



July 10, 2017

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812  
By e-mail: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



**RE: Comment Letter – 303(d) List Portion of the 2014 and 2016 California Integrated Report and 303(d) List for Waterbodies in the Los Angeles Region**

Dear Ms. Townsend:

The County of Orange and the Orange County Flood Control District (collectively “County”) appreciate the opportunity to provide the comments below on the proposed statewide Clean Water Act section 303(d) list of water quality limited segments (303(d) List).

The cities of Brea, Buena Park, Huntington Beach, Irvine, Lake Forest, and Tustin have indicated that they should be considered concurring entities with the County’s comments.

1. On May 26, 2017, the County requested review of a number of the Santa Ana Regional Board listing recommendations (see Attachment A, the contents of which are incorporated by reference as if fully set forth herein). This request for review was in accordance with section 6.2 of the Listing Policy which states that a request for the State Water Board to review a Regional Board’s specific listing recommendation must be made within 30 days after the date of the Regional Water Board approval of its 303(d) List, which in this case was on April 28, 2017. The current staff report does not reflect the State Water Board’s consideration of the County’s timely review request. Thus, the County asks that the State Water Board consider the County’s May 26 request for review and modify the listing recommendations in the staff report accordingly. The County further asks that the State Water Board provide responses to each of requests made in the May 26 letter.
2. The following comments pertain to the State Water Board’s changes to specific delisting recommendations submitted by the Regional Water Boards:

*Santa Ana Region (Region 8): Staff Report Appendix I: Factsheets, Decision ID 44427, Santa Ana-Delhi Channel for Indicator Bacteria*

The State Water Board staff recommendation to not de-list Santa Ana-Delhi Channel as impaired for REC-2 is inappropriate for the following reasons:

- a. The REC-2 water quality objective of 410 CFU/100ml does not exist in the Santa Ana Region Basin Plan. Effective April 8, 2015, REC-2 in the Santa Ana Region Basin Plan was revised for Santa Ana-Delhi Channel to be based on anti-degradation targets. While Section 3.10 of the Listing Policy allows anti-degradation to be considered based on trends in water quality, the State Board appears inappropriately to be applying them as not to be exceeded values in the same way that water quality objectives are implemented.
- b. The data being used in the line of evidence to support Decision ID 44427 was collected before the baseline period when the anti-degradation target was established. Any listing considerations should therefore be deferred to a subsequent listing cycle when data subsequent to 2015 is available.
- c. According to Listing Policy Section 3.10, the Water Board is required to complete six steps before listing a water body. The required steps which have yet to be completed in this particular listing are: using data collected for at least three years (step 1); and, determining the occurrence of adverse impacts (step 5). With no data collected subsequent to the establishment of the anti-degradation targets and the absence of an observed impact, it is inappropriate to list the water body as impaired for REC-2.

The comments submitted on behalf of the MSAR TMDL Task Force (Timothy F. Moore, July 10, 2017) provide additional information on the inappropriateness of the REC-2 listings for Santa Ana-Delhi Channel and Cucamonga Creek-Reach 1 and are supported by the County.

*Santa Ana Region (Region 8): Staff Report Appendix I: Factsheets, Decision ID 34041 and 32994 , Lower and Upper Newport Bay for Chlorpyrifos*

The State Water Board has mistakenly treated non-detect samples with high detection limits as exceedances. While most samples have a detection limit of 10 ng/L, a number of samples had detection limit as high as 50 ng/L (discussed as being a lab issue under quality assurance in the Orange County 2008-09 MS4 annual report). Every sample in the record though has non-detectable values for chlorpyrifos and the Santa Ana Regional Board appropriately concluded that the non-detect samples with detection limits higher than the evaluation guideline were not usable and excluded them in the listing assessment. After excluding high detection limit samples, Upper and Lower Newport Bay exceedance rates are 0/48 and 0/32 respectively. Therefore, they both qualify for "delisting" and the recommendation should be reverted to that approved by the Santa Ana Regional Board



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San Diego Region (Region 9): Staff Report Appendix I: Factsheets, Decision ID 48504, Prima Deshecha Creek for Chlorpyrifos

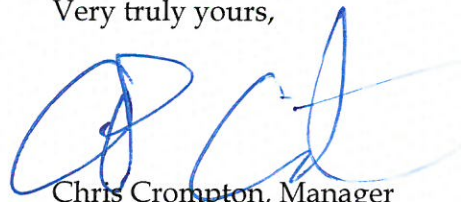
Similar to the discussion above for Lower and Upper Newport Bay, after excluding high detection limit samples, the recommendation for Prima Deshecha should be "Do not List" (0/6).

Los Angeles Region (Region 4): Staff Report Appendix H: Factsheets, Decision ID 32520

The Coyote Creek listing for dissolved copper, line of evidence 83899, does not use hardness adjusted values as required by the California Toxics Rule. If hardness adjusted values were used, the exceedance rate would be 0 exceedances out of 26 samples, not 6 out of 26 as is currently shown. It should also be noted that line of evidence 83899 data was not included in the final exceedance counts.

Please contact Jian Peng at (714) 955-0650 or Stella Shao at (714) 955-0651 if you have any questions.

Very truly yours,



Chris Crompton, Manager  
Water Quality Compliance

Cc: Orange County NPDES Permittees  
Mark Smythe, Santa Ana Regional Water Quality Control Board

Attachment:

Attachment A: May 26, 2017 Request for State Water Board review of Santa Ana Regional Board Listing Recommendation - 2016 303(d) List of Water Quality Limited Segments



Submitted by e-mail to:  
WQAssessment@waterboards.ca.gov

May 26, 2017

Rik Rasmussen  
Surface Water Quality Assessment Unit  
State Water Quality Control Board, Division of Water Quality  
P.O. Box 100  
Sacramento, CA 95812-2000

**RE: Request for State Water Board review of Santa Ana Regional Board Listing Recommendations - 2016 303(d) List of Water Quality Limited Segments**

Dear Mr. Rasmussen:

On April 28, 2017, the Santa Ana Regional Water Quality Control Board ("Regional Board") approved recommendations for the 2016 303(d) list for the Santa Ana Region through Resolution R8-2017-0013, with supporting documentation comprising of a Technical Staff Report, Appendices, and Errata Sheets. The County of Orange and the Orange County Flood Control District (collectively "County") request State Water Board review of a number of these listing recommendations, as discussed below.

The cities of Brea, Buena Park, Huntington Beach, Irvine, Lake Forest, and Tustin have directed that they should be considered concurring entities with the County's request.

**Requested Review of Listing Recommendations:**

1. Bolsa Chica and East Garden Grove-Wintersburg Channels ("Channels") are listed in Staff Report Appendix B as impaired by ammonia, and the Bolsa Chica Channel is additionally listed for indicator bacteria and pH. The listing of these Channels as impaired waters subject to listing under section 303 (d) Clean Water Act (CWA) is legally inappropriate. The Channels are man-made flood channels constructed as part of a municipal separate storm sewer system (MS4), used to collect and transport stormwater. Notably, as MS4, the CWA presumptive uses (fishable/swimmable) do not apply, and these water bodies have no designated beneficial uses and no applicable water quality objectives within the Santa Ana Regional Board Basin Plan. Neither the Staff Report nor the any of the Appendices provides sufficient basis upon which jurisdiction under the CWA can be exercised over the Channels given these factors. The Channels are not traditional navigable waters, and they should not be classified as tributaries to traditional navigable waters subject to CWA jurisdiction.



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In EPA's Preamble to the initial National Pollutant Discharge Elimination System (NPDES) MS4 regulations, the agency expressly determined that "streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purposes of this rule" and that "stream channelization, and stream bed stabilization, which occur in waters of the United States," were not subject to NPDES permits under Section 402 of the CWA. (53 Fed. Reg. 49416, 49422 (Dec. 7, 1988)). NPDES regulations define an MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets...ditches, *man-made channels* or storm drains)...designed or used for collecting or conveying storm water." (40 C.F.R. 122.26(b)(8) (emphasis added)). The "conveyances" identified in the regulation all refer to anthropogenic structures, not natural streams. As indicated above, the Channels are man-made infrastructure used to collect and convey stormwater; they are part of an MS4.

For the Channels to be subject to section 303(d) listing would mean that a single waterbody can be both an MS4 and a jurisdictional receiving water. This pretense that an MS4 and a receiving water body can be one in the same is contrary to the NPDES regulations. Under 40 C.F.R. 122.26(b)(9), an MS4 outfall is defined as the point at which an MS4 discharges *to* waters of the United States. (40 C.F.R. 122.26(b)(9) (emphasis added)). Thus, there is clear distinction between the MS4 used to collect, convey and discharge stormwater, and waters of the United States (WOTUS), into which point source discharges from MS4s are regulated. An MS4 cannot be a receiving water, because a receiving water cannot discharge into itself. (*See Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, -- U.S. --, 133 S.Ct. 710, 712-13 (2013), holding that the flow of polluted water from one portion of a river, through a concrete channel or other engineered improvement in the river, to a lower portion of the same river, does not constitute a discharge of pollutants; *see also So. Fla. Water Mngmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004), holding that where a canal and an adjacent wetland are not meaningfully distinct water bodies (and are, rather, two parts of the same water body), then the transfer of polluted water from the former into the latter would not need an NPDES permit, as it would not constitute a discharge of pollutants into waters of the United States).

For similar reasons as to why man-made flood control channels cannot be WOTUS, man-made flood control channels should not be deemed a "tributary" to WOTUS, contrary to the position of the Regional Board, who has indicated that the Channels are being listed based on the "tributary rule."

Historically, the tributary rule has been used to invoke federal jurisdiction over non-navigable, not relatively permanent *natural waters* when such water has a significant effect on a WOTUS. The U.S. EPA recently clarified in the 2015 Clean Water Rule rulemaking that concrete channels constructed in dry lands or uplands are not waters of the U.S. (80 Fed. Reg. 124 (June 29, 2015), Clean Water Rule: Definition of "Waters of the United States"). The final 2015 Clean Water Rule specifically excludes from the definitions of "tributary" and WOTUS, certain types of ditches and "stormwater control features constructed to convey, treat or store stormwater that are created in dry land." (40 C.F.R. §§ 230.3(o)(2)(iv), (o)(2)(vi) and (o)(3)(iii)). While application of the 2015 final Clean Water Rule is stayed by an order by the United States Court of Appeal for the Sixth Circuit, and is also under reconsideration

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by the EPA, under Executive Order issued on February 28, 2017, the action of the EPA is nonetheless instructive here. The EPA's explicit exclusion of ditches and dry land "stormwater control features" from the definition of WOTUS clearly demonstrates the regulatory intent that jurisdiction over man-made flood control channels should not be exercised under the "tributary rule."

Based on the foregoing, the State Water Board is requested to remove the Channels from the 303 (d) list, as they are flood control, MS4 infrastructure, and thus their listing as an impaired water body is legally inappropriate.

2. The 2015-16 Stormwater Monitoring Coalition laboratory toxicity inter-calibration study among southern California laboratories (generally covering the major commercial and governmental State-certified laboratories involved in stormwater monitoring) found significant and systemic variability problems in the performance of toxicity tests with a variety of organisms. Laboratory dilution water, for example, which was prepared using standard methods, elicited toxic responses (up to 60% effect) during the first round of calibration (SCCWRP Technical Report 956, 2016). While considerable efforts have been, and continue to be, dedicated to resolving these issues, the toxicity test results conducted prior to 2015 must be considered compromised from a quality control perspective. Although much of the toxicity data used for assessment purposes in the Staff Report came from the County, in good faith, the County cannot stand behind this data any more due to it being impugned by the SCCWRP study. This data affects the following listing decisions in the Staff Report:
  - Listings for toxicity: 33671, 61926, 62070, 62482, 42910, 34702, 34358, 64503, 35104, 64579, 32794, 63794, 63822, 63787, and 63795
  - Listings for Benthic Community that use toxicity as a line of evidence: 65192, 65194, and 65208

The Regional Board in its response to comments stated that "the State Board staff will not discredit sample results that show toxicity unless additional information is available showing that those results are false positives". The SCCWRP Technical Report, as discussed above, provides this additional information. It is recommended that the State Water Board not make listings based on toxicity data during this listing cycle and look instead at newer data, enhanced by the work of the Stormwater Monitoring Coalition, in future cycles.

3. The proposed listings for Benthic Community Effects and the application of California Stream Condition Index (CSCI) and Southern California Coastal Index of Biotic Integrity (SoCal IBI) raise a number of issues. The overarching concern is that the evaluation of bioassessment scores via Listing Policy criteria is moving forward without an approved statewide policy framework of how such data should be considered. At this time, CSCI should only be used as one of the reference tools for water quality objective development, not as a water quality objective itself.

Notwithstanding the overarching comment above that such listings should not be pursued at this time, the following more specific issues were identified.

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- a) A CSCI score of 0.79 has been applied to many engineered channels in the 303(d) listing process in spite of the consensus that 0.79 is rarely, if ever, achieved in engineered channels and it may not be achievable given that tradeoffs between ecological health and flood protection may be unavoidable (2015 Report on the SMC Regional Stream Survey). Among the 6 proposed listings, 5 are engineered channels (Decision ID 65192, 65193, 65194, 65195, 65208).
- b) The Staff Report and Fact Sheets conclude that there are poor biological conditions based on CSCI scores alone, without considering other biological indicators, such as benthic algae and riparian habitat conditions. The 2015 Report on the SMC Regional Stream Survey indicates that within engineered channels algae indices may reflect water quality conditions better than macro-invertebrate indices, such as CSCI.
- c) The association established between biological condition and existing pollutant listings in the proposed listings is weak. The location, hydrological condition and time period of chemistry and biological data need to be carefully examined before making an association between biological conditions and pollutants. For example, the listing for San Diego Creek Reach 2 (Decision ID 65195) uses unpublished data prior to 2002 to establish an association between the chemistry and the CSCI score. However, the chemistry data are more than 5 years older than the biological data, and neither the hydrological conditions nor the sample location for the chemistry data are available. In fact, the evidence presented does not establish an association between water quality and biological condition.
- d) As discussed in #2 above, the toxicity data referenced have clearly documented data quality issues and should not be used for listing purposes. 3 out of the 6 proposed listings (Decision ID 65208, 65192) were based on compromised toxicity data.

The State Water Board is requested, based on the above, to defer listings 65192, 65193, 65194, 65195, and 65208 until a formal policy is completed.

#### 4. Staff Report Appendix G: Factsheets, Decision ID 66920, new listing for DDT

The proposed listing of San Diego Creek Reach 1 for DDT is solely based on the existence of an organochlorine compounds total maximum daily load (TMDL) for Newport Bay and its watershed, not on data showing exceedences in the referenced stream reach. The referenced data is from a single sample that did not exceed the probable effects concentration (PEC) (for total DDTs and for sum of DDT, which should be noted are sediment quality guidelines and not water quality objectives). Two other sediment samples for the same site (801SDCxxx) were available in CEDEN but were not used in the assessment. Both of these samples also had DDT concentrations below the PEC.

The recommendation to list is clearly inappropriate since decisions on listing should be made on the basis of data analyzed during the listing period. Based on the data, San Diego Creek Reach 1 should not be listed as impaired for DDT and the State Water Board is requested to not approve listing 66920.

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## 5. Staff Report Appendix G: Factsheets, Decision ID 44222

Seal Beach has multiple monitoring stations for indicator bacteria. Based on a cumulative assessment of all stations, Seal Beach does not exceed the allowable frequency stated in Table 4.2 and should be delisted. The Regional Board, however, retained a listing for the entire beach as impaired based on exceedances occurring at the First Street station. This is inappropriate.

The State Water Board is requested to delist the entire beach based on the listing analysis or limit listing 44222 to a specific area - north of the Pier - since the entire beach does not exceed the allowable frequency.

## 6. Staff Report Appendix G: Factsheets, Decision ID 35179 and 34029

The Regional Board in its response to comments agreed that the decisions for this waterbody should be re-evaluated because it appears that during one of the previous listing cycles, a decision was made to split the Rhine Channel from Lower Newport Bay leading to separate decisions for Rhine Channel and for the rest of the Lower Newport Bay.

For Rhine Channel, listings for zinc and lead are a carryover of decisions from previous listing cycles based on data collected from 2000-03. The dataset provided in the Staff Report from 2006-09 (sediment data from ref3871) shows none of the 8 samples exceed the probable effects level (PEL) sediment quality guideline for lead, or the sediment effects range median (ERM) guideline for zinc. Analysis of 8 water samples also showed no exceedances of the zinc California Toxics Rule (CTR) criterion. Based on these data the State Water Board is requested to delist Rhine Channel for zinc and lead.

## 7. Staff Report Appendix G: Factsheets, Decision ID 38659 and 32603

The assessment of Upper and Lower Newport Bay for copper considered the County's water column data but not the sediment data. The Regional Board recognized this issue but deferred the decision to the State Board. For Upper Newport Bay, the County's sediment data shows none of the 55 samples exceeded the ERM guideline. The total number of exceedances, including both water and sediment data, met the delisting requirements for copper.

In addition, Line of Evidence 8864 shows significant quality control issues (the method blank samples yielded the highest metals concentrations among all samples, including actual water samples). The Regional Board response to comments did not address this issue directly but indicated that the data were not used as a line of evidence for either Upper or Lower Newport Bay. Given this information, the data should be removed from the record to avoid future misuse.

The State Water Board is requested to remove Line of Evidence 8864 and delist for copper (ID 32603).

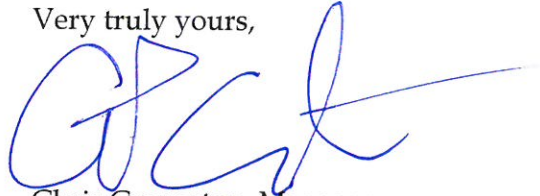


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Thank you for considering the above requests. Please direct any technical questions to Jian Peng at (714) 955-0650 or Stella Shao at (714) 955-0651 and legal questions to Julia Woo at (714) 834-6046.

Very truly yours,



Chris Crompton, Manager  
Water Quality Compliance

cc: North Orange County NPDES Permittees