EXHIBIT 1

ITEM 10: Amendments to the Water Quality Control Plan for the Santa Ana River Basin Region (Basin Plan) to: Update the List of Waters in Tables 3-1 and 4-1 and Designate Beneficial Uses; Remove REC1 Fecal Coliform Water Quality Objectives for Enclosed Bays and Estuaries; Remove Fecal Coliform TMDL for Water Contact Recreation (REC1) for Newport Bay; Revise the Shellfish Harvesting (SHEL) Beneficial Use Definition; Add Antidegradation Targets for REC2 Only Waters; Add New Chapter 6 Total Maximum Daily Loads

COMMENT LETTERS

1. U.S. Fish and Wildlife Service email dated November 21, 2016
2. Metropolitan Water District letter dated November 29, 2016
3. Irvine Ranch Water District letter dated November 30, 2016
4. Orange County Public Works letter dated November 30, 2016
5. Serrano Water District letter dated November 30, 2016
6. Orange County Coastkeeper (OCCK) letter, including Exhibits, dated November 30, 2016. The OCCK letter included Excel spreadsheet Exhibits, which can be reviewed on the Regional Board website at http://www.waterboards.ca.gov/santaana/water_issues/programs/basin_plan/bpa_fc_rec1.shtml

From:	Palenscar, Kai
To:	Woelfel, David@Waterboards
Cc:	Cleary-Rose, Karin; Brandt, Jeff@Wildlife; Christine_Medak@fws.gov
Subject:	Re: Basin Plan Amendment updating Beneficial Use Tables A
Date:	Monday, November 21, 2016 11:03:05 AM

Hi Dave,

Sediment transport is important for all of our alluvial fan and aquatic species. This includes San Bernardino kangaroo rat, Santa Ana River woolly-star, Santa Ana sucker, and to a lesser extent slender-horned spineflower. Diminished sediment transport combined with increased peak flows leads to channel incision and increased rates of bank erosion. The component of the sediment most important to sucker is large-grained sediment (cobble and gravel for foraging purposes) but all sediment is important to the long-term functioning of the river. Inputs of sediment (small and large-grained) from the upper watershed keep the gradient of the river intact. With diminished sediment input the river will erode and flatten out, decreasing flow velocity and degrading habitat for sucker.

Long-term channel incision leads to a hydrologically disconnected floodplain and a hardening of the channel bottom (proportionately more gravels and cobbles to sand). Effects of this impact to alluvial fan species include reduced rates of flood disturbance on the upper terraces and increased rates of eroded alluvium (bank erosion). Bank erosion removes portions of the seed bank and creates impediments (steep banks) within kangaroo rat habitat. The hardening of the channel bottom degrades the habitat for kangaroo rats, as well as creates a low flow channel that is more likely to be regularly inundated with flood water, potentially drowning kangaroo rats and replacing alluvial fan plant species with riparian species.

The major tributaries to consider as important for sediment transport in the San Bernardino Basin are Lytle-Cajon Creek, City Creek, Plunge Creek and Mill Creek. The upper Santa Ana River is confined by Seven Oaks Dam and San Timoteo Creek has multiple basins that trap sediment. Getting sediment transported through these large sediment traps would benefit species downstream.

In addition to sediment transport, nuisance runoff has allowed riparian habitats to persist in otherwise ephemerally moist habitats. Reduction in nuisance discharge may also indirectly effect listed species. Least Bell's vireo is heavily impacted by the replacement of riparian tree canopy with non-riparian plant species, but sucker may also be impacted in the Santa Ana River. Reduced flows degrades spawning habitat (degraded lowland tributaries) and encourages the growth of cattails and sedges, further reducing flow velocity.

Let me know if you want to chat.

Thanks,
Kai

Kai Palenscar, Ph. D.
Fish and Wildlife Biologist

U.S. Fish and Wildlife Service - Palm Springs Office
777 E. Tahquitz Canyon Way, Suite 208
Palm Springs, California 92262

T: 760-322-2070 x 408 (extension recently changed)
E: kai_palenscar@fws.gov

On Mon, Nov 21, 2016 at 7:55 AM, Woelfel, David@Waterboards <David.Woelfel@waterboards.ca.gov> wrote:

> Hello,
>
> If sediment transfer was important for a species we would very much consider that when issuing a permit. So in our Reach 4 of the Santa Ana River (the 215 / 10 freeway interchange downstream to Mission Ave Riverside, we have designated RARE for the sucker. Reach 5 of the River, upstream of the 10 freeway, we have not listed RARE for the sucker (however, RARE is listed in Reach 5 for the wholly star). I know sediment transport is important for the sucker. If you believe we should list Reach 5 as RARE also because of the sucker then let us know. So comments, email is OK, by end of next week. Sorry for the late notice.
>
> thanks
>
> **From:** Cleary-Rose, Karin [mailto:karin_cleary-rose@fws.gov]
> **Sent:** Friday, November 18, 2016 2:35 PM
> **To:** Woelfel, David@Waterboards
> **Cc:** Brandt, Jeff@Wildlife; Christine_Medak@fws.gov; Palenscar, Kai (kai_palenscar@fws.gov)
> **Subject:** Re: Basin Plan Amendment updating Beneficial Use Tables A
>
> Thank you Dave,
>
> Is sediment transport captured anywhere as a beneficial use?
>
> By when do you need a response?
>
> Thanks,
>
> Karin
>
> Karin Cleary-Rose

Inland Division Chief
U.S. Fish and Wildlife Service
777 East Tahquitz Canyon Way, Suite 208
Palm Springs, CA 92220
(760) 322 2070 ext 406 - Please note new extension.

On Fri, Nov 18, 2016 at 1:40 PM, Woelfel, David@Waterboards <David.Woelfel@waterboards.ca.gov> wrote:

Hi,

I have attached a table showing proposed waters and their designated beneficial uses that we hope to incorporate into our Basin Plan in an upcoming basin plan amendment. In addition, I attached tables showing beneficial uses we want to add to waters already listed in the Basin Plan. Many of the beneficial uses apply to habitat and as such you all are well qualified to comment on these designations. If you are able would you look over the tables and provide comments. As background the beneficial uses we are adding and which we would like your input on are:

RARE = Rare, Threatened, or Endangered Species waters support the habitats necessary for the survival and successful maintenance of plant or animal species designated under state or federal law as rare, threatened or endangered. (note we consider CDFW species of special concern as RARE as well as those listed under the Federal and State endangered species acts).

SPWN = Spawning, Reproduction, and Development (SPWN) waters support high quality aquatic habitats necessary for reproduction and early development of fish and wildlife. (note, In the 1995 Basin Plan version we only listed waters that had native fish spawning as designated with this use. All marine waters have this use. So we plan on designating SPWN in fresh waters that have sucker, chub, stickleback, trout, and dace populations. I realize all sorts of non-native fish spawn in flood control channels but would we consider those as “high quality aquatic habitats”?

EST = Estuarine Habitat waters support estuarine ecosystems, which may include, but are not limited to, preservation and enhancement of estuarine habitats, vegetation, fish, and shellfish, and wildlife such as waterfowl, shorebirds, and marine mammals. (note, Chris of USFWS asked us to designate this use for several estuaries in Orange County which we are doing)

COMM = Commercial and Sportfishing waters are used for commercial or recreational

collection of fish or other organisms, including those collected for bait. These uses may include, but are not limited to, uses involving organisms intended for human consumption. (note, our State Board has asked us to designate this use for waters where people fish as they are going to develop objectives for fish consumption. Our marine waters already have this use but no fresh waters do.)

Here are the issues we must consider;

- Clean Water Act and State Water Code require the Regional Board Staff to identify waters and the uses to be protected. (We have these listed in Table 3-1 of our Basin Plan)

- As a result of Federal and state listing of new species and a more thorough understanding where species are found there are several waters in which the RARE beneficial use should now be designated. Table 3-1 has been updated somewhat since 1995 but most beneficial uses listed in the table were designated in the 1995.

- We consider RARE to be placed on waters where the protection of endangered or threatened species depends on the water either directly or **to support its habitat**. So if a species is found in a waters of the state (like the K-rat is in some places) we will designate the RARE use.

- Our Table 3-1 is for information purposes, to highlight the existence of a use to tell regulators and dischargers alike that any plans made for that body of water will be carefully scrutinized for potential impacts to uses. We realize Table 3-1 gets out of date and so we are trying to update it. We depend on CEQA analysis and the Wildlife Agencies for the final word on the presence of listed species.

- We consider uses as existing or potential. An existing use is one that has occurred at some time since November 1975.

- We used the CDFW Natural Diversity Database to locate RARE species.

- The REC1 (water contact recreation), REC1 (non-water contact recreation) WARM or Cold (warm or cold water ecosystem) uses are what USEPA considers as presumed (fishable/swimmable) uses for all waters. To not designate a “fishable / swimmable use” a structured study (UAA) must be completed to show that the use can’t or has not been attained. This is difficult to do. We do not proposing completing a UAA on any of the waters we want to add. The MUN use is municipal and domestic supply. The MUN use can be excepted if certain conditions exists (water designed to carry storm / urban runoff, extreme low flow, carries treated effluent).

Thanks for your assistance. Please contact me if you have any questions. We plan to go to our Regional Board December 16 for approval of the amendment.

Dave Woelfel, M.S.

Environmental Scientist

Santa Ana Regional Water Quality Control Board

3737 Main Street, Suite 500

Riverside, CA 92501

Phone: 951-782-7960

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Office of the General Manager

November 29, 2016

Mr. Kurt Berchtold, Executive Officer
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

Ms. Felipa Carrillo, Executive Assistant
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

RE: Comment Letter – Amendments to the Water Quality Control Plan for the Santa Ana River Basin Plan

The Metropolitan Water District of Southern California (Metropolitan) appreciates the opportunity to comment on the Santa Ana Regional Water Quality Control Board's (Regional Board's) proposed amendments to the Water Quality Control Plan for the Santa Ana River Basin Plan (hereafter referred to as the Basin Plan). Metropolitan offers the following comments opposing the proposed Commercial and Sport Fishing "COMM" beneficial use designation in Table 3-1 for Lake Mathews in Riverside County (see Attachment 1). Metropolitan is concerned that any effort to open Lake Mathews to the public is contrary to the California Code of Regulations and Metropolitan's Administrative Code, and may jeopardize long-standing environmental protections for the area and compromise critical water supply infrastructure operational flexibility.

Background

Metropolitan is a regional water wholesaler that delivers approximately two million acre-feet per year to 26 member public agencies, who in turn provide water to nearly 19 million people in Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties. To supply the more than 300 cities and unincorporated areas in Southern California with safe and reliable water, Metropolitan owns and operates an extensive water system including the Colorado River Aqueduct, 16 hydroelectric facilities, nine reservoirs, 830 miles of large-diameter pipes, and five water treatment plants. Lake Mathews is the western terminus of Metropolitan's Colorado River Aqueduct system and is a vital component of southern California's imported water supply system.

Maintaining a high level of water quality in Lake Mathews is of utmost importance to Metropolitan. As such, Metropolitan has made significant investments to protect this critical water source. First and foremost, Metropolitan jointly maintains the 5,110-acre multiple

species reserve around Lake Mathews to prevent both illegal access to the lake and development-related pollution sources. Furthermore, Metropolitan constructed several watershed protection facilities, such as the Cajalco Creek Dam and Detention Basin, to protect Lake Mathews from runoff impacts and hazardous spills.

Comments

Metropolitan opposes the Regional Board adding the COMM beneficial use designation to Lake Mathews. Metropolitan offers the following comments on the proposed amendments to Table 3-1 of the Basin Plan for the Regional Board's consideration:

1. **Adding the Commercial and Sport Fishing "COMM" beneficial use for Lake Mathews would conflict with federal and state law and Metropolitan's Administrative Code.**

   Table 3-1 of the Basin Plan seeks to add COMM to the list of beneficial uses for Lake Mathews. However, this designation conflicts with existing legal requirements for Lake Mathews as both an ecological reserve and terminal reservoir. The land surrounding Lake Mathews is an ecological reserve, as defined by the California Code of Regulations. As such, Lake Mathews is "closed to all visitor use/access" (Title 14 Cal. Code Regs. § 630(b)(67) and (h)(20)). In addition, Metropolitan is legally obligated under the California and federal Endangered Species Acts to maintain Lake Mathews and its surrounding lands in their natural state pursuant to the Lake Mathews Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP, 1995) and Cooperative Management Agreement (CMA, 1995). These agreements significantly restrict recreational activities on and around the lake.

   As a "terminal reservoir" per the California Health & Safety Code § 117050, "Public fishing shall not be conducted" at Lake Mathews from either the water or land. It is further worth noting that based on its terminal reservoir status, Lake Mathews currently has a Municipal and Domestic Supply "MUN" beneficial use designation. Per the MUN designation, "[a] public agency may establish and enforce all rules and regulations necessary or convenient to the conducting of public fishing on the reservoir and its surrounding land and for the control, operation and protection of the reservoir, its surrounding land and all structures, facilities and equipment in connection with the reservoir" (Cal. Health & Safety Code § 117060). Metropolitan's Administrative Code has reaffirmed that Lake Mathews not be used for recreational purposes (Metropolitan's Admin. Code § 4208). Therefore, the COMM beneficial use designation would be erroneous as fishing is not legally available on Lake Mathews.

2. The COMM beneficial use designation could be cited as precedent for efforts to open Lake Mathews for fishing

While Metropolitan understands that the COMM beneficial use designation does not obligate Metropolitan to open Lake Mathews to fishing, the new designation could be cited as a reason to do so. For example, in 2013, Assembly member Kevin Jeffries (R-Riverside) introduced Assembly Bill (AB) 1686 that proposed to open Lake Mathews to recreational activities, including fishing. A copy of Metropolitan's Board Letter directing staff to oppose AB 1686 is attached (Attachment 2). The bill's author dropped AB 1686 based on Metropolitan's opposition for the same reasons stated above. By adding the COMM beneficial use to Lake Mathews, it could be more difficult for Metropolitan to deter external interests seeking to open the lake to recreation, despite the legal protections against any such action.

3. Metropolitan recommends the footnote for REC1 be moved to encompass all beneficial uses for Lake Mathews

Footnote number 4 under Table 3-1 of the amended Basin Plan refers to the REC1 beneficial use designation for Lake Mathews and says "Access prohibited per agency/company with jurisdiction." Metropolitan recommends that the numeric marker for footnote number 4 be moved from the REC1 column (i.e., X[4]) to the first column such that it reads "Lake Mathews[4]" (see excerpt from Table 3-1 below). In this fashion, it is clear that Lake Mathews is closed to the public not just for REC1, but for all public access related beneficial uses.

Table 3-1 BENEFICIAL USES – Continued (Table modified for display purposes)

LAKES AND RESERVOIRS	BENEFICIAL USE									
	MUN	AGR	IND	PROC	GWR	⋮	REC1	REC2	COMM	⋮
UPPER SANTA ANA RIVER BASIN										
...										
Lake Mathews[4]	X	X	X	X	X	...	X[4]	X		...
...										

[4] Access prohibited per agency/company with jurisdiction

Conclusion

Metropolitan thanks the Regional Board for the opportunity to comment on the draft Basin Plan amendments. Based on the comments provided above, Metropolitan respectfully requests that the Regional Board not add the COMM beneficial use designation to Lake Mathews in Table 3-1.

If you have any questions regarding this matter, please feel free to contact Bart Koch at bkoch@mwdh2o.com or (213) 217-5646.

Sincerely,

Jim Green
Group Manager, Water System Operations

CG:reg

(O:\Oopsexec\Admsupport\Correspondence\Final-MWD Comment Ltr. On Santa Ana.doc)

Table 3-1 BENEFICIAL USES - Continued

LAKES AND RESERVOIRS	BENEFICIAL USE																		Hydrologic Unit	
	MUN	AGR	IND	PROC	GWR	NAV	POW	REC1	REC2	COMM	WARM	LWRM	COLD	BIOL	WILD	RARE	SPWN	EST	Primary	Secondary
UPPER SANTA ANA RIVER BASIN																				
Baldwin Lake	+							I	I		I		I	I	I	I			801.73	
Big Bear Lake	X	X			X			X	X	X	X		X		X	X			801.71	
Erwin Lake	X							X	X				X	X	X	X			801.73	
Evans, Lake	+							X	X		X		X		X				801.27	
Jenks Lake	X	X			X			X	X	X			X		X				801.72	
Lee Lake	+	X	X		X			X	X		X				X				802.34	
Mathews, Lake	X	X	X	X	X			X[4]	X	X	X				X	X			802.33	
Mockingbird Reservoir	+	X						X[4]	X		X				X				802.26	
Norconian, Lake	+							X	X		X				X				802.25	
Prado Park Lake	+							X	X	X	X				X				801.21	
LOWER SANTA ANA RIVER BASIN																				
Anaheim Lake	+				X			X	X	X	X				X				801.11	
Irvine Lake (Santiago Reservoir)	X	X						X	X	X	X		X		X				801.12	
Peters Canyon, Rattlesnake, Sand Canyon, and Siphon Reservoirs	+	X						X[4]	X		X				X				801.11	

X Existing or Potential Beneficial Use
I Intermittent Beneficial Use
+ Excepted from MUN (see text)

[4] Access prohibited per agency/company with jurisdiction

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

BOARD ACTION

- **Board of Directors**
  Communications and Legislation Committee

3/13/2012 Board Meeting

8-15

Subject

Express opposition to AB 1686 (Jeffries, R-Riverside) - Waterways: Lake Mathews

Description

Assembly Member Kevin Jeffries (R–Murrieta) has introduced legislation that would open Lake Mathews and its surrounding lands to boating, fishing, and hiking. The bill (AB 1686) (Attachment 1) mandates that public access be allowed for hiking in the Lake Mathews Reserve and boating on the reservoir. Metropolitan is prohibited from taking "any action contrary to the authority granted" by the legislation, except that it may set a daily limit on the number of boats and hikers, set a speed limit on the lake, and collect a fee for access. There is no funding provided in the bill to establish either boat ramps or hiking trails. Instead, Metropolitan is allowed to work with other local agencies to develop funds for "any necessary infrastructure" to meet the legislative mandate. Nor is there any provision in the bill to replace the habitat located on the Lake Mathews Reserve that has been used as mitigation for other projects by Metropolitan and the State Water Project.

It has been Metropolitan's policy from the time Lake Mathews was first constructed that it not be used for recreation. That policy is set out in Section 4208 of the Administrative Code. Lake Mathews acts as the terminal reservoir for the Colorado River Aqueduct and has also served to provide wildlife protection and environmental mitigation for other Metropolitan water supply projects.

In 1979, Metropolitan executed an agreement with the Department of Water Resources (DWR) and Department of Fish and Game (DFG) to dedicate 2,565 acres at Lake Mathews to offset the environmental impacts of State Water Project facilities. In 1982, these lands received additional legal protection when they were designated a State Ecological Reserve by the Fish and Game Commission. Regulations governing the Lake Mathews Reserve prohibit public boating and fishing on the lake. AB 1686 does not address these regulations and would leave Metropolitan facing conflicting legal obligations.

In 1995, Metropolitan joined with the Riverside County Habitat Conservation Agency (RCHCA) to utilize additional lands around Lake Mathews to obtain permits allowing the incidental take of endangered species as a result of Metropolitan's water supply activities. The resulting Lake Mathews Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (Lake Mathews MSHCP/NCCP) was approved by the DFG and the U. S. Fish and Wildlife Service. The reserve lands set aside encompass 5,110 acres surrounding Lake Mathews, including the lands within the State Ecological Reserve. Public access was initially restricted to the prearranged tours conducted by Metropolitan. After a legal challenge of the Lake Mathews MSHCP/NCCP by the San Bernardino Valley Audubon Society, Metropolitan and DFG agreed to allow additional public access "only for environmental, scientific and/or educational purposes." Metropolitan has relied on the incidental take permits issued through the Lake Mathews MSHCP/NCCP for construction and operations impacts of projects in western Riverside County. Opening the reserve lands to public access for hiking and recreational uses would jeopardize the continued validity of the incidental take permits and potentially require Metropolitan to acquire and preserve replacement lands to maintain compliance with its legal obligations under the California and federal Endangered Species Acts.

AB 1686 is not the first effort to open Lake Mathews to recreational uses. In the 1980s the State Department of Parks and Recreation undertook a feasibility study of establishing a park unit at Lake Mathews. The proposal was strongly opposed by DFG and did not proceed. The Riverside County Chamber of Commerce then pursued opening the lake for recreation, but the county parks department declined to put up any funds for the effort. More recently, in 2007, the mayor of the city of Riverside made recreational use of Lake Mathews a goal of his administration. In light of the many state and federal legal restrictions on use of the reservoir, the city had no authority to proceed with the mayor's goal.

Metropolitan currently provides recreational uses at Lake Skinner and Diamond Valley Lake in Riverside County. In addition, recreation is allowed at Lake Perris, which is operated by DWR as part of the State Water Project. The availability of recreational opportunities for boating, fishing, and hiking at each of these reservoirs provides Riverside County with access to Metropolitan-funded facilities that were designed and constructed for recreational uses. Metropolitan has also contributed to the creation of other Riverside County reserves that provide hiking and recreation, including the Shipley Reserve and Santa Rosa Plateau Reserve.

AB 1686 does not recognize Metropolitan's considerable contributions to recreation in Riverside County. Nor does it address the existing state regulations and mitigation agreements that Metropolitan has put in place to utilize Lake Mathews and the Lake Mathews Reserve lands as the basis for mitigation of environmental impacts caused by its water supply facilities in the region. The bill's mandate that the lake be opened to public use comes without any means for Metropolitan to continue to comply with its existing legal obligations to protect these lands against disturbance. Nor does the legislation provide Metropolitan any funding for meeting the public access requirement. Boat launches and hiking trails would entail a significant capital cost to construct, with no assurances that access fees would cover even the costs required to operate and maintain those facilities.

The proposed legislation imposes a requirement on Metropolitan that violates its existing legal obligations and would require significant expenditures. Metropolitan has already contributed to the recreational opportunities in Riverside County through its other reservoirs and reserve lands that are open for public use. For these reasons, staff recommends that Metropolitan oppose AB 1686.

Policy

Metropolitan Water District Administrative Code Section 4208: No Recreational Use of Lake Mathews

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and express opposition to AB 1686.
Fiscal Impact: Significant unquantifiable costs would be required to construct recreation facilities and potentially to replace the reserve lands with undisturbed habitat to remain in compliance with environmental permits.

Business Analysis: Continuation of Metropolitan's policy to preclude recreational use of Lake Mathews will protect the existing investment in environmental mitigation and avoid costs of constructing new facilities that may not provide sufficient revenue to cover those costs.

Option #2

Take no action on AB 1686.

Fiscal Impact: Significant unquantifiable costs would be incurred to comply with the bill's mandate to open Lake Mathews to boating and hiking if the bill is enacted into law.

Business Analysis: It is unknown whether Metropolitan would recover the costs of constructing and operating recreational facilities at Lake Mathews, but experience at other reservoirs that would compete with Lake Mathews suggests that such costs would not be recovered.

Staff Recommendation

Option #1

Linda Waade 3/6/2012
Linda Waade *Date*
Deputy General Manager, External Affairs

Jeff Kightlinger 3/6/2012
Jeffrey Kightlinger *Date*
General Manager

Attachment 1 – Assembly Bill 1686

Ref# ea12617415

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL No. 1686

Introduced by Assembly Member Jeffries
(Coauthors: Assembly Members Miller and Nestande)
(Coauthor: Senator Emmerson)

February 14, 2012

An act to add Section 64.6 to the Harbors and Navigation Code, relating to waterways.

LEGISLATIVE COUNSEL'S DIGEST

AB 1686, as introduced, Jeffries. Waterways: Lake Mathews.

The Department of Boating and Waterways regulates the navigable waters in the state, including the operation of small craft harbors, boating facility planning and design, and beach erosion.

This bill would require the department to allow public access, as prescribed, to Lake Mathews, a reservoir in Riverside County, for the purposes of boating, fishing, and hiking, including access by nonmotorized bicycles. The bill would prohibit body contact with the lake, and limit the type of boats and fuel permitted on the lake. The bill also would allow the Metropolitan Water District of Southern California to develop, fund, and operate any necessary infrastructure; limit the number of boats on the water and persons accessing the recreational area of the lake; establish a fee for access to recreational, boating, and parking areas of the lake; and establish a speed limit for all boats on the water.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 64.6 is added to the Harbors and Navigation Code, to read:

64.6. (a) It is the intent of the Legislature to allow for recreational hiking and fishing at Lake Mathews.

(b) The department shall allow public access to Lake Mathews, a reservoir in Riverside County, for the purposes of boating, fishing, and hiking.

(c) Public hiking access shall be to the Lake Mathews-Estelle Mountain Reserve, and public hiking access shall include access by nonmotorized bicycles.

(d) Public access shall not include body contact with the lake.

(e) The department shall deny access to the lake for gas-powered boats unless the boat meets both of the following conditions:

(1) The boat has a four-stroke engine or a direct fuel injection two-stroke engine and complies with regulations of the State Air Resources Board.

(2) The boat uses gasoline free of MTBE additive.

(f) The department shall grant access to the lake for nonmotorized and electric boats.

(g) Access to the lake and habitat shall be consistent with habitat preservation requirements.

(h) The department shall allow the Metropolitan Water District of Southern California to do all of the following:

(1) Work with a city, county, nonprofit organization, or other public agency to develop, fund, and operate any necessary infrastructure.

(2) With any cooperating agency, set a daily limit on the number of boats on the water and persons accessing the recreational area of the lake.

(3) With any cooperating agency, establish a fee for public access to the recreational, boating, or parking area of the lake.

(4) With any cooperating agency, establish a speed limit for all boats on the water.

(i) A local agency shall not take any action contrary to the authority granted to the department pursuant to this section.

O

IRVINE RANCH WATER DISTRICT

15600 Sand Canyon Avenue • P.O. Box 57000 • Irvine, California 92619-7000 • (949) 453-5300 • www.irwd.com

November 30, 2016

Via Electronic Mail Only
Wanda Cross (wanda.cross@waterboards.ca.gov)
David Woelfel (david.woelfel@Waterboards.ca.gov)
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside California

Re: October 10, 2016 Proposed Amendments to the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan Amendment)

Dear Wanda and David:

Today we realized that in a single paragraph on page 25 of the 42-page Staff Report for the proposed Basin Plan Amendment referenced, the Santa Ana Regional Water Quality Control Board (SARWQCB) staff recommends designating a new commercial fishing or "COMM" beneficial use for Irvine Lake reservoir. The Irvine Ranch Water District (IRWD) is concerned about this proposed designation, particularly in light of the recent construction and impending operation of the new Baker Water Treatment Plant. IRWD is concerned that designating COMM as a beneficial use for Irvine Lake may not be consistent with operational changes at the reservoir necessary for the most efficient and cost effective extraction of raw and native water from the reservoir for treatment in the Baker Water Treatment Plant or Serrano Water District's water treatment plant. See Attachment A to this letter: *Domestic Water Supply Permit Amendment No. 05-08-16PA-028 for the Baker Water Treatment Plant* and accompanying Engineering Report (October 26, 2016).

Extraction, treatment and use of Irvine Lake water to supplement potable supply more fully implements the existing MUN beneficial use designation already applicable to Irvine Lake. Adding the COMM designation to Irvine Lake may result in perpetuation of a commercial fishing concession that relies heavily on importation of fish, and does not further the current MUN use, or the currently existing WARM, WILD, or COLD uses. We are very concerned that SARWQCB staff has not engaged directly with the owners of Irvine Lake, IRWD and Serrano Water District, prior to recommending adding the COMM designation. Therefore, IRWD requests that this discrete amendment related to Irvine Lake beneficial uses should be removed from the current proposed Basin Plan Amendment, delayed, and separately considered to allow time for SARWQCB staff to work with IRWD and Serrano Water District to conduct a thorough analysis of the new COMM designation to determine if the designation is necessary and warranted when all factors applicable to designation of beneficial uses under the federal Clean Water Act and the California Porter Cologne Water Quality Control Act are fully evaluated.

Very limited information is provided to support the proposed designation of the new COMM use for the reservoir. Specifically, on page 25 of 42 of the Staff Report, staff proposes to add the COMM beneficial use for Irvine Lake (as well as other lakes and reservoirs), based only on the statement that:

> "The lakes [including Irvine Lake] listed above are popular for sportfishing... and Lee Lake, Irvine Lake, and Anaheim Lake are or have been managed in recent years as fishing concessions...The COMM beneficial use is proposed to be designated to acknowledge that fishing is an existing activity in these lakes."

Under the Clean Water Act, each state, or in California, each water board,

> "must specify appropriate water uses to be achieved and protected taking into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.."

In conducting this evaluation, the water boards are expressly instructed to consider and balance all appropriate uses, including MUN uses and value of water for public water supplies. Further, the water boards may consider economic and social factors in considering and balancing beneficial uses, including economic factors related to increases in costs for effective treatment and use as potable supply that may result from the imposition of a new COMM use. *Introduction to the Clean Water Act, DU Classifications*, pp. 9-10 (USEPA) available at www.epa.gov/watertrain. .

Uses must be designated in a manner that recognizes and implements the "fishable/ swimmable" goals of Clean Water Act § 101(a)(2) and fishing related existing uses of waters of the United States. *Introduction to the Clean Water Act, Designating Uses of Waters*, pp. 10-11 (USEPA). However, beneficial uses that implement and recognize the "fishable" goal and protect aquatic resources within a waterbody need not be COMM. Instead, the water boards retain the discretion to implement other use designations to assure "fishable" goals and water quality that is protective of aquatic resources without promoting use of a waterbody for commercial fishing concessions.

Similarly, under Porter-Cologne § 13240, regional water boards are charged with adopting beneficial uses that, pursuant to §13050(f) should protect fish as well as humans, but need not include COMM, which is a use subcategory not mentioned in the statute. Further under Porter Cologne, an existing use ordinarily must be designated for protection, unless another beneficial use requiring more stringent objectives is designated. See Cal. Water Code § 13000. IRWD requests that staff consider the degree to which the stringent water quality objectives associated with already designated beneficial uses, including WARM, WILD, and COLD, sufficiently protect fish and aquatic species, without creating the potential for interference with implementation of Irvine Lake's other higher and best beneficial use: MUN water supply.

Because Irvine Lake is already designated for several fish related beneficial uses, including WARM, WILD, and COLD, adding the designation of COMM is unnecessary to assure protection of water quality necessary to support fish and protect aquatic resources. Such designation may, however, unreasonably interferes with the most efficient and cost-effective operation of the Baker Treatment Plant as necessary to maximize the lake's MUN beneficial

use. As noted on page 8 of the Engineering Report set forth in Attachment A, the Domestic Water Supply Permit Amendment for the Baker Water Treatment Plant specifically recognized that while commercial fishing concessions had historically operated at Irvine Lake, those concessions are no longer operating and cannot therefore interfere with the proposed extraction and treatment process recently permitted. Adopting the COMM beneficial use for Irvine Lake as proposed would be contrary to the current operations at Irvine Lake as described in the Engineering Report underlying the Domestic Water Supply Permit Amendment.

As required by Cal. Water Code § 13240, IRWD requests that SARWQCB staff consult with IRWD and Serrano Water District as affected local agencies prior to adopting the proposed COMM use. Further, IRWD requests that before action is taken, staff should work with IRWD and Serrano Water District to perform a careful and thorough evaluation under Cal. Water Code § 13050 of all factors and activities that may affect the quality and use of Irvine Lake, taking into consideration all demands being made and to be made on the lake, and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

Sincerely,

Irvine Ranch Water District

MLC: mlc

Attachment A

System No. 3010092—Domestic Water Supply Permit Amendment for Baker Water Treatment Plant

[See pdf submitted concurrently with this letter]

OC Public Works
Integrity, Accountability, Service, Trust
Shane L. Silsby, Director

November 30, 2016

Mr. Kurt V. Berchtold

Santa Ana Regional Water Quality Control Board

3737 Main Street Suite 500

Riverside, CA 92501-3348

Re: Proposed Basin Plan Amendments to address REC-1 objectives for bays and estuaries, the Fecal Coliform TMDL for Newport Bay, and other water quality standards matters

Dear Mr. Berchtold:

OC Public Works has reviewed the proposed Basin Plan Amendments to address the Newport Bay Fecal Coliform TMDL and other indicator bacteria-related water quality objectives for the Santa Ana Region. We appreciate the efforts of the Santa Ana Regional Water Quality Control Board to update indicator bacteria-related standards. The science of indicator bacteria has advanced considerably since adoption of the Newport Bay Fecal Coliform TMDL and we support efforts to revise water quality standards to reflect current science. The following comments are provided:

1. **Amendment to Chapter 3 -- SHEL beneficial use definition**

   Since the primary concern is the risk to human health from pathogenic bacteria, it is appropriate to narrow the definition of shellfish to filter feeding bivalves.

2. **Amendment to Chapter 3 – Table 3-1 Beneficial Uses**

   The definition of REC-1, as stated on page 4 of the Basin Plan Amendment Staff Report (December 9, 2016), is that 'recreational activities involving body contact with water where ingestion of water is reasonably possible. These uses may include, but are not limited to, swimming, wading, water-skiing, skin and scuba diving, surfing, whitewater activities, fishing and use of natural hot springs'. Not stated explicitly is that head immersion is required, as indicated in the 2012 USEPA's Recreational Water Quality Criterion. In epidemiological studies, the test subjects are required to have their heads under water in order to reliably count them in the exposure cohort. Many of the waterbodies that are being designated as REC-1 do not have such characteristics. Many are either inaccessible, or dry

most of the time, or so shallow that REC-1 is impossible, or when deep enough during storm events, too dangerous to recreate in and subject to the high flow suspension provisions of the Basin Plan (see attachment photos). For example:

a. Big Canyon Creek -the creek is too shallow to recreate, and the ponds are within a preserve where swimming is not allowed.

b. Brea Creek (San Gabriel River Drainage): upstream of Brea Dam is mostly either concrete or riprap, and the flow is intermittent, and too shallow to recreate. Downstream of the Dam is fully channelized with vertical concrete walls.

c. Fullerton Creek and Carbon Creek (San Gabriel River Drainage): These channels are mostly concrete or riprap, and too shallow to recreate.

Similar to Greenville Banning Channel these waterbodies should be candidates for delisting through a UAA rather than listing as part of this process.

We are also concerned with the intermittent ("I") designation of MUN for some of the coastal streams. The State's Sources of Drinking Water Policy allows an exception applicable to surface and ground waters where "There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices." In coastal streams, flows occur intermittently in response to rain events and are subject to natural contamination by indicator bacteria, turbidity, and other naturally occurring substances. Homes and businesses in the area currently use municipal water supplies for drinking and other municipal purposes, and capturing and treating water from intermittent coastal streams for municipal use would not be reasonable or economically feasible. Similarly, applying MCLs and other objectives applicable to municipal supplies to intermittent streams would not be a reasonable use of public funds. The proposed intermittent ("I") MUN designation for Muddy Canyon Creek, Los Trancos Creek, Buck Gully Creek, Big Canyon Creek, Carbon Creek, and Brea Creek should be removed.

3. **Amendment to Chapter 4 -- include only geometric mean water quality objective for *Enterococcus* for Bays and Estuaries by removing water quality objective for fecal coliform**

There is now wide consensus in the scientific community that *Enterococcus* spp. as indicators of bacterial pathogens are more closely associated with human health risk than either total or fecal coliforms. The US Environmental Protection Agency recognized this in their 1986 ambient water quality criteria recommendations and its following 2012 Recreational Water Quality Criteria.

The removal of fecal coliform objectives and incorporation of the *Enterococcus* geometric mean objective for bays and estuaries is therefore appropriate given the additional protections built into the proposed Basin Plan Amendments. The Staff Report also correctly recognizes that there are additional efforts at the state level to develop statewide objectives that may supersede regional objectives in the future.

4. **Amendments to Chapter 5 -- Antidegradation targets for REC2 only waters**

   The freshwater REC2 anti-degradation targets outlined in Table 5 are an appropriate approach and consistent with prior Board actions.

5. **Amendments to Chapter 5 -- Newport Bay Watershed: Remove fecal coliform TMDL for REC1**

   As noted previously, there is consensus that *Enterococcus* is a better indicator of risk to human health from water contact recreation than fecal coliforms in estuary and bay environment. Studies have shown fecal coliforms do not have a strong association with human health and therefore are poor indicators of risk. It is therefore appropriate to remove recreational water quality objectives and the TMDL based on fecal coliforms and to rely on the Enterococcus water quality objective. Additionally, the Newport Bay Bacteria Stakeholder Group is currently being formed and will develop further recommendations to the Regional Board regarding the protection of the REC-1 and SHELL beneficial uses in Newport Bay. This consensus-focused process is the appropriate forum to develop the future regulatory direction for bacteria in Newport Bay.

6. **Amendments to Chapter 5 -- Newport Bay Watershed: Extend the compliance date for the SHEL objectives**

   Because of the complexity of bacterial ecology, there are many challenges in managing the prevalence of indicator bacteria in Newport Bay. Extension of the SHEL compliance date is appropriate since it will allow time for these issues to be addressed in conjunction with the Newport Bay Bacteria Stakeholder Process. The County supports extension of the compliance date for SHEL water quality objectives and appreciates the Basin Plan Amendment recognizing the stakeholder process and its goals to develop consensus among watershed stakeholders regarding future regulation of bacteria levels in the Bay.

Specific Comments:

The following specific comments regarding the Staff Report and proposed Basin Plan Amendment are provided:

a. Staff report, page 11 (and other pages) we are unaware of evidence to support statements asserting that there are continuing perennial flows, erosion problems, and/or other water quality concerns in Muddy Creek, Los Trancos Creek, and Buck Gully Creek. BMPs and other measures have been implemented to address dry weather water quality concerns. The language in the Staff Report be modified accordingly.

b. Staff report, page 13, map, 'Big Cannon' should be 'Big Canyon'.

c. Staff report, page 30, "Huntington Harbor" should be 'Huntington Harbour'

d. Staff report, page 30 et seq., any reference to enterococcus should in fact be 'Enterococcus' or Enterococci because it's the name of a genus so it should always be capitalized.

e. Staff report, page 32, second bullet, line 9, the number '9' should instead be '5' since OCHCA operates based on the quasi-standard method of 5 samples per 30 days, therefore, each sample result is embedded in 5 consecutive geomean numbers.

f. Staff report, page 33, 3rd paragraph, bullet point 2, '30 day' and 'monthly' are two slightly different concepts and the intention is apparent to use calendar month. The same comment applies to the REC-1 WQO on the same page. The intent should be clarified.

g. Staff report, page 34, 1st paragraph, 'The State Water Board is developing a statewide REC1 bacteria objectives policy to implement the 2012 Criteria' should be 'The State Water Board is developing statewide REC1 bacteria objectives consistent with the 2012 Criteria'.

h. Staff report, page 35, 2nd paragraph, second bullet point, should be more appropriately revised to '(2) there is no impairment of the REC1 use in Newport Bay as measured by the promulgated Enterococci objective'.

i. Staff report, page 35, 4th paragraph states: "Again, that TMDL does not confer protection to the REC1 use and, as stated above, continuing to implement it may result in <u>appropriate</u> expenditure of public resources." Given the content, the term should be "<u>inappropriate</u>" instead of "appropriate".

j. Basin Plan Amendment (strike out version), Page 6, Big Canyon Creek: Big Canyon Creek is incorrectly placed under Santa Ana-Delhi Channel. It should be placed under Big Canyon Wash Drainage area.

k. Basin Plan Amendment (clean version), Page 20, 29 and 32) and staff report (page 33, 36): fecal indicator bacteria water quality objectives are expressed in different units (organisms, CFU/100ml, or MPN/100ml). Although those units are considered equivalent, it is suggested that they are expressed consistently to avoid confusion. Alternatively, we suggest the following language, or similar, to be used as a footnote to the chapter header: "Bacteria objectives, targets, and TMDL and/or Waste Load Allocations are expressed with different units for protecting REC1 (organisms/100 mL), REC2 (cfu/100 mL), and SHEL (MPN/100 mL). "CFU" and "MPN" represent units specific to analytical techniques used to quantify bacteria concentration, whereas "organisms" is a generic term used to express bacteria concentration. All unit expressions are considered equivalent measures of bacteria concentration (see Protocol for Developing Pathogen TMDLs, USEPA 2001, Office of Water, EPA 841-R-00-002 p 2-1). "

l. Table 3-1 (Staff Report at pp. 24-28) supporting details are missing regarding the addition of beneficial use designations to certain waters in. Additional information should be provided, including data or documentation supporting the proposed designations, citations for "recent research documents," and details on communications with staff from the resources agencies.

November 30, 2016
Mr. Berchtold

Thank you for the opportunity to provide comments. Please contact Jian Peng at 714-955-0650 if you have any questions.

Very truly yours

Chris Crompton, Manager
Water Quality Compliance

Attachment - Photos of Brea Creek, Fullerton Creek and Carbon Creek

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714.667.8800 | Info@OCPW.ocgov.com

November 30, 2016
Mr. Berchtold

Attachment

Photos of Brea Creek (left), Fullerton Creek (middle) and Carbon Creek (right)

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Frank O. Bryant, Vice-President
Jerry L. Haight
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Jerry Vilander, General Manager

November 30, 2016

Via Email and U.S. Mail

Wanda Cross (wanda.cross@waterboards.ca.gov)
David Woelfel (david.woelfel@waterboards.ca.gov)
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

Re: October 10, 2016 Proposed Amendments to the Water Quality Control Plan for the Santa Ana River Basin (Proposed "COMM" for Irvine Lake)

Dear Ms. Cross and Mr. Woelfel:

Serrano Water District (SWD) provides water service to its customers in Villa Park and portions of Orange, California. Together with the Irvine Ranch Water District (IRWD), SWD owns Santiago Reservoir, commonly known as "Irvine Lake," which is a significant source of the water treated and distributed by SWD. SWD also shares ownership with The Irvine Company (TIC) in fishing and other recreational rights associated with Irvine Lake. That reservoir served the public as a commercial recreational fishing venue for over 60 years, until recreational fishing activities were suspended earlier this year at the request of TIC.

SWD recently learned that the Santa Ana Regional Water Quality Control Board ("Regional Board") staff has recommended a new beneficial use designation of commercial fishing ("COMM") for Irvine Lake. While Irvine Lake has historically been used for commercial recreational fishing activities for many decades, SWD lacks sufficient information at this point to take a position on the Regional Board's staff recommendation to add the COMM designation to Irvine Lake. For this reason, and in accordance with Water Code §13240, SWD would appreciate meeting with Regional Board staff and staff of IRWD to learn more about the purpose and effect of the COMM designation proposed for Irvine Lake, and the reasons for the Regional Board's staff recommendation, in light of the fact that Irvine Lake has been operated for recreational commercial fishing for over 60 years without this designation. In this way, SWD hopes to gain a more complete understanding both of the significance of the proposed COMM designation and its effect on current and potential future uses and activities at Irvine Lake, so that SWD can take an informed position on the Regional Board staff recommendation.

Thank you in advance for your cooperation in this matter. Should you have any questions, please feel free to contact me.

Very truly yours,

Jerry Vilander, General Manager

cc: Joel D. Kuperberg, General Counsel, Serrano Water District
Paul Cook, General Manager, Irvine Ranch Water District

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November 30, 2016

Sent via email: wanda.cross@waterboards.ca.gov

Regional Water Quality Control Board
Santa Ana Region
Attn: Kurt Berchtold
3737 Main Street, Suite 500
Riverside, CA 92501

RE: Comments on Proposed Basin Plan Amendments to Remove Fecal Coliform Objectives for REC1 for Bays and Estuaries and Remove Fecal Coliform TMDL for REC1 in Newport Bay

Dear Executive Officer Berchtold and Regional Board Members:

Orange County Coastkeeper ("Coastkeeper") is a nonprofit clean water organization with the mission to protect and promote water resources that are swimmable, drinkable, fishable, and swimmable. Coastkeeper has over 2,000 members who live and/or recreate in and around the Santa Ana River watershed. Coastkeeper submits the following comments on the *Basin Plan Amendments to: Remove Fecal Coliform Objectives for Water Contact Recreation (REC1) for Bays and Estuaries; Removal Fecal Coliform TMDL for REC1 in Newport Bay; Revise Compliance Schedule for Fecal Coliform TMDL for Shellfish Harvesting (SHEL) in Newport Bay; Revise SHEL Beneficial Use Definition; Add Anti-Degradation Targets for REC2 Only Waters; Add Certain Waters to Table 3-1 and Designate Beneficial Uses for Those Waters* ("Basin Plan Amendment" or "BPA").

This comment letter builds on the comments made during the CEQA scooping meeting and meeting with Regional Board staff on the fecal coliform TMDL in December 2015. We incorporate our comments and documents exchanged with staff by reference. Coastkeeper has worked collaboratively with the Regional Board on these issues in the past and will continue to collaborate where possible, including participating in the stakeholder process set to begin January 2017.

Prior to a discussion on Coastkeeper's particular issues with the BPA, the TMDL background is critically important to understand. Newport Bay's bacteria impairment and subsequent TMDL were a high profile controversy in the 1990s. The development of a fecal coliform TMDL for Newport Bay was not at the insistence of the Regional Board, rather the result of litigation. Dischargers' compliance with that TMDL has recently been at issue and a 2017 facilitated stakeholder process will begin shortly to discuss the path forward for Newport Bay.

Fecal Coliform TMDL Background

Newport Bay is Orange County's gateway to the world for millions of visitors who descend over Upper Newport Bay to John Wayne Airport or arrive through the commercial or recreational marinas in Lower Newport Bay. The second largest estuarine embayment in southern California,[1] Newport Bay is the

[1] EOA, Inc., *Newport Bay Fecal Coliform Source Management Plan* 1 (Dec. 31, 2009) [hereinafter *NB FCSMP*].

nation's largest small craft harbor and a center for tour and charter boat operations, along with more than sixty different commercial ventures, rowing clubs, yacht races, and resorts. Newport Bay is home to numerous species of mammals, fish, invertebrates, native plants, and at least six endangered species, including the California Least Tern, the California Brown Pelican, and the Light-footed Clapper Rail.[2] Roughly 30,000 birds visit the Bay each year, and approximately eighty species of fish and over one thousand species of marine invertebrates can be found in the Bay.[3] Upper Newport Bay contains aquatic, riparian, and mudflat habitats, salt marsh, and includes the 700-acre Upper Newport Bay Ecological Reserve ("Reserve"). The Reserve plays a significant role in providing critical habitat for migratory waterfowl and shorebirds. The City of Newport Beach would not be the world-class destination that it is without the environmental resource of Upper Newport Bay, the economic resource of the Lower Harbor, and the aesthetic and recreational value of its shoreline.[4]

The Regional Board is charged with the duty of protecting Newport Bay. The Regional Board's Basin Plan establishes water quality standards ("WQS") (the beneficial uses and the water quality objectives) for surface waters in the Region, including Newport Bay.[5] The Basin Plan protects the Bay's uses that make it a world-class destination.[6] The Basin Plan looks to the various ways water can be used for the benefit of people and/or wildlife and the water quality criteria necessary to protect those uses.[7]

In establishing the Basin Plan, the Regional Board assigned more beneficial uses to Newport Bay than any water body in our region.[8] Chief among them are water contact recreation ("REC-1") and shellfish harvesting ("SHEL").[9] REC-1 waters are used for recreational activities involving body contact where ingestion of water is reasonably possible.[10] The REC-1 standard ensures the Bay stays protected for activities including swimming, wading, water-skiing, scuba diving, and fishing.[11] The SHEL standard ensures that the Bay will continue to serve as a habitat for shellfish collected for human consumption, commercial use, or sports.[12] Both standards are in place to protect human health.

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[2] Harbor Area Management Plan (June 2009); NEWPORT BEACH CITY COUNCIL STAFF REPORT (February 10, 2004); Watershed Executive Committee (July 27, 2004).
[3] NEWPORT BAY CONSERVANCY, http://newportbay.org/wildlife/marine-life/fish-of-upper-newport-bay/ (last visited April 14, 2016); UPPER NEWPORT BAY FEASIBILITY STUDY, FINAL REPORT 1-7 (Sept. 08, 2000), *available at* http://planning.usace.army.mil/toolbox/library/PCC2/ER%20tab%201.pdf.
[4] Newport Beach City Council Meeting, March 28, 2000.
[5] Resolution No. 99-10; Resolution No. 99-066; California Regional Water Quality Control Board, Santa Ana Region, Water Quality Control Plan, Santa Ana River Basin (8), at 3-1 (Feb. 2016) [hereinafter *Basin Plan*].
[6] *Basin Plan*, at 1-1.
[7] *Basin Plan*, at 3-2.
[8] Other beneficial uses in Newport Bay include: Commercial and Sport Fishing ("COMM"); Marine Habitat ("MAR"); Preservation of Rare and Endangered Species ("RARE"); Water Contact Recreation ("REC-1"); Non-contact Recreation ("REC-2"); Fish Spawning ("SPWN"); Shellfish Harvesting ("SHEL"); and Wildlife Habitat ("WILD"). *Id.* Additionally, Lower Newport Bay supports Navigation ("NAV"); while Upper Newport Bay supports the beneficial uses of Estuarine Habitat ("EST") and Preservation of Biological Habitats of Special Significance ("BIOL"). *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Basin Plan*, at 3-4.

Pathogens, which are disease-causing organisms,[13] have long-threatened Newport Bay's attractive recreational and shellfish harvesting uses. One of the traditional indicator bacteria used to identify pathogens is fecal coliform. Fecal coliform predominantly results from human feces in surface waters, although many other warm-blooded animals excrete these organisms as well.[14] Fecal coliform is a reliable indicator that harmful pathogens may be present in a water sample.[15] Water-borne pathogens may cause gastroenteritis, fever, flu-like symptoms, respiratory illness, cryptosporidiosis, dysentery, ear infections, or hepatitis A.[16] Such ailments directly impact the Bay's appeal, which reduces its use by local residents and visitors. Furthermore, the pathogens threaten the Bay's health, which impacts its access to visitors and its role as a thriving habitat for shellfish.[17]

Consistently high total coliform bacteria levels closed the upper portion of Upper Newport Bay to both uses in 1974.[18] Soon after, in 1978, despite its history as a site for a booming commercial fishing industry, the shellfish harvesting prohibition was expanded to the entire Upper Newport Bay.[19] Portions of the Newport Bay are also closed to REC-1 uses on a temporary basis, dependent on storms.[20]

In 1986, as an initial step to address the pathogen problem, the Regional Board identified Newport Bay as a water quality limited receiving water body for pathogens in accordance with Section 303(d) of the Federal Clean Water Act.[21] Although the Bay was 303(d) listed, the REC-1 and SHEL uses were not adequately protected.

In 1997, Defend the Bay, a non-profit Newport Beach-based environmental organization, sued the United States Environmental Protection Agency ("USEPA") for failing to adopt pollution limits, or TMDL, for Newport Bay, as required by the CWA.[22] The parties resolved the litigation by entering into a consent decree that required USEPA to establish or approve a bacterial TMDL by April 15, 2000. In 1999, the Regional Board adopted the fecal coliform TMDL in the Basin Plan.[23] Also in 1999, the Office of

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[13] Environmental Science Deskbook § 6.36 (James W. Conrad, Jr. ed., Thomson Reuters/West 2011) [hereinafter "Environmental Science Deskbook"]
[14] Environmental Science Deskbook § 6.36.
[15] Environmental Science Deskbook § 6.22.
[16] STATE WATER RESOURCES CONTROL BOARD, 2002 CALIFORNIA 305(B) REPORT OF WATER QUALITY 108 (Aug. 2003)..."Pollutants in urban runoff could adversely impact human health and the environment. Human illnesses have been linked to recreational activities in coastal waters especially near storm drain outlets. Bioaccumulation of pollutants, present in urban runoff, can occur in fish and other aquatic organisms. These organisms may be consumed by birds and humans." MS4 Permit, Finding 37.
[17] *See* MS4 Permit, Finding 36.
[18] *Basin Plan*, at 5-112.
[19] *Basin Plan*, at 5-147. This prohibition was primarily due to poor water quality resulting from nutrient enrichment, trace metals, and organics. *See* Harbor Area Management Plan, 2-45. Orange County Health Care Agency ("OCHCA") generally advises against consuming any shellfish in Newport Bay. *See* UPPER NEWPORT BAY FEASIBILITY STUDY, FINAL REPORT (Sept. 08, 2000) at 2-42; *see also* Harbor Area Management Plan, (citing Central Orange County Integrated Regional and Coastal Watershed Management Plan 2-40 (August 2007).
[20] *Basin Plan*, at 5-147.
[21] *NB FCSMP*, at xv.
[22] Defend the Bay v. Marcus (N.D. Cal. No. C-97-3997 MMC). The Consent Decree also formed sediment (adopted October 9, 1998), nutrient (effective April 16, 1999), and toxics materials (effective April 4, 2003) TMDLs. A TMDL is the total amount of the pollutant that can be discharged while water quality standards in the receiving water are attained, i.e., water quality objectives are met and the beneficial uses are protected. MS4 Permit, at 15.
[23] Resolution No. 99-10; Resolution No. 99-066.

Administrative Law ("OAL") and the State of California approved the TMDL and submitted it for USEPA approval.[24]

USEPA approved the Newport Bay fecal coliform TMDL on February 28, 2000, and in doing so, met the consent decree requirement from the *Defend the Bay* lawsuit.[25] USEPA's approval confirmed that the TMDL met all the required elements.[26]

The fecal coliform TMDL implementation plan established a compliance deadline to support REC-1 WQS by December 30, 2013 and a compliance deadline to support the SHEL water quality standard by December 30, 2019.[27] USEPA affirmed that this "rapid but reasonable timeframe" was to ensure the protection of the watershed's fish, wildlife, and people from pollution.[28] The deadline for REC-1 has since passed and the SHEL deadline is approaching quickly. Compliance with objectives to protect water contact recreation was given the reasonable deadline that they be achieved no later than 14 years after the State approved the TMDL.[29] Yet, 16 years later the Upper Newport Bay is not in compliance with REC1 fecal coliform standards.

The fecal coliform TMDL is enforceable against Orange County through the existing MS4 permit.[30] According to the Permit, compliance determinations for TMDLs are based on monitoring within the receiving waters.[31] Specifically, compliance determination for the fecal coliform TMDL is based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay.[32] The Permit specifies effluent limits based on fecal coliform to ensure consistency with the wasteload

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[24] *See* USEPA, *Staff Report Supporting Approval of TMDLs: Fecal Coliform Bacteria- Upper Newport Bay and Lower Newport Bay, CA* 1(Feb. 17, 2000) [hereinafter USEPA *Staff Report*].
[25] *See USEPA Staff Report*, at 1; CAL. CODE REGS tit. 33 § 3975 (2016).
[26] *See USEPA Staff Report*, at 1.
[27] MS4 Permit, at 74. *See also* Resolution 99-10 (however, elsewhere in Res. 99-10 states the REC-1 deadline as December 31, 2014).
[28] 1997 WL 33757711 (E.P.A.). The agreement included a schedule for pathogens by January 15, 2000 wherein USEPA would provide technical and financial assistance to support California's implementation of the TMDLs. The agreement was deemed an "important step towards cleaner streams and beaches in Orange County" by U.S. Attorney Michael Yamaguchi. USEPA, U.S. EPA Settles Suit, Addresses Newport Bay Watershed Pollution (Oct. 31, 1997). The TMDL included a plan and a schedule. The implementation plan included requirements for proposed plans, studies and monitoring. The Regional Board approved plans including developing a Fecal Coliform transport and fate model; REC-1 beneficial use assessment; identify and characterize Fecal Coliform sources in the Dunes Resort and agricultural runoff; and evaluation of the vessel waste program. *Id.*
[29] CAL. CODE REGS tit. 33 § 3975 (2016).
[30] TMDLs are plans and must be incorporated into an NPDES permit to become enforceable. Thus, the Fecal Coliform TMDL was incorporated into the Orange County MS4 permit, which is an NPDES permit that regulates the municipal storm sewer system, shortly after the TMDL's approval. The permit was issued under the NPDES by the Regional Board and regulates the discharge of "both dry-weather and stormwater runoff into and out of our city's storm drain system." The Regional Board adopted the NPDES Permit in January 2002, followed by an updated MS4 Permit in 2007. Organochlorine Compounds (OCs) TMDL, February 27, 2007. The State Board predicted that "[a]s total maximum daily loads (TMDLs) are developed, it is likely that MS4s [would] have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions." Organochlorine Compounds (OCs) TMDL (February 27, 2007).
[31] MS4 Permit, Section XVIII.C.1.
[32] *Id.*

allocations developed in the TMDL.[33] If a permittee's monitoring results indicate an exceedance of wasteload allocations, the permittee is required to reevaluate its control measures and propose additional BMPs/control measures.[34]

Information available to Coastkeeper indicates Orange County's monitoring, conducted at the representative sampling locations within San Diego Creek and Newport Bay, demonstrate persistent fecal coliform bacteria levels above those allowed under the MS4 Permit.

Instead of acknowledging persistent fecal coliform bacteria levels above those allowed under the MS4 Permit, and implementing BMPs to come into compliance with the TMDL, the Regional Board seeks to solve the problem by getting rid of the TMDL altogether. Regional Board staff argues that fecal coliform is an outdated bacterial indicator, and enterococcus should be utilized instead. Quizzically, instead of recommending a Basin Plan Amendment incorporating an enterococcus TMDL, the Regional Board staff attempts to rid the Basin Plan of a bacterial TMDL altogether. The staff justifies this position by arguing that there is no bacteria problem in the Newport Bay, so no bacterial TMDL is required. The staff comes to this conclusion by using a geomean ("GM") to determine exceedances – a departure from the State Board Listing Policy.[35]Utilization of the GM method conveniently disguises individual events where beaches are closed due to high bacterial levels.

The staff's position is indefensible for several reasons. First, fecal coliform is still a useful bacterial indicator of harmful pathogens in the water, even though enterococcus may be a more precise indicator. Second, this information was available to the Regional Board in 1999 when the fecal coliform TMDL was adopted. In 1986, a series of epidemiological studies carried out in sewage-impacted waters demonstrated the concentration of enterococcus and E. coli correlated best with bather illness.[36] The Regional Board had the information necessary to adopt such a standard in 1999, but chose not to do so, likely because meeting enterococcus standards is more difficult than fecal coliform standards. Finally, the staff lacks substantial evidence to support its position that the Newport Bay does not have a bacterial problem. Orange County's Annual Reports do not measure compliance with the bacterial TMDL.

During a meeting between Regional Board and Coastkeeper staff earlier this year, we detailed our concerns about the Annual Report's self-styled compliance mechanism. Clearly stated, the standard for evaluating attainment used in the Annual Reports differ from the standards demanded by the Regional Board. For instance, the 2014 Annual Report summarized attainment of the fecal coliform water quality objectives for sites in the Bay for those sites with at least 75% attainment. As would be explained in the 2015 Annual Data Report, "the 75% threshold was selected as a management tool to locate areas of high attainment of water quality objectives throughout the Bay." However, high attainment is not actual attainment, illustrating that this 75% threshold is an artificial standard used by the watershed cities and not a standard found in the adopted TMDL. The County's Annual Reports demand further evaluation, and cannot be construed as measuring compliance with the TMDL or other WQOs.

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[33] The fecal coliform TMDL specifies WLAs for urban runoff to protect water contact recreation and shellfish harvesting beneficial uses.
[34] MS4 Permit, at 79.
[35] St. Water Resources Control Bd., *Water Quality Control Policy; For Developing California's Clean Water Act Section 303(d) List*, Sept. 2004.
[36] EPA, US Bacteriological ambient water quality criteria for marine and freshwater recreational waters. Springfield, VA: US EPA, 1986. p. PB86-158-045. *See* RT Noble Water Research 37.

Statements By The Regional Board Are Not Supported By Substantial Evidence

State law requires any water quality control plans and any other components of California's water quality management plan as defined in 40 C.F.R. 130.2(k) and 130.6, proposed for board approval must include or be accompanied by Substitute Environmental Documentation ("SED") and supported by "substantial evidence" in the administrative record.[37] Substantial evidence means "enough relevant information and reasonable inferences from this information that a *fair argument* can be made to support a conclusion, even though other conclusions might also be reached."[38] Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."[39] Whether a *fair argument* that a project may have a significant environmental impact is determined by "examining the whole record before the administrative agency."[40]

Substantial evidence does not include "argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to, or are not caused by physical impacts on the environment."[41]

The Regional Board Relies on Fecal Coliform Assertions Without Citation and Unsupported By The Record

The Regional Board's premise for removing the fecal coliform objectives for REC1 waters in the region is based on the 2004 and 2012 RWQC. Specifically, that "USEPA found that fecal coliform are not a reliable indicator of health risk to swimmers, nor to the protection of the REC1 use"[42] and that USEPA "encouraged states to move expeditiously"[43] to delete fecal coliform standards. The staff report lacks citations to USEPA guidance documents or regulations supporting the "expeditious" deletion of fecal coliform objectives. Further, the staff report overstates USEPA position on enterococcus. USEPA recommends enterococcus as the indicator to be measured in marine and freshwater because it "generally provided substantial improvements over the indicators that were favored previously,"[44] including fecal coliform. EPA did not recommend the deletion of fecal indicator or state the standard was "obsolete." 40 C.F.R. § 131.41 does not state that fecal coliform is not a reliable indicator of health risk to swimmers. If the SED wants to assert that claim, and that EPA recommended changes to the WQO, then the report should cite to those documents.

Even if the 2012 RWQC referred to fecal coliform as "obsolete," which it does not, the document includes only "EPA recommendations and additional information for use by states in developing or implementing RWQC." The document expressly, "does not establish or affect legal rights or obligations." It "does not establish a binding norm and cannot be finally determinative of the issues addressed." The 2012 RWQC are not controlling on the Regional Board and are merely "intended as guidance in establishing new or revised water quality standards. They are not regulations themselves."[45]

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[37] CAL. CODE REGS tit. 23 § 3777(a) (2016).
[38] Section 15384(a) of the CEQA Guidelines.
[39] Section 15384(b) of the CEQA Guidelines.
[40] Id.
[41] Section 15384(a) of the CEQA Guidelines.
[42] RWQC 2012, at 15.
[43] Staff Report at 31.
[44] Id.
[45] RWQC 2012 at 3.

The Regional Board's Omission of a Required Single Sample Maximum or Statistical Threshold Value for REC1 in the Basin Plan Amendment is Not Supported By Substantial Evidence.

The Regional Board proposes removing the fecal coliform objectives for REC1 for Bays and Estuaries from the Basin Plan and replacing it with an enterococcus GM objective of 35/100mL without a SSM or its equivalent. The staff's recommendation against the inclusion of single sample maximums ("SSM") or an equivalent statistical threshold value ("STV") for enterococcus is not supported by substantial evidence.

The staff report provides four arguments justifying not assigning SSM values based on REC1 use for enterococcus in the Basin Plan amendments. First, the 2012 RWQC "departed from the SSM approach employed in the 1986 criteria."[46] Second, that USEPA no longer utilizes the concept of "use intensity." Third, the State Board is "engaged in a process to develop statewide recreation objectives" to implement the 2012 criteria. Fourth, that Orange County Health Care Agency (OCHCA) reliance on AB 411 bacteriological standards and "extensive monitoring" will protect public health.[47] Additionally, Regional Board staff maintains a hostile and minority position in California regarding the role of SSM data in impairment assessments inconsistent with state policy.

Staff first argues the 2012 RWQC is a departure from the 1986 criteria. Specifically, the staff report reads, "a significant difference between the 1986 and 2012 criteria is that in its 2012 criteria recommendations, USEPA has departed from the single sample maximum approach employed in the 1986 criteria."[48] Staff's interpretation that the 2012 RWQC significantly deviates from the 1986 criteria by not supporting equivalents to the SSM is incorrect.

In the 2012 RWQC, USEPA presented two sets of criteria (consisting of a GM and a STV) associated with two different illness rates and defers to the states to make a "risk management decision" to choose one or the other set.[49] The STV is a new standard designed to be used "in conjunction with the recommended GM value."[50] The GM and STV are derived similarly to the 1986 standards. [51] USEPA criteria recommendation are for both a GM and an STV, because used together they indicate whether water quality is protective of its designated REC1 use. Relying on the GM without the STV, "would not reflect spikes in water quality because the GM alone is not sensitive to them."[52] In relying on the 2012 RWQC, the Regional Board chose the enterococcus GM standard equivalent to the 1986 standards, but dismisses the need for the related STV.

The 2012 RWQC must be as protective as protective as the 1986 criteria. Criteria which included both a GM and a SSM. A position recommended by USEPA. Staff's claims in the staff report that the 2012 RWQC does not support SSM, or their equivalent, is not supported by the facts.

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[46] Staff Report at 32.
[47] Staff Report at 33.
[48] Staff Report at 32.
[49] 2012 RWQC at 28.
[50] 2012 Recreational Water Quality Criteria Fact Sheet (Dec. 2012).
[51] "EPA is recommending that the GM of a waterbody be calculated in the same way as recommended in the 1986 criteria by taking the log10 of sample values, averaging those values, and then raising that average to the power of 10. The STV is also derived in a manner similar to how the 1986 criteria SSM was derived by estimating the percentile of the expected water quality distribution around the GM criteria value. (A site specific analysis using the existing data is necessary)." 2012 RWQC at 39.
[52] 2012 RWQC, at 39.

Coastkeeper supports staff's second argument, that USEPA no longer utilizes the concept of use intensity as a basis for recommending multiple SSM criteria. We depart concerning the consequences of abandoning delineations based on use intensity. The standard that would apply would be the most protective and no longer lowered based on the use of the surface water. As such, the Regional Board should apply a consistently high SSM and incorporate that standard into the Basin Plan to provide consistent water quality protection for bays and estuaries throughout the region. Analysis of the types and intensity of REC1 and incorporating a sliding scale isn't what Coastkeeper is seeking. Rather, continued protection for waters already known to be highly used by REC1 users.

Staff's third argument, that the State Board is engaged in a process to develop statewide enterococcus REC1 WQO, does not support the failure of staff to recommend a SSM, or its equivalent. The mere existence of a process without a calendar of deliverables is purely speculative on the part of Regional Board staff and cannot be relied on to justify incorporating a GM and not a SSM. As the State Board stated in a Staff Report on the 2010 Integrated Report for CWA 303(d) and 305(b) concerning E. coli listing in the Santa Ana Region, "although standards for these waterbodies may change in the future [due to a stakeholder process], State Water Board staff recommend[s] list[ing] [those] water bodies that exceed the current USEPA" standard for bacteria.[53]

Staff's fourth argument, that OCHCA, AB 411, and extensive monitoring will protect public health is misplaced. Staff chooses not to include a single sample maximum or SVT; instead it deflects responsibility to the OCHCA. Staff references the state's single sample maximum at each sampling station at a public beach or public water contact sports area of 104 enterococcus bacteria per 100mL.[54] That section of the state code is not intended to be a WQS, rather it serves as a notification tool for beach advisories and closures.

Regional Board staff's recommendations severely restrict the ability of the Regional Board to respond to later bacteria indicator contamination by establishing an unnecessary regulatory speedbump by not including a SSM equivalent into the Basin Plan. The staff report's reference to sanitation standards, such as 104 enterococcus bacteria per 100 mL as a backstop projects the illusion of protection while relying on a standard designed and adopted for public health protection purposes and not a water quality standard enforceable by the Regional Board.[55] The standard above is used to make important health decisions on whether beaches are open, closed or posted with advisories against water contact recreation. This deferral by the Regional Board from actual regulatory protections found in a WQS to different regulation and regulator is an abrogation of the Regional Board's duty to protect water quality.

The Los Angeles and San Diego Regionals Board identified just this issue in comments to EPA on the 2004 RWQC. Removing SSM from WQS will create inconsistent and confusing outcomes between public health agencies and water quality regulators. Public health agencies are bound by the bacteriological standards for bacteria, including enterococcus, found in 17 CCR §7985. If the Regional Board adopts enterococcus criteria without also incorporating a SSM criteria, then local public health agencies would post beaches with public health warnings when the SSM for enterococcus contained in State law is violated. However, unless the enterococcus geometric mean criteria were exceeded, the Regional Board would consider the REC1 designated use to be fully supported by existing water quality. Common sense cannot dictate that REC1 water quality is satisfied at posted beaches with health warnings, yet without

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[53] St. Water Res. Control Bd., *Staff Report 2010 Integrated Report Clean Water Act Sections 303(d) and 305(b)* 12 (April 10, 2010).
[54] CAL. CODE REGS tit. 17 § 7958(a)(1)(D) (2016).
[55] Staff Report, 33

incorporating SSM criteria the Regional Board would be unaware of singularly important events impacting water quality. Worrying still, the Regional Board would have no compelling basis to regulate discharges to improve water quality sufficient for beaches to attain their REC1 designated use.

For example, on November 17, 2016, Orange County posted bacteria advisory notices at five Newport Bay beaches: Alvarado/Bay Isle Beach; Sapphire Avenue (*see* Exhibit D); Ruby Avenue; Onyx Avenue; and Newport Boulevard Bridge. The postings advising against water contact were noticed at each location, online, and through the Coastkeeper maintained Waterkeeper Swim Guide App. The postings were not caused by wet weather. Bacteria caused beach closures continue and the withdrawal of the fecal coliform TMDL from the Basin Plan will do nothing to reduce their occurrences. Staff's refusal to incorporate the SSM or STV lessens the likelihood closures similar to and including those mentioned above are considered by staff in impairment determinations. The closures and their impacts are real and the Basin Plan must have a mechanism to account for them.

The failure of the Regional Board to include an enterococcus SSM in the Basin Plan, as well as its failure to include SSM data in the impairment assessment, will also result in the County determining the sample frequency for waters of a public beaches or water-contact sports areas that have not been designated as such by the Regional Board.[56] Staff report statements claiming no REC1 impairment in Newport Bay due to enterococcus[57] strongly indicate the Regional Board will not require the continued sampling regime mandated under the fecal coliform TMDL.[58] Consequently, the frequency of sampling and the number of sampling stations will be reduced, further frustrating any prospective determination of enterococcus caused REC1 impairment in Newport Bay due to shrinking and aging data set. These consequences are a based on a reasonable assumption predicated upon the facts and not considered in the staff report.

Finally, Coastkeeper acknowledges Regional Board staff's long-held opposition to, and demonstrated hostility towards elements of the State Board Listing Policy regarding the use of SSM data. In response to the State Board's April 19, 2010 Integrated Report staff report and its recommendation to add several waterbodies in the Santa Ana region to the 303d list based on E.coli SSM results above the REC1 standards, the Regional Board forcefully responded by challenging EPA, State Board staff, and the Listing Policy.

When the State Board staff asserted, relying in part on an EPA opinion, a rebuttable presumption that "all surface waters must be assumed to be designated beaches, until a standards action is taken to modify that presumption," Regional Board staff responded by stating it was "unrealistic to apply this premise to all surface waters."[59] Staff went on to state, "common sense dictates that it is simply inappropriate to presume all surface waters in this Region (and in the state and in the country) are designated beaches, with anticipated high use that warrants the most stringent SSM for notification purposes." [60] Staff stated further, "we argue that it is tenuous at best to apply SSM data to impairment assessments."[61]

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[56] CAL. CODE REGS tit. 17 §7959(b) (2016).
[57] Staff Report, 35.
[58] *See* CAL. CODE REGS tit. 17 §7959(a).
[59] Ltr. from Gerard J. Thibeault, Exec. Officer, Santa Ana Regl. Water Quality Control Bd., to Darrin Polhemus, Chief, Div. of Water Quality, St. Water Quality Control Bd., *Santa Ana Region Comments on the 2010 Integrated Report* 2 (May 26, 2010).
[60] Id.
[61] Id.

The State Board's Listing Policy was not changed. SSM data is still utilized in impairment assessments and the surface waters of Orange County's bays and estuaries, including Newport Bay, are subject to high use and enjoyed by millions annually. These waters deserve the most protective and stringent SSM notification requirements. Requirements that must be reflected in the Basin Plan in order to provide the Regional Board the clear unambiguous authority to monitor and control the region's water quality. The failure to do so is not supported by substantial evidence in the administrative record.

Substantial Evidence Shows Removing the Newport Bay Fecal Coliform TMDL Will Adversely Affect REC1 Water Quality Standards.

Anticipating the removal of the REC1 fecal coliform objective, the staff report recommends the removal of the Newport Bay fecal coliform TMDL from the Basin Plan. Prior to making a water quality attainment determination following the adoption of WQS consistent with the 2012 RWQC, the Regional Board must evaluate "all readily available data and information to determine whether a waterbody meets the WQS."[62] USEPA assumes both GM and the STV are part of WQS for REC1, as such, both would be used to determine whether a waterbody meets the WQS for REC1.[63] "All existing and readily available data and information for the specified duration," as defined at 40 C.F.R. §130.7(b)(5), would need to be evaluated. USEPA expects all water quality information, including water quality monitoring data collected as part of the beach notification program, "as well as information regarding beach closures and advisories," would be included in an attainment determination.[64]

The Regional Board did not conduct a review of all available data to determine Newport Bay's attainment of enterococcus WQOs. Instead, the staff report states, "[s]ubsequent investigation will be necessary to determine whether or not a TMDL for the enterococcus objective applicable to the Bay is necessary," and "there is no impairment for REC1 use in Newport Bay due to violations of the promulgated enterococcus objective."[65] The conclusion of no enterococcus-based REC1 impairment is based on the fecal coliform TMDL permittee's 2016 Annual Data Report. A regulator's reliance on a permittee's own analysis of whether a TMDL is necessary, without independent analysis of their conclusions and review of the entire record is not substantial evidence supporting the withdrawal of a bacteria TMDL.

Coastkeeper has previously produced letters and documentation illustrating tracking between enterococcus and fecal coliform exceedances in Newport Bay. Data for thirty-five monitoring stations for over sixteen years exist for both fecal coliform and enterococcus in Newport Bay. State bacteriological standards for enterococcus exist for waters adjacent to public beaches and public water-contact sports areas where Regional Board staff can compare data sets to standards to determine whether waterbodies like Newport Bay are in attainment. The staff report is devoid of any analysis of actual enterococcus data, instead relying on the Annual Report of a discharger subject to a bacteria TMDL.

Functionally, the decision to withdraw the fecal coliform TMDL removes bacteria protection from Newport Bay without any meaningful analysis by the Regional Board to determine whether Newport Bay is impaired for enterococcus. Regional Board staff rely on the County of Orange, a discharger, to determine whether they require further regulation by applying the Listing Policy to their own data. Coastkeeper asked during the CEQA Scoping Meeting whether Regional Board staff or an independent expert had reviewed the County's analysis and, after a brief discussion between Mrs. Smythe and Mr.

[62] 2012 RWQC, at 42.
[63] Id.
[64] Id.
[65] Staff Report, at 35.

Woelfel, they responded that they were unaware of any such review. Coastkeeper believes this remains true.

Meanwhile no protection for recreational users of Newport Bay that the existing protections continue until such time an impairment analysis is conducted – by the discharger – and the preliminary analysis indicated the Bay is not impaired. It should be stressed that the County didn't believe the bay was impaired for fecal coliform until such time litigation raised the issue and the Regional Board was pressured to prepare the TMDL or have EPA prepare it.

Dischargers have convinced Regional Board staff the removal of the TMDL will have little impact on their activities in Newport Bay. The Regional Board staff report boldly asserts, "[t]he removal of this TMDL would not affect the implementation of control measures, which, as discussed above, will continue to be necessary to meet already established enterococcus objectives." It continues, "[t]here is no reason to suppose that BMPs in place or planned that directly or indirectly affect FIB densities, whether or not these are represented by enterococcus or another bacterial indicator, would be affected in any way."[66]

The unambiguous retreat from bacteria WQS and the associated Newport Bay fecal coliform TMDL has already yielded a retreat in the commitment by some parties concerning BMPs already in place, specifically pumpout stations. The city of Newport Beach rejected a pumpout program supported by Harbor Resources Department staff "in hopes of discouraging illegal discharge, improving water quality, and, potentially, prolonging the life of existing stations."[67] City Council member Duffield, an advocate of the rejected one-year pilot program designed to improve pumpout stations that have been historically been a source of bacteria into Newport Bay, stated that pumpout equipment was often down or malfunctioning.

Staff ignores the fact that any control actions taken to protect Newport Bay, and any that are being considered, are the result of the fecal coliform TMDL. The removal of the fecal coliform TMDL will remove any incentive for relevant permittees to plan and/or seek funding for bacteria control actions. Evidence of returned funding for bacteria TMDL BMPs and the failure to approve staff supported pumpout station improvements by cities like Newport Beach prove otherwise. One might conclude the anticipated withdrawal of the fecal coliform TMDL requirements undermined the need for the project, despite its environmental benefits.

Compounding the withdrawal of bacteria BMPs controlling dischargers to TMDL affected Newport Bay, Orange County is recognized as requiring additional investment in water quality BMPs in order to meet its regulatory requirements. In fact, American Society of Civil Engineers ("ASCE") and UCI CEE Affiliates 2016 State of Orange County's Infrastructure report analyzes twelve categories of public infrastructure and assigned grades based on condition, capacity and performance, and resiliency.[68] Orange County's water quality category received a D+, up from a D in 2010, and was alone as the worst performing category in the report. The "grade reflects the overall need for surface water quality infrastructure to address wet weather."[69] The second worst included another category relevant to water quality and inputs to areas of known water quality impairment, like Newport Bay, Flood Control and Levees.

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[66] Staff Report, at 35-36.
[67] Parimal M. Rohit, *Pumpout Service Proposal Fizzles Away Quietly,* http://www.thelog.com/news-departments/pumpout-service-proposal-fizzles-away-quietly (October 21, 2016).
[68] ASCE/UCI CEE Affiliates, *2016 The State of Orange County's Infrastructure*: *A Citizens Guide* 4 (2016) [Hereinafter "ASCE Report"].
[69] Id. at 64.

The ASCE report credits improvements in surface water quality to MS4 permit requirements ranging from the incorporation of new development and significant redevelopment low impact development BMPs, regular industrial and construction site inspections, street sweeping, and public outreach efforts.[70] In response, Coastkeeper highlights the County's Joint Unfunded Mandate Test Claim[71] challenging many of those requirements in the current MS4 Permit as unfunded mandates before the Commission on State Mandates. Any reliance by the County asserting the water quality benefits of strengthened MS4 permits they are actively undermining before the Commission on State Mandates causes Coastkeeper to question the County's commitment to those permit requirements and their corresponding water quality improvements.

Despite the known deficiencies in the water quality infrastructure, numerous TMDLs in Newport Bay, Orange County was unwilling or unable to remedy these chronic water quality problems. The withdrawal of the fecal coliform TMDL will further undermine any planned control actions benefiting Newport Bay, which will significantly affect water quality. Despite the recent grant award and subsequent return of grant funding by a co-permittee to a bacteria TMDL affected by the withdrawal of the TMDL, the release of an Orange County infrastructure report ranking water quality as the worst performing of twelve categories, and the Unfunded Mandate Test Claim undermining BMPs designed to reduce bacteria concentrations, the Regional Board failed to discuss the these issues or the significant effort on the environment the removal of a bacteria TMDL may have on Newport Bay. In sum, the Regional Board failed to properly examine the entire record before it. Without a thorough review of the whole record, the conclusions reached by the Regional Board staff cannot be found to be supported by substantial evidence.

<u>The Regional Board's Unique Averaging Period for Enterococcus Objectives for Coastal Waters is Not Supported by Substantial Evidence and Will Substantially Affect Water Quality</u>

For Clean Water Act purposes, RWQC consist of three components: magnitude, duration and frequency, the combination of which protects the designated use.[72] Duration under the USEPA's 2012 RWQC recommendations to protect primary contact recreational use states "the waterbody GM should not be greater than the selected GM magnitude for *any* 30-day interval."(emphasis added).[73] Unique to this Regional Board, staff recommends an averaging determination based the calendar instead of the duration routinely used statewide and nationally. The Regional Board's recommended deviation from the standard averaging period to a limited duration is likely to skew enterococcus results, the consequences of which are not discussed or analyzed.

The SED and staff report call for the inclusion of an averaging period for the enterococcus GM inconsistent with USEPA recommendations and state law. Regional Board staff proposes the fecal coliform objective to be deleted and replaced by an enterococcus objective with a narrower durational calculation than currently in the Basin Plan. The existing fecal coliform objective states a calculation for "any 30-day period." Staff proposes a "GM less than or equal to 35 organisms per 100mL based on at least 5 samples in a discrete 30-day (*monthly*) period" without providing evidence supporting the narrower durational scope for enterococcus.

State and federal regulators are clear when they provide a 30-day duration period over which GM samples should be measured and over which SSM or SVT, as applicable, should be compared against a

[70] Id. at 61-62.
[71] Dated June 29, 2010
[72] RWQC, at 40.
[73] Id.

recommended limit on the frequency of excursions.[74] Again, USEPA's 2012 RWQC recommends a waterbody GM "should not be greater than the selected GM magnitude in *any* 30-day interval." (emphasis added).[75] State regulation requires a "mean logarithm of the result of 5 weekly samples during *any* 30-day period" to be less than 35 enterococcus bacteria per 100mL for any public beach or public water contact sports area. (emphasis added).[76] The "discrete 30-day (*monthly*) period" is not found in either recommendation or regulation.

The County of Orange ("County") recently commented on the appropriate duration period calculation of bacteria GMs that may bring common cause on this issue. On May 28, 2010, the County wrote to the State Water Resources Control Board ("State Board") on how to calculate fecal coliform GMs after the State Board calculated on a monthly basis.[77] The County responded by affirming the need to calculate GMs on a "rolling 30-day basis where a minimum of 5 samples have been collected.[78] Coastkeeper and the County may be in agreement concerning the proper calculation of bacteria GMs.

In support of its position, Regional Board staff argues exceedances of bacteria WQOs are short-term and in response to wet weather.[79] Staff refers to County data, a discharger under the fecal coliform TMDL, and that party's own analysis of its data to support the conclusion exceedances are short term and in response to wet weather. The staff report is silent concerning its own analysis of bacteria data from the County to confirm the discharger's conclusions.

The County has collected bacteria data in bays and estuaries for those waters subject to AB 411, which includes Newport Bay. The County has collected data from 35 monitoring stations in Newport Bay for sixteen years measuring fecal coliform, enterococcus and E. coli. Coastkeeper previously shared with Regional Board staff and counsel our own data analysis showing fecal coliform and enterococcus tracking in Newport Bay at levels that indicate REC1 impairment due to enterococcus WQO exceedances. Additional data analysis is attached as Exhibit A[80], along with explanatory documents as Exhibits B and C, including Coastkeeper's bacteria analysis of Newport Bay samples in 2016.

Evidence of enterococcus SSM issues in Newport Bay go beyond Coastkeeper's own analysis and into Lines of Evidence ("LOE") found on the State Board's website. The Final California 2010 Integrated Report 303(d) List/305(b) Report for Newport Bay includes LOE showing elevated levels of enterococcus spanning a three year period covering dry and wet seasons. LOE ID 8085 includes forty-five enterococcus samples, ten of which exceeded the standard of 104 enterococcus per 100mL. These samples at the Ski Zone area of Newport Bay were taken "at a distance of 1,000 feet from the shoreline or the 30-foot depth contour, whichever is further from the shoreline."[81] That equates to one sample in 4.5 that exceed the SSM, a standard Regional Board staff may consider "relatively short-term" and one that may "significantly overstate the health risk to swimmers."[82] However, LOE exist showing exceedances of enterococcus SSM standards in Newport Bay measured at significantly greater distances away from or below surface waters

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[74] Id.
[75] Id.
[76] 17 CCR §7958(a)(2).
[77] OC Pub. Works, ltr to Jeanine Townsend SWRCB 2010 Integrated Report/Section 303(d) List. Chris Crompton (May 28, 2010).
[78] Id. at 4.
[79] RB Staff Report, 32.
[80] A copy of Exhibits A-C was sent on a CD to counsel for the Regional Board on Nov. 30.
[81] http://www.waterboards.ca.gov/water_issues/programs/tmdl/2010state_ir_reports/00147.shtml#18064
[82] See 61.

most commonly used by Newport Bay REC1 users and the TMDL monitoring stations. Exceedances at those distances may indicate issues closer to shore, in those areas frequented by REC1 users of Newport Bay, such as children and adults with compromised immune systems who may be more susceptible to REC1 exposure to enterococcus.

Enterococcus and fecal coliform bacteria track and enterococcus is the bacterial indicator that exceeds the SSM most often, "regardless of whether the sample was collected in dry weather, wet weather, near stormwater inputs, or along the beach."[83] Enterococcus exceedances are numerically greater than fecal coliform exceedances measured at the same sample location collected on the same day.[84] LOE 8075 shows thirty-two of ninety-eight enterococcus samples collected at the Newport Boulevard Bridge Station exceeded the SSM enterococcus density standard of 104/100mL, or nearly thirty-three percent of samples collected.[85] The same analysis of showed a twenty percent exceedance of the fecal coliform objective.

Arguments by Regional Board staff asserting shifting from fecal coliform to enterococcus, a more difficult standard to satisfy, in a waterbody subject to a fecal coliform TMDL runs counter to monitoring evidence already in the administrative record and further attached hereto as Exhibit A. Staff's recommendation against the inclusion of SSM or STV for enterococcus, already a departure from USEPA recommendations and the opinion of at least the San Diego and Los Angeles Regional Boards, is compounded by limiting the durational analysis to a calendar period.

According to Regional Board staff, the use of a rolling GM could result, the argument goes, in a higher number of bacteria WQO exceedances. Essentially, using a "discrete 30-day (monthly) period" would restart the compliance determination at the beginning of each month regardless of actual water quality and the threat to public health posed by elevated bacteria levels in REC1 waters. This scenario mirrors Los Angeles and San Diego Regional Board's concerns voiced in a 2004 letter to USEPA detailing beaches which may be closed or posted by health officials but not considered impaired by water quality regulators because the GM doesn't show an exceedance. To the users of the waterbody, the public, the water is impaired regardless of whether the waterbody's impairment is short lived. The Listing Policy is concerned with acute impairments as well as chronic impairments, especially if acute impairments are frequent.

The Regional Board provided similar rationale after it made a Do Not List decision for 12 waterbodies in the region despite E. coli LOE showing exceedances of the USEPA freshwater standard of 235 MPN/100mL.[86] Regional Board staff argued against the listing based on a stakeholder process, certain waterways might not be designated beaches, and that the SSM should not apply. Nonetheless, the State Board recommended 303(d) listing based on consistency with the Listing Policy despite the possibility standards for the waterbodies may change in the future.[87] The Regional Board must consistently apply the Listing Policy, utilize its LOE, review and analyze the entire bacteria data record of Newport Bay before it can reasonably infer from the information that a fair argument can be made to support its conclusion that there is no enterococcus impairment in Newport Bay. The reference to a discharger's own data analysis as to whether further regulation is necessary, without more, cannot be deemed substantial evidence supporting the withdrawal of a bacteria TMDL.

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[83] R.T. Noble et al., *Comparison of total coliform, fecal coliform, and enterococcus bacterial indicator response for ocean recreational water quality testing,* Water Research 37 (2003) 1673-1643, 1642.
[84] See 62
[85] Id.
[86] Staff Report, State Water Resources Control Bd., 2010 Integrated Report Clean Water Act Sections 303(d) and 305(b) 12 (April 19, 2010).
[87] Id.

Coastkeeper's concerns over the Regional Board's deviation from state policy on SSM bacteria exceedances for listing purposes is compounded by staff's frequent statements regarding the application of natural background exclusions for waterfowl and other species, as well as natural regrowth and biofilm, as potential contributors to bacteria levels in Newport Bay and elsewhere. These beliefs are stated freely in discussion with staff on the complexities of bacteria TMDLs, but absent from analysis in the staff report.

The origin of bacteria does not impact federally promulgated criteria values. Unless a sanitary survey proves the sources of the indicator bacteria are nonhuman and an epidemiological study shows the indicator densities are not indicative of human health risk the origin of bacteria is immaterial. In addition, "in evaluating whether state standards were as protective of human health as USEPA's 1986 criteria, USEPA concludes state WQS with exemptions for nonhuman sources were not as protective of human health as USEPA's 1986 criteria.[88] Further, claims in the staff report that public health are protected by AB 411 standards and OCHCA closing or posting beaches as a consequence of elevated bacteria levels cannot be supported. A stipulation of AB 411 is that beaches will be closed to water-contact sports by the County Health Officer when there is a presumption that measured bacterial levels have been caused by human sewage. When a survey of the situation points to factors other than human sewage, the Health Officer *may* choose to post the beach rather than close it.[89] (emphasis added). There is a distinction between the source of bacteria causing an exceedance that is not discussed in the staff report, but does have an impact on water quality protection and does illustrate a regulatory area requiring the Regional Board's focus.

Source identification and origin are not discussed in the staff report, but discussion with staff indicate bacteria source identification is a concern with listing this Newport Bay. Information in the record addressing source identification contrary to staff's opaque position isn't referenced or discussed. For example, a 2009 report on bacteria in Newport Bay stated their main finding on studies included, "[t]he predominance of a single enterococcus biotype at both Bay and tributary sites suggests that the tributaries are the primary source of these organisms in the Bay."[90] The report did note additional studies, including a more discriminatory typing method were necessary. Assumptions about natural background sources or biofilms of bacteria in Newport Bay cannot support the removal of the TMDL when expert opinion supported by facts in Newport Bay pose serious questions about the origin of bacteria in the waterbody.

The absence of a discussion regarding the how Newport Bay was determined to be in attainment with enterococcus REC1 WQO, including a discussion on the method of assessment and whether SSM or natural background exclusions were applied must be discussed in the staff report. Otherwise, Coastkeeper and the public must speculate as to the rationale for the decision not to list Newport Bay or merely substitute enterococcus in the existing fecal coliform TMDL.

Additionally, the environmental consequences of adopting a uniquely narrow enterococcus averaging period will significantly impact Newport Bay's impairment assessment by distorting the calculation of samples and increasing the possibility of an incorrect use attainment decision. EPA specifically recommended a combination of a GM and STV for a duration of 30-days to calculate and compare limits to the frequency of excursions. Based on a 30-day rolling GM of the County's fecal coliform and enterococcus data for Newport Bay, portions of Newport Bay are impaired for fecal coliform *and* enterococcus and require additional focus on the part of the Regional Board. The withdrawal of the fecal

[88] RWQC, at 35.
[89] "Testing the Waters": The Orange County Health Care Agency; Grand Jury Report 5 (1999).
[90] Stanley Grant, Newport Bay Bacteria Report 11 (2009).

coliform TMDL, and its associated regulatory and environmental benefits, without an independent analysis of the data is premature, not scientifically or legally justified, and will result in substantial adverse effect to Newport Bay' water quality.

An unstated and unanalyzed consequence of the Regional Board's regulatory relaxation may be the reduction in the number of sampling locations and the number of samples regularly collected. When waters adjacent to public beaches fail to meet any of the bacteria standards, including enterococci, the local health officer is required to post the beach to restrict access. Weekly testing is required from April 1 to October 31 if all of the following apply: the beach is visited by more than 50,000 people annually; and the beach is located in an area adjacent to a storm drain that flows in the summer. Under the fecal coliform TMDL, the County has been required since 1999 to sample 35 different locations multiple times per month to protect the public from the harm caused by bacteria contamination throughout Upper and Lower Newport Bay. Withdrawing the fecal coliform TMDL will threaten the continued testing of those sampling locations as a significant portion do not qualify under the AB 411 guidelines. Without the regulatory protections laid out by the Regional Board in 1999, Upper and Lower Newport Bay would not have the level of bacteria monitoring and public information available to determine how the water body is performing.

For example, the Wintersburg channel area of Lower Newport Bay is near a stormdrain, but it is not an area with a beach, and may not qualify for AB 411 sampling. However, there are a lot of people who use that area for REC1 activities, such as stand-up paddleboarding, who may be sickened by bacteria without the necessary information to determine its safety. The removal of the fecal coliform TMDL may result in the elimination of the nearest monitoring station to the Wintersburg channel. Even if the County agrees to voluntarily retain the station, that commitment would not be enforceable absent action taken by the Regional Board that staff is currently not recommending.

The Regional Board Failed to Include an Alternatives Analysis

The Regional Board has entirely filed to analyze the adverse impact on the environment withdrawing the Fecal Coliform TMDL for REC1 will have in Newport Bay. The *Substitute Environmental Document for Proposed Basin Plan Amendment* ("SED") states no alternatives to the proposed withdrawal of the fecal coliform objective or Fecal Coliform TMDL for REC 1 in Newport Bay are proposed because the implementation of the proposed Basin Plan amendments "is not expected to result in any adverse impact on the environment."[91]

The 2004 and 2012 RWQC are not controlling on the Regional Board or other regulators and the shift from fecal coliform to enterococcus for saltwater and E. coli for freshwater was met with alternative recommendations and actions. Elsewhere, USEPA revised the 2004 final TMDL for Fecal Coliform Bacteria in Upper Potomac River, Middle Potomac River, Lower Potomac River, Battery Kemble Creek, Foundry Branch, and Dalecarlia Tributary (DDOH 2004) to incorporate new WQS for E.coli that Washington D.C. promulgated in 2005 after the approval of the TMDL.[92] Similar to Upper and Lower Newport Bay, the Potomac River and its tributaries were 303(d) listed for fecal coliform bacteria after analysis proved exceedances of WQS. Effective January 1, 2008, the bacteriological WQS changed from fecal coliform to E. coli.

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[91] SED, 31 (Oct. 14, 2016).
[92] Appendix C, *E. coli Bacteria Allocations and Daily Loads for the Potomac River and Tributaries* 1 (May 2014).

After the change in WQS from fecal coliform to E. coli, the USEPA and District of Columbia regulators did not withdraw the fecal coliform WQS in response. USEPA and the District of Columbia Department of the Environment developed a specific consistent and scientifically defensible translator using the statistical relationship between paired fecal coliform and E. coli.[93]

Alternatives could include adding the enterococcus water quality objective, while also retaining the fecal coliform objective until such time the facilitated stakeholder process has concluded with recommendations. Enterococcus impairment to Newport Bay is a significant portion of the Stakeholder process. The process is designed to restore the stakeholder process in the Santa Ana region by restoring trust between various parties to a contentious issue. Intervening immediately before the first stakeholder meeting and prejudging its outcome undermines, perhaps fatally, the entire stakeholder process.

Further, the Regional Board could revise the Basin Plan utilizing statewide guidance provided by the State Board on bacteria in REC1 waters as well as the specific recommendations based on a two year stakeholder process. Analysis of the utility of adopting a Basin Plan Amendment months before staff believes the State Board will issue statewide guidance, potentially superseding their own recommendations, should be performed. Staff emphasizes the "imprudent use of Regional Board resources" but not in reference to this entire process potentially months before controlling statewide guidance is issued. Pausing until such time the State Board issues guidance is a viable alternative requiring consideration.

Regional Board Staff Failed to Analyze The Basin Plan Amendment for Consistency With The State and Federal Antidegradation Policies

Statutory requirements to maintain and restore the quality of the nation's waters has led to development of both federal and state anti-degradation policies. Included in Clean Water Act regulations, federal policy prohibits, among other things, further degradation of impaired waterways (i.e., waterways that have a TMDL established for the pollutant at issue).[94] California adopted its own anti-degradation policy with additional requirements.[95] The State has also promulgated specific procedures and requirements for preparing anti-degradation analyses.[96]

The Regional Board's anti-degradation analysis lacks substantial evidence supporting its assertions, and fails to meet the legal standards for such an analysis regarding the impact withdrawing a sixteen year old bacteria TMDL will, or may, have on water quality in Newport Bay. The Regional Board requested reports from the County, as the lead discharger, detailing projects completed in the Newport Bay watershed since the adoption of the fecal coliform TMDL. The reports submitted to the Regional Board were paid for, written, and contain analysis by, the MS4 dischargers in the Newport Bay watershed. The reports were not independently reviewed and conclude water quality standards are being met for fecal coliform and no impairment exists for enterococcus. The contents of these reports form the basis for the staff's findings and, if approved, the Regional Board will rely heavily on these reports when removing the existing fecal coliform TMDL from the Basin Plan.

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[93] Id. at 3.
[94] *See* 40 C.F.R. §131.12(a)(1) and 40 C.F.R. §131.12(a)(2)(ii).
[95] SWRCB Res. 68-16
[96] SWRCB Administrative Procedures Update 90-004, Anti-degradation Policy Implementation for NPDES Permitting (July 2, 1990).

In notifying the public of the withdrawal of a longstanding TMDL designed to protect recreational water users in Newport Bay, the Regional Board held one CEQA scoping meeting and provided days to comment on the documents. The period of time provided to the public to comment closed shortly before the hearing. Providing Regional Board staff insufficient number of days to read, analyze, respond, and make any necessary edits to the documents before Regional Board approval. Subsequently, and unrelated to the inappropriate comment and review period we voiced during the scoping meeting, additional time was provided for comment review by Regional Board staff due to a change in the hearing's date and venue. A venue that moved from near Newport Bay to a distant location in the eastern portion of the Regional Board's jurisdiction. Thereby giving with one hand and taking with the other. Providing additional time for the Regional Board to respond and make necessary edits, but making it substantially more difficult for member of the public to attend and participate in the process that will remove REC1 protections from Orange County's most significant and frequently used waterbody.

Conclusory anti-degradation analysis prepared in support of the fecal coliform objective removal and the removal of the fecal coliform TMDL lacks substantial evidence supporting their assertions, and falls short of meeting the legal standard for such analysis. The approval of the removal of fecal coliform objectives and the fecal coliform TMDL violates State and Federal anti-degradation policies.[97]

Conclusion

Coastkeeper again emphasizes the importance of amending Basin Plans and the unfortunately necessity of TMDLs in a region suffering under the weight of impairments. As the Regional Board often asserts, TMDLs are highly complex documents which have "significant consequences for the expenditure of public funds." However, expenditures are felt by the taxpayer on more than one side. While retreating on water quality protections will benefit the discharger, it does harm the State. The wholesale withdrawal of TMDLs have associated costs as well. Sunk costs associated with the development and implementation of these documents in an effort that ultimately failed to bring Newport Bay into attainment cannot be classified as a water quality success.

Coastkeeper and its members urge the Board to honor its duty to protect water quality by rejecting the removal of the fecal coliform objective for REC1 in Bays and Estuaries, and the associated removal of the fecal coliform TMDL for Newport Bay. Coastkeeper's staff attorneys will be present at the hearing on these issues and looks forward to an ongoing dialogue with the Board to address these concerns.

Please feel free to contact me directly at 714-850-1965 ext. 307 or at colin@coastkeeper.org with any questions or concerns you may have.

Sincerely,

Colin Kelly
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[97] SWRCB Resolution 68-16. SWRCB Administrative Procedures Update 90-004, Anti-degradation Policy Implementation for NPDES Permitting (July 2, 1990).

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