

## **Newport Bay Fecal Coliform TMDL Stakeholder Group Meeting**

Date and Time: October 26, 2017, 10:30 a.m. – 2:30 p.m.  
Location: 3535 Harbor Blvd., Suite 110, Costa Mesa, CA 92626  
Southern California Coastal Water Research Project  
Large Conference Room

### Stakeholder Group Members Present

Amanda Carr	County of Orange
Colin Kelly	Orange County Coastkeeper
Thomas Lo	City of Irvine
John Kappeler	City of Newport Beach
Susan Paulsen	Exponent, Inc.
Barbara Barry	Santa Ana Regional Water Quality Control Board
Terri Reeder	Santa Ana Regional Water Quality Control Board
Devin Slaven	City of Lake Forest
John Kappeler	City of Newport Beach

### Supporting Roles

Lewis Michaelson	Katz & Associates
Bree Robertoy	Katz & Associates
John Griffith	Southern California Coastal Water Research Project
Suzan Given	County of Orange
Karen Ashby	Larry Walker Associates

### Introduction and Meeting Objectives

L. Michaelson, facilitator, began the meeting by reviewing areas of agreement from the Oct. 4 meeting, the status of the Stakeholder Group process, and the meeting objective, which was to discuss and possibly reach consensus on a preferred regulatory alternative for Rec-1 and the level of impairment of Newport Bay.

### Presentation on Results of Small Group Meeting

A small working group of A. Carr, S. Paulsen, B. Barry and C. Kelly met on Oct. 19, 2017 to develop a proposed regulatory approach. K. Ashby of LWA provided support to the process and presented the results of the meeting, including areas of agreement and areas for further Stakeholder Group discussion.

### *Determination of Impairment*

Areas of Agreement:

- Wet weather: Upper and lower Newport Bay exceed
- Dry weather: Select sites exceed

Discussion: Should impairment be determined for each water body using all sites together, or for each site individually?

- A. Carr: My understanding is that geometric mean (GM) is the best measurement for dry weather, and statistical threshold variance (STV) is better for event-driven measurement. Newport Bay doesn't seem to exceed with GM, but exceeds with STV. That tells me we don't have chronic problems (e.g. leaking sewers). We have high single, isolated events. It is less likely those events are based on built infrastructure.
- B. Barry: We talked about how to apply GM in wet weather; we can't do that based on each station. I'm not comfortable with aggregating data for all of upper and lower Newport Bay. It will depend on the final State Board provisions and whether there is any deviation allowed.
- C. Kelly: Environmental organizations won't agree to aggregate data. As far as the decision between GM and STV, we need to wait to see the provisions.
- T. Reeder: We could take a different approach than a TMDL. We need to see State Board guidance on options for regulatory pathways.
- ACTION: Keep for discussion pending State Board provisions.

### *Regulatory Approach*

Areas of agreement:

- Dry weather approach will be different than wet weather
- Use tools available via the State Board bacteria provisions
- Use controllable versus uncontrollable factors, similar to approach in Basin Plan

Discussion: What will mechanism be to implement regulatory approach?

- A. Carr: A lawyer needs to be involved in this discussion.
- C. Kelly: We could get counsel from the different agencies in a room to discuss the course of action it could take. We might not agree, but we could narrow it down to two paths. The ultimate decision would be with the State Board or EPA. A cease and desist order (CDO) is not intended to be punitive, but it could be protective. We could work with agencies to develop text for the CDO so there would be buy-in. CDOs provide protections (e.g., against lawsuit) that other orders (e.g., investigative order) don't have.
- T. Reeder: Generally we don't go the route of a CDO unless it is a repeat offender and the responsible party is not working towards compliance. That is not to say we couldn't.
- S. Paulsen: Both sides have some entrenched positions, which is why we avoided discussing this in the small group. We might want to think about adding provisions for variances (e.g., EPA's 2015 variance framework) to the list.
- ACTION: Keep for discussion pending legal counsel meeting.

Discussion: What are controllable versus uncontrollable factors?

- C. Kelly: Coastkeeper generally relies on the Basin Plan. It's tricky when we talk as a community about natural source exclusions and controllable/uncontrollable because they are not the same thing. Natural source exclusion only applies after anthropogenic sources are identified and addressed. We try to segment these things (e.g., biofilm in a natural channel is natural and uncontrollable; biofilm in a concrete-lined channel where fertilizers could be at work, etc. may be controllable). We are not going to feel comfortable allowing blanket exclusions and would need to investigate each case. I agree that human markers are a good way of prioritizing projects. We would not throw out biofilm projects, they would

- just move down on the priority list. Agencies need to show their work if environmental organizations are going to accept that sources are uncontrollable.
- J. Kappeler: I agree. For cities, though, how do you think we could control such sources? There are permits with allowable discharge and biofilm can live two years with no water source.
  - S. Paulsen: The State Board provisions give relief for STV, but they don't give relief for GM. We're chasing our tail trying to determine how to implement these approaches. It may be based on what has been adopted in the Los Angeles region. It's almost a distinction without a difference.
  - B. Barry: The controllable/uncontrollable sources distinction is extremely important. It gets at the heart of the issue and why we have disagreement. I don't know how we'll come to consensus on that, but it would make things easier for the Regional Board. If not, the Board will have to weigh in on that in the future.
  - C. Kelly: We need to bridge gaps between the Basin Plan and State Board provisions. Permittees are not responsible for elimination, just for controllable sources. The concern is that the focus will be taken away from addressing issues if compliance is just granted.
    - A. Carr: Appreciate hearing that, but while I agree with that philosophy, we will never be 100 percent sure what the source is. No one has been successful in achieving natural source exclusion.
    - C. Kelly: I was told that the natural source exclusions will be determined by Regional Boards. Do not expect consistency across the State. There needs to be some sort of continued potential liability (e.g., certification by an executive officer or something to assess whether there has been a degradation over time). It takes maintenance, and we need to ensure maintenance.
  - J. Kappeler: Would a case study showing a scenario and the process/actions taken be helpful to the Stakeholder Group process? It would get us out of this conceptual discussion.
    - Yes, do 'bookend' scenarios.
  - J. Peng: For example, in San Diego the targets are the same, but HF183 is used to determine whether sources are human. In a smaller watershed like San Diego River, they were able to find one broken lateral and fix the problem, but it took a lot of effort and time.
    - S. Paulsen: Is there any info that could come out of that process that could be used as a case study (e.g., tracing how it's been applied)?
    - C. Kelly: We discussed this during the small group meeting; a party shouldn't be spending \$100,000 to determine the source when the fix is only \$10,000.
  - ACTION: Keep for discussion.

### *Basin Plan Objectives – Enterococci*

Area of agreement:

- Water quality objectives should be consistent with State Board bacteria provisions and recognize controllable versus uncontrollable factors.

Discussion: None

### *TMDL Targets – Enterococci*

Area of agreement:

- Water quality objectives should be consistent with State Board bacteria provisions and recognize controllable versus uncontrollable factors.

Discussion: None

### *Waste Load/Load Allocations*

Area of agreement:

- Concentration will be equal to targets and recognize controllable versus uncontrollable factors

Discussion: Will there be options for load reduction?

- S. Paulsen: I can't see that we would do trading or offsets for bacteria.
- ACTION: Keep for discussion.

### *Implementation Strategy – Focus*

Areas of agreement:

- Focus on human health risk
- STV results should be used to prioritize implementation actions
- Implementation plan would have a decision-making framework for prioritization of actions/projects
- After prioritization, a site-specific plan for each prioritized site/group of sites would be developed
- Implementation strategy would be adaptive

Discussion: What can be achieved in wet weather, and what is approach for exceedances in wet weather? What are the details of implementation and prioritization?

- T. Reeder: Regarding a load reduction option, the problem is that TMDLs look at receiving waters, while permits look at the pipe. We want to avoid having dischargers constantly out of compliance. We should try to provide different options to meet the permit (not tying dischargers into one pathway).
- ACTION: Keep for discussion.

### *Implementation Strategy – Monitoring*

Areas of agreement:

- Monitoring program to include FIB and/or human marker analysis for sites with frequent exceedances
- Ability to adjust monitoring program (subject to executive officer approval and public participation process)

Discussion: What will attainment/compliance determination pathways be?

- ACTION: Discuss this during case study discussions.

### Newport Beach Monitoring Stations

J. Kappeler compiled and provided an overview of maps of Newport Bay monitoring stations. Each map shows about 600 feet from the site. The sites can also be viewed in GIS, which shows structural BMPs.

### *Discussion*

- A. Carr: One thing we discussed is what to do if human markers are shown, but there is no drain. There are also instances where drains are not the City's, but the City is responsible and must pay for diversions (e.g., Caltrans drains).
- B. Barry: How many sites are impacted by Caltrans outfalls?
  - About a third. By default, the City maintains them.
  - T. Reeder: If we do a TMDL, we could add Caltrans as a responsible party (they are not listed as a responsible party now).
- For all the planned diversions, they will only work in dry weather?
  - J. Kappeler: We will do a limited first flush in wet weather.
- T. Reeder: It would be useful to see planned diversions and any BMPs on the maps.

### Other Discussion

- J. Freshwater has proposed a shellfish study to collect oyster samples and test for human markers in water and tissue. He could be asked to provide an overview at the next meeting.

### Next Steps and Action Items

- The next meeting will be November 16. The agenda will include:
  - Background/context for discussion and SHEL data analysis (Orange County)
  - Case studies of the Arches and one successful scenario (J. Kappeler)
  - Presentation about shellfish locations/info (C. Kelly)
  - Presentation from State Board on SHEL science, if possible
  - Overview of shellfish study proposal if there is time and Jason is available (J. Freshwater)
- C. Kelly to put together legal counsel meeting, to include representatives of the State Board/Regional Board, before the January Stakeholder Group meeting.
- J. Kappeler to put together case studies and case study site maps for the November 16 meeting.
- LWA to flag items in the discussion box that fall on legal counsel and submit to K&A.
- Regional Board to invite Ken Theisen to attend the November 16 meeting to answer questions.
- K&A to add map book to online repository.