



February 3, 2015

San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108
Attn: Ms. Michelle Mata
sandiego@waterboards.ca.gov

Sent via email

Re: Environmental Groups Comments on Triennial Review of the San Diego Basin Plan

Dear Ms. Mata:

Thank you for the opportunity to comment on the Triennial Review of the San Diego Basin Plan. Please accept these comments on behalf of San Diego Coastkeeper, Coastal Environmental Rights Foundation, and Surfrider Foundation San Diego Chapter (collectively “Environmental Groups”). Environmental Groups represent numerous San Diegans, act through community involvement, regulatory participation, and legal action to ensure the protection and restoration of San Diego Bay, Mission Bay, and the region’s inland and coastal waters.

Biological Objectives

Environmental Groups strongly support the inclusion of biological objectives (BOs) into the Triennial Review and as a Basin Plan amendment.

For the first forty-plus years of the Clean Water Act’s implementation, regulators and the public alike have largely focused on the chemical integrity of our waters. This, despite the first sentence of the Act itself stating that, “the objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹ We believe the addition of both narrative and numeric biological objectives to the assessment of our waters’ health is long overdue.

Environmental Groups are supportive of a scheme in which BOs complement and coexist with the existing objectives that are currently in the Basin Plan. Existing chemically-focused objectives will continue to protect and restore those beneficial uses for which BOs are not the best indicator or measure. Both on their own and alongside existing objectives, BOs serve to tell a more complete story over time of our region’s water body health and the health of the aquatic life within those waters.

¹ 33 USC 1251 Section 101.

BOs are able to give us a more complete picture of the ecological health of our streams because BOs integrate both chemical and physical stream parameters into an objective score. And because BOs integrate data over time we are given a better understanding of the health of our waters than chemical objectives, which merely give an instantaneous snapshot of a waterbody's health.

Regional bioassessments data shows that 75% of the waterways in San Diego scored "poor" or "very poor".² Implementing BOs and utilizing EPA's CADDIS causal assessment methodology will allow our region to determine what is driving the poor ecological health of our waterbodies and allow for us to implement more effective management decisions.

San Diego Coastkeeper in particular has been, and continues to be, a partner with regional stakeholders in bioassessment training and policy development. Environmental Groups look forward to continuing this work and to working more closely with the Regional Board during the development of BOs in our region.

Chollas Creek Metals Site Specific Water Effects Ratio (WER)

While Environmental Groups are generally supportive of the development of site-specific objectives (SSOs) through consideration of scientifically supported information unique to particularly water bodies, we are adamant that the consideration of SSOs for Chollas Creek must necessarily include a detailed and fully-supported analysis of the associated impacts to downstream waters that would result in a Basin Plan TMDL amendment. Specifically, the WER study as it currently exists includes no information on the potential impacts to San Diego Bay and bay sediments that would result from increased copper, zinc, and lead loading immediately upstream and adjacent to the Bay in Chollas Creek. It is possible, if not likely, that allowing increased dissolved copper, zinc, and lead amounts in Chollas Creek would result in further degradation and impairments in the Bay and to already-impaired bay sediments.

The Draft report on WER SSOs presently concludes that the results of the various tests conducted, "demonstrate that aquatic life in Chollas Creek will remain protected based on the final proposed wet-weather copper and zinc WERs".³ To be a truly integrated approach, however, the SSO must also consider downstream impacts of increased metals loading. The area of San Diego Bay immediately downstream from Chollas Creek is impaired for benthic community effects and sediment toxicity, and nearby areas are impaired for copper and zinc. Further, the allowance for more metals into the Bay could have negative repercussions on the ongoing Shipyard's sediment remediation and may allow for recontamination of the area. To be truly site-specific, any undertaking must consider both in-stream and immediately downstream impacts of the mouth of Chollas Creek and its relationship to the Bay and nearby bay sediments, as well as to already-conducted and ongoing Bay sediment remediation.

Environmental Groups strongly suggest that the Regional Board require a clear showing that the allowance of increased metals loading into Chollas Creek in such close proximity to San Diego

² *Update on the Bioassessment Program for the Regional Water Quality Control Board's Region 9*, Lilian Busse.

³ *Development of Site-Specific Water Quality Objectives for Trace Metals in Chollas Creek: Water-Effect Ratio Study for Copper and Zinc, and Recalculation for Lead*, October 28, 2014, p. 47

Bay will not have a deleterious impacts on the Bay or bay sediments and associated beneficial uses. Until such a showing is able to be demonstrated, the SSO for copper, zinc, and lead should not be considered for a Basin Plan amendment.

The Preliminary Issues Report also makes mention that “The Basin Plan should also be amended to clarify the application of WERs in the California Toxics Rule (CTR) when developing numeric water quality objectives for toxic pollutants”. While it is unclear on its face to what this refers specifically, Environmental Groups do not support an amendment of the CTR or exceptions to the CTR to the San Diego Basin Plan. Indeed, because the CTR is a federal regulation promulgated by EPA based on the Administrator’s determination that the numeric criteria are necessary to protect human health and the environment, a blanket waterbody exception to such a rule would be unlawful. As noted in the EPA’s response to comments during the CTR rulemaking process, and in the EPA Guidance on WER Procedure, a WER is site specific – and should not be used for an entire waterbody.

Evaluation of REC-1 Water Quality Objectives (WQOs) and the Methods for Quantifying Exceedances

Unlike the first two Issues listed in the Triennial Review, the evaluation of REC-1 WQOs and methods for quantifying exceedances come with no clear recommendation on Basin Plan amendments. Instead, the proposal appears to be aimed at committing the Board and Board staff to participation in a data acquisition and the assessment process. While Environmental Groups support the analysis and production of scientifically supported data in setting criteria and development of action plans aimed at addressing the great deal of impairments to our waters, we do not believe that the production of, assessment of, and evaluation of that research and data is a project necessitating inclusion into the Triennial Review prioritization list.

Through the normal course of actions taken by the Regional Board and Board staff, information on studies and research is shared, vetted, and analyzed. It is our understanding that regional studies on REC-1 standards and regionally-appropriate indicators have been underway for some time, and communication regarding those studies with the Board and regional stakeholders is, and should remain, ongoing. If and when the time comes that adequate data is provided to support amendments on WQOs or methods for quantifying exceedances, the Board should revisit the issue at that time.

As a starting point, Environmental Groups do not support the suspension of, or variance from, REC standards. Environmental Groups also do not support the designation of Limited REC standards in our region. First and foremost it is our position that it is neither prudent nor reasonable to simply give up on the restoration or protection of beneficial uses of waterbodies in the region, or on the attainment of objectives for instream or downstream waters, and in particular those waterbodies that have been most neglected or altered by human activity or inattention. Environmental Groups respectfully request that the revision to REC-1 standards and quantification methods be removed from the proposed Triennial Review list until and unless sufficient data and analysis to begin that endeavor is present.

Should the Regional Board eventually move forward with these amendments, Environmental Groups wish to remind the Board that a Use Attainability Analysis (UAA) would be required in any instance where a suspension is proposed.

TMDL Development Timelines

Environmental Groups note that the Regional Board has developed and implemented only one new TMDL (Los Penasquitos) for the San Diego region since 2010, and only 3 have been implemented in the last ten years. More recently, two other TMDLs have been put on hold (Loma Alta Slough and Tijuana River). This, despite the fact that the Clean Water Act requires the development of TMDLs for water bodies listed on the 303(d) list⁴. Under the most recent 303(d) list, there are 445 individual listings in Region 9.⁵

Recently, the State Water Board (SWB) presented a Draft Order directing regions outside of the Los Angeles Region to consider implementation of a safe harbor provision into their MS4 permits. Much of the justification for the SWB's finding that an exception to backsliding exists that would allow for a safe harbor rests on TMDL implementation and time schedules. In fact, the justification for an exception specifically called out the importance of the role TMDLs play in a modified MS4 permit that includes a safe harbor in stating, "the majority of pollutants of concern from the LA County MS4 are addressed by the 33 TMDLs that are included in this permit."⁶

The San Diego Regional Board has mentioned in comments dated January 21, 2015 written in response to the Draft Order that the Board will likely seek to implement a safe harbor provision in the Region 9 stormwater permit when it is reopened for the inclusion of Riverside County later this year or early next year. The inclusion of a safe harbor into Region 9 MS4 permit, however, will clearly violate anti-backsliding provisions of the Clean Water Act. Nonetheless, based on the Board's intent to seek inclusion of a safe harbor into our regional permit, we propose as an addition to the Triennial Review Issues list that the Regional Board expedite the development and implementation of the remaining outstanding TMDLs in our region should the Board choose to proceed with the safe harbor. Specifically, Environmental Groups propose to add to the Triennial Review issues list the development of an expedited process or procedure to fast-track the development of TMDLs for all waters on the 303(d) list that do not currently meet beneficial uses and WQOs.

An expedited TMDL development process satisfies the (P) "Protective" category of Basin Plan amendments, as the development of TMDLs involves careful assessment of water body conditions and impairments, and the subsequent development of milestones and action plans to address those impairments.

While Environmental Groups question whether regulations and their justifications must be "reasonable" when the health of our aquatic and marine ecosystems is at stake and the law clearly requires certain measures aimed at their protection and restoration be undertaken, the

⁴ 40 CFR 130.7(c)(1)(ii)

⁵ http://gispublic.waterboards.ca.gov/pub/303d/2010_USEPA_approv_303d_List_Final_122311.xls

⁶ LA Regional Board's Response to Comments, P. 37

TMDL development also satisfies the (R) “reasonable or attainable” category given that the Clean Water Act requires the development of TMDLs to address impaired water bodies⁷ and such a requirement, having survived a myriad of judicial challenges, is assumed reasonable. Furthermore, Environmental Groups are unaware of any authority that states insufficient resources may excuse an agency from developing required TMDLs.

Thank you for the opportunity to comment on the Triennial Review of the San Diego Basin Plan. Please feel free to contact me with any questions or for additional feedback. We look forward to working with the Regional Board and other stakeholders toward development of a meaningful and effective approach to basin planning in our region.

Sincerely,



Matt O'Malley
Waterkeeper and Legal & Policy Director
San Diego Coastkeeper



Livia Borak
Legal Advisor
Coastal Environmental Rights Foundation



Julia Chunn-Heer
Policy Advisor
Surfrider Foundation San Diego Chapter

⁷ 40 CFR 130.7(c)(1)(ii)