implementation Plan Actions) to the technical staff report was developed to support the need for the 30-year schedule for Phase II of implementation. There are re-evaluations every 10 years, which provides a built-in structure to lower allocations, loads, etc. if necessary or to change the final compliance date if warranted (e.g., at the first 10 year re-opener, if it appears that the stakeholders are close to meeting the TMDLs, then the compliance schedule length can be reduced). These TMDL Reopeners are specifically designed to evaluate if further selenium reductions are necessary, which is the intent of the adaptive management structure already incorporated into the Basin Plan.

Additionally, each Best Management Practices (BMP) Strategic Plan will be circulated for public review and comment for a period of no less than 30 days, and the Regional Board will hold a public hearing prior to considering approval of each plan. If no significant public comments are received, then the Executive Officer may approve the plan. Regional Board staff intend to oversee the pace of implementation actions as well as the schedule for implementation. By providing the 30-year time frame for Phase II from the start, the Regional Board maintains its discretion to shorten that time period if implementation of the BMP Strategic Plans achieves the necessary reductions or a reasonable and feasible treatment technology is developed that can easily be implemented in the watershed.

Based upon the efforts to install the pipeline diversion project in Peters Canyon Wash, Board staff recognize that these large public works projects take time to be conceptualized, assessed for feasibility, budgeted and then put out for bid, designed, permitted, constructed, operated and maintained properly. In addition, time is needed after the project is in operation to evaluate whether it is removing selenium as designed without resulting in localized or downstream impacts to biological resources.

The language requiring compliance with the TMDLs “as soon as possible” means that where it is demonstrably feasible to accelerate the process of achieving the TMDLs, then those accelerated steps are required by the proposed TMDLs. As noted in the preceding response to Comment No. OCCK1 (last paragraph), where
differences of opinion with respect to whether or not compliance “as soon as possible” is being achieved, then this matter is subject to resolution by the Regional Board at a public hearing. In such cases, the “as soon as possible” schedule for implementation of the TMDLs would be determined by the Regional Board.

With respect to the dates due for the different tasks and milestones in the compliance schedule, please note the following: The actual calendar dates will be inserted into the schedule and posted on the Regional Board’s web page, along with the final TMDL documents and USEPA’s approval letter, after USEPA approves the Selenium TMDLs. USEPA’s approval becomes the effective date of the TMDLs.

| OCCK3 | As you are aware Coastkeeper participated in a stakeholder process to develop the Selenium TMDL from 2005 to 2009. In 2010 the Regional Board produced a draft Selenium TMDL with a 19 year compliance schedule. While Coastkeeper had concerns regarding that long timeline we were supportive. The dischargers however rejected that timeline and instead embarked on an extended TMDL revision process strategically designed to push back compliance. Seeing the hopelessness of the extended stakeholder process Coastkeeper formally withdrew in 2011. The development of this TMDL continued, for another seven years, with no participation or input from the environmental community. It should be no surprise that the resulting TMDL has a potential final compliance date well beyond anything that would be acceptable to the environmental community. |

Assumptions have been made regarding the delay in adopting the draft TMDLs. Please note that the 2009-2010 draft TMDLs did not move forward to adoption for a variety of legal, technical and scientific reasons. The length of the compliance schedule may have been a concern to a number of stakeholders, however, this was not the basis for Regional Board staff’s determination that additional work was necessary and appropriate to address the legal, technical, and scientific concerns. OCCK’s participation was welcomed and was not precluded by Board staff or other stakeholders. The development and review of these TMDLs were conducted in a transparent manner, open to all parties, including environmental organizations.

As OCCK staff are aware, OCCK participated in the three technical and scientific workshops that were held in early 2014 to try to reach consensus on the remaining legal, technical and scientific concerns that had resulted in the 2009-2010 TMDLs not moving forward for consideration for adoption by the Regional Board. Other environmental representatives (Dr. Jack Skinner, Stop Polluting our Newport and staff from the University of California Nature Reserve’s San Joaquin Marsh Reserve) also participated in the three workshops.

Regional Board staff would also note that other regions have adopted extended compliance/attainment schedules for complex TMDLs. For example:

- 2002 Moro Bay Sediment TMDL – 50 years;
- 2007 San Francisco Bay PCBs TMDL – 20+ years;
| OCCK4 | With the existing compliance schedule the proposed TMDL will make no real progress in addressing the issue of selenium in the Newport Bay watershed. Considering that this process started in 1995 and the apparent final compliance date is 2056 (or later) the real timeline for this TMDL is 51 years. This is unacceptable. The compliance timeline for this TMDL should be no more than 18 years from the originally proposed 2010 adoption date and should contain date certain compliance deadlines. |
| OCCK4 | Please see preceding responses regarding the compliance schedule. OCCK has not offered any technical or legal basis for the recommendation of an 18-year schedule. Since the compliance schedule properly relies on the date the TMDLs are fully approved and become effective, it is inappropriate to suggest that the TMDL implementation schedule rely on a proposed 2010 adoption date, especially since consideration of adoption in 2010 was postponed (see also preceding response to Comment No. OCCK3). |

| Chris Crompton, Orange County Public Works [OCPW] | While these TMDLs were developed in the course of a multi-party stakeholder process, requirements which may be ordered upon the County (in any future MS4 permit, e.g.) as a result of the BPA may legally constitute unfunded state mandates. Thus, the County and all concurring entities respectfully submit these comments while reserving their legal rights to claim the existence of an unfunded mandate and seek a subvention of state funds vis-à-vis the TMDLs. Neither participation in the stakeholder process, nor any comment, or lack thereof, herein should be interpreted as the County or any concurring entity acceding or volunteering to be subject to imposition of the TMDLs, or as a waiver of any claim, present or future, that |
| Chris Crompton, Orange County Public Works [OCPW] | Comments noted. Commenter does not argue that the adoption of the TMDLs themselves would constitute an unfunded state mandate. Rather, that the implementation of the TMDLs in the future may constitute an unfunded mandate. It is also worth noting that the County, and other stakeholders, had substantial input in the development of the proposed TMDLs, and the implementation provisions in particular. |
inclusion of the TMDLs in any permit or order of the Regional Board would constitute an unfunded state mandate under the California Constitution.1

1As the Regional Board and its staff are aware, the County and its NPDES MS4 copemittees are currently pursuing claims before the Commission on State Mandates, which allege that certain requirements contained within Regional Board Order No. R8-2009-0030 constitute unfunded state mandates for which the claimants are entitled to a subvention of state funds.

| OCPW2 | **Section 3: Watershed Characteristics, Pg. 3-10, Footnote 4:** As noted in Comment #1, this footnote is intended to define the term “rising groundwater.” The footnote was the subject of significant discussion, mostly to balance legal and technical concerns, but has been modified significantly since submittal and no longer achieves that balance. The language should be revised back to the original version as follows: “Throughout this Staff Report, the term “rising groundwater” is used to describe groundwater intercepted by channels (i.e., lateral groundwater inflows, shallow groundwater, or shallow exfiltrating groundwater), as well as an actively rising water table with artesian conditions. In most areas of the Newport Bay watershed, “rising groundwater” refers to the condition where groundwater is intercepted by channels; however, the artesian conditions typically associated with the term “rising groundwater” exist in the Newport Bay watershed in localized areas.” | As proposed in the draft staff report, this footnote was intended to employ terms and language that are hydrogeologically correct. However, Board staff recognizes that the term “rising groundwater” has been widely employed as a convenience by the stakeholders in the Newport Bay watershed for many years, and that there is common understanding of the nature of the flows denoted by this term. In light of this, Board staff will propose that the footnote revert to the language identified in the OCPW comment. |

| OCPW3 | **Universal Comment: Santa Ana-Delhi Channel:** Universally throughout the staff BPA and Staff Report, “Santa Ana-Delhi Subwatershed” should be changed back to “Santa-Ana Delhi Channel.” This terminology was selected in consultation with the City of Santa Ana to be appropriately reflective of the waterway characteristics. | The term “Subwatershed” encompasses more than just the Channel itself and includes the tributaries to the Channel. Based on jurisdictional delineations performed by the U.S. Army Corps of Engineers as part of the Clean Water Act (CWA) section 404 dredge and fill permitting process, the Santa Ana Delhi Channel and its tributaries (Santa Ana Gardens Channel, Paularino Channel, and Airport Channel) are all considered Waters of the United States (WOTUS). Therefore, the designation of the Santa Ana Delhi Channel and its tributaries as a subwatershed is appropriate. Also note that the Santa Ana Delhi Channel is listed in the Santa Ana Region’s Basin Plan, with certain designated beneficial uses. |

| OCPW4 | **Section 3, Watershed Characteristics, Table 3.8 and Table 3.9:** Veeh Creek water column data have been inserted into the impairment assessment. These data have been part of discussions since the workshops were conducted early in the TMDL development process. At that time, Veeh Creek was not considered impaired. | Veeh Creek is hydrologically connected to Veeh Lake and to San Diego Creek Reach 2 via the Canada Channel. While Veeh Lake is privately owned, the creek falls within Orange County Flood Control’s jurisdiction. The County’s dry weather flow monitoring is the source of the |
time, and every time since the workshops, it has been generally agreed that the data would be included in any future TMDL assessments. Veeh Creek is on the outer boundaries of the San Diego Creek Watershed, privately owned, not in the Basin Plan, and likely drains into Veeh Reservoir, with limited if any flow to San Diego Creek. This area is therefore largely isolated hydrologically and not connected to the rest of the TMDLs. Any actions taken through these TMDLs would therefore not address Veeh Creek. Regional Board staff previously determined that the best solution was to use a 13267 Directive, if necessary, to gather additional data for the area. For these reasons, Veeh Creek data should be removed from the TMDLs.

The change was made because the original assessment of 3 out of 38 eggs exceeding the proposed numeric bird egg tissue target was incorrect. Pages 70-71 of Appendix H, Water and Tissue Data Used in Assessing Impairment, shows that 6 of 38 bird egg tissue samples exceeded the proposed numeric bird egg tissue target of 8.0 µg Se/g dw, with an exceedance rate of 16%. These samples included two (2) American Avocet eggs collected in 2002 of 11.2 and 17.2 µg Se/g dw; one (1) Black-necked Stilt egg collected in 2005 of 9.8 µg Se/g dw; two (2) American Avocet eggs collected in 2010 of 40.0 and 8.5 µg Se/g dw; and one (1) Black-necked Stilt egg collected in 2012 of 10.3 µg Se/g dw.

The change in the text has been made as suggested in the revised staff report.

The data used to determine impairment based on multiple exceedances of the CTR freshwater chronic criterion for selenium in freshwater of 5 µg/L. Exceedances of the CTR chronic criterion were found at monitoring stations both upstream (LGHF23S02; data from 2006-2015) and downstream (LGHF23@SV; data from 2007-2008) of Veeh Lake. However, Board staff agrees that additional investigation is needed to determine whether and to what degree fish, birds and other organisms may be impaired. Even though Board staff has left the finding of impairment in the TMDLs, staff has provided an explanatory paragraph in Section 8.3, Implementation Plan Structure and Approach (page 8-9) and the BPA that provides a different implementation path and process for Veeh Creek.
| OCPW7 | **Section 6: Linkage Analysis, Table 6.1 and Basin Plan Amendment:** The Trophic Transfer Factor (TTF) for prey fish to predator fish has been changed from 1.1 to 1.2 without justification. Changes in TTFs can have material impacts on the conversion of tissue concentrations to water column concentrations and it is concerning that such a change is made after the completion of the technical work. Please provide the basis for this change. | The change from 1.1 to 1.2 was a typographic error. Table 6.1 and the BPA have been revised to change the prey fish TTF back to 1.1. |
| OCPW8 | **Section 6: Linkage Analysis, Table 6.2, Footnote 5 and Basin Plan Amendment:** Footnote 5 has been added referencing additional model runs, but the runs are not included in any of the TMDL documentation. This particular table summarizes the water column concentrations predicted by the biodynamic model and the footnote is out of place, as it refers to changing the initial tissue concentrations in model runs while that decision was justified and established in Section 4, Numeric Targets. This issue has been well covered in other places in the Staff Report and is unnecessary and potentially problematic. Footnote 5 should be deleted. | The footnote has been removed from Table 6.2. |
| OCPW9 | **Section 1: Introduction, Pg. 1-1:** There is a typo on pg. 1-1. Change “selenium in freshwaters tributaries” to “selenium in freshwater tributaries” | The suggested change has been made to the sentence on page 1-1 of Section 1 of the revised staff report. |
| OCPW10 | **Section 3: Watershed Characteristics, Pg. 3-34:** There is a typo in the first paragraph on pg. 3-34 (as the timeframe referenced is in now in the past). Change “The public review period closes…” to “the public review period closed.” | The suggested change has been made to correct the tense on page 3-30, Section 3 of the revised staff report. |
| OCPW11 | **Section 5: Source Analysis, Pg. 5-3 and Basin Plan Amendment:** Change “areas” back to “subwatersheds.” | Changes have been made as suggested. |
| OCPW12 | **Section 7: Source Analysis, Table 7.2 and Basin Plan Amendment:** This table identifies the WLAs for implementation purposes. Footnote 13 has been modified and the revisions are now inconsistent with how the WLAs are identified in the table. WLAs are assigned to MS4 Permittees as opposed to being assigned to urban runoff. The original language should be restored. The additional clarifying language (for urban runoff) that was included as new text is acceptable as long as it is included as suggested below.  

> “Assessment location for the WLAs assigned to MS4 Permittees (urban runoff) wasteload allocation…”  

| OCPW13 | **Executive Summary: Allocations, Table ES-3:** A new footnote has been added to the table (footnote 2). The footnote contains a typo, uses inconsistent terminology, and should be revised for clarity.  

Footnote 2 currently reads as follows:  

> “See Section 8.2 for list of parties as regulated under the MS4 permit and those regulated as “other” NPDES dischargers.”  

Replace footnote 2 with the following:  

> “MS4 Permittees and Other NPDES Permittees are defined in Section 8.2.”  

| OCPW14 | **Section 7: Allocations, Pg. 7-12:** The terminology for the WLAs needs clarification in the first sentence of the second paragraph.  

Insert the following for clarity: “As described in Section 7.3, the tissue-based watercolumn WLAs are based on…”  

| OCPW15 | **Section 8: Implementation Plan, Pg. 8-28:** Additional language has been inserted regarding the approval for project-specific BMP effectiveness monitoring. This language was highly vetted to ensure that the various processes worked together and would not cause confusion during TMDL implementation. Some minor modifications are suggested:  

> “The project-specific monitoring can be approved either through the BMP Strategic Plan approval process (including periodic updates), or through the Regional Monitoring Program approval process (including periodic updates), or may be submitted separately for review and approval by the Executive Officer. Each project-specific monitoring plan must be submitted for review and approval by the Regional Board’s Executive Officer appended to the overall Regional Monitoring Program. Each”  

| | **Table 7.2 in the draft staff report has been revised with the alternative language suggested.** | **Revision to the footnote to Table ES-3 has been made as suggested.** | **Revision to page 7-12 has been made as suggested.** | **Revised language has been made to page 8-28 of Section 8 as suggested.** |
| OCPW16 | **Section 8: Implementation Plan, Pg. 8-34:** Language has been added to state information may be posted to additional websites as needed. Given that information will already be posted to the Regional Board’s website and the NSMP’s website, adding the possibility of additional websites seems to unnecessarily increase the administrative burden, especially with two significant avenues for public access already provided. While the information may be posted other places, including this language in the Staff Report seems unnecessary. Delete the new language “or other website as needed.” | Language regarding additional websites as needed has been deleted from page 8-34 of Section 8, of the revised staff report. |
| OCPW17 | **Basin Plan Amendment, Monitoring and Reporting:** This section has been re-ordered creating an organizational inconsistency between the BPA and Staff Report. In addition, in the section detailing Individual Action Plan Monitoring, in the first sentence, part of the terminology has been deleted (now reads Plan instead of Individual Action Plan). The original order for the monitoring and reporting sections should be restored to be consistent with the Staff Report. Also, the terminology for the Individual Action Plan (in the first sentence under the Individual Action Plan Monitoring section) should be corrected. | There does not need to be organizational consistency between the Staff Report and BPA. Regional Board staff re-ordered the sections in the BPA so that the reporting requirements were grouped together and placed after monitoring requirements for ease of access. The change to the terminology for the Individual Action Plan under the Monitoring section has been made as suggested. |

**Edwin William Galvez, City of Santa Ana [SA]**

| SA1a | **THE SANTA ANA DELHI CHANNEL HAS BEEN MISCHARACTERIZED AS WOTUS** The Santa Ana Delhi Channel (Channel) is a man-made municipal separate storm sewer system (MS4) consisting of a combination of underground storm drains and below-grade channels armored with rip-rap and concrete lining. (City of Santa Ana TMDL Compliance Alternatives Report, 2012.) The Channel is regulated by the Orange County MS4 permit, of which the City is a permittee. (BPA at p. 22.) | Please see response to comment SA1b, below. The Santa Ana Delhi Channel and its tributaries are considered Waters of the United States (WOTUS). The Santa Ana Delhi Channel is listed in the Santa Ana Region’s Basin Plan, with certain designated beneficial uses. |
| SA1b | In the BPA, the Staff Report, and its appendices, the Channel is referred to both as the "Santa Ana Delhi Channel" and the "Santa Ana Delhi Channel Subwatershed." During the review by stakeholders in 2015, the City requested a universal change from "Santa Ana-Delhi Subwatershed" to "Santa-Ana Delhi Channel." The suggested revision was | Regional Board staff did not and does not concur with the stakeholders’ recommendation to change the reference to the Santa Ana Delhi Channel as a "subwatershed" to simply the Santa Ana Delhi Channel and assert that it is only a MS4 channel. The Santa Ana Delhi Channel’s status as a WOTUS has been firmly established, both by the City’s own actions and |
based upon concerns related to the definition of Waters of the United States (WOTUS). The change was made in some places but it appears there are relic references in the TMDL documents referring to the Channel as a "subwatershed." The Channel is a subwatershed in as much as it delivers stormflows to downstream WOTUS like any other MS4.

**Recommendation:** Replace all instances of "Santa Ana Delhi Channel Subwatershed" with "Santa Ana Delhi Channel," which appropriately characterizes the waterway's characteristics as an MS4.

by federal and state regulatory agencies. The U.S. Army Corps of Engineers (USACOE) has issued CWA section 404 permits for numerous modifications to the channels since the 1980s, and the Regional Board has issued corresponding CWA section 401 water quality certifications. The following is a partial list of these certifications:

- **07/10/1992:** 401 Certification request for Santa Ana-Delhi Channel improvements at the San Diego Freeway, letter submitted to State Board recommending issuance of a conditional certification;
- **07/10/1996:** 401 Certification request for FEMA-funded Repair of Santa Ana Delhi Channel (F01) (USACOE Reference No. 96-00334-MFS); 401 certification waived under Regional Board Resolution 96-9, Waiver of Waste Discharge Requirements for Specific Types of Discharges;
- **07/10/1996:** 401 Certification request for FEMA-funded Repair of the Santa Ana Gardens (F02) (USACOE Reference No. 96-00337-MFS); 401 certification waived under Regional Board Resolution 96-9, Waiver of Waste Discharge Requirements for Specific Types of Discharges;
- **09/02/2010:** 401 Certification for the Santa Ana Gardens Channel Maintenance project (Regional Board File No. 302009-55);
- **11/04/2016:** 401 Certification for the Santa Ana-Delhi Channel Diversion project (Regional Board File No. 302016-06; USACOE permit No. SPL-2016-00249-GS NWP).

Most recently, the City of Santa Ana applied for and received a CWA section 401 certification from the Regional Board for the Santa Ana-Delhi Channel diversion project (RB File No. 302016-06, see previous paragraph). In its application, the City of Santa Ana included a jurisdictional delineation (conducted by AECOM) which found that the project would impact approximately 1.63 acres of jurisdictional waters. Thus, in its 401 application to the Regional Board, the City assumed that the Santa Ana Delhi Channel was a WOTUS. This assumption was confirmed when the USACOE issued a CWA section 404 permit for the project on June 15, 2017. Thus, the USACOE, which has primary responsibility for determining which waters are considered WOTUS, has affirmatively determined that the Santa Ana Delhi Channel is a WOTUS.

Furthermore, as part of the Basin Plan Amendments to Revise Recreation Standards for Inland Fresh Waters in the Santa Ana Region (REC Standards Amendment; adopted
by the Regional Board on June 15, 2012), the Regional Board approved the inclusion of the Santa Ana Delhi Channel in the Basin Plan along with the identification of certain beneficial uses. These Basin Plan amendments were subsequently approved by the State Water Board, Office of Administrative Law, and U.S. EPA. The amendment designated beneficial use for the Santa Ana Delhi Channel tidal prism (Bicycle Bridge at University Dr. at Upper Newport Bay to 1036 ft. upstream), Reach 1 (the channel portion below/downstream of Jeffery Road), and Reach 2 (the portion of the channel above/upstream of Jeffrey Road to the headwaters). These beneficial uses include the following (see Table 3.1 in the Basin Plan):

- **Tidal Prism:** REC1, REC2, WILD, RARE, MAR
- **Reach 1:** REC2, WARM, WILD, RARE
- **Reach 2:** REC2, WARM, WILD

The City of Santa Ana did not comment on the inclusion of the Santa Ana Delhi Channel in the Basin Plan during the public comment period or public hearing where the REC Standards Amendment was approved by the Regional Board.

Regional Board staff, therefore, will continue to include the Santa Ana Delhi Channel and its tributaries as waterbodies of the Santa Ana Delhi Channel Subwatershed and recognize the Channel as a WOTUS based on past Regional Board and USACOE actions under the CWA sections 401 and 404.

**SA2a**

**THE SANTA ANA DELHI CHANNEL IS NOT A WATER OF THE UNITED STATES UNDER THE CLEAN WATER ACT**

The Santa Ana Water Board proposes to amend the Basin Plan to incorporate selenium TMDLs that will apply to the Santa Ana Delhi Channel (among others) and characterizing it as an "impaired" watershed (BPA at pp. 2, 4, 15) and a WOTUS. The BPA also assigns WasteloadAllocations (WLAs) and LoadAllocations (LAs) to the Channel (BPA at pp. 15-16, 19); requires the development of a Regional Monitoring Program for the Channel (BPA at pp. 35-42); and imposes additional reporting requirements (BPA at pp. 42-44).

As the BPA acknowledges, the City and others have already invested significant effort in the development of the 2013 Nitrogen and Selenium Management Program Best Management Practice (BMP) Strategic Plan, which will attain

Regarding the City’s assertions that the Santa Ana Delhi Channel is not a WOTUS under the Clean Water Act, see response to Comment No. SA1b, above.

Regional Board staff supports the City’s planned low flow diversion project for the Santa Ana Delhi Channel as it is expected to provide multiple benefits to Upper Newport Bay by reducing inputs to the Bay of bacteria, trash and other pollutants during dry weather. However, as the City is aware, Newport Bay is not impaired for selenium; only the freshwater creeks are impaired. On multiple occasions, Regional Board staff has made it clear to City staff that reduction of selenium in the Santa Ana Delhi Channel and its tributaries (e.g., Santa Ana Gardens Channel) will be required. Beneficial uses established for the Santa Ana Delhi Channel are potentially being impacted by selenium. Birds have been observed foraging in the channel and its tributaries and two fish tissue
Nitrogen and selenium reductions to protect beneficial uses in the Channel. (BPA at p. 26.) The Cities of Santa Ana, Costa Mesa, and Newport Beach have obtained grant funding and are currently developing an urban discharge diversion facility to be located in the Channel. (2013 BMP Strategic Plan at p. 30.) The diversion facility will capture and divert urban discharge low-flow into the sanitary sewer system, or for use as irrigation on the adjacent Newport Beach Golf Course. The facility will reduce selenium levels and other water quality constituents of concern including fecal indicator bacteria and nutrients in the Channel and the brackish and freshwater habitats in Upper Newport Bay.

| SA2b | (Id.) Classifying the entire reach of the Channel as WOTUS is unnecessary and creates a jurisdictional conflict under the Clean Water Act. The Channel cannot be both an MS4, as it has already been designated, and a WOTUS. Because the Channel is an MS4, the Clean Water Act presumptive uses (fishable/swimmable) do not apply, and it has no designated beneficial uses and no applicable water quality objectives within the Basin Plan. The Channel is not a traditional navigable water and should not be classified as a tributary to traditional navigable waters subject to Clean Water Act Jurisdiction. | The Santa Ana Delhi Channel is a WOTUS. See response to Comment No. SA1b. |
| SA2c | The National Pollutant Discharge Elimination System (NPDES) regulations define an MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets...ditches, man-made channels or storm drains) designed or used for collecting or conveying storm water." 40 C.F.R. 122.26(b)(8). For the Channel to be listed in the Basin Plan as an impaired WOTUS, it would mean that a single waterbody can be both an MS4 and a jurisdictional receiving water. The implication that an MS4 and a receiving water body can be one in the same is contrary to the NPDES regulations. In EPA's Preamble to the initial MS4 regulations, the agency expressly determined that "streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purposes of this rule" and that "stream channelization, and stream bed stabilization, which occur in waters of the United States," were not | The Santa Ana Delhi Channel is a WOTUS. See response to Comment No. SA1b. |
subject to NPDES permits under Section 402 of the CWA.¹

The "conveyances" identified in the regulation—"roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains"—all refer to anthropogenic structures, not natural streams.²

2 40 CFR § 122.26(b)(8).

| SA2d | For similar reasons as to why man-made flood control channels cannot be WOTUS, man-made flood control channels cannot be deemed a "tributary" to WOTUS, for purposes of CWA jurisdiction. In some cases, the Regional Water Boards have indicated that a man-made concrete channel is being listed based on the "tributary rule." Historically, the tributary rule has been used to invoke federal jurisdiction over non-navigable natural waters when such water has a significant effect on a WOTUS. However, U.S. EPA recently clarified in the WOTUS rulemaking that concrete channels constructed in dry lands or uplands are not WOTUS. (80 Fed. Reg. 124 (June 29, 2015), Clean Water Rule: Definition of "Waters of the United States"; see also 40 C.F.R. §§ 230.3(o)(2)(vi) and §230(o)(3)(iii) (specifically excluding from the definition of "tributary," and, therefore, WOTUS, "stormwater control features constructed to convey, treat or store stormwater that are created in dry land"). While this final rule review is currently under reconsideration by Executive Order issued on February 28, 2017, the EPA's explicit exclusion of dry land "stormwater control features" from the definition of WOTUS clearly demonstrates the regulatory intent that jurisdiction over man-made flood control channel should not be exercised under the tributary rule. Tributaries can and should only be waters of the U.S. under 40 C.F.R. §230.3(s)(5) if they are natural water bodies. | The Santa Ana Delhi Channel is a WOTUS. See responses to Comments No. SA1b and OCPW3. |

| SA2e | Therefore, pursuant to federal regulations, the Channel is neither a WOTUS nor a WOTUS tributary and cannot be listed as an impaired WOTUS in the BPA. Recommendation: Remove the Channel from the proposed BPA to the extent its inclusion would characterize it as a WOTUS. The Santa Ana Delhi Channel is a WOTUS. See response to Comment No. SA1b. Therefore, Regional Board staff will continue to include the Santa Ana Delhi Channel and its tributaries as waterbodies of the Santa Ana Delhi Subwatershed and recognize the Channel as a WOTUS based on past Regional Board and USACOE actions under the CWA sections 401 and 404. |
ATTACHMENT B2.1 – PUBLIC COMMENT LETTERS ANNOTATED WITH COMMENT NUMBERS TO CORRESPOND TO RESPONSES TO COMMENTS DOCUMENT
April 22, 2017

Terri Reeder (via email)
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

Re: Proposed Newport Bay Watershed Selenium TMDL’s

Dear Ms. Reeder,

Orange County Coastkeeper (“Coastkeeper”) is a nonprofit clean water organization with the mission to protect and promote sustainable water resources that are swimmable, drinkable, fishable and sustainable. After reviewing the basin plan amendment to incorporate the Selenium TMDL’s to the Newport Bay Watershed we have the following comments:

OCCK1 Orange County Coastkeeper opposes the adoption of the basin plan amendment based on the compliance schedule. First of all the amendment compliance schedule does not contain any date certain requirements. All dates in the compliance schedule are based on arbitrary statements including “as soon as possible”, “(some time period after) after TMDL effective date”, “from approval of Phase I BMP Strategic Plan” and (some time period from Reconsidered TMDL effective date. This lack of date certain requirements leaves the compliance schedule open to interpretation by the various stakeholders and eliminates the ability to hold the dischargers accountable to meeting the requirements of the TMDL’s in a timely manner.

OCCK2 Our second concern is the lengthy time from for compliance. While the confusing nature of the compliance schedule makes it difficult to determine a final compliance date, it does state that final waste load allocations must be met 30 years after the effective date of a “reconsidered TMDL”. In the schedule the reconsidered TMDL is to be completed no later than 8 years after the effective date of the initial TMDL. Assuming that the initial TMDL becomes effective in 2018 this means the reconsidered TMDL would be effective in 2026 (or later) and final waste load allocations would not need to be met until 2056. This is 39 years after the adoption of the initial TMDL and is unacceptable.

OCCK3 As you are aware Coastkeeper participated in a stakeholder process to develop the Selenium TMDL from 2005 to 2009. In 2010 the Regional Board produced a draft Selenium TMDL with a 19 year compliance schedule. While Coastkeeper had concerns regarding that long timeline we were supportive. The dischargers however rejected that timeline and instead embarked on an extended TMDL revision process strategically designed to push back compliance. Seeing the hopelessness of the extended stakeholder process Coastkeeper formally withdrew in 2011. The development of this TMDL continued, for another seven years, with no participation or input from the environmental community. It should be no surprise that the resulting TMDL has a potential final compliance date well beyond anything that would be acceptable to the environmental community.
With the existing compliance schedule the proposed TMDL will make no real progress in addressing the issue of selenium in the Newport Bay watershed. Considering that this process started in 1995 and the apparent final compliance date is 2056 (or later) the real timeline for this TMDL is 51 years. This is unacceptable. The compliance timeline for this TMDL should be no more than 18 years from the originally proposed 2010 adoption date and should contain date certain compliance deadlines.

Thank You,

Ray Hiemstra
Associate Director
Orange County Coastkeeper
May 1, 2017

Ms. Terri Reeder
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

RE: Draft Newport Bay Watershed Selenium TMDL Staff Report and Basin Plan Amendment

Dear Ms. Reeder:

The County of Orange, OC Public Works (County) appreciates the opportunity to review and provide comments on the draft Total Maximum Daily Loads (TMDLs) for Selenium in Freshwater: Newport Bay Watershed, Orange County, California (dated January 2017), including the draft Basin Plan Amendment (BPA), Staff Report, and associated appendices. These TMDLs were developed through a collaborative third party stakeholder process involving, amongst others, the County, MS4 copermitters, and regulatory agencies, including the Santa Ana Regional Water Quality Control Board (Regional Board). Our comments relate predominantly to changes made subsequent to our submittal of the documents in December 2015. The comments have been grouped into two categories: technical comments (changes that have an impact on the TMDLs) and cleanup comments (comments that will improve the readability and clarity of the TMDLs). The following entities are identified as concurring entities to these comments: the Cities of Tustin, Santa Ana, and Irvine; and Irvine Company.

While these TMDLs were developed in the course of a multi-party stakeholder process, requirements which may be ordered upon the County (in any future MS4 permit, e.g.) as a result of the BPA may legally constitute unfunded state mandates. Thus, the County and all concurring entities respectfully submit these comments while reserving their legal rights to claim the existence of an unfunded mandate and seek a subvention of state funds vis-à-vis the TMDLs. Neither participation in the stakeholder process, nor any comment, or lack thereof, herein should be interpreted as the County or any concurring entity acceding or volunteering to be subject to imposition of the TMDLs, or as a waiver of any claim, present or future, that
inclusion of the TMDLs in any permit or order of the Regional Board would constitute an unfunded state mandate under the California Constitution.  

Technical Comments

OCPW 1. Universal Comment: Rising Groundwater: In several places throughout the Staff Report and Basin Plan Amendment, the terminology “rising groundwater” has been modified to “groundwater inflows.” This terminology has been an ongoing discussion point throughout the TMDLs development process. There was a decision, made by the Regional Board and stakeholders, to define the terminology in its first usage (achieved through footnote 4 on page 3-10). While the changes are not universal throughout the Staff Report, there are several places where changes in terminology have occurred, including:
• Executive Summary: Source Analysis write up
• Section 3: pg. 3-15 ; pg. 3-18; pg. 3-26
• Section 7: pg. 7-4

It is recommended that the language be revised back to rising groundwater. If necessary, Regional Board staff could add a footnote, where needed, to refer to the footnote on pg. 3-10 for terminology.

OCPW 2. Section 3: Watershed Characteristics, Pg. 3-10, Footnote 4: As noted in Comment #1, this footnote is intended to define the term “rising groundwater.” The footnote was the subject of significant discussion, mostly to balance legal and technical concerns, but has been modified significantly since submittal and no longer achieves that balance. The language should be revised back to the original version as follows:
“Throughout this Staff Report, the term “rising groundwater” is used to describe groundwater intercepted by channels (i.e., lateral groundwater inflows, shallow groundwater, or shallow exfiltrating groundwater), as well as an actively rising water table with artesian conditions. In most areas of the Newport Bay watershed, “rising groundwater” refers to the condition where groundwater is intercepted by channels; however, the artesian conditions typically associated with the term "rising groundwater" exist in the Newport Bay watershed in localized areas.”

OCPW 3. Universal Comment: Santa Ana-Delhi Channel: Universally throughout the staff BPA and Staff Report, “Santa Ana-Delhi Subwatershed” should be changed back to “Santa-Ana Delhi Channel.” This terminology was selected in consultation with the City of Santa Ana to be appropriately reflective of the waterway characteristics.

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1 As the Regional Board and its staff are aware, the County and its NPDES MS4 copermitters are currently pursuing claims before the Commission on State Mandates, which allege that certain requirements contained within Regional Board Order No. R8-2009-0030 constitute unfunded states mandates for which the claimants are entitled to a subvention of state funds.

2 All page number references throughout this memorandum are based upon a comparison document (final versions submitted to the Regional Board vs. versions released by the Regional Board for public comment).
4. **Section 3, Watershed Characteristics, Table 3.8 and Table 3.9:** Veeh Creek water column data have been inserted into the impairment assessment. These data have been part of discussions since the workshops were conducted early in the TMDL development process. At that time, and every time since the workshops, it has been generally agreed that the data would be included in any future TMDL assessments.

Veeh Creek is on the outer boundaries of the San Diego Creek Watershed, privately owned, not in the Basin Plan, and likely drains into Veeh Reservoir, with limited if any flow to San Diego Creek. This area is therefore largely isolated hydrologically and not connected to the rest of the TMDLs. Any actions taken through these TMDLs would therefore not address Veeh Creek. Regional Board staff previously determined that the best solution was to use a 13267 Directive, if necessary, to gather additional data for the area. For these reasons, Veeh Creek data should be removed from the TMDLs.

5. **Section 3: Watershed Characteristics, Table 3.9:** In the IRWD Constructed Wetlands, three additional bird egg samples are identified as exceeding the numeric target, but the sample size has not changed (i.e., the assessment changed from 3(38) in the prior draft to 6(38) in the current draft). Changes to the data at this late stage after the extensive technical work on the TMDL are of concern and should be justified. Please provide the basis for this change.

6. **Section 4: Numeric Targets, Pg. 4-18/19:** Additional language has been inserted to account for EPA’s final selenium criteria, which were published in 2016. The text is needed, however, it should be modified as follows:

“On June 30, 2016, USEPA published a final “Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016”. The final criterion differs slightly from the 2014 Draft Criterion. The final criterion element for selenium in whole body fish tissue was changed from 8.1 to 8.5 µg/g dw. **The drafting of these TMDLs was substantively completed prior to the release of EPA’s revised draft criterion in 2015 and the final criterion in 2016. As noted in Section 4.1.1, the TMDLs are phased and structured purposefully to account for the ongoing revisions to selenium objectives, especially in Phase I.** This change is not substantive and preliminary model runs (see Section 6, Linkage Analysis) indicate that changing the numeric target to 8.5 µg/g dw versus the recommended target of 8.1 µg/g dw would have a minimal effect on the resultant calculated water column concentrations. Therefore, it is appropriate to include the consideration of any modified objectives and the resultant changes to the allocations during the TMDL Reconsideration the effort required to revise the model is not commensurate with the results. As discussed at the end of Section 4.1.1, USEPA’s Final 2016 Criterion for selenium will be assessed during
development of selenium SSOs for the watershed and/or during the TMDL reconsideration.”

OCPW 7. Section 6: Source Analysis, Table 6.1 and Basin Plan Amendment: The Trophic Transfer Factor (TTF) for prey fish to predator fish has been changed from 1.1 to 1.2 without justification. Changes in TTFs can have material impacts on the conversion of tissue concentrations to water column concentrations and it is concerning that such a change is made after the completion of the technical work. Please provide the basis for this change.

OCPW 8. Section 6: Source Analysis, Table 6.2, Footnote 5 and Basin Plan Amendment: Footnote 5 has been added referencing additional model runs, but the runs are not included in any of the TMDL documentation. This particular table summarizes the water column concentrations predicted by the biodynamic model and the footnote is out of place, as it refers to changing the initial tissue concentrations in model runs while that decision was justified and established in Section 4, Numeric Targets. This issue has been well covered in other places in the Staff Report and is unnecessary and potentially problematic. Footnote 5 should be deleted.

OCPW 9. Section 7: Source Analysis, Table 7.2 and Basin Plan Amendment: This table identifies the WLAs for implementation purposes. Footnote 13 has been modified and the revisions are now inconsistent with how the WLAs are identified in the table. WLAs are assigned to MS4 Permittees as opposed to being assigned to urban runoff. The original language should be restored. The additional clarifying language (for urban runoff) that was included as new text is acceptable as long as it is included as suggested below.

“Assessment location for the WLAs assigned to MS4 Permittees the (urban runoff) wasteload allocation…”

Cleanup Comments

OCPW 10. Executive Summary: Allocations, Table ES-3: A new footnote has been added to the table (footnote 2). The footnote contains a typo, uses inconsistent terminology, and should be revised for clarity.

Footnote 2 currently reads as follows:

“See Section 8.2 for list of parties as regulated under the MS4 permit and those regulated as “other” NPDES dischargers.”

Replace footnote 2 with the following:

“MS4 Permittees and Other NPDES Permittees are defined in Section 8.2.”
11. **Section 1: Introduction, Pg. 1-1**: There is a typo on pg. 1-1.

   Change “selenium in freshwaters tributaries” to “selenium in freshwater tributaries”

12. **Section 3: Watershed Characteristics, Pg. 3-34**: There is a typo in the first paragraph on pg. 3-34 (as the timeframe referenced is in now in the past).

   Change “The public review period closes…” to “the public review period closed.”

13. **Section 5: Source Analysis, Pg. 5-3 and Basin Plan Amendment**: Change “areas” back to “subwatersheds.”

14. **Section 7: Allocations, Pg. 7-12**: The terminology for the WLAs needs clarification in the first sentence of the second paragraph.

   Insert the following for clarity: “As described in Section 7.3, the tissue-based water column WLAs are based on…”

15. **Section 8: Implementation Plan, Pg. 8-28**: Additional language has been inserted regarding the approval for project-specific BMP effectiveness monitoring. This language was highly vetted to ensure that the various processes worked together and would not cause confusion during TMDL implementation. Some minor modifications are suggested:

   “The project-specific monitoring can be approved either through the BMP Strategic Plan approval process (including periodic updates), or through the Regional Monitoring Program approval process (including periodic updates), **or may be submitted separately for review and approval by the Executive Officer**. Each project-specific monitoring plan must be submitted for review and approval by the Regional Board’s Executive Officer appended to the overall Regional Monitoring Program. Each project-specific plan must include **and, at a minimum, address** the following:”

16. **Section 8: Implementation Plan, Pg. 8-34**: Language has been added to state information may be posted to additional websites as needed. Given that information will already be posted to the Regional Board’s website and the NSMP’s website, adding the possibility of additional websites seems to unnecessarily increase the administrative burden, especially with two significant avenues for public access already provided. While the information may be posted other places, including this language in the Staff Report seems unnecessary.

   Delete the new language “or other website as needed.”

17. **Basin Plan Amendment, Monitoring and Reporting**: This section has been re-ordered creating an organizational inconsistency between the BPA and Staff Report. In addition, in the section detailing Individual Action Plan Monitoring, in the first sentence, part of the terminology has been deleted (now reads Plan instead of Individual Action Plan). The original order for the monitoring and reporting sections should be restored to be consistent
May 1, 2017
Ms. Terri Reeder

with the Staff Report. Also, the terminology for the Individual Action Plan (in the first sentence under the Individual Action Plan Monitoring section) should be corrected.

The County appreciates the opportunity to work with the Regional Board collaboratively on these important documents and appreciates the Board’s efforts to move forward with consideration of them at its June meeting. Please contact Jian Peng at (714) 955-0650 if you have any questions.

Very truly yours,

[Signature]

Chris Crompton, Manager
Water Quality Compliance

Cc: Newport Bay Watershed TMDL Funding Partners
May 1, 2017

VIA EMAIL (SANTAANA@WATERBOARDS.CA.GOV)

Ms. Terri Reeder  
Santa Ana Regional Water Quality Control Board  
3737 Main Street, Suite 500  
Riverside, CA 92501

Re: Draft Newport Bay Watershed Selenium TMDL Staff Report and Basin Plan Amendment

Dear Ms. Reeder:

The City of Santa Ana (City) appreciates the opportunity to provide comments on the Santa Ana Regional Water Quality Control Board’s (Santa Ana Water Board) draft Total Maximum Daily Loads (TMDLs) for Selenium in Freshwater: Newport Bay Watershed, Orange County, California (dated January 2017), including the draft Basin Plan Amendment (BPA), Staff Report, and associated appendices. The City is also aware that the County of Orange has prepared and submitted comments thereon. The City expresses its support for and joins in the submission of the County’s comments. The comments in this letter supplement the County’s comments and are intended to allow the City to continue working toward the common goal of improving water quality in the region efficiently.

I. THE SANTA ANA DELHI CHANNEL HAS BEEN MISCHARACTERIZED AS WOTUS

The Santa Ana Delhi Channel (Channel) is a man-made municipal separate storm sewer system (MS4) consisting of a combination of underground storm drains and below-grade channels armored with rip-rap and concrete lining. (City of Santa Ana TMDL Compliance Alternatives Report, 2012.) The Channel is regulated by the Orange County MS4 permit, of which the City is a permittee. (BPA at p. 22.)

In the BPA, the Staff Report, and its appendices, the Channel is referred to both as the “Santa Ana Delhi Channel” and the “Santa Ana Delhi Channel Subwatershed.” During the review by stakeholders in 2015, the City requested a universal change from “Santa Ana-Delhi Subwatershed” to “Santa-Ana Delhi Channel.” The suggested revision was based upon concerns related to the definition of Waters of the United States (WOTUS). The change was made in
some places but it appears there are relic references in the TMDL documents referring to the Channel as a “subwatershed.” The Channel is a subwatershed in as much as it delivers stormflows to downstream WOTUS like any other MS4.

**Recommendation:** Replace all instances of “Santa Ana Delhi Channel Subwatershed” with “Santa Ana Delhi Channel,” which appropriately characterizes the waterway’s characteristics as an MS4.

II. **THE SANTA ANA DELHI CHANNEL IS NOT A WATER OF THE UNITED STATES UNDER THE CLEAN WATER ACT**

The Santa Ana Water Board proposes to amend the Basin Plan to incorporate selenium TMDLs that will apply to the Santa Ana Delhi Channel (among others) and characterizing it as an “impaired” watershed (BPA at pp. 2, 4, 15) and a WOTUS. The BPA also assigns Wasteload Allocations (WLAs) and Load Allocations (LAs) to the Channel (BPA at pp. 15-16, 19); requires the development of a Regional Monitoring Program for the Channel (BPA at pp. 35-42); and imposes additional reporting requirements (BPA at pp. 42-44).

As the BPA acknowledges, the City and others have already invested significant effort in the development of the 2013 Nitrogen and Selenium Management Program Best Management Practice (BMP) Strategic Plan, which will attain nitrogen and selenium reductions to protect beneficial uses in the Channel. (BPA at p. 26.) The Cities of Santa Ana, Costa Mesa, and Newport Beach have obtained grant funding and are currently developing an urban discharge diversion facility to be located in the Channel. (2013 BMP Strategic Plan at p. 30.) The diversion facility will capture and divert urban discharge low-flow into the sanitary sewer system, or for use as irrigation on the adjacent Newport Beach Golf Course. The facility will reduce selenium levels and other water quality constituents of concern including fecal indicator bacteria and nutrients in the Channel and the brackish and freshwater habitats in Upper Newport Bay. (Id.) Classifying the entire reach of the Channel as WOTUS is unnecessary and creates a jurisdictional conflict under the Clean Water Act.

The Channel cannot be both an MS4, as it has already been designated, and a WOTUS. Because the Channel is an MS4, the Clean Water Act presumptive uses (fishable/swimmable) do not apply, and it has no designated beneficial uses and no applicable water quality objectives within the Basin Plan. The Channel is not a traditional navigable water and should not be classified as a tributary to traditional navigable waters subject to Clean Water Act Jurisdiction.

The National Pollutant Discharge Elimination System (NPDES) regulations define an MS4 as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets…ditches, man-made channels or storm drains) designed or used for collecting or conveying storm water.” 40 C.F.R. 122.26(b)(8). For the Channel to be listed in the Basin Plan as an impaired WOTUS, it would mean that a single waterbody can be both an MS4 and a jurisdictional receiving water. The implication that an MS4 and a receiving water body can be one in the same is contrary to the NPDES regulations. In EPA’s Preamble to the initial MS4 regulations, the agency expressly determined that “streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purposes of this rule” and that
“stream channelization, and stream bed stabilization, which occur in waters of the United States,” were not subject to NPDES permits under Section 402 of the CWA. The “conveyances” identified in the regulation – “roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains” – all refer to anthropogenic structures, not natural streams.

Under 40 C.F.R. § 122.26(b)(9), an MS4 outfall is defined as the point at which an MS4 discharges to waters of the United States. 40 C.F.R. 122.26(b)(9) (emphasis added). Thus, there is clear distinction between the MS4 used to collect, convey, and discharge stormwater, and WOTUS, into which point source discharges from MS4s are regulated. An MS4 cannot be a receiving water because a receiving water cannot discharge into itself. (See Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al., 568 U.S. 78, 133 S.Ct. 710, 712-13 (2013) (holding that the flow of polluted water from one portion of a river, through a concrete channel or other engineered improvement in the river, to a lower portion of the same river, does not constitute a discharge of pollutants); see also So. Fla. Water Mngmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 112 (2004) (holding that where a canal and an adjacent wetland are not meaningfully distinct water bodies (rather, two parts of the same water body), then the transfer of polluted water from the former into the latter would not need an NPDES permit, as it would not constitute a discharge of pollutants into waters of the United States.).

For similar reasons as to why man-made flood control channels cannot be WOTUS, man-made flood control channels cannot be deemed a “tributary” to WOTUS, for purposes of CWA jurisdiction. In some cases, the Regional Water Boards have indicated that a man-made concrete channel is being listed based on the “tributary rule.” Historically, the tributary rule has been used to invoke federal jurisdiction over non-navigable natural waters when such water has a significant effect on a WOTUS. However, U.S. EPA recently clarified in the WOTUS rulemaking that concrete channels constructed in dry lands or uplands are not WOTUS. (80 Fed. Reg. 124 (June 29, 2015), Clean Water Rule: Definition of “Waters of the United States”; see also 40 C.F.R. §§ 230.3(o)(2)(vi) and §230(o)(3)(iii) (specifically excluding from the definition of “tributary,” and, therefore, WOTUS, “stormwater control features constructed to convey, treat or store stormwater that are created in dry land”).) While this final rule review is currently under reconsideration by Executive Order issued on February 28, 2017, the EPA’s explicit exclusion of dry land “stormwater control features” from the definition of WOTUS clearly demonstrates the regulatory intent that jurisdiction over man-made flood control channel should not be exercised under the tributary rule. Tributaries can and should only be waters of the U.S. under 40 C.F.R. § 230.3(s)(5) if they are natural water bodies.

Therefore, pursuant to federal regulations, the Channel is neither a WOTUS nor a WOTUS tributary and cannot be listed as an impaired WOTUS in the BPA.

Recommendation: Remove the Channel from the proposed BPA to the extent its inclusion would characterize it as a WOTUS.
III. CONCLUSION

Thank you for the opportunity to comment on the draft BPA, Staff Report, and associated appendices. The City is committed to improving water quality in the region and provides these comments with the intent to participate in developing a Basin Plan that accomplishes this goal.

Sincerely,

[Signature]

Edwin William Galvez
City Engineer
City of Santa Ana