

**2021 Responses to Comments at the October 28, 2016 Santa Ana Water Board Meeting**

*Participants*

*Dave Webb, Director of Public Works, City of Newport Beach (City)*

*Shelly Anghera, PhD, formerly of Anchor QEA, technical consultant for City*

*Leonie Mulvihill, Assistant City Attorney for City*

*Chris Miller, Harbor Manager for City*

*Dave Webb –City of Newport Beach*

*Susan Paulsen, PhD – consultant (Exponent) for Irvine Company*

*Amanda Carr, Deputy Director, Orange County Environmental Resources*

*Jesse Salem, owner and operator of Newport Harbor Shipyard*

*Tim Simpson, GSI Environmental for Lido Peninsula Company and Newport Shipyard*

*David Kennedy, Boat U.S.*

*John Marshall, Recreational Boaters of California*

*Dave New, Basin Marine, President of Basin Marine Incorporated*

*Jim Jordan, boater*

*Kevin Ketchum, past President, Marine Recreation Association*

*Paul Blank, boater*

*Sheri Oberle, AkzoNobel Coatings*

*Neal Blossom, Director for Chemet*

*Ray Hiemstra, Associate Director for Coastkeeper*

*George Hylkema, Board Member of the Newport Mooring Association*

## SUMMARIES OF COMMENTS FROM STAKEHOLDERS

### City of Newport Beach (City)

#### Dave Webb, Director of Public Works

*(Note: Mr. Webb initiated commentary by City representatives and later returned to provide further comments, which are shown in the order of presentation below. Mr. Webb generally reiterated detailed written comments submitted by the City of Newport Beach (October 14, 2016). Detailed responses to these comments are provided in the Response to Comments Document 2018. Appropriate references to these responses are provided below.)*

#### Summary of Comments

##### Comment 1: Cu concentrations in the Bay:

- Most of the harbor generally falls below the CTR.
  - There are some exceedances of Cu CTR but the key is that there is no toxicity
  - The Cu exceedances are concentrated in certain areas, particularly the west end of the Lower Bay
  - There are lots of variables in play here...The number and concentration and size of boats is important.
  - Some of the problem areas we know have big charter boats
  - The frequency and method of the bottom painting, ... makes a big difference.
- The City's new study of Cu concentrations in the Bay show that there are only a few exceedances of the CTR, and Cu concentrations are close to the 3.1ug/L criteria

*Response 1: Impairment is determined on the basis of exceedances of the CTR criteria (number of exceedances/total number of samples per the State Water Board's State Listing Policy (SLP) methodology); the presence of toxicity is not required.*

*While it is correct that Cu exceedances of the CTR criteria tend to be higher (both in number and magnitude of exceedances) in the West end of Lower Newport Bay, exceedances are found elsewhere in the Lower Bay. In a Cu-Metals Marina Study<sup>1</sup>, exceedances of the dissolved Cu CTR chronic criterion (3.1 µg/L) were found in all marinas sampled in both the Lower Bay and the lower Upper Bay. In the Turning Basin and S. Lido Channel areas (West end), over 84% of the samples exceeded the CTR chronic criterion, and over 37% of the samples exceeded the CTR acute criterion (4.8 µg/L). In other parts of the Lower Bay and the lower Upper Bay, there were 33% and 48% exceedances of the CTR chronic criterion, respectively.*

*Newer data confirm that the Bay is still impaired for dissolved Cu. Data from a study by Anchor QEA<sup>2</sup> for the City (2015, 2016) show that approximately 34% of the samples exceeded the dissolved Cu CTR chronic criterion of 3.1 µg/L (rather than only a few, as stated in the comment). In addition, 16% of the samples exceeded the dissolved Cu CTR acute criterion of 4.8 µg/L, and dissolved Cu concentrations were as high as 12.7 µg/L. In addition, the State Water Board's data assessment for the 303(d) list in 2014-16<sup>3</sup> determined that Newport Bay is still impaired for Cu, and the status for Cu in the Bay is DO NOT*

<sup>1</sup> Orange County Coastkeeper and L.M. Candelaria. July 2007. Lower Newport Bay Copper-Metals Marina Study. Technical Report for Santa Ana Regional Water Board.

<sup>2</sup> Anchor QEA. 2016. Newport Bay Copper Study: Winter 2016. Memorandum to the City of Newport Beach.

<sup>3</sup> Final 2014/2016 California Integrated Report (Clean Water Act Section 303(d) List/305b Report. (A 2018 Integrated Report has been approved; it contains no updates for Newport Bay.)

*DELIST. Data from DPR's latest monitoring study<sup>4</sup> (August 2019) also show impairment as dissolved Cu exceeded the CTR chronic criterion in 50% of the samples taken from Newport Bay, and 19% of the samples exceeded the CTR acute criterion.*

*See also responses to the City's comments on Attachments 4 and 5 to the City's letter (Response to Comments Document 2018).*

Comment 2:

The data [used for Board staff's impairment assessment] are irrelevant and outdated

*Response 2: The data used for Santa Ana Water Board staff's Impairment Assessment are appropriate based on the State Listing Policy (SLP)<sup>5</sup> methodology. Newer data have also confirmed that the Bay is still impaired for dissolved Cu. See response to comment 1 above.*

*See also responses to the City's comments 3.1 – City Letter and 3.1 - Attachment 3 to City letter (Response to Comments Document 2018).*

Comment 3: Regarding Nontoxic paints:

–nontoxic paints [to replace Cu AFPs] are more expensive than Cu AFPs and take longer to apply, take longer to dry

*Response 3: First, conversions to nontoxic paints are a recommended but not required strategy in the Implementation Plan for the proposed Cu TMDLs. Dischargers will be required to consider whether incentives for such conversions would be an appropriate strategy to incorporate into their proposed implementation plan(s) to meet the Cu TMDLs.*

*Santa Ana Water Board staff acknowledge that “nontoxic paints [to replace Cu AFPs] are more expensive than Cu AFPs and take longer to apply”; however, they are expected to last longer than Cu AFPs (5-7 years vs 2-3 years for Cu AFPs).*

*See the alternative paint study by the Port of San Diego.*

<https://www.portofsandiego.org/environment/copper-reduction-program.html>.

*See also the Marina del Rey Pilot Hull Paint Study by the Los Angeles Department of Beaches and Harbors. [https://www.lacounty.gov/SDSInter/dbh/.../1055137\\_FINALPilotPaintStudyReport050219.pdf](https://www.lacounty.gov/SDSInter/dbh/.../1055137_FINALPilotPaintStudyReport050219.pdf).*

Comment 4: Non-Cu paints:

–Non-Cu paints don't last long – maybe 6 months (also heard 3 years), boatyards say 6 months

–Cost is 33% more [than Cu AFPs], that's \$16,000 compared to \$2500 for Cu paint job

-There are toxicities in non-Cu AFPs too – zinc, other biocides

- City doesn't want to switch from one problem [Cu] to another

*Response 4 : Non-Cu antifouling paints (AFP) include both non-biocide paints and non-Cu biocide paints. Since the prior comment refers to “nontoxic” paints, we assume that the comment “non-Cu*

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<sup>4</sup> Department of Pesticide Regulation. Burant, A., Zhang, X., Singhasemanon, N., and J. Teerlink. 2019. Study 319 Report: Monitoring of Dissolved Copper in California Coastal Waterbodies. Dept. of Pesticide Regulation, Environmental Monitoring Branch.

<sup>5</sup> State Water Resources Control Board (SWRCB). 2004, amended 2015. Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List.

*paints don't last long – maybe 6 months” refers to other biocide AFPs. As stated in the response to comment 3 above, the proposed TMDLs do not require boat conversions to alternative AFPs, but this is a recommended task included for the dischargers' consideration. Both non-biocide and non-Cu biocide paints were evaluated in the alternative paint study by the Port of San Diego, and some non-biocide paints can last 5 to 7 years (compared to 2-3 years for Cu AFPs). See the response to the City's comment 3 above. See also response to the City's comment 5.2 – City letter (Response to Comments Document 2018).*

Comment 5: City continues to dredge harbor and has removed a lot of contaminated material. That effects [affects] things [in the Bay] – deepened channels which improves circulation.

*Response 5: Dredging of the harbor is noted. Santa Ana Water Board staff are aware of the City's dredging projects in the Rhine Channel, Upper Newport Bay and Lower Newport Bay (specifically the west end of the Lower Bay). Based on the data, especially in the West end of the Bay, dredging does not provide long-term assurance of Cu TMDLs compliance because the most significant Cu source is Cu AFPs on boats, and Cu discharges from boats must be reduced to meet these TMDLs. See also revised draft Substitute Environmental Document (SED) 2021, 5.3.b. No pre-dredge sediment samples were used to evaluate sediments, and sediments are not considered to be impaired based on a newer interpretation of the impairment assessment guidelines in the SLP. (An older interpretation of the SLP methodology to determine sediment impairment was used in Board staff's Impairment Assessment described in the Staff Report 2016). See responses to the City's comment 3.1 - Attachment 3, and 6.10 - Attachment 6 (Response to Comments Document 2018).*

Comment 6: City has limited resources and time:

City would like to send notices to all the shipyards and going out and discussing with them about the hull cleaning and paint processes; explore hot spots in Bay; move big boats in west end; sponsor hull cleaning seminars (Chris Miller is working on that now) – possibly spring/summer work with divers. Promote less cleaning of boats based on manufacturer input, and send out notices to mooring holders and our permittees. City is working on these ideas voluntarily.

*Response 6: The Santa Ana Water Board applauds voluntary efforts to address Cu discharges from Cu AFPs in the Bay. The actions that the City describes can and should be part of an implementation plan that the City would be required to submit if the proposed Cu TMDLs, including the TMDLs Implementation Plan, are approved. See also response to the City's comment 6 - City letter (Response to Comments Document 2018).*

**Shelly Anghera, PhD, formerly of Anchor QEA, technical consultant for City of Newport Beach**

*(Note: Dr. Anghera generally reiterated detailed written comments prepared by Anchor QEA and presented as attachments to the City of Newport Beach comment letter dated October 14, 2016. Santa Ana Water Board staff provided detailed written responses to these comments in the Response to Comments Document 2018. Appropriate references to these responses are provided below.)*

Summary of technical comments

Comment 1: We [Anchor QEA] added 5-6 different data sets after 2009.

*Response 1: Comment noted regarding additional data sets. The written comments submitted by the City of Newport Beach (City), with attachments prepared by Anchor QEA, asserted that the data employed in Santa Ana Water Board staff's Impairment Assessment for the proposed TMDLs were outdated and incorrect. (The assertion that the data were incorrect relied on the false assumption that pre-dredge data were employed in the assessment.)*

*See responses to the City's comments 3 - City letter and 3.1 and 3.2 - Attachment 3 to City letter (Response to Comments Document 2018).*

*Newer studies confirm that the Bay is still impaired for dissolved Cu, and are included in the Staff Report 2021<sup>6</sup>. Data from a study by Anchor QEA<sup>7</sup> for the City (2015, 2016) show that approximately 34% of the samples exceeded the dissolved Cu CTR chronic criterion of 3.1 µg/L. In addition, 16% of the samples exceeded the dissolved Cu CTR acute criterion of 4.8 µg/L, and dissolved Cu concentrations were as high as 12.7 µg/L. The State Water Board's data assessment for the 303(d) list in 2014-16<sup>8</sup> also determined that Newport Bay is still impaired for Cu, and the status for Cu in the Bay is DO NOT DELIST. Data from DPR's latest monitoring study<sup>9</sup> (August 2019) also show impairment as dissolved Cu exceeded the CTR chronic criterion in 50% of the samples taken from Newport Bay, and 19% of the samples exceeded the CTR acute criterion.*

Comment 2: New listings are being considered for fish tissue and wildlife – not enough samples to justify the listings -concentrations in fish tissue and wildlife are same as background concentrations along S. California coast

*Response 2: See responses to the City's comments 3.2.4 - Attachment 3 to City letter, and 6.12 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 3: Cu exceedances have not been linked with an observed impairment. CTRs are intended to be conservative but we have not been able to find a single toxic sample in the water yet, even when we're testing pretty high copper concentrations. The copper CTR exceedances are limited to certain portions of the harbor. And the implementation plan, as written, effects [sic] the entire harbor, and is overly conservative.

*Response 3: A water body is considered to be impaired based on the number of exceedances of the CTR criteria compared to the number of samples per State Listing Policy (SLP) methodology based on the binomial distribution. Toxicity is not required in addition to exceedances of the CTR criterion to determine impairment. See response to the City's comment 6.28 - Attachment 6 to City letter (Response to Comments Document 2018).*

*The City states that exceedances are limited to certain portions of the harbor, and that Santa Ana Water Board staff's Implementation Plan is overly conservative, since it is written for the entire Bay. Again, the determination of impairment is based on number of exceedances compared to the total number of samples (per SLP methodology), therefore there will be some sampled areas that are in compliance but*

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<sup>6</sup> Staff Report 2021 is Appendix A of the draft SED 2021.

<sup>7</sup> Anchor QEA. 2016. Newport Bay Copper Study: Winter 2016. Memorandum to the City of Newport Beach.

<sup>8</sup> Final 2014/2016 California Integrated Report (Clean Water Act Section 303(d) List/305b Report. (A 2018 Integrated Report has been approved; it contains no updates for Newport Bay.)

<sup>9</sup> Department of Pesticide Regulation. Burant, A., X. Zhang, N. Singhasemanon, and J. Teerlink. 2019. Study 319 Report: Monitoring of Dissolved Copper in California Coastal Waterbodies. Dept. of Pesticide Regulation, Environmental Monitoring Branch.

*the listing is for the entire water body. Data from Anchor QEA's study for the City (2015,2016) show that over 30% of the samples exceeded the dissolved Cu CTR chronic criterion, which means that the Bay is still impaired for Cu; however, if there are 30% exceedances, then approximately 70% of the samples were in compliance. The City, therefore, can focus on areas that exceed the CTR criterion in their implementation plan(s). See response to the City's comment 5.6 - City letter (Response to Comments Document 2018).*

Comment 4: Regarding Calculations [for Cu load estimates from boats]:

- This calculation drives the implementation plan that says you will reduce 20 percent of your copper loading from boats in the first three years, and then 50 percent in the first five years, it's all based on this calculation.
- In the staff report, they assumed the maximum leach rate and we were using peer-reviewed literature, work that was being done out of San Diego, and found that the average leach rates of paints that are currently being used is between six micrograms per square per day.
- The loading from boats was for 10,000 boats when the harbor is actually less than 5,000.
- Also, the calculations in the staff report assumed that only 50 percent of BMPs are being used. And the DPR guidance does say that in order to use the 9.5 paints, you have to be using BMPs with those, so we revised these calculations.
- A margin of safety was applied to the TMDL calculation of 20 percent, which we think is just another layer of conservativeness on top of it.
- When we recalculated using peer-reviewed literature and defensible and recent data, we are getting something that's, instead of 36,000 pounds per year being released from copper, we're getting numbers closer to 10,000 pounds per year being released from boats. And that has a significant impact on how the implementation and what are the best management practices for moving forward.

*Response 4: A detailed response to ALL comments on the Cu load calculations is given in responses to Attachment 1 - City letter (Response to Comments document 2018).*

Comment 5: Data do not reflect current conditions. [sediment data]

There has been significant dredging and improvement especially in the sediment. There's only -- in the staff's report there was only a handful. There's 40 samples, approximately, that were represented that post condition. All the other samples were pre-dredge condition.

Available data sets include the Orange County Monitoring Program – long-term monitoring stations, quarterly sampling for Upper Newport Bay and Lower Newport Bay. It's exactly the same sites every year. But this dataset represents approximately 140 samples collected between 2011 and 2016.

There's not a single copper exceedance in the sediment at these seven locations.

There's also, we identified in our comments, another five additional studies that should be considered of data that exists after 2011.

96 sediment toxicity tests have been conducted since 2011. And 18 that had a toxic response and of that, though, there is only two of those 18 had where you had an ERM exceedance of a metal and the presence of toxicity, and that was just in the Rhine Channel.

In addition, there was another 19 toxicity tests, called Summit Water Interface tests, and there was no toxicity observed in those samples.

So we believe that there is no real demonstration here that there is an impairment going on with the sediment using the methods that were put forward staff report.

*Response 5: The data used for Santa Ana Water Board staff's Impairment Assessment are valid, and no pre-dredge data, from areas that were later dredged, were used for impairment assessment purposes. In addition, the determination of sediment impairment has been revised based on State Water Board staff's newer interpretation of the State Listing Policy assessment methodology. Additional sediment monitoring is required, however, in accordance with the SQOs methodology in the Sediment Quality Provisions. See response to comment 1 above.*

*See also responses to the City's comment 3.1 - Attachment 3 to City letter, and 6.10 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 6: Dissolved Cu data

-This is a summary of the available dissolved copper concentration data, again, from this Orange County Monitoring Program. This is going - this is years 2011 through 2015...this represents 205 samples, again, collected quarterly and at these six sites.

-There's a very consistent copper concentration in this long monitoring program.

So we're not seeing a huge amount of data with a great number of exceedances in these at these, at least, these six locations.

-The City of Newport Beach asked us to design a Water Quality Sampling Program. This is 40 samples that were collected in approximately about 24 hours of time.

--at the same time we ran the toxicity test and got the dissolved copper concentration. This is a 3.4, this is a 10, a 5.1, an 8, and a 3.4, just to give you an idea. All of these concentrations were greater than the 3.1. And in all of these toxicity tests, we had zero toxicity to the most sensitive test which is the *Mytilus*, which is our mussels that live off docks.

So we don't believe that the staff report accurately indicates [water quality conditions]. We believe that it shows that the water quality is much worse than we what we actually believe and what we believe the data show, the current data especially. Like I said, in the last five years, we've had no toxic effects found using the most sensitive animal, that we had the five samples from the water column but we also had those 39 samples of the sediment water interface test, which is also the same sensitive organism.

*Response 6: First, note that the long-term monitoring data referred to are for six locations only, and these sites do not include any marina sites (where the highest Cu concentrations occur). Second, the presence of toxicity is not required to demonstrate impairment per the SLP. See responses to the City's comment 1 and S. Anghera's comment 3, above; see also responses to the City's comments in Attachments 4 and 5 to the City's letter (Response to Comments Document 2018).*

Comment 7: Fish tissue data - our comments provide a summary of all of the available fish data that we could find on CEDEN and other data sources. And when we did a comparison, we find that Newport Beach is often lower or exactly the same as all the fish, even off the coast in the ocean.

*Response 7: See responses to the City's comment 6.12 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 8: We do not need a TMDL at this time

-- the Brake Pad Initiative is coming on and that's probably going to be the greatest impact to copper and zinc concentrations through the NPDES program, and that's going to be coming in the next ten years.

-- future dredging is only going to make the harbor deeper, increase the circulation, and then continue to remove legacy contaminants that are in the environment.

--we believe the DPR will have an effect. Like you saw, that Dave provided, the concentrations [leach rates] of the most common paints that are being used right now are above the 9.5. So when the boat owners convert, it will naturally be coming down to lower concentrations of copper in the future.

-- our summary is that we really just don't need a new TMDL at this time. Like Linda said, there is a TMDL that was done in 2002. What we really need is a good implementation plan, a good monitoring program. We don't need additional restrictions. Things are getting better all by themselves.

We want to include, you know, a part of that monitoring, have it include understanding, getting water column data together with toxicity data, so we really can identify where impairments are occurring and be able to prioritize areas for management. I could see updating the monitoring program so that it's more -- it collects a broader range of sites and habitats that exist within Newport Bay.

-- we also think that continuing to handle the Rhine Channel differently outside of this TMDL is a good recommendation. The Regional Board and the City of Newport Beach have been working on a solution together. And so keeping it out of this Copper TMDL seems appropriate.

And finally, there is a listing for sediment toxicity and we're not finding sediment toxicity. And so we would recommend removing that as it relates from the TMDL for this particular Metals TMDL. And I think advocating and supporting the AB 425, which is the Department of Pesticide regulation, by making sure that only legal paints are being used and developing the best management practices for the hull cleaning and doing better education.

*Response 8: Regarding the need for a TMDL - Based on the data, including newer data, Cu TMDLs are still needed for Newport Bay. See response to comment 1 above. See also responses to the City's comments 6.35 and 6.40 – Attachment 6 (Response to Comments Document 2018).*

*Regarding the Brake Pad Initiative - Santa Ana Water Board staff agree that the Brake Pad Initiative may decrease Cu in urban runoff; however, the major source of Cu to the Bay is Cu AFPs, and reductions of Cu discharges from Cu AFPs are essential to achieve the TMDLs. Note that no reductions for Cu in tributary runoff are required by the proposed TMDLs since the wasteload allocation for this source is being met.*

*Regarding future dredging – While dredging does remove legacy contaminants and increases circulation, the main source of Cu to the Bay is Cu discharges from Cu AFPs on boats; this is an ongoing source. In addition, a Metals Sediment Study<sup>10</sup> showed that in most water samples taken above sediments that contained Cu, dissolved Cu did not exceed the CTR chronic criterion. See also response to comment 5, above.*

*Regarding DPR's leach rate regulation – Board staff agree that the use of lower leach rate Cu AFPs will reduce Cu discharges from boats (and help to achieve the TMDL allocation for boats), but only if the current Cu AFPs in use have leach rates higher than DPR's maximum leach rate (i.e. the extent of the reduction and the effect on Cu concentrations in the Bay are dependent on the leach rates of the Cu AFPs now in use). Note also that DPR's determination of the maximum leach rate for Cu AFPs assumes that BMPs will be employed with the use of these lower leach rate Cu AFPs.*

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<sup>10</sup> Orange County Coastkeeper and L.M. Candelaria. March 2014. Metals Sediment Study in Lower Newport Bay (Post-dredging) Final Report. Technical Report for Santa Ana Regional Water Board.

*Regarding updating the monitoring program – Board staff agree that the monitoring program should be updated; however, as stated above, the presence of toxicity is not required in addition to exceedances of the dissolved Cu CTR criterion to determine impairment. (See response to comment 3 above.) Monitoring should be updated to include some marina sites; continued monitoring and evaluation are part of the Implementation Plan requirements of the proposed Cu TMDLs.*

*Regarding the Rhine Channel - See Staff Report 2021<sup>11</sup>, Section 3.2 Toxics TMDLs for Newport Bay and San Diego Creek (USEPA 2002), which discusses the Rhine Channel with respect to the rest of Lower Newport Bay. Metals TMDLs were established by USEPA for dissolved copper (Cu), cadmium (Cd), lead (Pb) and zinc (Zn) for Upper Newport Bay and San Diego Creek; and dissolved Cu, Pb and Zn for Lower Newport Bay (including the Rhine Channel). In addition, mercury (Hg) and chromium (Cr) TMDLs were established by USEPA only for the Rhine Channel. The proposed Cu TMDLs for Newport Bay include the Rhine Channel.*

*Regarding the sediment toxicity listing - Removing the Clean Water Act Section 303(d) listing for sediment toxicity is subject to a separate process from the consideration of these Cu TMDLs.*

*Regarding “advocating and supporting the AB 425... by developing the best management practices for the hull cleaning and doing better education”: Santa Ana Water Board staff agree that these measures are appropriate and necessary. Accordingly, per the proposed Cu TMDLs’ Implementation Plan, these items are to be considered in the development of the dischargers’ proposed implementation plan(s).*

**Leonie Mulvihill, Assistant City Attorney for City of Newport Beach**

*(Note: Ms. Mulvihill generally reiterated detailed legal comments submitted by the City of Newport Beach (October 14, 2016). Detailed responses to the City’s legal comments are provided in the Response to Comments Document 2018. Appropriate references to these responses are provided below.)*

Summary of legal comments

Comment 1: DPR is the exclusive regulatory of the use and sale of pesticides in the state of California. Board staff and DPR staff should confer together.  
The proposed implementation plan would put the city, as well as every other discharger in a position to do something that DPR has chosen not to do.

*Response 1: These comments are addressed in the responses to the City’s comments 1 and 2 - City letter, and 7.1, 7.2, and 7.3 - Attachment 7 to City letter (Response to Comments Document 2018).*

Comment 2: The CEQA analysis - significant concerns regarding the environmental impact -- the environmental review --alternative actions were not considered no analyzed.  
-Impacts of the proposed implementation plan were not analyzed.  
-failure to acknowledge the economic costs involved here, which is a responsibility of the document. Those costs are not quantified.

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<sup>11</sup> Staff Report 2021 is Appendix A of the draft SED 2021.

*Response 2: The SED was revised in response to comments and recirculated on July 10, 2018. The SED has been further revised based on comments received in August 2018 and later, and the draft SED 2021 was recirculated on June 29, 2021 for public review and comment.*

Comment 3: Concerns about the scientific data that suggests that this action might not be well supported by substantial evidence.

*Response 3: The concerns referenced are not specified. Santa Ana Water Board staff presume that this assertion is based on comments included in Attachments 1-6 - City letter (October 14, 2016), and Irvine Company and Irvine Company consultant's (Exponent) comments concerning the scientific and technical merits of the proposed Cu TMDLs. Detailed responses to these comments are provided in the Response to Comments Document 2018.*

### **Chris Miller, Harbor Manager for City of Newport Beach**

#### Summary

Comment 1: Mr. Miller cites some dredging statistics and information on wildlife observed in the Bay that suggest that the Bay is getting better.

*Response 1: Comments noted.*

Comment 2: Number of boats is incorrect—it is not 10,000, it is in the 4,400-4,500 slip range

*Response 2: The estimated number of boats has been revised to 5,000. See response to the City's comment 1.3 – Attachment 1, City letter - (Response to Comments Document 2018), and the response to Irvine Company's general comment 4-1 (Staff Report 2021<sup>12</sup>).*

Comment 3: Balboa Yacht Basin study [Newport Bay Copper Reduction Project ] – boaters were not interested in a product that didn't work

*Response 3: See Coastkeeper's comment 3 below regarding the Newport Bay Copper Reduction Project – boaters actually were interested in converting to nontoxic paints. Further, the proposed TMDLs do not require boat paint conversions. Rather, the proposed TMDLs require that the dischargers consider the conversion of Cu AFPs to non-biocide AFPs as a possible strategy in their proposed implementation plan(s) to meet the Cu TMDLs.*

### **Dave Webb –City of Newport Beach**

*(As noted above, Mr. Webb restated comments provided by the City in detailed written form (letter dated October 14, 2016). Detailed written responses to the City's comments are provided in the City's letter and Attachments 1 to 10 (Response to Comments Document 2018). Since the comments below were provided during Mr. Webb's second appearance, they are denoted in numerical order following Mr. Webb's prior comments, i.e., beginning with comments 7.)*

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<sup>12</sup> Staff Report 2021 is Appendix A of the draft SED 2021.

Summary

Comment 7: The majority of the harbor is compliant with the CTR...The TMDL analysis misportrays the actual conditions.

*Response 7: This statement is not correct. See response to comments 1 and 2 from D. Webb, above.*

Comment 8: The leach rates in the water column loading ....have concerns with them; they're based on some old data, they're based on old studies, use the maximum levels, things like that

*Response 8: Detailed responses to ALL comments on Cu load calculations are given in Attachment 1 - City letter (Response to Comments Document 2018). In particular, the leach rate used for these calculations is based on DPR's maximum leach rate regulation (January 2014); it is incorrect to say that "leach rates are based on old data, old studies".*

Comment 9: The criteria exceedances are not directly linked to the impairments. Copper CTR exceedance is limited to small portions of the harbor

*Response 9: See responses to the City's comments 5.6 - City letter and 6.4 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 10: DPR controls the paints and the 9.5 [leach rate] is a discharge. EPA also approves those paints. The paints that are approved now are legal. We understand they create problems and in some cases they go over CTR but they're legally-used paint.

The nice thing is we're moving to a less concentration paint, those are coming online.

*Response 10: DPR does have the authority over the sale and use of Cu AFPs and the "paints that are approved now are legal". However, this does not obviate the Santa Ana Water Board's authority and obligation to control discharges from Cu AFPs in order to ensure that water quality standards are achieved. This is the purpose of the proposed Cu TMDLs (and those previously established by USEPA). See responses to the City's comments 1, 2 and 5.1- City Letter, and 6.44 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 11: Requiring the county and the city and others to oversee and monitor and enforce this might violate unfunded mandates.

*Response 11: See responses to the City's comments 5.5 - City letter, and 7.7 - Attachment 7 to City letter (Response to Comments Document 2018).*

Comments 12: We think the CTR appears to be overly conservative.

*Response 12: See response to the City's comment 6.4 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 13: We also support better science. I think that we can look at maybe site-specific criteria, versus a TMDL over the whole harbor.

*Response 13: See responses to the City's comments 5.6 - City letter, and 6.4 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 14: Newport supports a continued dialogue with the Regional Board and other parties.

*Response 14: Comment noted.*

Comment 15: Thoughts/recommendations:

- Do not proceed with the further consideration or adoption of this Basin Plan Amendment. it's not ready yet. There's too much problems with the data.
- DPR- and the EPA-approved paints are acceptable for use
- Have the staff basically work with the stakeholders and the NGOs on a five-year plan [to allow time for the lower leach rate Cu paints] to come in, the Brake Pad Initiative comes in, when we start seeing further things.
- We can even do BMPs, like they recommend, but they don't say it's going to get rid of that. We may still have exceedances.
- Develop implementation of reasonable science for kind of like a harbor-wide sampling of the water and the sediment again. relook at the sampling. look at the whole harbor again.
- Convene and participate with stakeholder meetings, review the data.

*Response 15: See response to the City's comment 4 - City letter (Response to Comments Document 2018).*

**Susan Paulsen, PhD – consultant (Exponent) for Irvine Company**

*(Note: Dr. Paulsen (Exponent) generally reiterated written comments submitted by Exponent on behalf of the Irvine Company. Written responses to these comments are provided in the Response to Comments Document 2018.*

Summary

Comment 1 – The company would request, and consistent with this being a workshop, that the Board not adopt the TMDL or the Non-TMDL Action Plans but would instead pursue an efficient and effective collaborative solution for Newport Bay.

*Response 1 – Comment noted.*

Comment 2 -Chief among the concerns is the impairment assessment behind the TMDL and that it uses data that extend back to 2000 or 2002. In some cases the sediment samples -- the sediments upon which -- from which the samples were taken and upon which the impairment assessment is based are no longer present in the bay; they've been dredged and removed from the bay entirely.

*Response 2 – Regarding older data used for Santa Ana Board staff's Impairment Assessment – See responses to the City's comments 3.1-City Letter, 3.1-Attachment 3 to City Letter, and Irvine Company's comment 1.1 (Response to Comments Document 2018).*

*The assertion that Board staff's Impairment Assessment relied on data from sediments that have been removed from the Bay is not correct. See response to the City's comments 3.1, 3.2 - Attachment 3 to City letter, and 6.10, 6.17, 6.18, 6.19, 6.32, 6.34, 6.39 -Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 3: We agree with the Regional Board that tissue is not impaired with respect to copper. We do believe, though, that the stakeholder process would be an appropriate way to look at listings for the

other pollutants, so arsenic, chromium, mercury, and zinc, and that the listings -- the proposed listings for those at this point are premature.

*Response 3: Based on the data, Board staff believe that Zn, Hg, As and Cr are metals of concern; however, the proposed Action Plans have been removed from the proposed Basin Plan Amendments at this time. See responses to the City's comments 3.2.4 – Attachment 3, and 6.23-6.26 – Attachment 6 (Response to Comments Document 2018).*

Comment 4: For sediment, we've talked a little bit about the state sediment quality objectives policy. The sediment quality objectives integrate three measures of sediment quality; one of those is toxicity. ...in 2009 there were a few stations that had high toxicity or moderate toxicity but since then things have improved. And all of the samples that were collected in 2014 were nontoxic, showed no toxicity. -- those analytical results should be included in the Impairment Assessment for the bay. We would also point out that there was the Post-Dredge Study that was done by the Coastkeeper and the Regional Board in 2014. There were sediment samples that showed copper concentrations above ERM levels in those samples but there were also toxicity measurements that were made on those samples. There was no toxicity found in any of those post-dredge samples.

*Response 4:*

*First, sediments were not assessed with sediment quality objectives (SQOs) procedures identified in the State Water Board's Water Quality Control Plan for Enclosed Bays and Estuaries – Sediment Quality Provisions (Sediment Quality Provisions) because the data that were available did not include all data sets required for that assessment. Based on State Listing Policy (SLP) methodology at the time of Santa Ana Water Board staff's Impairment Assessment, exceedances of the ERM sediment guidelines were used to determine impairment.*

*With respect to the Coastkeeper/Board staff post-dredge sediment study, sediment Cu exceeded the ERM guideline and toxicity was present in some areas. Exceedances of the ERM guideline were not paired with toxicity, however. The sediments, therefore, are not considered to be impaired since the initial assessment was based on the older guidelines, but further monitoring and evaluation of sediments by the SQOs assessment is required by the Cu TMDLs. See responses to the City's comments 6.17, 6.18, 6.19, 6.32, 6.34 and 6.39 – Attachment 6 to City letter, and 3.1-Attachment 3 to City letter (Response to Comments Document 2018). See also the City's comment 2 – Attachment 3 (2021 Responses to Comments from August 2018 ).*

Comment 5: For water, recent data do show that there have been exceedances of a dissolved copper criteria, the CTR criteria. But the most recent data also, and some of the data in the staff report, appear to indicate that there is not toxicity associated with those samples, so it appears that the CTR objectives may be overly conservative. And CTR actually provides for that. There are provisions within the CTR rule that allow you to look at the actual toxicity with ambient samples and set site-specific objectives or do a water effects ratio if the criteria are not appropriate. And we have indications that they are not appropriate, so in our view, additional study would be needed.

*Response 5: Again, toxicity is not required to determine impairment.*

*See response to the City's comment 6.28 - Attachment 6 to City letter (Response to Comments Document 2018).*

*It is correct that the CTR allows for the establishment of site-specific objectives, but this can be accomplished within the framework of the proposed Cu TMDLs. See response to the City's comment 6.5 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 6: The company also has several legal concerns.

- One is that there doesn't appear that there's been a peer review for this, or that there was a peer review conducted for EPA's 2002 TMDL.
- The CEQA analysis, we agree with the city's comments and believe that it was flawed.
- The company is concerned that the Regional Board does not have the authority to regulate marina owners and operators using either a TMDL or cleanup and abatement orders.
- And finally, there's concern that the proposed implementation actions conflict with federal regulations that apply to recreational vessels and their owners.

*Response 6:*

*Regarding peer review: Per applicable peer review guidelines (Unified California Environmental Protection Agency Policy and Guiding Principles for External Scientific Peer Review (March 13, 1998); Exhibit F, California Environmental Protection Agency (Cal/EPA) External Scientific Peer Review Guidelines, Gerald W. Bowes, PhD, November 2006), external scientific peer review is not required if a new application of an adequately peer-reviewed product does not depart significantly from its scientific approach. Santa Ana Water Board management is responsible to determine whether or not a work product must be submitted for external scientific peer review. Based on a memorandum prepared by Santa Ana Water Board staff regarding prior peer review of the scientific approaches employed by Board staff to develop the proposed amendments, Santa Ana Water Board management has determined that no further peer review is required. The Substitute Environmental Document (SED) has been revised and the draft SED 2021 was recirculated on June 29, 2021 for public review and comment.*

*-Regarding the Santa Ana Water Board's authority to regulate marina owners/operators, see response to Irvine Company's comment 3.2 (Response to Comments Document 2018).*

*-Federal requirements applicable to recreational vessels preclude the issuance of NPDES permits (Clean Boating Act). This does not obviate or undermine the Santa Ana Water Board's obligation and authority to issue appropriate orders, including waste discharge requirements, under state law.*

Comment 7: So in sum, we are glad that this is not being proposed for adoption today. We would respectfully request that the Regional Board allow the stakeholders to embark upon a stakeholder process to reevaluate the existing data in light of the changes that have occurred in the bay, to make sure that we are using data and an impairment assessment that are representative of current conditions, and to evaluate and design an appropriate program for data collection going forward for water and sediment if it's needed.

In addition, to address the water column concerns if it's needed, based on review of the data, to collect additional information on both the concentrations of dissolved copper present in the water column, as well as toxicity data for those same samples.

And then finally, we would ask that the Regional Board not list tissue for arsenic, chromium, mercury, or zinc in the non -- as part of the non-TMDL actions that might be taken.

*Response 7: The recommended compliance schedule for the proposed Cu TMDLs would allow for the stakeholder process and review requested. See response to the City's comment 4 -City letter (Response to*

Comments Document 2018). As stated previously, the non-TMDL Action Plans for As, Cr, Hg, and Zn are no longer included in the Cu TMDLs BPA.

**Amanda Carr, Deputy Director, Orange County Environmental Resources**

(Note: Ms. Carr generally reiterated comments submitted by the County of Orange in writing (letter dated October 17, 2016). Responses to these comments are provided in the Response to Comments Document 2018.

Summary

Comment 1: The permittees have put in a lot of efforts in controlling discharges from the storm drain system into Newport Bay over the years

*Response 1: Comment noted.*

Comment 2: We do have concerns with the proposed Copper TMDL. As noted in the TMDL, the MS4 system is a minor source but it is still going to be a regulated source in this proposed TMDL. The primary source of Cu in urban runoff comes from brake pads and this problem will go away through legislation.

*Response 2: Comment noted. The proposed Cu TMDLs do not require a reduction in Cu discharges for tributary runoff. See response to S. Paulsen's comment M10 (Response to Comments Document 2018).*

Comment 3: We support a stakeholder process to review the Impairment Assessment, in particular, recognizing the significant and permanent changes that have gone in the bay.

*Response 3: See response to the City's comment 4 - City letter (Response to Comments Document 2018).*

Comment 4: When you include pre-dredge sediment data, that takes away all of the benefit of what we've spent millions of dollars to remove, if we're judged on data from sediments that are no longer there.

*Response 4: No pre-dredge sediment data were used to determine impairment of sediments. In addition, sediments are no longer considered to be impaired based on the State Water Board's newer interpretation of the SLP. See response to S. Paulsen's comment 2 above. See also responses to the City's comments 3.1, 3.2 - Attachment 3 to City letter, and 6.10, 6.18, 6.19, 6.34 -Attachment 6 to City letter (Response to Comments Document 2018).*

**Jesse Salem, owner and operator of Newport Harbor Shipyard**

Summary

Comment 1: There are no nontoxic bottom paints.

There are three kinds of bottom paint: hard epoxy bottom paint with about 60 percent copper; soft or ablative bottom paint which has got about 30 percent copper, and is that very soft paint which sloughs off; and alternative paints -either zinc-based, and all the copper alternative zinc-based paints have a zinc content of between 20 and 50 percent; and then there are some pharmaceutical-based bottom paints; and finally, non-metal-based silicone-based bottom paints.

There's nothing that works as well as a high-cooper, high-load bottom paint.

*Response 1: Non-Cu AFPs that are classified as non-biocide paints were evaluated in the Port of San Diego study and shown to be an acceptable option to Cu AFPs.*

*See response to the City's comment 5.2 – City letter (Response to Comments Document 2018), and the Port of San Diego weblink:*

<https://www.portofsandiego.org/environment/copper-reduction-program.html>

**Comment 2:** You will be doing the wrong thing if you accelerate the TMDLs how you propose doing them because it will not work and it will -- not only will it chase people away from boating, and the ancillary effect with that, it will chase business away from Newport Beach.

*Response 2: Comment noted. USEPA already established Cu TMDLs for Newport Bay in 2002 as part of the Toxics TMDLs<sup>13</sup>; therefore, if the proposed Cu TMDLs are not approved by the Santa Ana Water Board, USEPA's TMDLs must be implemented. USEPA's TMDLs recognize that Cu AFPs are the major source of Cu input to the Bay, and these TMDLs require a greater reduction from boats than Santa Ana Water Board staff's proposed Cu TMDLs (92 vs 60%, respectively). Board staff's proposed Cu TMDLs would supersede the Cu TMDLs established by USEPA, and include an Implementation Plan that provides dischargers the opportunity to identify reasonable and fair strategies to reduce Cu discharges from Cu AFPs over time (up to 12 years).*

### **Tim Simpson, GSI Environmental for Lido Peninsula Company and Newport Shipyard**

#### Summary

**Comment 1:** Consider comments by Anchor [Shelley Angherra] and Exponent [Susan Paulsen] about the condition of the bay.

--MS4 program is working

- There's more recent science, more recent data that shows that the bay is not impaired and the current programs are working.

*Response 1: The proposed Cu TMDLs do not require a Cu reduction for tributary runoff (MS4 program). See response to S. Paulsen's comment M10 (Response to Comments Document 2018).*

*Newer data confirm that the Bay is still impaired for dissolved Cu. Data from a study by Anchor QEA<sup>14</sup> for the City (2015, 2016) show that approximately 34% of the samples exceeded the dissolved Cu CTR chronic criterion of 3.1 µg/L (rather than only a few, as stated in the comment). In addition, the State Water Board's data assessment for the 303(d) list in 2014-16<sup>15</sup> determined that Newport Bay is still impaired for Cu, and the status for Cu in the Bay is DO NOT DELIST. Data from DPR's latest monitoring study<sup>16</sup> (August 2019) also show impairment as dissolved Cu exceeded the CTR chronic criterion in 50% of*

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<sup>13</sup> USEPA 2002. Total Maximum Daily Loads for Toxic Pollutants, San Diego Creek and Newport Bay, California. U.S. Environmental Protection Agency, Region 9

<sup>14</sup> Anchor QEA. 2016. Newport Bay Copper Study: Winter 2016. Memorandum to the City of Newport Beach.

<sup>15</sup> Final 2014/2016 California Integrated Report (Clean Water Act Section 303(d) List/305b Report. (A 2018 Integrated Report has been approved; it contains no updates for Newport Bay.)

<sup>16</sup> Department of Pesticide Regulation. Burant, A., Zhang, X., Singhasemanon, N., and J. Teerlink. 2019. Study 319 Report: Monitoring of Dissolved Copper in California Coastal Waterbodies. Dept. of Pesticide Regulation, Environmental Monitoring Branch.

*the samples taken from Newport Bay, and 19% of the samples exceeded the CTR acute criterion. See response to D. Webb's comment 1 above.*

*See also response to the City's comment 6.27 - Attachment 6 to City letter (Response to Comments Document 2018).*

Comment 2: There are no alternatives [to Cu AFPs]. We have to be careful that we don't push boaters into products that have consequences that haven't been fully understood.

*Response 2: See response to J. Salem's comment 1 above.*

Comment 3: I really encourage the stakeholder process

*Response 3: Comment noted. See response to the City's comment 4 - City letter (Response to Comments Document 2018).*

### **David Kennedy, Boat U.S.**

#### Summary

Comment 1: Concern about cost for boaters

*Response 1: The proposed Cu TMDLs do not require the conversion of boats to alternative AFPs, and the use of BMPs with lower leach rate Cu AFPs are recommended as a first step to reduce Cu discharges from boats. However, per the proposed TMDLs Implementation Plan, boat conversions may be considered as a possible compliance strategy in the dischargers' proposed implementation plan(s). There will be a higher cost to convert from Cu AFPs to non-biocide AFPs initially; however, these non-biocide paints should last longer than Cu AFPs. See response to Vice Chair Ackerman's comment 2 and D. Webb's comment 3 above.*

Comment 2: Concern about antifouling paints – what works and doesn't work

*Response 2: See response to comment 1 above.*

Comment 3: Concern with the identification of individual boat owners as responsible parties.

*Response 3: Although individual owners are identified as dischargers under the Cu TMDLs, it would not be practical to issue individual orders to each boat owners. The Santa Ana Water Board expects to implement the TMDLs, if approved, by issuing waste discharge requirements or other appropriate orders to the City of Newport Beach, the County of Orange and marina owners/operators.*

### **John Marshall, Recreational Boaters of California (RBOC)**

#### Summary

Comment 1: Number of Boats is incorrect - The number of vessels that we can accommodate is about 4,570.

*Response 1: The number of boats in the proposed Cu TMDLs has been reduced from 10,000 to 5,000.*

Comment 2: The economic impact to the boating community could be catastrophic. we must consider those economic factors when adopting a TMDL.

*Response 2: Santa Ana Water Board staff agree that economics must be considered in the development of these Cu TMDLs. Economics are considered in the revised draft SED 2021 for the proposed action to adopt the Cu TMDLs.*

Comment 3: Concerns about potential influx of invasive species and pathogens if Cu-based bottom paints are banned.

*Response 3: Comment regarding invasive species and pathogens is noted. The Implementation Plans for the proposed Cu TMDLs requires that the dischargers, including the City of Newport Beach, develop and implement their own proposed implementation plan(s) that include strategies by which the TMDLs will be achieved. The proposed Cu TMDLs Implementation Plan requires that the conversion of boats to alternative paints be considered as a possible compliance strategy, but it is not a required strategy. Concerns regarding invasive species should be considered as part of this deliberative process. Conversions to alternative paints are not required by the proposed Cu TMDLs, nor do the TMDLs propose to ban Cu AFPs. See response to D. Webb's comment 3 above.*

**Dave New, Basin Marine, President of Basin Marine Incorporated**

Summary

Comment 1: Non-copper paints do not work, and they impose a hardship on the community, their families...loss of business and work.

*Response 1: See response to D. Webb's, comment 3, above. No evidence was presented to support the argument that non-Cu paints would "impose a hardship on the community, their families...loss of business and work".*

Comment 2: And myself and my competitors are all very conscious of keeping our water clean and we'd like to keep it that way.

*Response 2: The commitment to good water quality is appreciated. There are actions that can and should be taken to improve water quality, including the use of BMPs during hull cleaning, the use of boat storage bags and/or boat lifts and reduced frequency of cleaning.*

Comment 3: We do need some education on the part of the industry and I think we can go about doing that.

*Response 3: Both a diver certification/education program and a boater/boatyard education component is a recommended strategy that must be considered by the dischargers in developing their proposed implementation strategies to achieve the proposed Cu TMDLs.*

**Jim Jordan, boater**

Summary

Comment 1: Concern about proposed regulations.

*Response 1: Changes in established practices are frequently a cause for concern. The proposed compliance schedule and Implementation Plan for the proposed Cu TMDLs provides a flexible, adaptive management approach for the identification, implementation and modification of strategies that will achieve the Cu TMDLs.*

Comment 2: Cu AFPs do not necessarily last 3-5 years – need to be replaced more often.

*Response 2: Comment noted. To the extent that hull maintenance and repainting occur more frequently than the estimated 3-5 years, there may be an opportunity to achieve the TMDLs more rapidly (consistent with the “as soon as possible” compliance schedule requirement in the TMDLs), if boat conversions to alternative AFPs are part of the compliance strategies chosen by the dischargers.*

Comment 3: There’s a tradeoff in keeping a boat clean and fuel consumption that needs to be a concern. I have my boat cleaned once a month. Concern that bagging a boat for hull cleaning would be unusable..

*Response 3: Comment noted; the practicalities of bagging a boat to clean the hull need to be considered, if that strategy is chosen by the dischargers as a method of compliance with the Cu TMDLs. For example, some boaters may choose to clean their boats by the container/filter method (in a bag), while others may not.*

#### **Kevin Ketchum, past President, Marine Recreation Association**

##### Summary

Comment 1: Number of Boats is incorrect – there are not 10,000 boats in the Bay

*Response 1: The number of boats has been revised to 5,000. See response to C. Miller’s comment 2 above.*

Comment 2: Size of vessel also matters - The average lineal [linear] footage of vessels in Newport Harbor is less than 40 feet

*Response 2: Comment noted; however, our data show that 40 feet is a reasonable average size for boats in Newport Bay. (Note that 40 feet is also the average boat size that USEPA used in their Cu TMDLs for the Bay.)*

Comment 3: Redo the draft TMDL

*Response 3: Comment noted. As stated above, the Basin Plan Amendments and Staff Report 2021<sup>17</sup> have been revised to address the number of boats and other issues. Further, as discussed in response 1.4 to the City’s comment 1 - City letter (Response to Comments Document 2018), the proposed BPA includes language that makes moot the concerns regarding the accuracy of the estimates of the number and size of boats in the Bay.*

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<sup>17</sup> Staff Report 2021 is Appendix A of the draft SED 2021.

*Specifically, the revised BPA states that “Compliance with the Cu TMDLs will be considered to be achieved if the dissolved Cu CTR criterion of 3.1 µg/L\* is achieved, i.e. no impairment is demonstrated per the assessment methodology in the State Listing Policy (SLP)<sup>18</sup>, and no further reduction in Cu discharges will be required even if the Cu wasteload or load allocation for boats is not yet achieved. If, however, the Cu wasteload or load allocation for boats is achieved, but the CTR criterion\* is not achieved, these TMDLs, including the allocations identified for boats and other sources, will be reviewed and revised as needed to ensure CTR compliance and further reduction in Cu discharges from Cu antifouling paints (AFPs) and/or other sources may be required.  
\*(or a chronic CTR criterion adjusted by a Water Effects Ratio)*

*The percent reductions and schedule for those reductions identified above shall become moot upon the demonstration that compliance has been achieved.*

*This assessment would need to be revisited based on the continued monitoring and evaluation to be conducted pursuant to the TMDLs. “*

*Additionally, the Implementation Plan for the proposed Cu TMDLs provides for adjustments, both to the TMDLs and to implementation strategies, based on monitoring and investigation. In short, there is no need to redo the draft TMDL at this time.*

**Paul Blank, boater**

Summary

Comment 1: Mr. Blank reported on his poor experience with non-Cu AFP, concerns with the use of non-Cu AFPs and with the expense of non-Cu AFPs over Cu AFPs.

*Response 1: Comment noted. Once again, the proposed Cu TMDLs do not require conversions from Cu to alternative AFPs, though providing incentives for such conversions may be a strategy employed by the dischargers to achieve the TMDLs.*

**Sheri Oberle, AkzoNobel Coatings**

Summary

Comment 1: Boat hulls with Cu AFPs are being cleaned too often.

-the controls need to be more on reducing the amount of under-hull cleaning rather than reducing the amount of actual copper in the paints.

*Response 1: Comment noted. This comment is consistent with DPR’s recommendation, as part of its maximum leach rate determination for Cu AFPs, that the frequency of hull cleaning be reduced with the use of lower leach rate Cu AFPs (in addition to the use of BMPs). Boater education on this matter should be part of a compliance strategy developed by the responsible dischargers.*

**Neal Blossom, Director for Chemet**

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<sup>18</sup> State Water Board’s Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List (2004, amended 2015)

## Summary

Comment 1: Look at toxicity- toxicity is really the driver that gives you negative consequences if you have it or not. When you don't have toxicity, you won't have a problem.

*Response 1: It is incorrect that "When you don't have toxicity, you won't have a problem." The presence of toxicity is not required to determine impairment of a water body -only exceedances of the CTR criterion are required.*

*See also response to the City's comment 1 above, and responses to the City's comments 6.3 through 6.37 and 6.40 – Attachment 6- City Letter (Response to Comment Document 2018).*

Comment 2: The threat to Newport Bay and, in particular, the endangered species you're talking about here, isn't from copper, it's from invasive species. You do not want to have non-efficacious coatings on your recreational vessels.

*Response 2: Cu concentrations in Newport Bay continue to exceed the CTR chronic criterion, which is the applicable water quality objective; therefore, Cu TMDLs are still necessary.*

*We agree that there is a need to also address invasive species. Consideration of conversions of boats to non-Cu AFPs alternatives, if chosen by the responsible parties as part of their compliance strategies, should take this into account.*

Comment 3: I think we heard some data today that probably could be utilized to get towards the delisting.

(for the Water Quality Control Policy for California for Section 303(d) list, which is the TMDL list. "Water segments or pollutants shall be removed from the Section 303(d) list if any of the following conditions are met," and 4.6 is, "Water/Sediment toxicity guidelines are not exceeded using a biannual median distribution.")

*Response 3: First, the specific delisting being recommended is not clear. Nor are the data that support a delisting recommendation. In addition, the presented citation from the State's Water Quality Control Policy is not correct. From the State Listing Policy, under #4 California Delisting Factors - #4.6 states that "Water/Sediment Toxicity or associated water or sediment guidelines are not exceeded using the binomial distribution..." In any case, delisting decisions are made via a data review and public participation process that is separate from the consideration of these proposed Cu TMDLs.*

Comment 4: Now no one is talking about increasing the copper in these waters; it's going to be decreased... So lower copper leach rates are coming. BMPs work.

I would encourage you, work with the stakeholders here. Work with reducing copper and removing toxicity. Don't chase the numbers.

*Response 4: Comments noted. Santa Ana Water Board staff are aware of DPR's regulation for a maximum leach rate for Cu AFPs. We also support the use of BMPs for hull cleaning as recommended by DPR. Note, however, that the dissolved Cu CTR chronic criterion is the appropriate legal criterion for waters in Newport Bay. When this criterion is exceeded (based on State Listing Policy methodology), the water body is determined to be impaired, and TMDLs are required.*

*Board staff have been working with the dischargers and will continue to do so. The Santa Ana Water Board is required by law to implement the federal and state water quality standards, and to develop and implement TMDLs where those standards are not being met.*

**Ray Hiemstra, Associate Director for Coastkeeper**

Summary

Comment 1: First off, the TMDL must be implemented Cu levels haven't changed over the years -water quality has improved a lot when they mentioned sediment and nutrients and that's because there's TMDLs with implementation schedules. So we need a TMDL that gets implemented.

Comment 2: The next thing is that this has been settled and done already in San Diego and Marina del Rey, so the precedent has been set.

- a lot of the same people with the same arguments, we need more data, we need things like that, all of that has been said before.

In San Diego and in L.A. the TMDLs were implemented with ten-year -- there was a voluntary -- San Diego had five years of voluntary compliance, L.A. just went with ten years on compliance. We'd already had a five-year -- a four-year voluntary compliance here in Newport Bay where we tried, as was mentioned.

Comment 3: It was Coastkeeper who ran the Newport Bay Copper Reduction Project. And what we found was that boaters were very interested in these alternatives and looked into it but when they got to the boatyard, that's where things stopped... there's an interest in this

Comment 4: In San Diego, this has proven that it's worked. There's Hempsil, there's Intersleek. Down there they're meeting their goals, they're well into their TMDL, so it's not like it can't happen.

*Response 1 through 4: Comments noted.*

Comment 5: Numbers of boats - we've come out with is about an average of 6,500 large boats and about 300 dinghies in the bay, so that's different than 10,000, it's different than 4,500.

*Response 5: The estimated number of boats has been revised to 5,000. See response to the City's comment 1.3 – Attachment 1, City Letter (Response to Comments Document 2018). See also Response to K. Ketchum's comment 3, above.*

Comment 6: The stakeholder process -- We are a fan of those when the... have a set goal and a reason, but this just looks like a delaying tactic.

*Response 6: Comment noted.*

Comment 7: The new data, the very limited data that was shown today by Anchor ...showed impairments in the bay.

*Response 7: Data from Anchor QEA's study for the City (2015,2016) in which over 30% of the samples exceeded the dissolved Cu CTR criterion confirm that the Bay is still impaired for dissolved Cu. The State Water Board's data assessment for the latest 303(d) list (2014-16) also determined that Newport Bay is*

*still impaired for Cu, and the status for Cu in the Bay is DO NOT DELIST. In addition, data from DPR's latest monitoring study (August 2019) also show impairment since dissolved Cu exceeded the CTR criterion in 50% of the samples taken in Newport Bay.*

*See also responses to the City's comments in Attachments 4 and 5 to City letter (Response to Comments Document 2018).*

Comment 8: We are willing to talk about certain issues...but we need to see action. This has been dragging on.

Comment 9: There's a tremendous amount of misrepresentation out there, misinformation, some of it, most of it isn't one person. This is a complicated issue and there's a lot of misunderstanding. you have staff who are experts in water quality.

Comment 10: I would like to see a hard date set in March of 2017, so that there isn't this endless delay, and make a decision. I'm confident in the data. And you know, precedent has been set already in San Diego and L.A.

*Responses 8-10: Comments noted. The Regional Water Board has moved deliberately to proceed with these Cu TMDLs as expeditiously as possible.*

#### **George Hylkema, Board Member of the Newport Mooring Association**

##### Summary

Comment 1: The Newport Mooring Association supports the City of Newport Beach's position supporting the use of marine antifouling bottom paint which contains copper.

*Response 1: Comment noted. Newport Bay continues to exceed the dissolved Cu CTR criterion of 3.1 ug/L and Cu TMDLs are still required; however, the proposed Cu TMDLs do not require the conversion of Cu AFPs to non-Cu AFPs. The Cu TMDLs do require that dischargers develop their own implementation plan to implement these Cu TMDLs, and the dischargers may choose to include (or not include) the conversion of Cu AFPs to non-Cu AFPs as a strategy in their plans.*