

ADDENDUM: Draft Comment Summary and Responses

Comment Deadline: May 13, 2014

Amendment to the Water Quality Control Plan for the Los Angeles Region to Revise a TMDL for Toxic Pollutants in Marina del Rey Harbor

Responses to Comments on revisions to the Marina del Rey Harbor Toxic Pollutants TMDL were previously made available. This addendum is a supplement to the original Responses to Comments and provides further details in response to the comments submitted to the State Water Resources Control Board. The comments for which additional responsive information is provided are reprinted in this addendum for reference, as are the responses to those comments provided in the original document.

No.	Author	Comment	Response
4.3	General Stakeholders ¹	<p>The Board has no authority to name “Responsible Parties” in a TMDL.</p> <p>The Los Angeles Water Board is not authorized by State or federal law to designate anchorages and boaters as responsible for copper pollutants in the Marina in a TMDL Amendment. The Los Angeles Board overstepped its authority and is inviting litigation if this goes forward. Anchorages do not discharge to the marina.</p> <p>Questions of liability should be established by an impartial judge, not a regulatory agency in the context of a TMDL Amendment. What’s most troubling is that an unelected, unaccountable board running rampant over the rights of citizens, over reaching to impose liability in TMDL and create for itself the ability to order remedial action, require permits, impose fines on citizens, harm our local economy and effectively take away our property.</p> <p>This action would be improper and unlawful. This</p>	<p><i>Response from original document:</i></p> <p>The relevant portion of the Los Angeles Water Board’s response to comment 14.9 to Los Angeles Water Board Resolution R14-004, states:</p> <p>It is both fair and legal to assign responsibility for reducing copper in Marina del Rey Harbor to boat owners. Based on the source analysis and linkage analysis, the major source of dissolved copper in the harbor is copper from boat paint; therefore, this load allocation must be assigned to achieve the TMDL. Furthermore, the copper discharged from antifouling paints is a “waste” pursuant to California Water Code section 13050(d). According to CWC section 13263(g), “All discharges of waste into the waters of the State are privileges, not rights.” For a full discussion of the legal authority to regulate discharges of copper from hull paints, see Section III of the Technical Report for the TMDL for Dissolved Copper in Shelter Island Yacht Basin included as a</p>

¹ Numerous comment letters were submitted by boat owners, Marina del Rey Lessees, boatyard owners, boat paint industry representatives, other marinas, and other interested parties. These comment letters contained similar and in some cases identical comments, and therefore they have been grouped under the category “General Stakeholders” rather than repeated.

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		<p>proposal violates both the Clean Water Act and CERCLA. “Responsible parties” is a term of art under CERCLA, a federal statute designed to allocate liability for clean-up of past contamination. This cannot be implemented in a TMDL. A TMDL is an informational document that establishes goals. It is not a document that can assign liability.</p>	<p>reference to the Marina del Rey Toxics TMDL Staff Report.</p> <p>The Los Angeles Water Board’s legal authority to identify responsible parties is found in the California Water Code, Division 7, Water Quality and the federal Clean Water Act.</p> <p>The Los Angeles Water Board has the discretion to hold anchorages accountable for discharges of waste which occur or occurred within the marina leasehold based on three criteria: (1) status as owner or operator of the marina facility on which an activity occurs that results in a discharge of waste; (2) knowledge of the activity causing the discharge; and (3) the ability to control the activity. The Marina del Rey Harbor anchorages meet all three of these criteria.</p> <p>The anchorages congregate boats and thereby cause or contribute to the discharge of copper from the large number of boat hulls in the harbor.</p> <p>The anchorages have knowledge of the copper discharges from antifouling paint and have the ability to control discharges of copper to the harbor. Anchorages exercise control and enforcement over boat owners and their discharges by way of conditional lease or license agreements with owners of boats moored within the anchorage leasehold. The conditions written into these contract agreements are the key to the anchorage’s legal authority to exercise control over residual copper discharges from boat hulls within the leasehold. By way of these conditions, the anchorages can control the number of moored boats, the types of hull coatings used, and hull cleaning activities allowed within the leasehold.</p> <p>Persons owning boats moored in Marina del Rey Harbor are responsible for discharges of copper waste because hull</p>

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			<p>coating leachate containing copper is continuously generated whenever a vessel hull is exposed to water.</p> <p>A TMDL is a water quality control planning document, the purpose of which is to identify the loading capacity of a waterbody relative to a specific pollutant(s) and determine the necessary reductions in pollutant loading necessary to achieve water quality objectives given the waterbody's loading capacity. As a planning document, it is the intent that the State uses its water quality control authorities to ensure that the necessary pollutant load reductions are achieved such that water quality standards are achieved. Therefore, to effectively implement the TMDL it is necessary to identify those entities who are discharging the pollutant(s) to the waterbody.</p> <p><i>Comment addendum:</i> The Los Angeles Water Board prepared the TMDL to address impairment in the Marina del Rey Harbor due to discharges of copper from boat hulls and other sources. The purpose of a TMDL is to identify the sources of impairment in compliance with the federal Clean Water Act and to set forth a program of implementation in compliance with section 13242 of the Water Code. Contrary to the comment, the Porter-Cologne Water Quality Control Act (Cal. Wat. Code §§13000 et seq.) states that the state and regional boards are the principal state agencies with primary responsibility for the coordination and control of water quality and are provided the authority to require actions and to adopt permits and orders to protect water quality. The TMDL is incorporated into the Basin Plan to provide the plan to address water quality impairments. The specific actions to implement the plan may be included in the regulatory mechanism(s) to be developed in the future under the authority of the Water Code.</p> <p>See Response to Comment 5.1.</p>

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			<p>Consistent with state and federal law, the TMDL properly assigns anchorages, the County, and the boat owners as the entities to take appropriate actions to achieve the load allocations. The Board agrees that the identification of parties in the TMDL does not assign liability for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.</p> <p>Anchorages were identified as a source because they congregate boats, thus contributing to the elevated concentrations of dissolved copper in the water column, and they have the means to control discharge of copper from antifouling paints in the Harbor. When the Los Angeles Water Board develops the regulatory mechanism(s) to implement this TMDL, it will establish requirements specific to each entity or group of individuals to which the pollutant allocations apply. These requirements will take into consideration the ability of each entity or group of individuals to control the discharge of the pollutant. Potential means for anchorages to implement in the TMDL include, but are not limited to:</p> <ul style="list-style-type: none"> • Require evidence of training in BMPs by hull cleaners working within the anchorages • Educate boaters regarding hull cleaning BMPs, alternative antifouling paints and grants available for paint conversions • Monitor for and prohibit visible paint plumes from hull cleaning activities • Provide incentives to boat owners who use alternative non-toxic hull coatings in slip sublease agreements (e.g. “wait list” priority) • Require certification of use of low leaching or non-toxic coatings as part of sublease application process or renewal process • Monitor and report on the types of antifouling paints

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			<p>used within the anchorage Marinas and yacht clubs in San Diego are implementing many of the actions listed above in effort to achieve the Shelter Island Yacht Basin TMDL.</p>
5.1	Alston & Bird	<p>Our chief concern stems from the Amendment’s language that names anchorages and boat owners as “responsible parties” for the load allocations for discharges of dissolved copper. <i>See</i> Final Basin Plan Amendment.</p> <p>This language should not be in the TMDL Amendment. “A TMDL does not, by itself, prohibit any conduct or require any actions.” <i>City of Arcadia v. State Water Res. Control Bd.</i> (2006) 135 Cal.App.4th 1392, 1414 [38 Cal.Rptr.3rd 373]. In fact, the California Third District Court of Appeal, the Ninth Circuit, and the United States Environmental Protection Agency have all insisted that a TMDL is merely a technical document designed to inform further administrative actions. <i>See, e.g., Pronsolino v. Nastri</i>, (9th Cir. 2002) 291 F.3d 1123, 1129 (“TMDLs are primarily informational tools.”); <i>City of Arcadia, supra</i>, 135 Cal.App.4th at page 1414; 40 C.F.R. § 130.2(i). Thus, the TMDL Amendment, itself, is not the appropriate place for the Regional Board to assign liability for discharges. For these reasons, we request that the State Board direct the removal of all language in the TMDL that assigns responsibility and allocates liability to individual anchorages and boat owners.</p>	<p><i>Response from original document:</i> The State Water Board agrees that a TMDL does not, by itself, prohibit any conduct, require any action, or otherwise impose legal liability on dischargers. The State Water Board also agrees that TMDLs are primarily informational tools. An important element of the information provided, is identification of those parties who have legal authority or control over sources of the pollutant of concern. These parties may be subject to future regulatory action if necessary to limit discharges of the pollutant and achieve water quality standards. The identified parties who control sources of the pollutant are identified “responsible parties” in this and other TMDLs throughout the State.</p> <p><i>Comment addendum:</i> TMDLs are not self-implementing and must be incorporated into regulatory mechanisms. This two-pronged approach includes planning (the TMDL) and implementation (regulatory mechanism) phases led by the Water Boards. The public process for developing the TMDL, which outlines the plan for achieving water quality standards, and the public process for developing the regulatory mechanism for implementing the TMDL both include opportunity for stakeholder participation. An additional opportunity for stakeholder participation is provided for in this TMDL, which states that “should a voluntary program developed by the responsible parties and approved by the Executive Officer within two years of the effective date of the TMDL, such a program may be reflected in the regulatory mechanism.”</p> <p>The TMDL does not, in itself, impose an enforceable legal</p>

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			<p>liability. It is only after the provisions of the TMDL are incorporated into a permit or other regulatory mechanism that those provisions may be directly enforced. The additional step of adopting a regulatory mechanism is a separate process from adoption of the TMDL, is subject to notice and comment by regulated parties, and may be petitioned to the State Water Board for review.</p> <p>The intent of the TMDL is to identify the source of the impairment, e.g., the load allocation or waste load allocation, and identify the parties assigned to implement the actions necessary to address the impairment. Consistent with the Clean Water Act and the Water Code, the Marina del Rey Harbor TMDL identifies the sources of copper impairment (in part due to paint on boat hulls) and identifies the parties responsible for implementing the actions (individuals and private and public entities). The naming of individuals as responsible for implementing the actions to achieve the load allocations in this TMDL is not unprecedented. Individuals are identified in other TMDLs as sources and responsible parties, as the term is meant in the State's TMDL Program.</p> <ul style="list-style-type: none"> • San Diego Water Board's Shelter Island Yacht Basin TMDL names individual boat owners, marina owners and operators, the Port, and underwater cleaners operating at Shelter Island; • San Francisco Bay Water Board's Richardson Bay Pathogens TMDL names boat owners and marina owners; • Central Valley Water Board's Shasta River Dissolved Oxygen and Temperature TMDL names owners of ranch lands and operators who oversee and manage grazing activities; • Los Angeles Water Board's Ventura River Algae TMDL names horse and livestock facilities, which includes owners and operators; • Central Coast Water Board's Santa Maria Watershed

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			<p>Bacteria TMDL assigns load allocations to “Responsible Parties” to “Owners/operators of land used for/containing domestic animals/livestock”;</p> <ul style="list-style-type: none"> • Central Valley Water Board’s Cache Creek Mercury TMDL identifies “private landowners” as implementation parties; • North Coast Water Board’s Garcia River Sediment TMDL names individual land owners; • Los Angeles Water Board’s Malibu Bacteria TMDL names individual onsite wastewater treatment system (OWTS) owners responsible for their discharge and names the municipality in which the OWTS are located as responsible for monitoring and determining high risk areas; and • Multiple TMDLs name agricultural landowners and operators.