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 scoping 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

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. 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. 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.

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. The Basin Plan protects the Bay’s uses that make it a world-class destination. 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.

In establishing the Basin Plan, the Regional Board assigned more beneficial uses to Newport Bay than any water body in our region. Chief among them are water contact recreation (“REC-1”) and shellfish harvesting (“SHEL”). REC-1 waters are used for recreational activities involving body contact where ingestion of water is reasonably possible. The REC-1 standard ensures the Bay stays protected for activities including swimming, wading, water-skiing, scuba diving, and fishing. The SHEL standard ensures that the Bay will continue to serve as a habitat for shellfish collected for human consumption, commercial use, or sports. 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).
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, 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. Fecal coliform is a reliable indicator that harmful pathogens may be present in a water sample. Water-borne pathogens may cause gastroenteritis, fever, flu-like symptoms, respiratory illness, cryptosporidiosis, dysentery, ear infections, or hepatitis A. 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.

Consistently high total coliform bacteria levels closed the upper portion of Upper Newport Bay to both uses in 1974. 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. Portions of the Newport Bay are also closed to REC-1 uses on a temporary basis, dependent on storms.

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. 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. 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. 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.  

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. USEPA’s approval confirmed that the TMDL met all the required elements. 

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. USEPA affirmed that this “rapid but reasonable timeframe” was to ensure the protection of the watershed’s fish, wildlife, and people from pollution. 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. Yet, 16 years later the Upper Newport Bay is not in compliance with REC fecal coliform standards. 

The fecal coliform TMDL is enforceable against Orange County through the existing MS4 permit. According to the Permit, compliance determinations for TMDLs are based on monitoring within the receiving waters. Specifically, compliance determination for the fecal coliform TMDL is based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay. 

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 3375771 (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]ls 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. 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.

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 geometric mean (“GM”) to determine exceedances – a departure from the State Board Listing Policy. 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. 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.


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

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.
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.33

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.34 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.35 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

33 St. Water Res. Control Bd., Staff Report 2010 Integrated Report Clean Water Act Sections 303(d) and 305(b) 12 (April 10, 2010).
35 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. Staff report statements claiming no REC1 impairment in Newport Bay due to enterococcus strongly indicate the Regional Board will not require the continued sampling regime mandated under the fecal coliform TMDL. 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 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.” 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.” Staff stated further, “we argue that it is tenuous at best to apply SSM data to impairment assessments.”

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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).
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.”

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. “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.

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.” 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.

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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.”

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.” 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. 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.” 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.

60 Staff Report, at 35-36.
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 to low impact development BMPs, regular industrial and construction site inspections, street sweeping, and public outreach efforts. In response, Coastkeeper highlights the County’s Joint Unfunded Mandate Test Claim 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 by 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.

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

For Clean Water Act purposes, RWQC consist of three components: magnitude, duration and frequency, the combination of which protects the designated use. 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.) 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.\textsuperscript{74} Again, USEPA's 2012 RWQC recommends a waterbody GM "should not be greater than the selected GM magnitude in any 30-day interval."\textsuperscript{75} (emphasis added.)\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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\textsuperscript{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."\textsuperscript{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."\textsuperscript{82} However, LOE exist showing exceedances of enterococcus SSM standards in Newport Bay measured at significantly greater distances away from or below surface waters.

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} 17 CCR §7958(a)(2).
\textsuperscript{78} Id. at 4.
\textsuperscript{79} RB Staff Report, 32.
\textsuperscript{80} A copy of Exhibits A-C was sent on a CD to counsel for the Regional Board on Nov. 30.
\textsuperscript{81} http://www.waterboards.ca.gov/water_issues/programs/tmdl/2010state_ir_reports/00147.shtml#18064
\textsuperscript{82} Sec 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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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.” 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. (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.” 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.
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’s 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 storm drain, 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.”

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. 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.

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.95

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.

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,

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