CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION
RESOLUTION NO. R8-2017-0014

AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE SANTA ANA RIVER BASIN TO INCORPORATE TOTAL MAXIMUM DAILY LOADS FOR SELENIUM IN FRESHWATER, NEWPORT BAY WATERSHED, ORANGE COUNTY, CALIFORNIA

WHEREAS, the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) finds that:

1. An updated Water Quality Control Plan for the Santa Ana River Basin (Basin Plan) was adopted by the Santa Ana Regional Water Quality Control Board (Santa Ana Water Board) on March 11, 1994, approved by the State Water Resources Control Board (State Water Board) on July 21, 1994, and approved by the Office of Administrative Law (OAL) on January 24, 1995. The Basin Plan has been subsequently amended to incorporate Total Maximum Daily Loads (TMDLs), revised Nitrogen and Total Dissolved Solids (TDS) management strategies, language authorizing the inclusion of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits, revised recreation standards for inland surface waters, and other changes.
2. The Basin Plan establishes water quality standards for each water body within the Santa Ana Region. Water quality standards include beneficial uses, narrative and numeric water quality objectives, and an antidegradation policy.

   The Basin Plan specifies the following narrative water quality objectives pertaining to toxic substances applicable to inland surface waters and enclosed bays and estuaries: 1) toxic substances shall not be discharged at levels that will bioaccumulate in aquatic resources to levels which are harmful to human health; and, 2) the concentrations of toxic pollutants in the water column, sediments or biota shall not adversely affect beneficial uses.

3. On May 18, 2000, the United States Environmental Protection Agency (U.S. EPA) promulgated the California Toxics Rule (CTR). The CTR established numeric criteria for priority toxic pollutants for the State of California, including a chronic exposure criterion of 5 µg/L for selenium in freshwater. The CTR criteria serve as enforceable numeric water quality objectives for the State of California.

4. Section 303(d) of the Clean Water Act (CWA) requires states to identify the waters within its boundaries that do not meet water quality standards. San Diego Creek and Newport Bay are included on the current CWA section 303(d) list due to evidence that the concentrations of toxic substances, including metals and pesticides, were adversely affecting beneficial uses in these water bodies. Selenium concentrations in a number of freshwater streams within the Newport

Bay Watershed, including San Diego Creek, Peters Canyon Wash, Big Canyon Wash, and the Santa Ana Delhi Channel, exceed the CTR criterion for chronic exposure.

5. States are required to establish a Total Maximum Daily Load (TMDL) for each pollutant associated with an impaired waterbody on the CWA section 303(d) list. The elements of a TMDL are described in title 40 Code of Federal Regulations, parts 130.2 and 130.7 and sections 303(d)(1)(C) and (D) of the CWA, as well as in U.S. EPA guidance documents (e.g., Report No. EPA/440/4-91/001). A TMDL is defined as the sum of the individual waste load allocations (WLAs) for point sources, load allocations (LAs) for nonpoint sources and natural background. (40 CFR § 130.2.) TMDLs must be set at levels necessary to attain and maintain the applicable narrative and numeric water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. (40 CFR §130.7(c)(1).) Title 40 Code of Federal Regulations part 130.7 also dictates that TMDLs shall take into account critical conditions for stream flow, loading and water quality parameters. TMDLs include one or more numeric targets, including numerical interpretation(s) of narrative water quality objectives that, if achieved, represent attainment of those objectives. TMDLs must account for all sources of the relevant pollutants, irrespective of whether the pollutant is discharged to impaired or unimpaired upstream reaches. A TMDL can also be established for a pollutant/waterbody that does not meet water quality standards even if that pollutant/waterbody combination is not yet included on the CWA section 303(d) list.

6. On June 14, 2002, in response to a consent decree, U.S. EPA promulgated TMDLs for toxic pollutants, including selenium, for San Diego Creek and Newport Bay (U.S. EPA Toxics TMDLs). The U.S. EPA Toxics TMDLs did not include an implementation plan, since such a plan is within the purview of the State.

7. Building upon the data and knowledge developed since the promulgation of the U.S. EPA Toxics TMDLs, Santa Ana Water Board staff initiated development of revised TMDLs, to include an implementation plan and compliance schedules. This included work to review the U.S. EPA Toxics TMDLs and to develop revised selenium TMDLs as necessary, together with an appropriate implementation plan.

8. As reflected in the administrative record of this matter, the proposed Basin Plan amendment to incorporate selenium TMDLs, shown in **Attachment A** to this Resolution (proposed Selenium TMDLs), is the result of an extensive public participation process. The development of the proposed Selenium TMDLs, issues and challenges encountered, and the elements of the proposed Selenium TMDLs have been discussed at numerous Santa Ana Water Board public meetings as well as meetings of the Newport Bay Watershed Executive

Committee. In addition, three special workshops were held on January 15, January 30, and February 10, 2014, to address scientific, technical and legal issues that required resolution in order to move forward with the Selenium TMDLs. Participants in those workshops included representatives from local agencies, state and federal agencies, environmental groups, consultants, and other interested members of the public.

9. Santa Ana Water Board staff has also worked with stakeholders, regulators and the scientific community to develop preliminary recommendations for site-specific objectives (SSOs) for selenium in freshwater within the Newport Bay Watershed. These recommendations will be refined and a separate staff report and associated documentation will be prepared to support a proposed future Basin Plan amendment establishing selenium SSOs for freshwater in the Newport Bay Watershed.

10. The State is required to incorporate TMDLs into the Basin Plan. (40 CFR §§ 130.6(c)(1), 130.7). Under the California Water Code, incorporation of TMDLs into the Basin Plan requires the inclusion of an implementation plan. Attachment A to this resolution contains the proposed Selenium TMDLs that, if approved, will be incorporated into the Basin Plan.

11. Pursuant to Health and Safety Code section 57004, all California Environmental Protection Agency (CalEPA) organizations are required to submit all proposed rules that have a scientific basis or components for external independent scientific peer review. Basin Plan amendments, such as the proposed Selenium TMDLs, are subject to this requirement.

12. Peer review of the scientific elements of the proposed Selenium TMDLs was completed through an Interagency Agreement between CalEPA and the University of California. This peer review was conducted in accordance with CalEPA guidelines. The peer reviewers' comments and Santa Ana Water Board staffs' responses are included as **Appendix B1** to the staff report. The staff report describes recommended changes to the proposed Selenium TMDLs in response to the peer review comments.

13. Pursuant to Public Resources Code section 21080.5, the Resources Agency has approved the Santa Ana Water Board's basin planning process as a "certified regulatory program" that adequately satisfies the California Environmental Quality Act (CEQA) requirements for preparing a "substitute environmental document" documents. (Cal. Code Regs., tit. 14, § 15251, subd. (g); Cal. Code Regs., tit. 23 § 3782.) The Santa Ana Water Board has prepared a Substitute Environmental Document (SED) and the Environmental Checklist and Analysis: Substitute Environmental Document for a Proposed Basin Plan Amendment to Incorporate Total Maximum Daily Loads for Selenium in Freshwater, Newport Bay Watershed, Orange County, California (Selenium TMDLs SED). The

Selenium TMDLs SED contains an environmental checklist and significant analysis and findings related to impacts and mitigation measures associated with the proposed Selenium TMDLs. The Selenium TMDLs SED can be found in **Appendix U** to the staff report.

14. A CEQA scoping meeting was held on November 20, 2008 to provide interested parties the opportunity to comment on the appropriate scope and content of the Selenium TMDLs SED. A notice of the CEQA Scoping meeting was sent to potentially interested and affected parties on October 20, 2008. Comments received at the scoping meeting where appropriate, were addressed in the staff report, SED and proposed Selenium TMDLs.

15. In preparing the Selenium TMDLs SED, the Santa Ana Water Board has considered the requirements of Public Resources section 21159 and section 15187 of title 14 of the California Code of Regulations, and intends this document to serve as a tier one environmental review. This analysis is not intended to be an exhaustive analysis of every conceivable impact, but an analysis of the reasonably foreseeable consequences of the adoption of this regulation from a programmatic perspective. Project level analysis, as necessary, will need to be considered in any subsequent environmental analysis performed by other public agencies, pursuant to Public Resources Code section 21159.2.

16. The Selenium TMDLs SED concludes that there will be no or potentially significant impacts associated with the reasonably foreseeable implementation of the proposed Selenium TMDLs. Accordingly, no mitigation measures or alternative to the project are proposed.

17. The public has had a reasonable opportunity to participate in the review of proposed Selenium TMDLs and the associated Selenium TMDLs SED. Drafts of both documents were released for public comment on March 15, 2017 and were posted on the Santa Ana Water Board's website. A Notice of Public Hearing was published and circulated a minimum of 45 days preceding the Santa Ana Water Board's action. Santa Ana Water Board staff responded to written and oral comments from the public. Responses to comments received from the public can be found in **Appendix B2** to the staff report. The Santa Ana Water Board held a public hearing on August 4, 2017 to consider adoption of the proposed Selenium TMDLs. The Santa Ana Water Board considered all testimony offered at the hearing and the written comments submitted by the peer reviewers, interested parties and public agencies before taking final action.

18. Analysis of the proposed Selenium TMDLs was conducted to determine consistency with the antidegradation policy (SWRCB Resolution No. 68-16 and 40 CFR § 131.12). The proposed Selenium TMDLs do not allow for degradation of water quality, but requires restoration of water quality and attainment of water quality standards.

19. The proposed Selenium TMDLs meet the necessity standard of the Administrative Procedures Act, Government Code section 11353, subdivision (b). The proposed amendments are required to fulfill the Santa Ana Water Board's obligation pursuant to the California Water Code and the federal Clean Water Act to exercise its full power and jurisdiction to protect the quality of waters of the state, including the duties to establish TMDLs for impaired waters and to identify the program of implementation, including monitoring, whereby these TMDLs, and thus water quality standards, will be achieved.

20. The proposed Selenium TMDLs must be submitted for review and approval by the State Water Board, Office of Administrative Law (OAL) and U.S. EPA. The proposed Selenium TMDLs will become effective upon approval by U.S. EPA.

21. Once adopted and effective, the proposed Selenium TMDLs will replace the selenium portions of the U.S. EPA's Toxics TMDLs in their entirety.

THEREFORE BE IT RESOLVED THAT:

1. The Santa Ana Water Board hereby approves and adopts the CEQA substitute environmental document, identified as the Selenium TMDLs SED above.

2. The Santa Ana Water Board, after considering the entire record, including oral testimony at the public hearing, hereby adopts the proposed Selenium TMDLs, as identified above and as set forth in the **Attachment A** to the Resolution for inclusion into the Santa Ana Water Board's Basin Plan.

3. The Executive Officer of the Santa Ana Water Board is directed to forward copies of the proposed Selenium TMDLs to the State Water Board in accordance with the requirements of section 13245 of the California Water Code.

4. The Santa Ana Water Board requests that the State Water Board approves the proposed Selenium TMDLs in accordance with sections 13245 and 13246 of the California Water Code, and, thereafter, forwards the amendment to OAL and U.S. EPA for approval.

5. If, during the State Water Board's approval process, Santa Ana Water Board staff, the State Water Board, or OAL determines that minor, non-substantive corrections to the language of the proposed Selenium TMDLs are needed for clarity or consistency, the Executive Officer may make such changes, and shall inform the Santa Ana Water Board of any such changes.

6. The Executive Officer is directed, at the time of filing and posting the Notice of Decision, to take steps to promptly ensure payment of the applicable fee to the

Department of Fish and Wildlife for its review of the Selenium TMDLs SED or to file a Certificate of Fee Exemption, whichever is appropriate.

I, Hope A. Smythe, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a resolution adopted by the Santa Ana Regional Water Quality Control Board on August 4, 2017.

Hope A. Smythe
Executive Officer