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RE: Basin Plan Amendments to Incorporate Total Maximum Daily Loads for Copper and Non-TMDL Action Plans for Other Metals in Newport Bay

Dear Dr. Candelaria:

Recreational Boaters of California [RBOC] appreciates the opportunity to provide comments regarding the California Regional Water Quality Control Board, Santa Ana Region's Basin Plan Amendments to Incorporate Total Maximum Daily Loads for Copper and Non-TMDL Action Plans for Other Metals in Newport Bay.

RBOC is the nonprofit advocacy organization that works to protect and enhance the interests of the state's recreational boaters before the legislative and executive branches of state and local government. RBOC has been promoting the enjoyment, protection, and responsible use of our waterways since 1968.

This issue is important to boating. From recreational boats in the water for a season to commercial ships that are in the water year round, antifouling paint on the underwater part of the boat is fundamental to the proper maintenance and performance of almost all watercraft. The uncontrolled growth of marine organisms on boats significantly degrades performance, increases fuel consumption, contributes to the spread of aquatic invasive species and can even lead to a vessel sinking in extreme cases.

Many antifouling paints contain cuprous oxide, a form of copper, as the licensed pesticide that is their primary active ingredient. These antifouling paints, approved by the USEPA, are designed for the copper to gradually leach into the water from the boat. Paints containing copper are currently the most effective, affordable and available antifouling products for all vessels, including recreational boats.

With regard to the proposed basin plan amendments, RBOC endorses and concurs with the comments of the City of Newport Beach:



1. The Copper TMDL unlawfully attempts to force local agencies to ban copper anti-fouling paint.

The Copper TMDL is unlawful because: (1) It explicitly relies on an implementation plan that requires local agencies to take actions the Legislature has prohibited; and (2) The Regional Board purports to usurp the authority of the Department of Pesticide Regulation to govern the use of copper anti-fouling paint.

The Legislature states that the City does not have the legal authority to ban copper paint, and that any action by the City would be “void and of no force or effect.” Local governments cannot regulate the use of pesticides in Food and Agriculture Code Section 11501.1, subdivision (a).

The Legislature has plainly granted exclusive authority to DPR to regulate the use of pesticides such as copper anti-fouling paint.

It would be arbitrary, capricious and contrary to law to end-run that process to compel local governments to regulate the use of registered pesticides in a manner contrary to DPR’s legislative judgment. There is a 1997 Management Agency Agreement between DPR and the State Water Resources Control Board that includes an established dispute resolution process in place to address conflicts between the two state agencies.

2. The Copper TMDL is unlawful because alternatives to copper anti-fouling paint are not effective or available.

Alternative paints are not widely commercially available, do not have a track record of being effective and are not affordable. The only alternative paints with any degree of effectiveness are not recommended by US EPA’s technical contractor because they present serious environmental hazards.

3. The margin of safety is too large and is unsupported.

The Copper TMDL is improperly and artificially lowered because the Regional Board proposes a margin of safety that is unreasonably large. The Regional Water Board’s staff report does not include any explanation of why such a large margin of safety is appropriate, and none is apparent. There is no justification to add a margin of safety amounting to one fifth of the TMDL on top of all the other conservative assumptions especially when the observed “impairment” is alleged, and isolated technical exceedances of the chronic water quality criterion have no observed toxicity.

4. The phased implementation schedule is unreasonable, unsupported and would force early investments that may be unnecessary.

The 20% reduction by the end of year 3, 50% by the end of year 7, and 83% reduction by the end of year 15 is unreasonable, unsupported and unlawful because it is too short and fails to allow time at the beginning to address the many problems with the TMDL and its implementation.

The Regional Board concludes that “voluntary compliance in Newport Bay [would be] difficult” given that neither the Regional Board nor any of the entities regulated by the TMDL may legally restrict the use of copper anti-fouling paint. The City submits that it will likely take considerable time for this vague plan to work, and the Regional Board’s failure to allow for such time in its implementation schedule is improper. Similarly, it would be wasteful and unnecessarily costly and controversial to develop site-specific objectives while at the same time being held to early and high percentage decreases.

And lastly, with the lack of available and affordable copper anti-fouling paint alternatives on the market today, it is irrational to adopt a schedule that does not allow the proposed new market to respond and develop.

5. The Copper TMDL imposes unfunded state mandates that the State must reimburse under the California Constitution.

Though the regional boards and the State Water Resources Control Board commonly argue that their programs are exempt from the reimbursement program under Government Code 17513, the Copper TMDL would represent a discretionary decision by the state to impose requirements beyond those mandated by federal law. This would be a “true choice” by the state to impose the mandate, and subvention will be required.



6. It is improper to promulgate a TMDL for an entire bay when only certain areas of water bodies within the bay may even be arguably impaired.

7. The Substitute Environmental Document (SED) fails to comply with the California Environmental Quality Act (CEQA).

Prior to approving the proposed TDMLs, the Regional Board must comply with CEQA and its guidelines. The SED is inadequate since its analysis of impacts uses an invalid “baseline” which generally consists of the environmental conditions that exist at the time of environmental review. It is legal error to determine significance of impacts in comparison with a non-existent hypothetically “permitted” action.

Further, the SED’s impact analysis is flawed because it fails to properly account for, or analyze, the foreseeable significant impact of its program. In fact, the Washington State Department of Ecology has concluded that there are no currently available non-toxic alternatives to copper anti-fouling paints. The SED must be revised to address the likelihood that a reasonably foreseeable implementation of the Copper TMDL will involve application of toxic anti-fouling paint, and to analyze the environmental impacts of applying those paints. Additionally, the SED is invalid for failing to analyze a reasonable range of alternatives, and it does not include an economic factors analysis.

8. The data sources in the staff report are older than 10 years, and were collected prior to significant dredging activities that recently occurred in the Upper and Lower Bay.

9. The vessel count used in the calculations is significantly different than the actual, verified number of 4,470 vessels in Newport Harbor.

In addition, RBOC objects to the provision of the basin plan amendment that would specifically identify boaters as dischargers responsible to reduce copper loads and correct sediment impairment. This will impose significant, costly and burdensome requirements on individual boat owners in the implementation of the basin plan amendment.

Thank you for this opportunity to discuss our significant issues and concerns with the basin plan amendment.

Sincerely,

Ralph Longfellow

Ralph Longfellow, President