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Dave Kiff
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City of Newport Beach
100 Civic Center Drive, 2nd Floor, Bay E
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Re: Comments Regarding Basin Plan Amendments for Copper TMDLs and Non-Metals Action Plans for Zinc, Mercury, Arsenic and Chromium in Newport Bay, California

Dear Mr. Kiff:

This law firm has been retained by the City of Newport Beach (City) to provide comments on legal deficiencies in the Basin Plan Amendments for Copper TMDLs and Non-Metals Action Plans for Zinc, Mercury, Arsenic and Chromium in Newport Bay, California, (Copper TMDL) being considered for adoption by the California Regional Water Quality Control Board, Santa Ana Region (Regional Board). Our comments are set forth in this letter.

I. Introduction

We understand that the City appreciates the time and effort Regional Board staff has devoted to meeting with stakeholders and developing the proposed Copper TMDL. Unfortunately, notwithstanding these efforts, the Copper TMDL is subject to numerous legal defects such that it cannot be lawfully adopted in its current form. First, the Copper TMDL is based upon an implementation plan that would require the City and other local agencies to ban Copper Anti-Fouling Paint even though the Legislature has expressly forbidden regulation of registered pesticide use by any agency other than the Department of Pesticide Regulation. Second, the Copper TMDL unlawfully requires nearly all the boats in Newport Bay to convert to nontoxic anti-fouling paints even though viable alternative products are essentially unavailable. Third, the Copper TMDL's margin of safety is too large and is unsupported. Fourth, the implementation schedule unlawfully requires early investments that may prove unnecessary. Fifth, the Copper TMDL would impose unfunded state mandates on the City that the state is constitutionally required to reimburse. Sixth, even if a TMDL is

to be adopted, it is unlawful to regulate all of Newport Bay when only isolated areas even arguably exceed California Toxics Rule requirements. Finally, the Substitute Environmental Document does not comply with the California Environmental Quality Act (CEQA).

II. 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 Anti-Fouling Paint

The Copper TMDL is unlawful because it explicitly relies on an implementation plan that requires local agencies to take actions the Legislature has prohibited and because the Regional Board purports to usurp the authority of the Department of Pesticide Regulation to govern the use of Copper Anti-Fouling Paint. This approach ignores legal impediments to implementation and fails to grapple with the conflict between public policy objectives of improving water quality on the one hand and providing effective pesticides on the other hand. Ignoring the legal impossibility of the implementation measures required by the Copper TMDL does not make the regulation attainable. It makes the TMDL unlawful, and it should not be adopted as currently drafted.

A. The Legislature Explicitly Preempted Any Attempts by Local Government Agencies Such as the City to Regulate the Use of Registered Pesticides Such as Copper Anti-Fouling Paint

In bold italics, the Copper TMDL Staff Report Proclaims that “[t]his TMDL cannot be met unless Cu loading from boats is reduced or eliminated.” (Staff Report, p. 68, emphasis deleted). In order to accomplish this objective, the Staff Report indicates that “Dischargers responsible for reducing and/or eliminating Cu discharges from AFPs to meet the TMDL load allocation (LA) include . . . the City of Newport Beach . . .”. (*Id.* at p. 69.) Given that the Legislature has declared actions by the City do so are “void and of no force or effect,” it is obvious that the Copper TMDL is fatally flawed and must be revised. (Food & Agr. Code, § 11505.1, subd. (a).)

The Legislature clearly and unambiguously stated its intent to preempt any and all attempts by other government agencies to regulate the use of pesticides in Food and Agriculture Code section 11501.1, subdivision (a):

This division and Division 7 (commencing with Section 12501) are of statewide concern and occupy the whole field of regulation regarding the registration, sale, transportation, or use of pesticides

to the exclusion of all local regulation. Except as otherwise specifically provided in this code, no ordinance or regulation of local government, including, but not limited to, an action by a local governmental agency or department, a county board of supervisors or a city council, or a local regulation adopted by the use of an initiative measure, may prohibit or in any way attempt to regulate any matter relating to the registration, sale, transportation, or use of pesticides, and any of these ordinances, laws, or regulations are void and of no force or effect.

The statutory language establishes that the Legislature invoked the broadest doctrine of preemption, field preemption. “If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a ‘municipal affair.’ [Citations.]” (*Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 808.)

In addition, the Legislature’s intent to preempt local regulation is stated expressly, so there is no need to evaluate if a comprehensive regulatory scheme implies an intent to occupy the field. Indeed, in an unrelated implied preemption case, the California Supreme Court noted section 11501.1 was adopted to overturn the High Court’s decision in *People v. County of Mendocino* (1984) 36 Cal.3d 476 that California’s pesticide regulation program did not impliedly occupy the field such that local regulation would be preempted. (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93, fn. 9.)

As the Staff Report acknowledges, Copper Anti-Fouling Paints are regulated as pesticides by the Department of Pesticide Regulation as “the lead state agency.” (Staff Report, p. 71.) Thus, Food and Agriculture Code section 11501.1 applies, express and complete preemption is imposed, and no action by the City “may prohibit or in any way attempt to regulate any matter relating to the . . . use of pesticides.” Any such actions would be “void and of no force or effect.”

Further, the Regional Board’s attempts to force the City to regulate the use of Copper Anti-Fouling Paints notwithstanding preemption by the Food and Agriculture Code would expose Newport Beach to lawsuits by the Department of Pesticide Regulation and potentially private entity lawsuits. In Food and Agriculture section 11501.1, subdivision (b), the Legislature imposed a mandatory duty on the Department of Pesticide Regulation to sue any local government entity that, after notification, does not repeal a preempted ordinance or regulation. (Food & Agr. Code, §

11505.1, subd. (b) [“the director *shall* maintain an action for declaratory relief to have the ordinance or regulation declared void and of no force or effect, and *shall* also bring an action to enjoin enforcement of the ordinance or regulation.” (Italics added)].) Likewise, if the City is forced flout the preemptive effect of section 11505.1, it may be exposed to lawsuits by private parties affected by City actions to ban Copper Anti-Fouling Paints. In either case, the City would contend the Regional Board is a necessary party and must be joined in the action as a defendant, but it is nonetheless inappropriate to subject Newport Beach to such potential litigation.

B. The Copper TMDL Unlawfully Infringes on the Department of Pesticide Regulation’s Jurisdiction By Attempting to Force the City to Undermine the Department’s Quasi-Legislative Determination on How to Regulate Copper Anti-Fouling Paint

The Copper TMDL unlawfully attempts to usurp the Department of Pesticide Regulation’s exclusive authority under state law to regulate the use of registered pesticides because the TMDL is designed to do just that: the Staff Report states that “boats must be converted from Cu to nontoxic AFPs to achieve the Cu TMDLs.” (Staff Report, p. 59.) Indeed, the Staff Report acknowledges that “[t]he California Department of Pesticide Regulation (DPR) and USEPA have the authority to restrict the sale and use of Cu AFPs.” (Staff Report, p. 69.) Even though, as the Staff Report states, the Regional Board has “the authority to regulate the discharge of Cu into waters,” it is unlawful for the Regional Board to exercise that authority in a manner that effectively bans the use of Copper Anti-Fouling Paints when the Department of Pesticide Regulation, the agency with rightful authority to govern the use of such registered pesticides, declined to adopt just such a ban. “To be valid, [quasi-legislative] administrative action must be within the scope of authority conferred by the enabling statute.” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391 [citations omitted].) The Copper TMDL violates this basic principle of administrative law.

The Legislature has plainly granted exclusive authority to the Department of Pesticide Regulation to regulate the use of registered pesticides like Copper Anti-Fouling Paint. As noted, the Department’s comprehensive regulatory scheme is expressly intended to “occupy the whole field of regulation regarding the . . . use of pesticides.” (Food & Agr. Code, § 11505.1, subd. (a).) Further, AB 425 and its legislative history demonstrate that the Legislature entrusted the Department of Pesticide Regulation to exercise its policy judgment balancing the water quality impacts of Copper Anti-Fouling Paint use against the important

benefits provided by this effective product. Specifically, the Legislature required the Department to establish a maximum allowable leach rate and to make recommendations for mitigation measures to protect aquatic environments. The Department exercised its judgment on these matters, and issued its *Determination of Maximum Allowable Leach Rate and Mitigation Recommendations for Copper Antifouling Paints Per AB 425* on January 30, 2014. Indeed, if the Department had attempted to establish an outright ban on use of Copper Anti-Fouling Paints, instead of establishing a maximum leach rate, that action would have been overturned as inconsistent with the legislature's direction. (*Association for Retarded Citizens, supra*, 38 Cal.3d at 391 ["Thus, if the court concludes that the administrative action transgresses the agency's statutory authority, it need not proceed to review the action for abuse of discretion; in such a case, there is simply no discretion to abuse. [Citations]."].)

The Copper TMDL's requirements that boats stop using lawfully registered pesticides is inconsistent with acts of the Legislature. "Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void." (*Association for Retarded Citizens, supra*, 38 Cal.3d at 391.)

C. It is Unlawful for the Regional Board to Attempt to Coerce the City Into Banning Copper Anti-Fouling Paints Instead of Pursuing the Established Dispute Resolution Process with the Department of Pesticide Regulation

It is inappropriate and unlawful for the Regional Board to abdicate its responsibility to resolve conflicts with the Department of Pesticide Regulation under an existing agreement and, instead, attempt to force the City to ban Copper Anti-Fouling Paints because the Regional Board failed to convince its sister state agency to do so. The Staff Report references the 1997 Management Agency Agreement between the two state agencies, but it fails to mention that the agreement includes a dispute resolution provision:

It is the desire of both agencies to establish as speedy, efficient, and informal method for resolving interagency conflicts. Conflicts among staff of the State and Regional Boards, DPR, and the Commissioners, which cannot otherwise be informally resolved, will be referred to the Executive Director of the State Board and the Director of DPR. Conflicts which cannot be resolved at this level may be referred to the Secretary for Environmental Protection. [¶] The Executive Director of the State Board and the Director of DPR will each appoint one staff member to assist in resolving conflicts.

(Management Agency Agreement, p. 14.) Thus, the Regional Board has a procedure available to resolve its conflict with the Department of Pesticide Regulations. It would be arbitrary and capricious, and contrary to law, to end-run that process by compelling local governments to regulate the use of registered pesticides in a manner contrary to the Department of Pesticide Regulation's legislative judgment.

III. The Copper TMDL is Unlawful Because Alternatives to Copper Anti-Fouling Paint are Not Effective or Available

The Copper TMDL is unlawful because it depends upon an illusory compliance strategy. In order to implement the TMDL, according to the Staff Report, almost all of the boats in Newport Bay will have to be converted from Copper Anti-Fouling Paints to nontoxic alternatives. The Staff Report admits that "This conversion depends on the availability, efficacy and cost of nontoxic AFPs/coatings." (Staff Report, p. 80.) While the Staff Report discusses studies that purportedly found these alternative paints are "available and cost-effective," it does not directly state that alternative products are actually commercially available so that the paint conversion required by the Copper TMDL could actually happen.

Even if the Staff Report did make such a finding, it could not be supported by evidence. In fact, the record will show that alternative paints are not commercially available, are not effective and are not affordable. Moreover, as explained in Section VIII, below, the only alternative paints with any degree of effectiveness are not recommended by US EPA's technical contractor because they present serious environmental hazards.

IV. The Margin of Safety is Too Large and is Unsupported

The Copper TMDL is improperly and artificially lowered because the Regional Board proposes a margin of safety that is unreasonably large and unsupported. Under Clean Water Act section 303(d)(1)(C), TMDLs must include "a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." The same requirement is repeated without elaboration in the applicable regulation. (40 C.F.R. § 130.7(c)(1).) The Copper TMDL Staff Report incorrectly summarizes this specific federal requirement by stating that the margin of safety is more generally "to address uncertainty in the analysis." (Staff Report, p. 10.)

The Staff Report does not include any explanation of why such a large margin of safety is appropriate, and none is apparent. The Copper TMDL calculations and analysis rely on multiple layers of "conservative" assumptions, and the

California Toxics Rule is further based upon extremely conservative assumptions. There is no justification to add a margin of safety amounting to one fifth of the TMDL on top of all the other conservative assumptions, especially when the observed “impairment” are alleged and isolated technical exceedances of the chronic water quality criterion with little to no actual observed toxicity. Moreover, and importantly, there is no explanation of how the 20% proposed margin of safety “takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality,” as required by the Clean Water Act. (33 U.S.C. § 303(d)(1)(C).) As a result, the TMDL and its load allocations are unlawfully and unreasonably low.

V. The Phased Implementation Schedule is Unreasonable, Unsupported and Would Force Substantial Early Investments That May Be Unnecessary

The Copper TMDL requires phased reductions in copper loading from boats beginning almost immediately, with a 20% reduction by the end of year 3, 50% by the end of year seven and so on to an 83% reduction by the end of year 15. (Staff Report, pp. 91-92.) This phased reduction schedule is unreasonable, unsupported and unlawful because it is too short and fails to allow time at the beginning of the schedule to address the many problems with the TMDL and its implementation.

Given that neither the Regional Board nor any of the entities regulated by the TMDL may legally restrict the use of Copper Anti-Fouling Paint, the Regional Board’s acknowledgment that the Copper TMDL cannot be achieved without such a restriction, and the Regional Board’s further conclusion that “voluntary compliance in Newport Bay is difficult,” (Staff Report, p. 82) there is no justification for the failure to provide a reasonable period of time of at least five years when no reductions are required. This time period is necessary since there is currently no mechanism in place to require the conversion of boats to nontoxic anti-fouling paints or coatings. The current plan to develop a program to “restrict the sale and use of Cu antifouling paints” is for “Regional Board staff and dischargers to *work with DPR . . .*” (Staff Report, p. 102 [italics added].) The City submits that it will likely take considerable time for this vague plan to work, and the Regional Board’s failure to allow for such time in its implementation schedule is improper.

Similarly, though the Staff Report asserts that the phased implementation schedule allows for the development of site-specific objectives for copper that would supercede the California Toxics Rule criteria, it would wastefully and unnecessarily require costly and controversial efforts to achieve early reductions in copper loading while these efforts are ongoing. Given that water quality

trends already show improvement and there is little evidence of actual toxicity notwithstanding isolated exceedances, there is no justification for forcing these early efforts.

The lack of available, effective and affordable Copper Anti-Fouling Paint alternatives also demands that a reasonable time period be provided at the beginning of the implementation period. The Regional Board apparently intends to force development of new technologies and to create a new market for alternative products. Even so, it is irrational to adopt a schedule that does not allow the proposed new market time to respond and develop.

VI. The Copper TMDL Imposes Unfunded State Mandates the State Must Reimburse under the California Constitution

The Copper TMDL, if adopted, will impose unfunded state mandates that the state will be constitutionally obligated to reimburse. Article XIII B, Section 6, of the California Constitution, provides that “[w]henever . . . any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service” The Copper TMDL will trigger this subvention obligation.

Though the regional boards and State Water Resources Control Board commonly argue that their programs are exempt from the reimbursement requirement under Government Code section 17513, that argument would not be well taken in this case. Federal law does not require the Regional Board to ban the use of Copper Anti-Fouling Paints. Indeed, the Staff Report acknowledges, as it must, that Congress chose to exempt discharges from recreational boats from any permitting requirement under the Clean Water Act. (Staff Report, p. 75, citing 33 U.S.C. 1342(r).) While US EPA is developing a best management practices program under the Clean Boating Act, implementation “is considered to be a ‘long term action’” with no time schedule. (Staff Report, p. 91.) Thus, there currently is no federal requirement to ban Copper Anti-Fouling Paints and US EPA permits regulating commercial vessels actually allow the use of Copper Anti-Fouling Paints subject to some conditions. (See Staff Report, p. 76.)

The Copper TMDL would represent a discretionary decision by the state to impose requirements beyond those mandated by federal law. This would be a “true choice” by the state to impose the mandate (*Hayes v. Comm’n on State Mandates* (1992) 11 Cal.App.4th 1593) and subvention will be required.

VII. It is Improper to Promulgate a TMDL for Entire Bay When Only Certain Water Bodies Within the Bay May Be Even Arguably Elevated Above California Toxics Rule Levels

The Copper TMDL improperly proposes to establish TMDLs for all of Newport Bay notwithstanding the fact that only small areas of the Bay even arguably exceed the California Toxics Rule Criterion Continuous Concentration for copper. Federal regulations governing TMDLs require states to identify “water quality limited segments.” (40 C.F.R §§ 130.1(j), 130.7(c)(1) [“Each State shall establish TMDLs for the water quality limited segments identified” on its 303(d) list].) The Clean Water Act does not require the development of a TMDL regulating an entire group of water segments when only a few arguably exceed water quality standards, nor is it proper to do so. Indeed, California’s 303(d) list contains numerous examples of water quality limited segments within larger geographic water bodies. To use an example frequently cited in the Staff Report, the San Diego Regional Board developed a Total Maximum Daily Load for Dissolved Copper in the Shelter Island Yacht Basin, not all of San Diego Bay.

Evidence before the Regional Board on the Copper TMDL shows that only small and unique water segments within Newport Bay even arguably exceed the Criterion Continuous Concentration for copper. As demonstrated in technical memoranda submitted with the City’s comments (*Newport Bay Copper Study: Winter 2016* (Anchor QEA, March 25, 2016); *Random Sample Points Methodology* (Anchor QEA, July 10, 2015), areas of Newport Bay that were observed to exceed 3.1 µg/L of copper were limited to restricted, closed and often dead end channels like West Newport, the Rhine Channel and Linda Isle. Though it would be improper for the Regional Board to adopted the Copper TMDL for the many reasons explained throughout the City’s comments, if a TMDL is to be adopted, there is no basis to develop and implement a TMDL for the entire Newport Bay under these circumstances.

VIII. The Substitute Environmental Document Fails to Comply with CEQA

As a preliminary matter, the Substitute Environmental Document (SED) is inadequate since its analysis of impacts uses an invalid “baseline.”

Environmental analysis under Certified Regulatory Programs such as that applicable to the Regional Board are subject to general principles applicable to CEQA review. One such general principle is that significance of environmental impacts is determined in comparison with a “baseline” that generally consists of the environmental conditions that exist at the time of environmental review. It

is legal error to determine significance of impacts in comparison with a non-existent hypothetically “permitted” condition.

The Regional Board’s SED violates this principle throughout the document, repeatedly concluding that the proposed project will have “no” or less than significant impacts in comparison to a baseline that assumes implementation of the US EPA TMDL. (see, e.g., SED at pps. 44, 45, 49, 56, 57.) Since the US EPA’s TMDL is not currently being implemented, the SED must be revised to determine impact significance in comparison to a baseline that does not assume the US EPA’s TMDL is (or will be) enforced.

More particularly, the SED’s impact analysis is flawed because it fails to properly account for or analyze the foreseeable significant impacts of a key part of its recommended compliance program: the conversion of boats from Copper Anti-Fouling Paint to allegedly “non-toxic” alternative paints. The SED does not identify any such “non-toxic” non-Cu AFPs. In fact, the Washington State Department of Ecology has concluded that there are no currently available non-toxic alternatives to Cu AFPs:

“Although the assessors were able to select preferred alternatives, results indicated that none of them was a good alternative to copper antifouling paint. Some appeared to be slightly preferable to the copper antifouling paint in terms of hazard, but they all contained chemicals that posed human health and environmental concerns.”

(Washington State Department of Ecology, Assessing Alternatives to Copper Antifouling Paint: Piloting the Interstate Chemicals Clearinghouse (IC2) Alternatives Assessment Guide (2014), page i.)

The Washington State Department of Ecology concluded that all non-Copper Anti-Fouling Paints analyzed should be categorized as “Benchmark 1” chemicals, i.e., chemicals that have a combination of either high persistence in the environment, high bioaccumulation potential, or high human toxicity or ecotoxicity, and avoidance of all of those products should be recommended.

In the absence of currently available non-toxic non-Copper Anti-Fouling Paints, the SED’s assumption that foreseeable implementation will include use of “non-toxic” anti-fouling paint is erroneous and unsupported, which fatally undercuts all analysis in the SED based on that assumption. The SED must be revised to address the likelihood that reasonably foreseeable implementation of the Copper TMDL will involve application of toxic anti-fouling paints, and to analyze the environmental impacts of application of those toxic paints. These revisions must include analysis of potential impacts to both humans and the environment,

including but not necessarily limited to impacts in the areas of Biological Resources and Hazards and Hazardous Materials.

Additionally, the SED is invalid for failing to analyze a reasonable range of alternatives, as it is required to do under CEQA's provisions for Regulatory Programs. Apart from the No Project alternative, the SED analyzes only one "action" alternative – a purported "Modified TMDLs and Action Plans, Modified Regulatory Approach" alternative. The SED's discussion of this alternative is completely without value, however, as it does not actually describe an alternative to the proposed project. Rather, the discussion of that alternative consists entirely of conclusory and unsupported statements that the proposed project is the "most scientifically and technically defensible approach."

Since the SED does not actually describe any "action" alternative to the proposed project, it also fails to disclose the potential environmental impacts and benefits of such an alternative. The failure of the SED to identify or analyze any actual "action" alternative to the proposed project fatally undercuts the requirement that the document adequately inform decision makers and the public of a reasonable range of alternatives to the project.

In particular, the SED should describe and analyze an alternative under which reduction in copper loading would be achieved on a statewide basis, by the state of California, pursuant to the exclusive authority of the California Department of Pesticide Regulation (DPR) to regulate pesticides, including Copper Anti-Fouling Paints. The SED additionally should describe and analyze an alternative under which implementation methods would be targeted at the limited areas of Newport Bay that are arguably exceed California Toxics Rule requirements for copper, rather than regulating the entire Bay. Such focused implementation must be discussed as an alternative, as it is likely to result in fewer environmental impacts than the project as proposed.

The SED also fails to comply with CEQA because it does not include an economic factors analysis. In fact, the SED is misleading at best when it states:

The Regional Board has analyzed the costs of implementing reasonably foreseeable BMPs to comply with the TMDLs and Action Plans. These economic factors have been considered in this environmental analysis and are summarized in the Staff Report (Section 8.3).

(SED, p. 28.) There is no such summary in Section 8.3 of the Staff Report. In fact, the only information to be gleaned from Section 8.3 is that there will be

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costs but the Board will make no attempt to quantify those costs. Such short shrift of its obligations under CEQA is unprecedented and contrary to law.

IX. Conclusion

Because of the many legal deficiencies described in this letter, the Copper TMDL cannot be lawfully adopted in its current form.

Sincerely,

/s/ Gregory J. Newmark

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c: Leonie Mulvihill, Esq.

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