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January 15, 2014

IN REPLY PLEASE
REFER TO FILE: **WM-9**

Mr. Samuel Unger, P.E., Executive Officer
California Regional Water Quality
Control Board – Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Attention Ms. Shana Rapoport

Dear Mr. Unger:

COMMENT LETTER – MARINA DEL REY HARBOR TOXICS TMDL RECONSIDERATION

The County of Los Angeles appreciates the opportunity to provide comments on the proposed amendments to Chapter 7 of the Basin Plan to revise the Marina del Rey Harbor Toxic Pollutants Total Maximum Daily Load (TMDL). Enclosed are our comments for your review and consideration.

If you have any questions, please contact me at (626) 458-4300 or ghildeb@dpw.lacounty.gov or your staff may contact Ms. Angela George at (626) 458-4325 or ageorge@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works

GARY HILDEBRAND
Assistant Deputy Director
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Enc.

cc: Chief Executive Office (Rita Robinson)
County Counsel (Judith Fries)
Department of Beaches and Harbors (Gary Jones)

**COMMENTS OF THE COUNTY OF LOS ANGELES
ON THE RECONSIDERATION OF
MARINA DEL REY HARBOR TOXIC POLLUTANTS TOTAL MAXIMUM DAILY LOAD**

The County of Los Angeles appreciates the opportunity to comment on the changes proposed as part of the reconsideration of the Marina del Rey Harbor Toxic Pollutants Total Maximum Daily Load (TMDL).

In March 2013, the Marina del Rey Harbor Watershed Group (consisting of the County of Los Angeles, City of Los Angeles, Culver City, and Caltrans) submitted a "White Paper" to the Regional Board recommending a number of changes to the original TMDL based on new information and data collected since the promulgation of the TMDL in 2006. Subsequent to the submission of the White Paper in March, additional concerns emerged in response to the expansion of the geographic area addressed by the TMDL, incorporation of dissolved copper from the paints used on boats moored in the marina, and incorporation of in-harbor sediment. These additional concerns were brought to the Regional Board staff's attention on various occasions. While some of the technical issues raised have been addressed by Regional Board staff with the current draft of the TMDL, major concerns remain that warrant serious consideration. Below is a summary of our key concerns and recommendations.

COMMENTS SPECIFIC TO THE REQUIREMENTS ASSOCIATED WITH MS4 DISCHARGES

1. The Interim and Final Compliance Dates Should Be Extended

Compliance dates for lead, zinc, PCBs, chlordane, and DDTs

Since the inception of the TMDL in 2006, responsible parties have been developing plans and implementing best management practices (BMPs) to address stormwater discharges to the back basins of the Marina. The continued implementation of originally planned BMPs, in conjunction with the implementation of new projects under the MS4 permit, has created a need for additional time to complete the projects and assess the resulting water quality improvements. The compliance schedule currently proposed in the tentative Basin Plan Amendment for the back basins does not allow sufficient time to reasonably assess the effectiveness of implemented BMPs and propose additional management techniques to address any remaining issues.

In addition to addressing stormwater discharges into the back basins, the proposed TMDL has an expanded geographic coverage that includes the front basins of the Marina. Because the original TMDL was limited to the back basins, all plans developed for the TMDL so far have also been limited to addressing stormwater discharges to the back basins. Addressing the front basins would require similar planning processes that the responsible parties implemented to address the back basins. Therefore, sufficient time should be given to develop and implement plans

to address the MS4 discharges into the front basins. In essence, it would be reasonable to treat the addition of the front basins as a “new” TMDL with an analogous compliance schedule.

While we acknowledge and support the approach proposed by Regional Board staff of having different timelines for the back and front basins, the time provided is not sufficient to address either of them. For the back basins, we are requesting that the compliance dates for the 50 percent interim and the final targets (except for copper) be extended from 2016 to 2018 and from 2018 to 2021, respectively. For the front basins we are requesting that the compliance dates for the 50 percent interim and the final targets (except for copper) be extended from 2019 to 2021 and from 2021 to 2025, respectively.

Compliance dates for copper

Since the adoption of the original TMDL in 2006, Senate Bill 346 (SB 346), which requires a reduction in copper content in brake pads to five percent (by weight) by 2021 and to 0.5 percent by 2025, was signed into law in 2010. This law is expected to significantly reduce copper loading over time in California’s urbanized watersheds and is considered to be a cost-effective way to reduce copper pollution in California waters and achieve copper targets in TMDLs across the State. Recent TMDLs adopted by the Regional Board, such as the Los Cerritos Channel and San Gabriel River Metals TMDLs, have recognized the importance of SB 346 in copper reduction and included a compliance schedule that aligns with the implementation timeline of SB 346.

In the March 2013 White Paper submitted to the Regional Board, the County recommended a final compliance date of 2030 for copper. This timeline was proposed taking into consideration the assumption that it would reasonably take at least five years after the final phase out of copper in brake pads for the effect to be observed. It is unreasonable to require implementing expensive BMPs to treat copper while the state has an effective source control program in place, which would eventually address it. The County therefore requests that the final compliance date for copper for MS4 discharges be set to 2030.

The following table summarizes proposed compliance schedule extensions for MS4 discharges.

Marina Area	Lead, zinc, PCBS, chlordane, and DDTs		Copper	
	Schedule in the proposed TMDL	Requested schedule	Schedule in the proposed TMDL	Requested schedule
Back Basins				
Interim Compliance: 50%	March 22, 2016	March 22, 2018	March 22, 2016	March 22, 2026
Final Compliance	March 22, 2018	March 22, 2021	March 22, 2018	March 22, 2030
Front Basins				
Interim Compliance: 50%	March 22, 2019	March 22, 2021	March 22, 2016	March 22, 2026
Final Compliance	March 22, 2021	March 22, 2025	March 22, 2021	March 22, 2030

2. The Waste Load Allocations for the Back Basins and Front Basins Should Be Separated

Due to the addition of the front basins to the TMDL, the Regional Board recalculated the loading capacity and waste load allocations (WLAs) to account for the additional drainage area. While the TMDL provides different compliance timelines for the front and back basins, it maintains a combined WLA for discharges to the front and back basins. Having a combined WLA would make the compliance determination impossible for MS4 dischargers. We request that the WLAs for the back basins and the front basins be separated consistent with the compliance timeline.

3. E(WMP)-based Compliance Option Should be Added to The List of Compliance Alternatives

Page 11 of the tentative Basin Plan Amendment (BPA) states:

“If permittees provide quantitative demonstration as part of the watershed management program that control measures and BMPs will achieve WLAs consistent with the schedule in Table 7-18.2, then compliance with permit water quality based effluent limitations (WQBELs) may be demonstrated by implementation of those control measures and BMPs ...”

We recommend that a compliance alternative that reflects the above language be added to the list of compliance options provided in Table 7-18.2 of the tentative BPA. Specifically, we suggest adding the following to the list of compliance options on pages 20-23:

Control measures and BMPs as described in an approved Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) has been implemented.

4. The Submission of the Coordinated Integrated Monitoring Plan Under The MS4 Permit Should Fulfill the Requirement to Submit a Revised Coordinated Monitoring Plan for the TMDL

The tentative Basin Plan Amendment requires stormwater agencies to submit a revised coordinated monitoring plan (CMP) by June 2015. At the same time, the 2012 MS4 permit requires the submittal of an Integrated Monitoring Program (IMP) or Coordinated Integrated Monitoring Program (CIMP) by June 2014. The Marina del Rey Enhanced Watershed Management Program group, which includes the County, Los Angeles County Flood Control District, and cities of Los Angeles and Culver City, is planning to submit a CIMP by June 2014. Given that a CIMP is intended to encompass all monitoring requirements in a watershed, the group may opt to include the revised CMP as part of its CIMP submittal. We would recommend that the TMDL be revised to allow permittees the option of submitting the revised CMP as part of the CIMP as follows:

The submission of a final Integrated Monitoring Plan or Coordinated Integrated Monitoring Plan as required in the 2012 MS4 permit may be used to satisfy the TMDL's requirement for submission of a revised coordinated monitoring plan.

COMMENTS SPECIFIC TO THE REQUIREMENTS ASSOCIATED WITH BOAT HULL PAINTS

1. The Load Allocation for Dissolved Copper Is Unrealistic and Should Be Removed

The proposed Basin Plan Amendment includes a load allocation that would require an 85 percent reduction in dissolved copper and indicates that compliance with that requirement can be demonstrated by showing that 85 percent of the boats in the harbor are using non-copper hull paints. However, at this time, there is neither a viable alternative (non-copper) paint nor similar requirements imposed on other marinas/harbors in the region. Imposing mandatory hull paint replacement when there is no viable alternative paint, there is no similar requirement in other local marinas/harbors, there is no statewide requirement for non-copper paint, and there is no current State or Federal law that requires the sole production and use of copper-free boat hull paints, is an unreasonable and arbitrary action that would unnecessarily impair the efficient management of the Marina del Rey Harbor. Instead of prematurely including a load allocation for dissolved copper and an associated mandatory load reduction, a statewide effort to address the issue of copper-based anti-fouling boat hull paints should be pursued. The California Legislature has recently attempted to pass legislation to address copper in hull paints, and the State of Washington has successfully done so. The County is willing to work with the Regional Board and other stakeholders on a statewide effort, and if legislation is enacted, the TMDL could be reopened to incorporate reasonable allocations and timelines in light of any new statewide copper paint requirement.

2. The Loading Capacity of the Harbor for Dissolved Copper is Significantly Underestimated

In calculating the loading capacity of the Marina del Rey Harbor for dissolved copper, staff assumed a water surface area of 1,200,000 m² (or 296.5 acres). This area is much lower than the actual surface area of the Marina del Rey Harbor water as covered by the TMDL. By lowering the area, the loading capacity of the harbor for dissolved copper was grossly underestimated by about 20 percent.

The area used in calculating the loading capacity should be consistent with the water surface area being addressed by the TMDL, which is the entire Marina del Rey Harbor. Our estimate indicates that this area should be 403 acres. We request that the TMDL be revised to use the correct water surface area of 403 acres in calculating loading capacity; and the load allocation for dissolved copper should be revised accordingly.

3. The Conversion of Boat Hull Paint From a Biocide-Based Paint to a Non-Biocide Based Paint May Create Unintended Environmental Consequences

In recent years, invasive species increasingly have become a major threat to aquatic ecosystems including Santa Monica Bay and Marina del Rey Harbor. One common mechanism of transport of aquatic invasive species is through boat travel.

Traditionally, copper-based hull paints have been used as a biocide to prevent the transport of invasive species from one waterbody to another. While the elimination of copper-based hull paints might improve water quality in the long run, such measures might create the unintended and undesirable consequence of increasing the spread of invasive species. In this regard, Regional Board's own draft Substitute Environmental Document prepared for the TMDL states (p.75):

"Increased growth of fouling organisms could occur as a result of boat owners switching from copper-based antifouling paints to alternative coatings, which may prove to be less effective. An increase in abundance and species diversity of fouling organisms on a boat previously moored in a different location could lead to the transport of invasive species into the Marina del Rey Harbor Waters. Certain invasive species have been known to cause disruptions in ecosystems..."

Further, studies¹ have shown that biofilms that would grow on boats, which the copper paint is intended to prevent, could be a reservoir for bacteria. Given thousands of boats in the Marina, the replacement of biocide paint with non-biocide

¹ Shikuma and Hadfield (2010): Marine biofilms on submerged surfaces are a reservoir for *E.coli* and *Vibrio Cholerea*. National Institute of Health.

paint could aggravate the bacteria problem in the water.

Such potential environmental harm would make this TMDL improperly in conflict with the Coastal Act's specific mandates to protect such environments. In light of these concerns, it would be premature to require the replacement of the hull paints at this time; such requirement should only be adopted after viable product alternatives are available that would address the competing environmental issues described above.

4. The Dissolved Copper Targets are Overly Stringent and Not Substantiated by Science

Dissolved copper can exist as a variety of inorganic and organic chemical species. Research shows that the bioavailability of copper as a toxicant in water is determined by the concentration of free inorganic species, and not the total dissolved copper or the organically complexed species. The presence of copper-binding organic matter in water minimizes copper toxicity despite high concentrations of dissolved copper.

For example, studies conducted for San Francisco Bay concluded that most of the dissolved copper in the bay exists in harmless form - bound to organic ligands, which effectively buffer their availability to organisms. The findings of the studies resulted in the development of site-specific dissolved copper criteria for the Bay by the San Francisco Regional Board to provide a more appropriate and less stringent standard, which eventually led to the removal of copper from the 303(d) list. As a result, the copper criterion currently applicable to the San Francisco Bay is 6.9 µg/L.

In contrast, the Marina del Rey Harbor TMDL proposes a copper criterion of 3.1 µg/L. We believe that this is overly protective and warrants the development of site-specific criteria for Marina del Rey Harbor using appropriate scientific tools, such as the Biotic Ligand Model (BLM). We urge the Regional Board to delay adoption of the proposed TMDL until a site-specific study can be completed, or otherwise include appropriate re-opener language in the TMDL to consider the result of a site-specific study.

5. The Proposed Timeline is Unachievable

As currently proposed, the TMDL requires the conversion of boat hull paints to non-copper paints for 85% percent of boats in the Marina by 2024. With over 4,500 boats in Marina del Rey Harbor, this would require approximately 4,000 boats to adopt a non-copper based hull paint within the next 10 years to comply with the TMDL. In contrast, Shelter Island Yacht Basin, which holds approximately 2,200 boats and was used as a model to develop the Marina del Rey Harbor dissolved copper TMDL, provides a 17-year compliance schedule to achieve its 76% dissolved copper load reduction target.

The 10-year timeline is literally impossible to meet. It requires repainting over 400 boats a year, which is unachievable for many reasons. First, it will take many years

for boat owners to be educated about any new requirements and willing to convert their paints, especially given the significant questions remaining concerning the cost, durability, and maintenance of non-copper based paints. Behavioral changes needed in the boating community to embrace alternative paints take time. As an example, it took more than 6 years (2007-2013) to convert fewer than 30 boats in Shelter Island Yacht Basin. Second, the boat yards at Marina del Rey have limited capacity and could not handle 400 boats a year even under ideal conditions where the boat yards' time is fully devoted solely to paint conversions. Of course, the boat yards cannot devote all of their time to new conversions, since much of that time will be spent with maintenance of the existing boats. For example, boats typically have to be repainted every 1-3 years, meaning that much of the boat yard's capacity would be devoted to the re-painting. Third, given the significant additional costs of conversion, financial incentives, such as State grants, need to be in place to encourage boat owners to convert their paints, and such a process would take many years before they are available to the boaters. For example, it took approximately 5 years to obtain a State grant for the Shelter Island Yacht Basin.

Considering the fact that Marina del Rey Harbor holds more than twice as many boats as Shelter Island Yacht Basin and requires more copper reduction than is required for Shelter Island Yacht Basin, the timeline needed to implement a copper reduction program in Marina del Rey Harbor should be more than twice the timeline provided for Shelter Island Yacht Basin. This warrants a compliance timeline of 2050 for Marina del Rey Harbor. We request that the Regional Board take this into consideration and provide an appropriate timeline.

6. Imposing Hull Paint Conversion on Individual Boaters Would Have Significant Economic Impact on Marina del Rey

The economic costs of imposing the paint requirement on the individual boaters would be, in some cases, prohibitive, and could cause an economically devastating flight of boats from Marina del Rey to other local marinas, which would not have these costly requirements.

Unlike conventional repainting, converting the boats to non-copper based paints generally requires that all of the old coating be stripped from the hull. The Marina del Rey boat yards have reported that the cost of stripping paint from the hull of a standard 35 foot boat is between \$6,000 and \$7,000. In addition, assuming that each boater is also required to obtain a discharge permit, as has been indicated by the Regional Board staff, the 2013-2014 Water Board Fee List states a minimum fee of an additional \$1,094. This may well be prohibitive to many recreational boaters, which is in direct contravention of the policies of the California Coastal Commission's mandate to encourage lower cost recreational boater opportunities. See, e.g. Section 30213 of the Coastal Act.

Since the proposed TMDL applies only to Marina del Rey and not to other local marinas, it puts Marina Del Rey at a significant disadvantage to other operational marinas throughout the region. Boaters will see a major financial incentive to avoid

these new costly regulations by simply moving to another local marina. Given that Marina del Rey already has a vacancy rate in excess of 15%, Marina del Rey will be unable to easily replace those departing boaters, leading to significant economic losses to the County and the entire Marina del Rey community. This problem would be eliminated if such regulations were to be applied at the State level to all marinas.

7. Addressing Copper Contamination from Antifouling Paints Requires a State-wide Regulation, Not a Local Regulation

Marina del Rey is neither the only harbor in California nor the only harbor with boats painted with copper hull paints. Boats move from one marina to another throughout the region and the State, indicating that the marinas are interlinked and boats from one marina will have an impact on other marinas when it comes to copper leaching from hull paints. Therefore, any effort to address copper paints should be dealt with holistically at the State level. It's unfair and ineffective to impose a regulation that would apply only to one or two marinas.

The most effective way to address copper hull paints is to control the source, i.e., to prohibit the manufacturing, sale, and application of copper paints throughout the California similar to the prohibition enacted for vehicle brake pads. The State of Washington has followed a similar track and enacted laws that would address brake pads as well as hull paints.

In California, the effort to address copper-based hull paints at the state-wide level is underway through the Department of Pesticide Regulation (DPR). In fact, newly passed State legislation (AB 425) requires the DPR to "*determine a leach rate for copper-based antifouling paint used on recreational vessels and to make recommendations for appropriate mitigation measures that may be implemented to protect aquatic environments from the effects of exposure to that paint if it is registered as a pesticide.*" We believe that the State is on the right track and any efforts to address copper paints should be directed towards supporting the DPR effort.

8. The Treatment of the Boats in the Marina as Non-Point Sources Is Not Adequately Explained

The TMDL treats the discharge of dissolved copper from boat hulls as a non-point source, assigning a load allocation to the boats. The TMDL provides no justification for treating the boats as non-point as opposed to point sources. See 33 U.S.C. § 1362(14).

COMMENTS SPECIFIC TO THE REQUIREMENTS ASSOCIATED WITH IN-HARBOR SEDIMENT

1. Compliance Date Should Be Extended

A successful execution of a contaminated sediment management plan to attain the in-harbor sediment load allocation depends on such factors as availability of sediment disposal sites and logistics to relocate the boats currently residing in the harbor during sediment removal. Furthermore, external pollutant sources must be fully controlled before any remediation of contaminated sediment is initiated to avoid re-contamination of the harbor sediment.

Following the successful management of MS4 sources, the TMDL should provide sufficient time to analyze the sediment condition and develop an appropriate plan of action. In particular, potential attenuation of contaminants through natural degradation should be tested (see the comment below). Sediment removal, capping, or other costly means of remediation should be considered only after other more cost-effective alternatives (such as natural attenuation) have been exhausted. Specifically, after external sources have been addressed, a study should be conducted to assess the condition of the sediment over time. Based on the results of the study, a contaminated sediment management plan could then be prepared to determine the best approach to address any remaining issues in the sediment. Given the complex nature of Marina del Rey Harbor and the process that a project of this magnitude would require, the actual implementation of the sediment remediation would need to follow a phased approach which could take more than 10 years to complete after the sediment management plan is in place.

Given this necessary sequence of actions, the final compliance schedule for in-harbor sediment should be set to 2038.

2. Natural Attenuation Should Be Given a Chance in Reducing Legacy Pollutants

Contaminates in sediments are known to undergo degradation overtime through natural bio-chemical processes. Natural processes have proven to play a key role in remediating contaminated soil and sediments. In particular, this can be an effective alternative once the external sources of the contamination have been addressed.

An example where natural degradation is playing a vital role is the case of the superfund site at Palos Verdes Shelf, the largest DDT and PCBs deposit site in the nation. Recent surveys of the site have shown that both DDT and PCBs are disappearing at a faster rate than expected, and the EPA is currently reconsidering the implementation of a sediment remediation project, which would cost tens of millions of dollars.

Most of the contaminants of concern in Marina del Rey Harbor, such as PCBs, DDT, and chlordane are legacy pollutants with no or little current contributions from the watersheds. In addition, existing sources of metals (copper, lead, and zinc) in the

watershed will be addressed as required by the proposed TMDL in the next 8 years. Once these external sources have been addressed, sufficient time should be provided to assess the effectiveness of natural attenuation before upwards of hundreds of millions of tax dollars are spent on sediment removal or capping. Accordingly, we request the Regional Board provide the flexibility and needed time to test this cost-effective approach.

3. Participation in the Bight Regional Monitoring Program Should Satisfy the SQO-Associated Monitoring Requirement for the TMDL

The proposed Basin Plan Amendment requires performing sediment quality evaluation in accordance with the State's Sediment Quality Objective (SQO) plan for enclosed bays and estuaries (SQO Part I). There is an existing regional monitoring program that could satisfy this requirement and would leverage the expenditure of public funds in a cost-effective manner.

As noted in the draft TMDL staff report dated November 2013, a regional sediment monitoring program in the Bight region of Southern California occurs every five years. This regional monitoring covers Marina del Rey Harbor and is being conducted in accordance with the SQO Part I. The County has been an active participant in the design and implementation of this regional monitoring program. As such, we propose that the Basin Plan Amendment be revised such that participation in the Bight program be the TMDL-required SQO-based sediment monitoring and evaluation.

4. Inconsistence in Setting of Targets for Bioaccumulative Pollutants

In setting fish tissue associated sediment targets for PCBs in Marina del Rey Harbor, the Regional Board relied heavily on a bioaccumulative study conducted in San Francisco Bay². Given the site-specific nature of this study, its applicability to Marina del Rey Harbor is questionable. The finding of this single study, from outside the Los Angeles region, should not be used to set TMDL targets unless corroborated by similar studies from Southern California. Similar to the dissolved copper target issue discussed above, the fish-based targets for bioaccumulative pollutants should also be established though a site-specific study conducted for Marina del Rey Harbor.

Moreover, there should be consistency in setting targets for all bioaccumulative pollutants of concern in the TMDL, including PCBs, DDT, and chlordane. While DDT and chlordane sediment targets are now set based on National Oceanic and Atmospheric Administration's effects-range-low (ERL) values, PCB targets are proposed based on the bioaccumulative study as discussed above.

The State Water Resources Control Board is currently working on SQO Part 2,

² Gobas and Arnot, 2010: Food web bioaccumulation model for PCBs in San Francisco Bay. Published in the *Journal of Environmental Toxicology and Chemistry*.

which would establish fish tissue based sediment objectives. We recommend that ERL-based targets should be maintained for all pollutants until either the State adopts the SQO Part 2 or site-specific bioaccumulative study is completed for Marina del Rey Harbor.

5. The County Should Not be Held Solely Responsible For Any Future Recontamination of the Sediment

The proposed Basin Plan Amendment requires the County, as owner and operator of Marina del Rey Harbor, to bear the heavy burden of remediating the sediment in the Marina del Rey Harbor despite the fact that those contaminated sediments originated from the watershed, which drains lands that are under the jurisdiction of not only the County but also various cities. Once the sediment has been remediated, the County should not be responsible for future recontamination of the sediment in the harbor as result of upstream discharges. We request that the following language be added to the implementation section of the TMDL.

After remediation activities of the in-harbor sediment are complete, if the harbor is recontaminated as a result of continued discharge of contaminants from the surrounding watershed, additional remediation activities in the harbor shall be the responsibility of upstream dischargers.

COMMENTS SPECIFIC TO THE SUBSTITUTE ENVIRONMENTAL DOCUMENT

1. The Substitute Environmental Document Is Inadequate

The Regional Board's draft Substitute Environmental Document for the proposed TMDL ("CEQA Report") is inadequate and does not support the adoption of the draft revised TMDL. The CEQA Report is required, among other things, to identify the reasonably foreseeable environmental impacts of the reasonably foreseeable methods of compliance (Pub. Res. Code §21159(a)(1)) and to identify reasonably foreseeable *feasible* mitigation measures (Pub. Res. Code §21159(a)(2)). The CEQA Report also must disclose why an agency approved a project if significant environmental impacts are involved. (Cal. Code Regs., tit.14 §15002(a).) It is not sufficient to simply list potential mitigation measures, a decision making agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures. (Pub. Res. Code § 21081; *Mountain Lion Foundation v. Fish & Game Com.*, 16 Cal. 4th 105, 134 (Cal. 1997); see also *Environmental Council v. Board of Supervisors* (1982) 135 Cal. App. 3d 428, 439.) The public agency bears the burden of affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures. *Mountain Lion Foundation, supra* (citing *City of Poway v. City of San Diego* (1984) 155 Cal. App. 3d 1037, 1046.)

The CEQA Report does not adequately evaluate whether its proposed mitigation

measures for either remediation of the harbor sediments or dissolved copper are feasible, and does not meaningfully evaluate alternatives. Instead of analysis, all the CEQA Report states on the subject of whether the proposed mitigation measures are feasible is, "foreseeable environmental impacts from methods of compliance are well known, as are feasible mitigation measures." (CEQA Report, p. 17, §4.2.) This is not substantive analysis.

The CEQA Report recognizes that there are severe potential environmental impacts to its implementation alternatives for both copper and sediment. The Report identifies more than 50 categories of potentially significant environmental impact. (See CEQA Checklist, Report pp. 28-34.) The CEQA report fails to provide adequate analysis for any of these categories. For example, the CEQA report recognizes potentially significant impacts on native plant life caused by the replacement of copper-based antifouling paints:

"Increased growth of fouling organisms could occur as a result of boat owners switching from copper-based antifouling paints to alternative coatings, *which may prove to be less effective*. An increase in abundance and species diversity of fouling organisms on a boat previously moored in a different location could lead to the transport of invasive species into the Marina del Rey Harbor Waters. Certain invasive species have been known to cause disruptions in ecosystems by a variety of mechanisms, such as through competition with native biota for food and resources. The natural community, if one exists in the Marina del Rey Harbor, could be negatively affected by the introduction and establishment of invasive species." *Id.*, p. 61 (emphasis added.)

Despite acknowledging that alternative coatings "may be less effective", and the harm that could bring, the Report nevertheless then states, without any reference or support, that, "At present, there are a number of available alternatives that have been demonstrated to be both nontoxic in nature and effective at reducing fouling growth." *Id.* This does not constitute the required meaningful evaluation of alternatives. This is further demonstrated in the same paragraph of the Report, when it states the hope that market will ultimately create more viable alternatives, "Additionally, the formal mandate for copper load reduction in this TMDL Basin Plan amendment will in and of itself increase the market demand for innovative solutions including nontoxic, effective hull coatings. This in turn will create greater market demand for the development of new products." This is hope, not evaluation of feasible alternatives. It is not based on any factual analysis. Another alternative stated in this same paragraph is that "underwater hull cleaning should be performed particularly on vessels prior to leaving an area known or suspected to support species that could become invasive if brought into the Marina del Rey Harbor Waters." No explanation is provided as to how such a requirement would be implemented or enforced, especially when the "area known or suspected to support species that could become invasive" is outside the jurisdiction of the County or the Regional Board.

As another example, as to whether the remediation of the sediments through dredging would result in deterioration of existing fish or wildlife habitat, the CEQA Report states:

"Dredging or capping would increase suspended sediment in the vicinity of dredging activity, increasing turbidity of the water. This would reduce water clarity in the Harbor, which would result in the deterioration of existing fish or wildlife habitat. The increased turbidity would affect survival of phytoplankton and zooplankton, which form the prey basis for many of the wildlife, fish, and bird species in the Harbor. Dredging processes would disrupt activities of wildlife in the Harbor, and the presence of the pipeline and barge, as well as tugboat and barge movements, would affect biological resources in the Harbor for the duration of the dredging. Noise, human disturbance, and mechanical barriers from equipment and boats, all would affect wildlife, fish, and birds in the harbors. Some sediment in the Harbor contains toxic compounds that, when suspended, could affect water quality, which in turn could affect existing fish or wildlife habitat." (CEQA Report, p.75.) However, despite identifying these significant adverse impacts, the Report fails to provide any consideration of alternatives and mitigation measures, much less meaningful ones, as required.

COMMENTS SPECIFIC TO MULTIPLE COMPONENTS OF THE PROPOSED REVISED TMDL

1. The TMDL should not include pollutant-water body combinations that are not in the 303(d) list

Page 8 of the TMDL Staff Report states "*...Regional Board staff recommends updating the Clean Water Act Section 303(d) listing for Marina del Rey Harbor during the next listing cycle to encompass toxic impairments throughout the harbor and addressing these impairments in this reconsideration of the Marina del Rey Harbor Toxic Pollutants TMDL.*" In other words, a TMDL is being developed prior to 303(d) listing. This has led to the incorporation of the Marina del Rey Front Basins sediment and dissolved copper in water column for the entire Marina.

While we understand the need to address known impairments, the proper regulatory process should be followed in developing a TMDL to ensure that problems are prioritized. The Clean Water Act provisions associated with 303(d) listing and TMDLs implicitly require that a waterbody should first be incorporated into a 303(d) list prior to developing a TMDL. Regional Board's decision to develop a TMDL for waterbody-pollutant combination that is not in an approved 303(d) list undermines established regulatory process.

Therefore, we request that TMDLs for the Front Basin and the dissolved copper be delayed until after these impairments go through proper 303(d) listing and approval process.

2. Lead TMDL and Associated Requirements Should Be Removed from the Front Basins

As acknowledged in the draft TMDL staff report (p. 10-11 and 21), the front basins of the Marina have not been found to be impaired due to lead. Existing data for the front basins show that there are zero exceedances of the lead criterion out of total 24 samples collected over the last decade. However, staff incorporated the numeric target for lead into the compliance requirements for the front basins, citing the need to holistically address the entire watershed. While separate efforts may not need to be implemented to reduce lead concentrations in the front basins of the Marina because the efforts that would be implemented for other pollutants would address lead as well, including waste load allocations in a TMDL for a non-impairment is inappropriate. The TMDL should be revised to remove the waste load allocation for lead associated with sediment in the front basins.

3. Future re-opener dates should be added

As the science and policy behind stormwater and sediment quality management evolve and new data is collected through the TMDL monitoring program, it is important to re-evaluate the TMDL periodically. For instance, the completion of the stressor identification study in December 2016 as required by the proposed Basin Plan Amendment is a milestone potentially worthy of a re-opener.

While the proposed Basin Plan Amendment includes a discussion of a future reconsideration (p. 12), it does not include a specific date for when that reconsideration would take place. While reconsideration can take place any time, it is helpful to specify a date so that necessary information and data can be gathered toward that target. Given the complexity of this TMDL, more than one reopener is needed. We request that future TMDL re-opener dates of 2018 and 2024 be set in the TMDL schedule. Also, we recommend revising the reconsideration language on page 12 of the tentative Basin Plan Amendment as follows (with the underlines indicating additions and strikethroughs indicating deletions):

The TMDL may be reconsidered to revise (a) the implementation schedule in order to ensure that pollutant sources are controlled and a suitable location for contaminated sediment disposal is available prior to remediation of contaminated sediments if ~~the county has~~ responsible parties have made a good faith effort to plan, fund, and permit sediment remediation activities; and (b) the waste load and load allocations and monitoring programs based on the findings of new studies and data.

4. Reference to “jointly responsible” should be deleted as it is inconsistent with the Clean Water Act

The tentative Basin Plan Amendment provides that the MS4 permittees are “jointly responsible” for meeting the mass-based waste load allocations assigned to the

MS4 permittees (tentative BPA page 10). There is no basis under the Clean Water Act for making MS4 permittees “jointly responsible” and this reference should be deleted.

A TMDL is a requirement imposed by the federal Clean Water Act and therefore it is limited to what is authorized by the Clean Water Act. The Clean Water Act limits a waste load allocation to one point source, not a combination of point sources. Title 40 C.F.R. § 130.2(h) defines “waste load allocation (WLA)” to mean “The portion of a receiving water’s loading capacity that is allocated to **one** of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.” This regulation does not define waste load allocations in terms of a set of point sources or “joint” discharges. Instead, under this definition, each point source has its own separate waste load allocation; that point source is responsible only for its own allocation.

The fact that each point source is responsible only for its own allocation, and not the allocation given to others, derives from the provisions of the Clean Water Act itself. There is no provision for imposing joint responsibility under the Clean Water Act. Under the Act, a party is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Snell Contractor, Inc.*, 333 F.Supp.2d 1344, 1348 (N.D. Ga. 2004); *United States v. Sargent County Water Dist.*, 876 F.Supp. 1081, 1088 (D.N.D. 1992). See also *United States v. Michigan*, 781 F. Supp. 1230, 1234 (E.D. Mich. 1991) (“There is nothing in federal law that requires the Counties to accept responsibility for discharges that ... are appropriately within the province, jurisdiction and responsibility of local municipalities.”).

The Clean Water Act regulations applicable to MS4 permits specifically provide that co-permittees under an MS4 permit are only required to “comply with permit conditions relating to discharges from the municipal separate storm sewers *for which they are operators.*” 40 C.F.R. § 122.26(a)(3)(vi) (emphasis supplied).

Similarly, under the Porter-Cologne Act, Water Code § 13000 et seq., waste discharge requirements (“WDR”) are issued to the person or entity that is “discharging.” Water Code § 13260(a)(1) provides that “any person discharging waste, or proposing to discharge waste” shall file a report of waste discharge. After hearing, the Regional Board issues waste discharge requirements to “the **person** making or proposing the discharge.” Water Code § 13263(f) (emphasis supplied). Enforcement is directed towards “any person who violates any cease and desist order, cleanup and abatement order . . . or . . . waste discharge requirement.” Water Code § 13350(a). See also Water Code § 13300 (the regional board may require the **discharger** to submit for approval a detailed time schedule of specific actions)(emphasis supplied); Water Code § 13301 (cease and desist order directed at “those persons not complying with the requirements or discharge prohibitions”). Under the Porter-Cologne Act, a discharger is not responsible for discharges of pollutants over which it has no authority or control.

Should the Regional Board decline to delete the reference to “jointly responsible,” then the Regional Board should clarify that no one permittee is individually required to ensure that co-mingled stormwater meets the applicable WLAs. This can be accomplished by adding in the MS4 and Caltrans section on page 10 of the tentative Basin Plan Amendment the following sentence at the end of the first paragraph:

No permittee shall be individually required to ensure that co-mingled stormwater meets the applicable MS4 WLAs unless such permittee is shown to be solely responsible for the exceedances.