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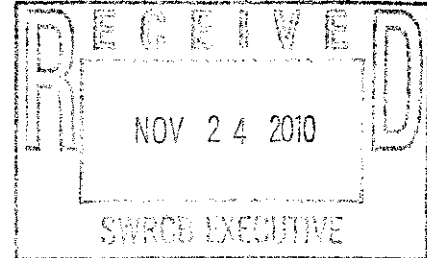
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Public Comment  
McGrath Lake Toxicity TMDL  
Deadline: 11/30/10 by 12 noon

**Via E-Mail & Federal Express**  
**(commentletters@waterboards.ca.gov)**

November 24, 2010

State Water Resources Control Board  
1001 "I" Street  
Sacramento, CA 95814  
Attn: Jeanine Townsend, Clerk to the Board



**Re: Comment Letter – McGrath Lake Toxicity TMDL**

Dear Gentilepersons:

This letter concerns the proposed Basin Plan Amendment (“BPA”) to the Los Angeles Regional Basin Plan adopted by the Regional Water Quality Control Board – Los Angeles Region on October 1, 2009. The proposed BPA, if approved, will add a TMDL for PCBs, pesticides and sediment toxicity in McGrath Lake. This letter is written on behalf of Charles Conway, Jr., Colleen F. Conway, Helen G. Haynes, William Berg, Marilyn Berg, Madge McKee and Bill McKee (individually and collectively, “California Hugos”). The California Hugos own an undivided 75% interest in approximately 60 acres of land west of Harbor Boulevard, within which the northern portion of McGrath Lake is located.

The proposed BPA and supporting and underlying documents are deficient as follows.

**I. There is an Inadequate Discussion of the Reasonably Foreseeable Environmental Impacts of Dredging in the Substitute Environmental Document**

There is an inadequate discussion in the June 20, 2009 Substitute Environmental Document (“SED”) of the reasonably foreseeable environmental impacts of dredging. The SED estimates 53,000 to 155,000 cubic yards of material may need to be disposed offsite if there is dredging. *Id.* at 85. Using an estimate of 18 cubic yards of material per truckload<sup>1</sup>, that means approximately 2,900 to 8,600 truckloads of material will need to be disposed offsite if the lake is dredged. However, there is no discussion in the SED of the environmental impacts of such disposal, including the traffic, energy and air quality impacts, as well as the impact upon local landfill capacity, that would be created by the offsite transportation and disposal of up to 8,600 truckloads of dredge material.

<sup>1</sup> Estimate provided by Waste Management, Inc.

Also, the SED assumes the material can be disposed at a local Class III facility. Staff Report, p. 85. However, the dredge material may need to be disposed of at a Class I landfill, particularly if the sediment contains “some of the highest PCB and OC pesticide concentrations in the state” as alleged by the RWQCB in response to Comment 7.11 regarding the July 20, 2009 Draft McGrath Lake PCBs, Organochlorene Pesticides, and Sediment Toxicity TMDL.<sup>2</sup> The nearest Class I landfills are in Kettleman City and Buttonwillow, which are approximately 185 miles and 135 miles, respectively, from McGrath Lake. However, the SED contains no discussion about the environmental impacts, including the traffic, energy and air impacts, of 2,900 to 8,600 truckloads of hazardous material being transported approximately 370 miles (roundtrip) to Kettleman City or approximately 270 miles (roundtrip) to Buttonwillow.

We anticipate the SWRCB may claim in response that the SED contains an appropriate first-tier level review of the environmental impacts of dredging. However, and as discussed below in Section III below, the 14-year TMDL deadline effectively makes this a project specific (*i.e.*, dredging) TMDL, and thus a greater level of discussion of the environmental impacts of dredging is needed in the SED.

This comment was raised by our office on behalf of the California Hugos during oral comments at the October 1, 2009 RWQCB hearing on the proposed BPA, but was not substantively addressed by the RWQCB at the hearing, was not subsequently responded to in writing by the RWQCB, and did not result in any revision to the BPA, the SED, or any other document.

## **II. There is an Inadequate Analysis in the Staff Report of the Economic Factors Associated with Dredging**

There is an inadequate analysis in the September 17, 2009 Staff Report by the California Regional Water Quality Control Board – Los Angeles Region (“Staff Report”) of economic factors associated with possible dredging in contravention of California Public Resources Code Section 21159. More specifically, the Staff Report fails to consider the reasonable possibility that the dredge material will need to be disposed of at a Class I landfill (instead of a Class III landfill), and the possible costs of the same.

California Public Resources Code Section 21159 provides that the environmental analysis in the Staff Report shall take into account a reasonable range of economic factors. The Staff Report assumes, in a very cursory one-sentence statement on page 71 of the Staff Report, that McGrath Lake dredge material will be disposed at a local Class III landfill

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<sup>2</sup> Also, DDT concentrations in sediment at Lake McGrath have been detected at levels as high as 3,488 µg/kg (Staff Report, p. 24). These levels exceed Title 22 Criteria for DDT (with a total threshold limit concentration of 1,000 µg/kg). Dredge material with that concentration of DDT would need to be disposed of at a Class I landfill under Title 22.

because dredge material from Port Hueneme was purportedly disposed of at a Class III landfill and allegedly has “similar” levels of contamination to McGrath Lake sediments. However, no basis to substantiate the claim of similarity between Port Hueneme and McGrath Lake sediments is provided in the Staff Report. To the contrary, there is clear evidence that the levels of contamination for the Port Hueneme and McGrath Lake sediments are *not* similar. For example, the highest total DDT concentration for McGrath Lake sediment reported in the Staff Report was 3,488 µg/kg (Staff Report, p. 24), yet for the Port Hueneme sediments, the highest DDT concentration are a much lower 282.5 µg/kg.<sup>3</sup> Furthermore, the concentrations of Chlordane and Dieldrin, both of which were detected in sediment at McGrath Lake, are not reported for Port Hueneme. In sum, the Staff Report’s purported basis for assuming that McGrath Lake dredge material can be disposed at a Class III landfill appears to be nothing more than unsubstantiated speculation about McGrath Lake sediment being “similar” to Port Hueneme sediment.

The Staff Report fails to consider the reasonable possibility that dredge material from McGrath Lake may need to be disposed of at a Class I landfill facility, and the potential additional costs of doing so. As stated by the RWQCB in response to Comment 7.11 regarding the July 20, 2009 Draft McGrath Lake PCBs, Organochlorine Pesticides, and Sediment Toxicity TMDL, “the sediments of McGrath Lake have been documented as having some of the highest PCB and OC pesticide concentrations *within the state*” (emphasis added). For example, DDT concentrations in sediment at Lake McGrath have been detected at levels as high as 3,488 µg/kg (Staff Report, p. 24). These levels exceed Title 22 Criteria for DDT (with a total threshold limit concentration of 1,000 µg/kg). Dredge material with that concentration of DDT would need to be disposed of at a Class I landfill under Title 22.

If the dredge material must be disposed of at a Class I facility, the costs of transporting up to 155,000 cubic yards of dredge material to Kettleman City or Buttonwillow, and disposing of the same, assuming a cost of \$124 per cubic yard,<sup>4</sup> could run as much \$19,220,000, if not more. Compared to the estimated (and significantly lower) cost of \$11,826,127 for disposing of the material at a local Class III landfill as set forth in the Staff Report, these additional potential costs should have been considered in the Staff Report.

This comment was raised on behalf of the California Hugos during oral comments at the October 1, 2009 RWQCB hearing on the BPA, but was not substantively addressed by the RWQCB at the hearing, was not responded to in writing by the RWQCB, and did not result in any revision to the BPA, the SED, the Staff Report, or any other document.

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<sup>3</sup> California Coastal Commission, 2008, Staff Recommendation on Consistency Determination, Port Hueneme Harbor, Ventura County, Tables 3 to 6.

<sup>4</sup> The estimate of \$124/cubic yard of material was provided by Waste Management, Inc.

### **III. The Proposed 14-Year Deadline for Lake Sediment Load Allocations is Too Short, and Thus Effectively Leaves Dredging as the Only Option**

The proposed 14-year deadline in the proposed BPA for lake sediment load allocations (or "LAs") to be achieved is too short. This short deadline effectively takes natural attenuation off the table as an option, as the Staff Report concludes (on page 59) that the soonest natural attenuation could be achieved for any of the contaminants is 25 years (stated as an average number of years).

Furthermore, in-situ capping (as discussed in the Staff Report) is not a viable option to achieve lake sediment load allocations. According to the Staff Report, the average depth of McGrath Lake is 0.6 meters (or 2 feet). *Id.* at 11-12. Due to the shallow depth of McGrath Lake, in-situ capping would result in unacceptable negative impacts on the lake's purported beneficial uses of flood control and habitat. A one-foot cap (which is assumed on page 69 of the Staff Report) would effectively fill in large portions of the lake, which has an average depth of only two feet, and significantly reduce the lake's depth and volume. The filled-in portions of the lake would be lost as aquatic habitat. Reduction in the lake's volume would also reduce the lake's beneficial use for flood control. Existing United States EPA guidance states that in-situ capping is only conducive to sites where water depth is adequate to accommodate the cap with anticipated uses (*e.g.*, flood control).<sup>5</sup> Furthermore, in-situ capping is only appropriate at sites where the rate of groundwater flow into the water body is low and will not result in contaminant releases through the cap.<sup>6</sup> Groundwater flow contributions to Lake McGrath are significant, contributing as much as 3 inches per day to the lake elevation on one occasion (Staff Report, p. 11). In-situ capping is also only recommended in low-energy environments that will not be subject to erosion or disruption of the cap.<sup>7</sup> Typically, low-energy environments suitable for in-situ capping are located in deep waters (Palermo, *et al.*, 1998) where the submerged surface will not be impacted by wind, waves, rainfall, wildlife activity, currents or other disruptions. McGrath Lake does not fit this description or criteria.

Because natural attenuation and in-situ capping are not realistic or feasible remedial options under the proposed TMDL, there is only one viable remedial option: dredging. As such, the proposed BPA runs afoul of Water Code Section 13360, which prohibits an agency from specifying a particular manner of compliance in the BPA.

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<sup>5</sup> United States Environmental Protection Agency, 2005, Contaminated Sediment Remediation Guidance for Hazardous Waste Sites.

<sup>6</sup> U.S. EPA, 2005; Palermo, M.R., J.E. Clausner, M.P. Rollings, G.L. Williams, T.E. Myers, T.J. Fredette, R.E. Randall, 1998, U.S. Army Corps of Engineers Guidance for Subaqueous Dredged Material Capping.

<sup>7</sup> U.S. EPA, 2005; Palermo, *et al.*, 1998.

The proposed BPA provides that implementation of the McGrath Lake sediment remediation actions (*i.e.*, dredging) shall begin no later than 10 years from the effective date of the TMDL, and lake sediment load allocations shall be achieved 14 years from the effective date of the TMDL. The BPA should be amended to provide that lake sediment allocations may be achieved in a time period that provides some reasonable opportunity for natural attenuation to be a possible remedial action. Doing so would address the objection that the TMDL violates the prohibition in Water Code Section 13360 against specifying a particular manner of compliance.<sup>8</sup> In so extending the deadline, the BPA could be modified to provide that if monitoring after a certain number of years reveals that the load allocation deadline may not be achieved using remediation techniques then being employed (*e.g.*, natural attenuation), the RWQCB may require the preparation of a revised Work Plan to address the concern. In the end, extending the 14-year deadline may only result in a short delay in achieving lake sediment load allocations, yet at the same time will buttress the TMDL against charges it violates Water Code Section 13360. Furthermore, such a change will allow natural attenuation to be a possible means of remediating the lake bed sediment, a process which could cost between \$11 million to \$19 million *less* than dredging. This cost savings is not a minor issue, as evidenced by the fact the proposed BPA includes a provision that the McGrath Lake Work Plan ("MLWP") shall include a strategy for securing funds necessary to remediate lake bed sediments. Moreover, to the extent the SWRCB, in response to this comment, points out that the purportedly excessively high levels of contamination in the lake bed sediment calls for a shorter time period for meeting load allocations, the SWRCB only lends support to our objections that the SED and Staff Report fail to adequately address the possibility that dredge material may need to be disposed of at a Class I facility (as opposed to a Class III facility).

This comment was raised by our office on behalf of the California Hugos during oral comments at the October 1, 2009 RWQCB hearing on the proposed BPA, but was not substantively addressed by the RWQCB at the hearing, was not subsequently responded to in writing by the RWQCB, and did not result in any revision to the BPA or any other document.

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<sup>8</sup> We also note that, to the extent the SWRCB fails to extend 14-year TMDL deadline, it only undermines any anticipated argument by the SWRCB in response to Section I above that the SED was an appropriate first-tier review, since the 14-year deadline effectively makes this a project specific (*i.e.*, dredging) TMDL. *Stated another way, extending the 14-year TMDL deadline strengthens the SWRCB's argument that the SED's discussion of the environmental impacts of dredging was adequate.*

**IV. The BPA Fails to Vest Discretion with the Executive Officer to Account for the Lack of Funds for Lake Bed Remediation**

The RWQCB has acknowledged during past meetings and discussions that the availability of funding to achieve lake bed LAs is a significant concern. In fact, Section II of the draft BPA expressly provides that “the MLWP shall include a strategy to secure funds necessary to remediate the lake sediments and achieve lake sediment allocations”. However, the draft BPA does not account for the possibility that such funding strategy may be unsuccessful. Accordingly, the last sentence of Section II of the Implementation Plan element of the draft BPA should be broadened and revised to read as follows:

The Executive Officer shall allow a revised MLWP to reflect the results of data obtained through TMDL implementation and availability of funds.

Another benefit of making the foregoing revision is that it would buttress the SWRCB against claims that the 14-year deadline effectively only allows for dredging as a viable alternative.

This comment was raised by our office on behalf of the California Hugos during oral comments at the October 1, 2009 RWQCB hearing on the proposed BPA, but was not substantively addressed by the RWQCB at the hearing, was not subsequently responded to in writing by the RWQCB, and did not result in any revision to the BPA or any other document.

**V. There is No Legal Authority for Setting Load Allocations for Lake Bed Sediment**

The RWQCB incorrectly assumed that load allocations may be set for pollutants in lake bed sediment (as compared to load allocations for pollutants in *suspended* sediment in water). We understand this approach has been used elsewhere. However, we believe it exceeds the RWQCB’s and SWRCB’s permissible statutory authority. Nowhere in the express language of 33 U.S.C. Section 1313(d)(1)(C) or 40 C.F.R. Part 130.2 is authority granted for setting load allocations for *lake bed* sediment. Rather, these provisions limit load allocations to pollutants *entrained* in water. For example, 33 U.S.C. Section 1313(d)(1)(C) provides that “[e]ach State shall establish *for the waters* identified in paragraph (1)(A) of this subsection . . . the total maximum daily load . . .” (emphasis added). A “load allocation” is defined at 40 C.F.R. Part 130.2 as “[t]he portion of a *receiving water*’s loading capacity . . .” (emphasis added). Furthermore, “load” or “loading” is defined at 40 C.F.R. Part 130.2 as the “amount of matter or thermal energy that is introduced into a *receiving water* . . .” (emphasis added). Matter only becomes a “load” once it is introduced into the water and before such time it cannot be considered a “load”, and hence load allocations may not be set for lake bed sediment (since lake bed sediment is not part of the receiving water). Setting load allocations for lake bed

sediment is as unacceptable as setting load allocations for pollutants in soil particles on agricultural lands (while the soil particles are in place on such lands).

While we are not aware of any reported federal or state cases directly addressing this issue (*i.e.*, we are not aware of any cases directly addressing the issue of whether load allocations may be set for lake bed sediment), support for our position can be found in several well-established cases addressing related issues. For example, in Pronsolino v. Marcus, 91 F. Supp. 2d 1337, 1352 (N.D. Cal. 2000), the Court held that non-point sediment itself is a “pollutant” under the Clean Water Act.<sup>9</sup> In so concluding, the Pronsolino Court cited to, *inter alia*, Rybachek v. United States EPA, 904 F.2d 1276, 1285-1286 (9<sup>th</sup> Cir. 1990), in which the Court held that the re-suspension of streambed sediment itself is a “discharge” under the Clean Water Act. If re-suspension of lake bed sediment is considered a discharge, then lake bed sediment cannot be part of the “receiving waters” (since one logically cannot discharge from a receiving water into the same receiving water). Stated another way, because sediments have been deposited on the lake bed (and are therefore not suspended), they are not a component of the receiving waters, but rather constitute a distinct physical environment. Only if and when sediments are discharged (or re-suspended) from the lake bed into the suspended phase (but not before such time) are they part of the receiving waters. This is not an abstract legal argument or objection, but has practical implications. For example, if the RWQCB had not exceeded its statutory authority in proposing load allocations for the lake bed sediment, we would not be faced with one of the resulting technical problems with the proposed TMDL, to wit, the lack of an established relationship between pollutant concentrations in the lake bed sediment and pollutant concentrations in the water of McGrath Lake.

In sum, since the lake bed sediment is not part of the “receiving water”, load allocations may not be set for lake bed sediment under 33 U.S.C. Section 1313(d)(1)(C) or 40 C.F.R. Part 130.2. Accordingly, the SWRCB should drop all references to lake bed sediment load allocations in the proposed BPA.

This comment was raised by our office on behalf of the California Hugos during oral comments at the October 1, 2009 RWQCB hearing on the proposed BPA, but was not substantively addressed by the RWQCB at the hearing, was not subsequently responded to in writing by the RWQCB, and did not result in any revision to the BPA, the SED, or any other document.

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<sup>9</sup> In Pronsolino, the issue was whether the Clean Water Act authorized a TMDL that called for a 60% reduction in *general* sediment entering the river (from timber-harvesting and agricultural runoff). Here, by contrast, the proposed TMDL sets load allocations for pollutants (such as pesticides and PCBs) *in the sediment*.

## **VI. The Description of “Cooperative Parties” Should be Revised to More Accurately Reflect the Intent and Scope of the BPA**

In the bullet point itemization of possible cooperating parties on page 10 of the draft BPA, three (3) changes should be made to ensure “cooperative parties” are appropriately described. First, the specific reference to “McGrath Family” should be dropped, leaving instead the more generic description “Owners of the Central Ditch west of Harbor Blvd. and the northern end of the lake.” Second, the phrase “agricultural landowners in the McGrath Lake sub-watershed” should be changed to “agricultural landowners and dischargers in the McGrath Lake sub-watershed.” Third, a fifth category of cooperative parties should be added: “Other landowners in the watershed.” It is everyone’s interest, including the RWQCB and SWRCB, that the description of “cooperative parties”, while not binding, be as broad as possible.

This comment was raised by our office on behalf of the California Hugos during oral comments at the October 1, 2009 RWQCB hearing on the proposed BPA, but was not substantively addressed by the RWQCB at the hearing, was not subsequently responded to in writing by the RWQCB, and did not result in any revision to the BPA or any other document.

## **VII. Other**

The California Hugos join in the following other comments previously submitted to the RWQCB concerning the proposed BPA (including any subsequent commenters’ explanations to the SWRCB about why the RWQCB’s response to each comment was inadequate or incorrect):

- **Comment #7.11 (that the BPA should identify natural attenuation as a viable remediation strategy, and adjust the implementation schedule for achieving load allocations accordingly).** The RWQCB’s response to Comment #7.11 was inadequate because it did not address the concerns stated above in Section III of this letter (that the proposed 14-year deadline for lake sediment load allocations is too short and thus effectively leaves dredging as the only option in violation of Water Code Section 13360).
- **Comment #7.13 (that lake bed sediments should be addressed under another regulatory program or authority).** The RWQCB’s response to Comment #7.13 was inadequate because it did not address the concerns stated above in Section V of this letter (that the SWRCB and RWQCB lack the statutory authority to set load allocations for lake bed sediments). Also, the reference to the 1999 consent decree in the RWQCB’s response is not appropriate because that consent decree, in the absence of any underlying statutory authority, cannot confer authority upon the SWRCB and RWQCB to set load allocations for lake bed sediments.



- **Comment #9.3 (that the use of ERLs as numeric targets is not appropriate).** The RWQCB's response to Comment #9.3 was inadequate because it failed to adequately address the lack of a linkage between sediment pollutant concentrations and water toxicity, an issue that only arises because the SWRCB and RWQCB have (as discussed above in Section V) exceeded their statutory authority by setting load allocations for lake bed sediment.
- **Comment #9.5 (to the effect that the time deadlines set forth in this proposed BPA are inconsistent with other lake TMDLs for pesticides and PCBs).** The RWQCB's response that "the timeframes for these [five] other referenced TMDLs are not appropriate for McGrath Lake; a terminal, shallow, back-dune lake" was inadequate because no justification was provided for *why* the RWQCB believed the approach should be any different for a "terminal, shallow, back-dune lake".
- **Comment #12.8 (that the BPA should identify natural attenuation as a viable remediation strategy, and adjust the implementation schedule for achieving load allocations accordingly).** The RWQCB's response to Comment #12.8 was inadequate because it did not address the concerns stated above in Section III of this letter (that the proposed 14-year deadline for lake sediment load allocations is too short and thus effectively leaves dredging as the only option in violation of Water Code Section 13360).
- **Comment #12.10 (that lake bed sediments should be addressed under another regulatory program or authority).** The RWQCB's response to Comment #12.10 was inadequate because it did not address the concerns stated above in Section V of this letter (that the SWRCB and RWQCB lack the statutory authority to set load allocations for lake bed sediments). Also, the reference to the 1999 consent decree in the RWQCB's response is not appropriate because that consent decree, in the absence of any underlying statutory authority, cannot confer authority upon the SWRCB and RWQCB to set load allocations for lake bed sediments.

This letter is made without waiving any rights and privileges of the California Hugs.

Respectfully,



Douglas Gravelle  
DAG/hg

cc: Clients