

May 1, 2017

Ms. Terri Reeder
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

**RE: Draft Newport Bay Watershed Selenium TMDL Staff Report and Basin Plan
Amendment**

Dear Ms. Reeder:

The County of Orange, OC Public Works (County) appreciates the opportunity to review and provide comments on the draft Total Maximum Daily Loads (TMDLs) for Selenium in Freshwater: Newport Bay Watershed, Orange County, California (dated January 2017), including the draft Basin Plan Amendment (BPA), Staff Report, and associated appendices. These TMDLs were developed through a collaborative third party stakeholder process involving, amongst others, the County, MS4 copermittees, and regulatory agencies, including the Santa Ana Regional Water Quality Control Board (Regional Board). Our comments relate predominantly to changes made subsequent to our submittal of the documents in December 2015. The comments have been grouped into two categories: technical comments (changes that have an impact on the TMDLs) and cleanup comments (comments that will improve the readability and clarity of the TMDLs). The following entities are identified as concurring entities to these comments: the Cities of Tustin, Santa Ana, and Irvine; and Irvine Company.

While these TMDLs were developed in the course of a multi-party stakeholder process, requirements which may be ordered upon the County (in any future MS4 permit, e.g.) as a result of the BPA may legally constitute unfunded state mandates. Thus, the County and all concurring entities respectfully submit these comments while reserving their legal rights to claim the existence of an unfunded mandate and seek a subvention of state funds vis-à-vis the TMDLs. Neither participation in the stakeholder process, nor any comment, or lack thereof, herein should be interpreted as the County or any concurring entity acceding or volunteering to be subject to imposition of the TMDLs, or as a waiver of any claim, present or future, that

inclusion of the TMDLs in any permit or order of the Regional Board would constitute an unfunded state mandate under the California Constitution. ¹

Technical Comments

1. Universal Comment: Rising Groundwater: In several places throughout the Staff Report and Basin Plan Amendment, the terminology “rising groundwater” has been modified to “groundwater inflows.” This terminology has been an ongoing discussion point throughout the TMDLs development process. There was a decision, made by the Regional Board and stakeholders, to define the terminology in its first usage (achieved through footnote 4 on page 3-10). While the changes are not universal throughout the Staff Report, there are several places where changes in terminology have occurred, including:

- Executive Summary: Source Analysis write up
- Section 3: pg. 3-15²; pg. 3-18; pg. 3-26
- Section 7: pg. 7-4

It is recommended that the language be revised back to rising groundwater. If necessary, Regional Board staff could add a footnote, where needed, to refer to the footnote on pg. 3-10 for terminology.

2. Section 3: Watershed Characteristics, Pg. 3-10, Footnote 4: As noted in Comment #1, this footnote is intended to define the term “rising groundwater.” The footnote was the subject of significant discussion, mostly to balance legal and technical concerns, but has been modified significantly since submittal and no longer achieves that balance. The language should be revised back to the original version as follows:

“Throughout this Staff Report, the term “rising groundwater” is used to describe groundwater intercepted by channels (i.e., lateral groundwater inflows, shallow groundwater, or shallow exfiltrating groundwater), as well as an actively rising water table with artesian conditions. In most areas of the Newport Bay watershed, “rising groundwater” refers to the condition where groundwater is intercepted by channels; however, the artesian conditions typically associated with the term “rising groundwater” exist in the Newport Bay watershed in localized areas.”

3. Universal Comment: Santa Ana-Delhi Channel: Universally throughout the staff BPA and Staff Report, “Santa Ana-Delhi Subwatershed” should be changed back to “Santa-Ana Delhi Channel.” This terminology was selected in consultation with the City of Santa Ana to be appropriately reflective of the waterway characteristics.

¹ As the Regional Board and its staff are aware, the County and its NPDES MS4 copermittees are currently pursuing claims before the Commission on State Mandates, which allege that certain requirements contained within Regional Board Order No. R8-2009-0030 constitute unfunded states mandates for which the claimants are entitled to a subvention of state funds.

² All page number references throughout this memorandum are based upon a comparison document (final versions submitted to the Regional Board vs. versions released by the Regional Board for public comment).

- Section 3, Watershed Characteristics, Table 3.8 and Table 3.9:** Veeh Creek water column data have been inserted into the impairment assessment. These data have been part of discussions since the workshops were conducted early in the TMDL development process. At that time, and every time since the workshops, it has been generally agreed that the data would be included in any future TMDL assessments.

Veeh Creek is on the outer boundaries of the San Diego Creek Watershed, privately owned, not in the Basin Plan, and likely drains into Veeh Reservoir, with limited if any flow to San Diego Creek. This area is therefore largely isolated hydrologically and not connected to the rest of the TMDLs. Any actions taken through these TMDLs would therefore not address Veeh Creek. Regional Board staff previously determined that the best solution was to use a 13267 Directive, if necessary, to gather additional data for the area. For these reasons, Veeh Creek data should be removed from the TMDLs.

- Section 3: Watershed Characteristics, Table 3.9:** In the IRWD Constructed Wetlands, three additional bird egg samples are identified as exceeding the numeric target, but the sample size has not changed (i.e., the assessment changed from 3(38) in the prior draft to 6(38) in the current draft). Changes to the data at this late stage after the extensive technical work on the TMDL are of concern and should be justified. Please provide the basis for this change.
- Section 4: Numeric Targets, Pg. 4-18/19:** Additional language has been inserted to account for EPA's final selenium criteria, which were published in 2016. The text is needed, however, it should be modified as follows:

“On June 30, 2016, USEPA published a final “Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016”. The final criterion differs slightly from the 2014 Draft Criterion. The final criterion element for selenium in whole body fish tissue was changed from 8.1 to 8.5 ug/g dw. **The drafting of these TMDLs was substantively completed prior to the release of EPA’s revised draft criterion in 2015 and the final criterion in 2016. As noted in Section 4.1.1, the TMDLs are phased and structured purposefully to account for the ongoing revisions to selenium objectives, especially in Phase I.** This change is not substantive and preliminary model runs (see Section 6, Linkage Analysis) indicate that changing the numeric target to 8.5 ug/g dw versus the recommended target of 8.1 ug/g dw would have a minimal effect on the resultant calculated water column concentrations. Therefore, **it is appropriate to include the consideration of any modified objectives and the resultant changes to the allocations during the TMDL Reconsideration** the effort required to revise the model is not commensurate with the results. As discussed at the end of **Section 4.1.1**, USEPA’s Final 2016 Criterion for selenium will be assessed during

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development of selenium SSOs for the watershed and/or during the TMDL reconsideration.”

7. **Section 6: Source Analysis, Table 6.1 and Basin Plan Amendment:** The Trophic Transfer Factor (TTF) for prey fish to predator fish has been changed from 1.1 to 1.2 without justification. Changes in TTFs can have material impacts on the conversion of tissue concentrations to water column concentrations and it is concerning that such a change is made after the completion of the technical work. Please provide the basis for this change.
8. **Section 6: Source Analysis, Table 6.2, Footnote 5 and Basin Plan Amendment:** Footnote 5 has been added referencing additional model runs, but the runs are not included in any of the TMDL documentation. This particular table summarizes the water column concentrations predicted by the biodynamic model and the footnote is out of place, as it refers to changing the initial tissue concentrations in model runs while that decision was justified and established in Section 4, Numeric Targets. This issue has been well covered in other places in the Staff Report and is unnecessary and potentially problematic. Footnote 5 should be deleted.
9. **Section 7: Source Analysis, Table 7.2 and Basin Plan Amendment:** This table identifies the WLAs for implementation purposes. Footnote 13 has been modified and the revisions are now inconsistent with how the WLAs are identified in the table. WLAs are assigned to MS4 Permittees as opposed to being assigned to urban runoff. The original language should be restored. The additional clarifying language (for urban runoff) that was included as new text is acceptable as long as it is included as suggested below.

“Assessment location for the WLAs assigned to MS4 Permittees the (urban runoff) wasteload allocation...”

Cleanup Comments

10. **Executive Summary: Allocations, Table ES-3:** A new footnote has been added to the table (footnote 2). The footnote contains a typo, uses inconsistent terminology, and should be revised for clarity.

Footnote 2 currently reads as follows:

“See Section 8.2 for list of parties as regulated under the MS4 permit and those regulated as “other” NPDES dischargers.”

Replace footnote 2 with the following:

“MS4 Permittees and Other NPDES Permittees are defined in Section 8.2.”

11. Section 1: Introduction, Pg. 1-1: There is a typo on pg. 1-1.

Change “selenium in freshwaters tributaries” to “selenium in freshwater tributaries”

12. Section 3: Watershed Characteristics, Pg. 3-34: There is a typo in the first paragraph on pg. 3-34 (as the timeframe referenced is in now in the past).

Change “The public review period closes...” to “the public review period closed.”

13. Section 5: Source Analysis, Pg. 5-3 and Basin Plan Amendment: Change “areas” back to “subwatersheds.”

14. Section 7: Allocations, Pg. 7-12: The terminology for the WLAs needs clarification in the first sentence of the second paragraph.

Insert the following for clarity: “As described in Section 7.3, the tissue-based water column WLAs are based on...”

15. Section 8: Implementation Plan, Pg. 8-28: Additional language has been inserted regarding the approval for project-specific BMP effectiveness monitoring. This language was highly vetted to ensure that the various processes worked together and would not cause confusion during TMDL implementation. Some minor modifications are suggested:

“The project-specific monitoring can be approved either through the BMP Strategic Plan approval process (including periodic updates), ~~or~~ through the Regional Monitoring Program approval process (including periodic updates), or may be submitted separately for review and approval by the Executive Officer. Each project-specific monitoring plan must be ~~submitted for review and approval by the Regional Board’s Executive Officer~~ appended to the overall Regional Monitoring Program. ~~Each project-specific plan must include~~ and, at a minimum, address the following:”

16. Section 8: Implementation Plan, Pg. 8-34: Language has been added to state information may be posted to additional websites as needed. Given that information will already be posted to the Regional Board’s website and the NSMP’s website, adding the possibility of additional websites seems to unnecessarily increase the administrative burden, especially with two significant avenues for public access already provided. While the information may be posted other places, including this language in the Staff Report seems unnecessary.

Delete the new language “or other website as needed.”

17. Basin Plan Amendment, Monitoring and Reporting: This section has been re-ordered creating an organizational inconsistency between the BPA and Staff Report. In addition, in the section detailing Individual Action Plan Monitoring, in the first sentence, part of the terminology has been deleted (now reads Plan instead of Individual Action Plan). The original order for the monitoring and reporting sections should be restored to be consistent

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with the Staff Report. Also, the terminology for the Individual Action Plan (in the first sentence under the Individual Action Plan Monitoring section) should be corrected.

The County appreciates the opportunity to work with the Regional Board collaboratively on these important documents and appreciates the Board's efforts to move forward with consideration of them at its June meeting. Please contact Jian Peng at (714) 955-0650 if you have any questions.

Very truly yours,



Chris Crompton, Manager
Water Quality Compliance

Cc: Newport Bay Watershed TMDL Funding Partners