




October 14, 2016

Dr. Linda Candelaria, PhD
California Regional Water Quality Control Board, Santa Ana Region
3737 Main Street, Suite 500
Riverside, California 92501-3348

RE: Regional Board Meeting- October 28, 2016

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

Dear Dr.  Candelaria:

These comments are in response to the notice we received on August 25, 2016, advising that the California Regional Water Quality Control Board, Santa Ana Region ("Regional Board") will consider adopting Amendments to the Water Quality Control Plan for the Santa Ana River Basin ("Amendments") to incorporate Total Maximum Daily Loads ("TDMLs") for copper and non-TDML Action Plans for other metals in Newport Bay.

First, let me reiterate our sincere appreciation for the Regional Board's work in improving water quality in the Santa Ana River watershed. You have been an important partner with us – and we with you – in these efforts.

However, the pending Copper TMDL has us greatly concerned.

As you know, the City of Newport Beach ("City") provided written and oral comments to you on July 24, 2015, when staff included Newport Bay Copper/Metals TDMLs as an informational item on the Regional Board's regular agenda. At that time, we advised the Regional Board the City was concerned about the proposal to require the City and others to restrict or ban the use of *legally-available* copper-based antifouling paints (AFP) through a new TMDL. In particular, we outlined to the Board that the implementation plan was both unenforceable and a circumvention of the legal role and rights of the Department of Pesticide Regulation ("DPR"), which is the exclusive regulator of pesticides, including copper AFP. We urged you to confer with the City and engage in a meaningful dialogue about the current copper levels in Newport Bay and the development of meaningful Amendments.

Respectfully, we do not believe that this consultation about the practical impacts of the proposed implementation plan to our community and our harbor was robust or meaningful.

We have since conferred with DPR's Pesticide Registration Branch. While we are paraphrasing our discussion, they confirmed DPR's status as the exclusive regulator of pesticides in California. Specifically, Environmental Scientist Carlos Gutierrez with the Pesticide Registration Branch explained that DPR is required to investigate actual or potential significant adverse effects to people *or the environment* resulting from the use of pesticides. Mr. Gutierrez shared our concern that the Regional Board appeared to be poised to take an action to regulate AFP, and that it was doing so on a piecemeal basis as opposed to working with DPR on a unified approach that could be implemented on a state-wide basis. Finally, Mr. Gutierrez confirmed that DPR has determined that establishing a maximum allowable leach rate of 9.5 µg/cm²/day may be the most effective way to reduce copper in California waters. (See *also*, Department of Pesticide Regulation Memorandum dated September 12, 2016.)

We believe that the proposed Amendments have the following significant problems:

- The Amendments seem to be underdeveloped, in part because they rely on data that is out-of-date, incorrect and overly conservative;
- The Amendments are impractical if not impossible for the City to effectively implement; and
- In light of the above, we believe if the proposed Amendments are adopted as proposed, the action may be the subject of litigation.

This is important enough that we believe we need to approach the full Regional Board with our concerns. Therefore, on October 28, 2016, we will urge the Board to consider our information and take a different action than suggested by staff.

Generally, our request will be as follows:

1. Do not adopt the TMDL at this time.
2. Select an additional review period – up to four (4) years – for the Board staff, the City, DPR, and other stakeholders/dischargers to have a meaningful discussion about additional testing and monitoring, education, best management practices, the implementation timeline for DPR's updated AFP regulations, and more, with the goal of coming back to the Regional Board with more robust data and implementation ideas.

The City commits to participating thoroughly in that discussion provided that all of the parties do so collaboratively, as has been our collective spirit in the past.

To support this request, we have attached memorandums identifying the deficiencies in the proposed Amendments. To briefly summarize, the inadequacy of the proposed Basin Plan Amendments span a wide array of legal and technical issues, including but not limited to the following:

- The Copper TMDL unlawfully attempts to force local agencies to solve a conflict caused by the Regional Board's failure to convince the Legislature or its sister state agencies to ban copper AFP.
- The Copper TMDL is unlawful because alternatives to copper AFP are not effective or available.
- The margin of safety is too large and unsupported and the data relied upon is inadequate.
- The phased implementation schedule is unreasonable, unsupported and would force substantial early investments that may be unnecessary.
- The Copper TMDL imposes unfunded state mandates.
- It is improper to promulgate a TMDL for the entire bay when only certain areas within the bay may be even arguably impaired.
- The substitute environmental document fails to comply with the California Environmental Quality Act ("CEQA") and CEQA's implementing guidelines.

However well intended, the Amendments seem flawed, preempted, give substandard consideration to current conditions and technical analyses, and violate CEQA. Among other things, the information included in the attachments establishes there may in fact not be a copper impairment (either in the water or sediment), and that no implementation plan is necessary at this time.

Again, we are providing this information in recognition of our strong history of collaboration with the Regional Board. Our continued commitment to evaluate and resolve water quality issues of concern is evidenced by our history of voluntary and cooperative efforts in the watershed. Specific to copper, these efforts include, but are not limited to:

- Contracting with (and funding) Anchor QEA Consultants to provide professional/technical assistance with research/testing/analysis in an effort to better understand and define any potential copper-related issues in Newport Bay.
- Conducting two independent harbor-wide water column sample tests for Copper (July 2015 & February 2016).

- Conducting five toxicity tests in areas of higher copper concentrations (all showed no toxicity).
- Conducting boat zone testing to better assess copper bottom paint leachate concentration degradation.
- Visiting, observing and reviewing the experimental vessel skirt/vacuum hull bottom cleaning operation in Santa Cruz, CA.
- Meeting with bottom paint applicators and shipyards to better understand available paints, application process, re-application rates, and cost of copper and non-copper AFPs.
- Since 2010, and with your assistance, financing and completing significant dredging efforts to remove sediments/legacy contaminants, and to improve flushing and circulation, thus improving the overall water quality of Newport Bay.
- Developing a web page to educate boat owners and provide updated copper water quality information.

For these and other reasons, and to continue our history of working cooperatively rather than in adversarial proceedings, we respectfully request that you and your Board staff colleagues consider our recommendation that the Regional Board not adopt the Amendments on October 28, 2016. Additional time will allow us to further discuss our concerns and our going-forward ideas to return to the Regional Board at a later date with more robust data and a well-thought out implementation plan.

Please know that we appreciate the Board's fine work and we as a community remain willing and ready to discuss the development of Amendments that incorporate a justified and grounded implementation plan to address actual water quality concerns in the Newport Bay.

Sincerely,



Dave Kiff
City Manager
City of Newport Beach

Enclosures:

- Attachment 1: Anchor QEA, TDML Loading Calculations, October 12, 2016
- Attachment 2: Anchor QEA, TDMLs and Non-TDML Action Plans, October 13, 2016
- Attachment 3: Anchor QEA, Current Sediment, Water and Tissue Data, October 13, 2016
- Attachment 4: Anchor QEA, Random Sample Points Methodology, July 10, 2015
- Attachment 5: Anchor QEA, Newport Bay Copper Study: Winter 2016
- Attachment 6: Anchor QEA, Technical Comments, October 14, 2016
- Attachment 7: Greg Newmark, Meyers Nave, October 14, 2016
- Attachment 8: Declaration of Chris Miller
- Attachment 9: City of Newport Beach Letter to US EPA, September 16, 2016
- Attachment 10: Department of Pesticide Regulation, Memorandum, September 12, 2016

Cc: Kurt V. Berchtold, Executive Director
Terri Reeder, Chief Coastal Waters Planning Section
Joanne Schneider, Assistance Director
Mayor and City Councilmembers
Aaron C. Harp, City Attorney
David A. Webb, Public Works Director
Amanda Carr, Deputy Director, OC Environmental Resources