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VIA U.S. MAIL AND E-MAIL

Selica Potter, Acting Clerk to the Board
State Water Resources Control Board
1001 I St.
Sacramento, CA 95814

Dear Ms. Potter

Comments Regarding The Chollas Creek Metals TMDL

INTRODUCTION

Following are the City of San Diego's comments in response to the State Board's December 1, 2005 "Notice of Opportunity to Comment" [Notice] (received by this office on December 14, 2005).

The City submits these comments because the Chollas Creek metals TMDL presents the rare situation where there are significant collateral environmental consequences that result from activities designed to otherwise improve the environment. Thus, while the City is committed to improving water quality in and around the City, achieving that goal in an urbanized area requires the City to balance those efforts against the need to ensure adequate housing exists, particularly for low-income residents; that historical and other cultural resources are protected; that the aesthetic values are preserved; and that development occurs in a manner that is consistent with the land use plans developed by the City.

As will be shown in detail below, in the case of the Chollas Creek metals TMDL the fact that water quality would compete with these other important resources was obscured from the Regional Board members because the draft environmental analysis contained no discussion of the impacts attendant to constructing pollution controls, despite an unambiguous obligation to do so. Only when Regional Board staff responded to the City's initial comments on the deficient draft analysis did it become evident that significant construction could occur in complying with the TMDL, and that one of the reasonably foreseeable impacts of complying with the TMDL would be the impacts from constructing detention basins. This significant new information was

never subjected to public review and comment, preventing the Regional Board members from making a fully informed decision – thwarting the key purposes of CEQA.

SCOPE OF REVIEW AND COMMENTS

The Notice solicits comments on the following four issues¹:

- Identification of changes or alterations that the San Diego Water Board made to the project that you believe warranted recirculation of the substitute environmental documents and an explanation as to why the alterations required recirculation;
- Identification of any reasonably foreseeable means of compliance with the project as altered, which were not already considered by the San Diego Water Board in its substitute environmental documents;
- Identification of any not previously considered significant adverse environmental impacts attendant with those means of compliance; and
- Identification of any specific “substantial evidence” supporting the existence of any such significant adverse environmental impacts (see Title 14, CCR section 15384). The commenter should submit copies of such evidence if it is not already contained in the San Diego Water Board’s administrative record.

It appears that requested information is limited in focus to “changes made to the project” and the consequences that flow from those “changes made to the project.” While changes to the project after the draft environmental analysis constitute “significant new information” that requires recirculation, it is not the limit of significant new information. CEQA Guidelines section 15088.5(a) states that “significant new information” includes:

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
- (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project’s proponents decline to adopt it.

¹ The City learned at the last minute that this notice also sought written comments on non-CEQA issues. While the notice did not clearly express such an intention, the City has attempted to capture all comments on this rulemaking in this document. The City will augment these comments at the Board hearing as necessary.

(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043).

Thus, to the extent that the notice focuses only on changes to the project, the notice improperly limits the scope of significant new information. As will be discussed in detail below, significant new information exists because (1) changes were made to the project after circulation of the draft environmental analysis; (2) the draft environmental analysis was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded; and, (3) the City has identified new, significant impacts that would result from the project that were not included in the draft environmental analysis.

The City also notes that the relationship between the State Board and the Regional Board with respect to the finality of environmental determinations is not well-defined. Water Code section 13245 states that Basin Plan amendments (such as TMDLs) do not have the force and effect of law until the State Board approves the amendment. Under CEQA and the State Board/Regional Board's CEQA regulations, a notice of decision regarding the environmental determination is to be filed with the Secretary of Resources. CEQA Guidelines § 15252(b); 23 CCR § 3720. In this case, there is no record that such a document has been filed with the Secretary of Resources regarding the Chollas Creek metals TMDL. See Exhibit One. Thus, the administrative record for such a determination would still be open, the City's comments on the inadequacy of the environmental analysis – detailed below – would have to be considered by the State Board prior to the State Board approving the Basin Plan amendment, and the State Board would have to correct the deficiencies.² See Public Resources Code § 21177(a) and *Galante Vineyards v. Monterey Peninsula Water Management District*, 60 Cal.App.4th 1109 (1997) (Comments on deficient environmental analysis are timely if the comments are submitted before the close of the public hearing on the project before the issuance of the notice of determination). After revisions are made to correct the deficiencies noted below, recirculation would be required.

COMMENTS REGARDING THE ENVIRONMENTAL ANALYSIS

A. CEQA Principles Applicable to Certified Regulatory Programs

The San Diego Regional Water Quality Control Board is a "certified regulatory program" under the California Environmental Quality Act. See Cal. Pub. Res. Code § 21080.5, 14 C.C.R. § 15251(g). The main difference between an agency with a certified regulatory program and other

² The State Board could simply remand the matter back to the Regional Board for correction and recirculation for public comment. Regardless of the procedure, additional analysis and another public comment period would be required before the Basin Plan amendment would have the force and effect of law.

agencies is that a certified agency is exempt from Chapters 3 and 4 of CEQA, but *only* chapters 3 and 4. See Cal. Pub. Res. Code § 21080.5(c); 14 C.C.R. § 15250(b).³ State agencies must comply with those provisions of CEQA that lie outside of Chapters 3 and 4. See *Sierra Club v. State Board of Forestry*, 7 Cal.4th 1215 (1994) (State Board of Forestry must comply with PRC § 21160 authorizing permitting agencies to obtain information necessary to assess environmental impacts of permits). Because all of the deficiencies in the Regional Board's analysis are rooted in requirements that lie outside Chapters 3 and 4 of CEQA, the fact that the Regional Board is operating under its functionally equivalent program is irrelevant.

B. The Regional Board Violated CEQA By Failing to Recirculate the Final Environmental Analysis After Making Significant Revisions To A Woefully Inadequate Draft Document

1. The Regional Board Circulated a Fundamentally Inadequate Draft Environmental Analysis

If the State Board believes that the administrative record regarding CEQA compliance closed when the public comment period on the Chollas Creek metals TMDL Technical Report closed in June 2005, the Regional Board nevertheless violated CEQA by not recirculating the environmental analysis.

CEQA requires an environmental analysis to be recirculated when there have been substantial revisions to the analysis prior to certification. Cal. Pub. Res. § 21092.1; 14 C.C.R. §§15073.5 and 15088.5. A substantial revision includes the identification of new, avoidable significant effects and the addition of new measures or revisions to the project to reduce the impacts below significance. 14 C.C.R. §§ 15073.5(b)(1) and 15088.5(a)(1) – (3). In addition, recirculation is required when the draft analysis is so deficient meaningful public review and comment was precluded. 14 C.C.R. § 15088.5(b)(4).

Here, the draft environmental analysis was so inadequate meaningful public review and comment was precluded. The Technical Report identified the construction of detention basins or retention ponds as reasonably foreseeable methods of compliance, but the draft environmental analysis contained no discussion of the effects of *constructing* such controls. See Appendix I "Public Review Draft 20 March 2005" and Technical Report "Public Review Draft," pp. 76 – 83. Thus, the environmental analysis plainly did not consider the reasonably foreseeable environmental impacts of the methods of compliance, as required by Public Resources Code section 21159. One example of the fundamentally inadequate analysis is the Regional Board's

³ Chapter 3, entitled "State Agencies Board and Commissions" contains the requirement that State agencies prepare an EIR if the project may have a significant effect. Cal. Pub. Res. § 21100) and specifies the procedures to be followed in preparing an EIR See Cal. Pub. Res. §§ 21100.1, 21101, 21104, and 21108). Chapter 4 imposes similar requirements on local agencies. See Cal. Pub. Res. § 21150.

contention that “identifying the specific projects that the dischargers might implement is overly speculative at this time.” Technical Report at p. 80. This is inconsistent with the requirements of Public Resources Code section 21159(c) which requires an analysis of “a reasonable range of environmental, economic, and technical factors, population and geographic areas, *and specific sites.*”

2. The Regional Board Violated CEQA By Adding Significant New Information Regarding Impacts and Mitigation Measures After Releasing the Draft Environmental Analysis

Regional Board staff, ostensibly recognizing that the draft environmental analysis was fundamentally inadequate, then altered the environmental analysis significantly after the close of the public comment period. First, the environmental conclusion regarding the overall impact of the TDML project was changed from “no significant effect” to “less than significant effect due to mitigation measures.” Compare Appendix I “Public Review Draft 20 March 2005” with Appendix I. The checklist presented to the Regional Board, and not subjected to public review and comment, was significantly revised from the draft made available to the public to reflect the following changes:

- The revised checklist stated that the project could substantially degrade the existing visual character of the site, unless mitigated. This impact was initially shown as “no impact.”
- The revised checklist stated that the project could expose sensitive receptors to substantial pollutant concentrations, unless mitigated. This impact was initially shown as “no impact.”
- The revised checklist stated that the project could result in a substantial temporary or periodic increase in ambient noise levels, unless mitigated. This impact was initially shown as “no impact.”

The environmental analysis was also changed to reflect these new impacts. The analysis also added a discussion of mitigation measures to avoid each of these three impacts. Compare Appendix I “Public Review Draft 20 March 2005” with Appendix I.

These changes fall clearly into the category of the “identification of new, avoidable significant impacts,” and “the addition of mitigation measures to reduce the effect to insignificant.” Thus, these changes fall squarely within the requirement for recirculation under CEQA Guidelines sections 15073.5(b)(1) and 15088.5(a)(1); however, this revised analysis was never subjected to public review because these changes were released to the public on June 21, 2005 – after the public comment period had closed – and the Regional Board did not permit public comment at the June 29, 2005 hearing on this matter. Thus, the record is clear that the

revised environmental analysis was never subjected to public review, violating CEQA Guidelines section 15088.5.

3. The Regional Board Changes to the Project Constitute New Information That Requires Re-Circulation

The draft environmental analysis and draft Technical Report did not include specificity regarding the location of structural BMPs works, presumably because there were a variety of categories of locations where BMPs could have been built. After the draft environmental analysis was circulated for public review and the public comment period closed, Regional Board staff added an interpretation as to where structural BMPs to implement the TMDL could be built. The change effectively prohibits the construction of any BMPs within "Waters of the U.S. or State." This change to the project constitutes significant new information because it served to severely restrict the potential location of BMPs to a point where it is foreseeable that additional impacts from the project would occur in parts of the watershed.

The effect of this failure to permit meaningful public comment violated one of the basic tenants of CEQA – public participation. *Mountain Lion Coalition v. Fish and Game Commission*, 214 Cal.App.3d 1043 (1989)(Final functional equivalent document must be circulated for public review). In *Mountain Lion Coalition*, the Court of Appeal, in no uncertain terms, discussed the importance of public review as applied to functionally equivalent documents. The Court stated:

The requirement of public review has been called "the strongest assurance of the adequacy of the EIR [(environmental impact report)]." [citations]

We do not reach the question of whether the final [Environmental Impact Document ("EID")], which was not considered by the trial court, clears up some of the deficiencies of the draft. The cumulative impact analysis contained in the final EID has never been subjected to public review and criticism. If we were to allow the deficient analysis in the draft EID to be bolstered by a document that was never circulated for public comment ... we would be subverting the important public purposes of CEQA. Only at the stage when the draft EID is circulated can the public and outside agencies have the opportunity to analyze a proposal and submit comment. No such right exists upon issuance of a final EID unless the project is substantially modified or new information becomes available. [citations] To evaluate the draft EID in conjunction with the final EID in this case would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more

detailed analysis to the final EID that is insulated from public review.

Mountain Lion Foundation, 214 Cal.App.3d at 1051-1052 (Internal quotations and citations omitted).

The same result occurred here. Regional Board staff circulated an environmental analysis that was obviously inadequate based on the wholesale revision to the environmental checklist and discussion in the Technical Report. By failing to submit the revised analysis to public review, the important environmental issues related to the construction of BMPs and the resultant impact on housing, historical and cultural resources, aesthetics, and land uses were deferred and insulated from public review.

B. The Environmental Analysis As Revised Is Inadequate

Because the Regional Board released a fundamentally inadequate draft analysis and failed to recirculate the revised environmental analysis, numerous impacts associated with the reasonably foreseeable methods of compliance were never presented to the Regional Board. Thus, the environmental analysis, even as revised, is still inadequate as an informative document.

1. An Inadequate Project Description and Examination of Compliance Alternatives Set the Stage for Failure

A critical component of an EIR is the environmental setting. In the Chollas Creek watershed, virtually all of the tributaries to Chollas Creek: (1) are surrounded by developed areas within which storm water is conveyed by storm drains to outfalls at canyon rims; (2) lie within canyons and contain "waters" which originate at the end of the storm drains; and (3) are ephemeral and dominated by urban runoff during all but infrequent precipitation. See Technical Report at 23 (describing the percentage of total acreage devoted to various land uses) and Exhibit 2.

The project description is also a critical component of an adequate environmental document. See *Santiago County Water District v. County of Orange*, 118 Cal.App.3d 818 (1981)(EIR inadequate because of failure to discuss construction of water delivery facilities in project description). The project description in this case is influenced by Public Resources Code section 21159, which provides the *minimum* requirements for an environmental analysis of a rule or regulation that requires the installation of pollution controls.⁴ That statute requires certain state agencies to analyze the following:

⁴ The Notice and the Technical Document suggest that the areas of analysis listed in Public Resources Code section 21159 are the only issues that need be examined. However, the statute clearly states that these topics are the minimum requirements for an adequate environmental

- (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance.
- (2) An analysis of reasonably foreseeable feasible mitigation measures.
- (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation.

Public Resources Code section 21159(a)

Thus, the methods of compliance are part of the project description because the impacts, mitigation measures, and alternatives to the methods of compliance must be analyzed.

The project description in this case contained only a cursory discussion of the methods of compliance. The Technical Report for the TMDL states that the required reduction in pollutants may be achieved by education, street sweeping, elimination of illicit discharges, inspections, buffer strips, sand filters, and diversion structures, in addition to bioretention and detention basins. The City is aware of no data that suggests that the pollutant reductions required by the TMDL can be achieved by anything other than: (1) diversion; (2) detention and infiltration; or, (3) flow equalization and treatment (by flocculation or filtration such as reverse osmosis). Two of these means require detention facilities. In addition, the size of an infiltration works is based on soil drainage characteristics.

Having identified the types of facilities that will be constructed to achieve compliance, a lead agency can make some general assumptions regarding where these works will be located. It is reasonably foreseeable that detention basins will be built immediately prior to the receiving waters because various other factors further restrict the location of such BMPs, including:

- a. The "tributary rule," which subjects all receiving waters within the Chollas Creek watershed to the TMDL;
- b. Topography, which prevents BMP works from being built on canyon walls;
- c. The prohibition on building structural BMPs within waters of the United States or the State, which precludes the City's ability to treat or divert contaminated water below these outfalls (e.g., in a basin constructed parallel to an existing channel).
- d. The structural BMPs need to capture and treat a very high percentage of storm water due to the large level of loading reduction required by the TMDL; i.e., it is not reasonable to expect that works located far from the storm drain outfalls would, by themselves, meet the

analysis; other impacts must be identified if the impacts are a direct result or a reasonably foreseeable indirect result of the project.

TMDL because significant amounts of storm water run into the conveyance system immediately above the outfalls.

e. Locating works some distance from the receiving waters would be infeasible because it would be necessary to construct a new, separate conveyance system to prevent the treated water from mixing with untreated water.

The project description in the revised analysis is devoid of any discussion or analysis of these issues, and thus is inadequate because the failure to include this information prevented a meaningful analysis of the impacts of compliance.

Having determined the reasonably foreseeable means of compliance and the limitations on the location of the necessary treatment works, the other missing component of an adequate project description is the number of control devices that may be required to achieve compliance. Because the TMDL defines the maximum loads of metals that may flow into Chollas Creek without regard to the size of a rain event, loading must be controlled in all storm events.⁵ Accordingly, certain assumptions must be made with respect to the size of the storm in order to design structural BMPs that will provide adequate contaminant reduction. Lacking a "design storm," or information on soil infiltration rates, the City has used the Regional Board's assumption of treating storm water associated with average annual rainfall of 12.6 inches to calculate the volume of storm water runoff that must be captured – 700 acres of detention capacity will be needed to comply with the TMDL via infiltration, or 240 acres of equalization capacity will be needed to treat via flocculation/reverse osmosis filtration. See Exhibit 3 and Karen Henry's analysis submitted to the Regional Board. Additional land will also be needed to have stable manufactured slopes; the City estimates that each acre of detention capacity will require 1.7 acres of usable land. See Exhibit 3. The City also estimates that there are 816 storm drain outfalls from the City of San Diego (i.e., not within Port District-controlled land or within the cities of La Mesa or Lemon Grove) into the receiving waters of the Chollas Creek watershed. Thus, to construct the required basins the City will need to acquire and develop approximately 1,387 acres of the 16,273 total acres in the Chollas Creek watershed if infiltration is used and 480 acres if flocculation or filtration is used.

Based on the above, it is reasonably foreseeable that the TMDL implementation could require the City to build a large number of relatively smaller sized works in areas immediately behind a geologically-safe setback above all existing storm drain outfalls which have receiving waters immediately below them. These works could occupy 1,387 acres – almost 10 percent of the 16,273 total acres in the watershed.⁶

⁵ In fact, data shows that the loading of these metals increases with the size and duration of storms.

⁶ The analysis of the necessary components of the detention works was prepared by Karen Henry, the former Deputy Director of the Storm Water Pollution Prevention Program and a licensed engineer, and David Pohl of Weston Solutions, Inc. Mr. Pohl holds a PhD in geo-

2. The Revised Environmental Analysis Still Does Not Analyze the All Impacts Associated With Construction of Structural BMPs

Only when a meaningful discussion of the environmental setting is set forth and a thorough project description has been prepared can an adequate analysis of impacts and mitigation measures be prepared. *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185 (1977).

The City notes, as it did in its previous comment letter to the Regional Board, that lead agencies cannot hide behind an inadequate analysis and leave it to the public to produce the necessary substantial evidence regarding adverse impacts. *Gentry v. City of Murietta*, 36 Cal.App.4th 1359, 1379 (1995).

The Regional Board's contention that the environmental analysis constitutes the first level "tier" of environmental documents that will be prepared to implement the TMDL does not change the expectation that analysis will be performed and impacts discussed. "Tiering does not excuse the lead agency from adequately analyzing the reasonably foreseeable significant environmental effect for the project and does not justify deferring such analysis to a later tier EIR or negative declaration." 14 C.C.R. Section 15152(b).

The Regional Board has also stated that some analysis was not conducted because the lead agency need not speculate. As the City noted in its earlier comment letter, to claim that an impact is speculative and terminate a discussion requires analysis – it does not excuse a failure to investigate and analyze. See 14 C.C.R. Section 15145. The record does not support a finding that the Regional Board has conducted this investigation.

Nevertheless, the City submits the following analysis of environmental impacts. This analysis was prepared by Chris Zirkle, the City's Deputy Director of the Storm Water Pollution Prevention Program, and former Assistant Deputy Director in charge of the Environmental Analysis Section (the department within the City that prepares City CEQA analyses. Accordingly, the analysis included in this comment constitutes substantial evidence. See 14 C.C.R. Section 15384(b) (substantial evidence includes expert opinion based on fact) and *Gentry*, supra at 1379 – 1380 (Statements by agency staff with expertise constitutes substantial evidence.)

environmental engineering (a specialty in civil engineering). Accordingly, the analysis included in this comment constitutes substantial evidence. See 14 C.C.R. Section 15384(b) (substantial evidence includes expert opinion based on fact) and *Gentry*, supra at 1379 – 1380 (Statements by agency staff with expertise constitutes substantial evidence.)

Here, while the Regional Board's environmental analysis foresees the need to construct works, because no analysis was done on the required number of treatment works, the analysis does not discuss the need for the City to acquire and demolish hundreds of acres of residential and industrial uses in order to construct the works. This is inconsistent with the only listed impact in the draft environmental analysis, where Regional Board staff discusses the impacts from operating a works that detains water – the works has to be constructed before it can be operated. Because the Regional Board did not analyze this impact, the discussion that follows constitutes the only substantial evidence in the record regarding the potential impacts and therefore the listed impacts will be significant, or have not been adequately address in the Regional Board's environmental analysis. Hence, the Regional Board prejudicially abused its discretion because it failed to proceed in the manner required by law.

a. Aesthetics –

The Regional Board's description of BMPs indicates that: "BMPs should be designed when feasible to maintain or create habitat, recreational areas and green spaces". Given the reasonably foreseeable size and location of the BMPs described above, the works would be too small and subject to too many edge effects to create sustainable habitat. Moreover, regular maintenance would require periodic removal of plant growth and sediments. Topographically, it is reasonable to assume that basins associated with the works will need to be excavated and that significant portions of the basins would consist of manufactured slopes, limiting recreational opportunities. Thus, the conclusion that the listed mitigation measures would reduce aesthetic impacts to below a level of significance is not supported by substantial evidence.

b. Biological Resources –

Because aerial deposition is a reasonably foreseeable contributor to the metals loading in Chollas Creek, upland impacts may occur as a result of the need to intercept sheet flow runoff from canyon walls for treatment before these flows enter receiving waters. These interceptors would logically be located near and above the receiving waters - in areas where many canyons support native, upland vegetation and sensitive species. Impacts would result not only from construction of the diversions, but also from construction of treatment works and the associated pumps that would be necessary to put the treated water back into the receiving waters at a location near its diversion point. As the Regional Board's analysis is inadequate because it does not analyze all impacts, and because the listed mitigation measures do not reduce all impacts below a level of significance, the environmental analysis is inadequate.

c. Cultural Resources –

The Chollas Creek watershed is located in a part of San Diego that is designated as "Urbanized" by the City's Progress Guide and General Plan because it is fully developed. Many of the structures within the watershed were built prior to 1960, making them at least 45 years old

and thus potentially significant historic resources under the criteria in 14 C.C.R. section 15064.5(a)(3)(C). Thus, with regard to checklist item V(a), the loss of an undetermined number of significant historic structures should be considered a potentially significant effect.

With regard to checklist item V(b), it is generally accepted by land use agencies that because many older structures were built prior to or without the benefit of heavy earth-moving equipment, the soils underneath older structures have the potential to contain potentially significant archaeological resources. Therefore, the excavation of soils under potentially significant historic resources should be considered to have a potentially significant effect on archaeological resources.

Similarly, many formational materials within the Chollas watershed are fossiliferous. Therefore, given that excavation of detention works could penetrate through surficial soils and into formational materials, the response to checklist item V(c) should indicate that this impact is potentially significant.⁷ Because the environmental analysis does not discuss impacts to these resources or propose mitigation measures, the environmental analysis is inadequate.

d. Geology and Soils –

Excavating infiltration works in the vicinity of canyon rims has the potential to make canyon walls unstable (only basins serving an equalization purpose could be lined). Increasing infiltration increases instability even if the slope in question is already engineered. For slopes that aren't engineered (and this is the case in older neighborhoods – see above), this instability can lead to failure. Increasing the integrity of slopes downhill of detention works could also result in increased impacts to biological resources or, if retaining walls are used, aesthetic impacts. Therefore, as a result of the project change, checklist item V(c) should indicate that the geology impact from the project is potentially significant.

For purposes of revising the CEQA analysis, we suggest that the Board consider that works which involve any level of infiltration be setback from a canyon rim such that a 45 degree line drawn from the bottom of the basin nearest the canyon rim does not intersect the canyon wall.

⁷ The “Kennedy Maps” are maps of geologic formations that may contain specific paleontological resources, and are specifically used by planning and land use agencies to identify the potential for significant paleontological resources. Such resources occur within the City of San Diego, and therefore could occur within the Chollas Creek watershed. *See* Geology of the La Jolla, Del Mar, La Mesa, Poway, Point Loma, and Southwest Quarter of the Escondido Quadrangles, San Diego County, California, by Michael P. Kennedy, 1975; and Geology of National City, Imperial Beach, and Otay Mesa Quadrangles, Southern San Diego Metropolitan Area, California, by Michael P. Kennedy and Siang S. Tan, 1977.

e. Land Use and Planning –

Checklist Item IX(b) indicates that the project would not conflict with any applicable land use plan, policy or regulation of an agency with jurisdiction over the project adopted for purposes of avoiding or mitigating and environmental effect.” This conclusion is not supported by substantial evidence; substantial evidence supports the opposite conclusion:

Housing

The Housing Element of the City’s adopted General Plan and the position taken by the City Council when declaring a “Housing State of Emergency” both have as a basic objective an increase in the housing supply. According to Appendix E of the Technical Report, low and high density residential uses account for almost 64% of the land uses within the Chollas Creek Watershed. On average, this means that 64% of the 480-1400 acres of land that would be occupied by treatment works (307 to 896 acres) is currently developed with homes. Assuming an average of 10 dwelling units per acre (4,000 square foot lots are common in the watershed), this equates to the loss of 3,070 to 8,960 units. Removal of this number existing dwelling units would decrease the housing supply and is thus in conflict with adopted City policy.

Industrial Land

The Industrial Element of the City’s adopted General Plan states that there is a serious shortage of large parcels suitable for industrial development exists in the City. Related goals and recommendations include:

“Insure that industrial land needs as required for a balanced economy and balanced land use are met consistent with environmental considerations” (p.286)

””Protect a reserve of manufacturing lands from encroachment by non-manufacturing uses.” (p. 286)

“As mentioned earlier, in allocating additional land for industrial use it is imperative that sufficient acreage be designated to meet projected needs so that the existing market can operate effectively.” (p.287)

The general theme of the existing Industrial element is precisely this shortage of industrial land, high industrial and prices, etc. and how the economy is negatively affected by the non-industrial use of industrial land. The supply increased only slightly since 1979 and has not increased since. In fact it is now at crisis level proportions.

According to Appendix E of Region 9’s Technical Report, low and high density residential uses account for 3.12% of the land uses within the Chollas Creek Watershed. On average, this means that 3.12% of the 480-1400 acres of land that would be occupied by treatment works (15 to 43.7 acres) is currently developed with industrial uses.

The removal of housing and industrial acreage from the City's stock in order to build storm water treatment works required to comply with the TMDL would conflict with the City's General Plan and its declared Housing State of Emergency. Therefore, as a result of the project change, checklist item IX(b) should indicate that the Land Use and Planning impact from the project is potentially significant with respect to the loss of residential and industrial lands. The environmental analysis is inadequate because it failed to analyze this impact.

f. Population and Housing –

Checklist item XII(c) indicates that there would be no displacement of substantial numbers of people, necessitating the construction of replacement housing elsewhere. The number of dwellings that would be lost as a result of the project change (3,070 to 8,960) should be considered substantial. According to U.S. Census Data, the average dwelling unit in San Diego houses 2.6 people. The loss of 3,070 to 8,960 dwelling units would therefore result in the displacement of 7,982 to 23,296 people. This number of dwellings that would be lost as a result of the project change should be considered substantial. Therefore, as a result of the project change, checklist items XII (b) and XII (c) should indicate that the Population and Housing impact from the project is potentially significant.

g. Utilities and Service Systems –

Checklist item XVI (c) indicates that the project will not require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects. This is directly contradicted by the Technical Report, and given that the project change causes the additional significant impacts cited above, there is even more reason why this item should indicate that the Utilities and Service Systems impact from the project is potentially significant.

Given that the project change will result in previously undisclosed significant effects, CEQA compliance to date has deprived interested parties the opportunity to provide meaningful comment. In particular, we suggest that opportunity to comment be provided to historic preservationists, housing advocates, industrial developers, and those interested in public policy as it pertains to preservation of San Diego's shrinking supply of industrial lands.

h. Other Considerations

Cumulative Impacts

Functionally equivalent documents must contain an analysis of the cumulative impacts of the project. Environmental Protection Information Center, Inc. v. Johnson, 170 Cal.App.3d 604, 625 (1985). The environmental analysis is completely lacking in any discussion of the cumulative impacts of the TMDL. This is a prejudicial abuse of discretion as a matter of law. *Id.*

CEQA Alternatives

Given that the above-noted significant effects appear to be unmitigable, CEQA requires the evaluation of alternatives that would lessen the impacts. One such alternative should be provided to set the TMDL to a level above the California Toxics Rule. This alternative may still result in Basin Plan compliance; however, the reduced need for BMP acreage would preserve more existing land uses, effectively mitigating (partially) the significant impacts to existing land uses. Alternatively, the environmental analysis should describe why such an alternative will not achieve the basic purposes of the project.

Economic analysis

Public Resources Code section 21159(c) requires lead agencies subject to that provision to consider "a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites." The diversion BMP noted in the Regional Board's economic impact vastly underestimates the cost of this BMP by estimating only a \$1 million cost associated with building a diversion structure. Other costs that would be required to implement this BMP would be upsizing of sewer pipe capacity between the diversion and the Point Loma Wastewater Treatment Plant because existing pipes are not large enough to convey storm water flows (and the metals are seen primarily only in storm water flows). Given that sewers are generally not over-sized so that they can be "self-cleaning", a parallel conveyance system would be required. At the end of this conveyance, the Point Loma plant itself would need to be expanded to handle storm water flows. Region 9's CEQA analysis includes as mitigation a requirement to reintroduce water to drainages to avoid "drying out existing wetlands. A reintroduction of treated water to the headwaters of Waters of the US/state would also require construction of a new reclaimed or potable water distribution system. If reclaimed, rather than potable water were to be used, it is unknown whether Total Dissolved Solids levels in reclaimed water would adversely affect the beneficial uses in the receiving waters.

The Regional Board's economic analyses of Vegetated Swales, Vegetated Buffer Strips, Bioretention and Detention Basins/Retention Ponds are reportedly based on the 1999 EPA document entitled "Preliminary Data Summary of Urban Storm Water Best Management

Practices" [EPA-821-R-99-012, August 1999]. The Regional Board estimates came straight from Table 6-2 on page 6-4 of the EPA report but footnotes to that table indicates that the table estimates do not include land or all capital costs or regional adjustments to the costs. Footnote 1 on page 6-2 of the report states that "Land cost is the largest variable influencing overall BMP cost".

From EPA Table 6-2, the Regional Board estimated on page 101 of its Technical Report that the cost of treating storm water from a 50-acre residential area with a Retention Basin is \$100,000. The ramifications of this underestimation are demonstrated by the following example.

	Region 9 estimate	Corrected Estimate
Base Cost to serve 50-acre Residential Site (35% impervious)	\$100,000	\$100,000
Actual Capital Cost	no change	\$130,000 (see footnote 2 of EPA Table 6-2)
Adjustment for Regional Cost	no change	\$161,200 (see EPA Table 6-3)
Land Needed	not estimated	50 acres x 90% impervious x 2% = 0.9 ac. (from EPA Table 6-9)
Land Cost	no change	\$5,040,000 (9 houses @ \$560,000 each)

First, the cost is increased to \$130,000 to account for actual capital costs. Second, Table 6-3 of the EPA report indicates that an adjustment of 1.24 should be made to account for regional costs.

Table 6.2 of the EPA report assumes that 35% of a 50-acre residential site is impervious; However, in reality, the Chollas Creek watershed is closer to 90% impervious. Table 6-9 of the EPA report assumes that the land required for a Retention Basin is 2%-3% of the impervious area in the drainage. At 2%, the land required for a Retention Basin to serve 50 acres is 0.9 acres and the land required to serve the entire 16,000-acre watershed is $(16,000/50 \times 0.9) = 288$ acres.

The vast majority of land where Retention Basins could be built is developed. In the north-central portion of the watershed, the land is developed with single-family residences. Residential lot sizes in this area vary, but a reasonable estimate of the average is 4,000 square feet or, roughly 0.1 acre. For every 50 acres in this portion of the watershed, nine houses would need to be acquired, demolished, and the land developed with a Retention Basin. According to the San Diego Housing Commission, as of October, 2005, the average cost of an existing, detached house in San Diego is \$560,000. Therefore, the total cost of a Retention Basin to serve a 50-acre

area in the Chollas watershed is $(\$560,000 \times 9) + \$161,200$ or over \$5.2 million dollars, not \$100,000 and the total cost to build Retention Basins throughout the watershed is $(16,000/50 \times \$5,200,000) = \$1,664,000,000$.

We recommend that the State Board ask the Regional Board to re-evaluate the economic costs of complying with the TMDL by considering the cost of condemning and acquiring developed land in San Diego and by considering the full costs of a diversion BMP.

Clarification

The TMDL Technical report indicates that Freeways and "Commercial/Institutional" land uses are the biggest contributors to copper, lead, and zinc. "Light Industrial" and "Heavy Industrial" land uses are shown in the report to constitute 2.5-4.8% and 0.2-0.6% respectively of land area. However, attachment A to the Regional Board's resolution approving the TMDL states under the heading of "Source Analysis" that, "Modeling efforts point toward freeways and commercial/industrial land uses as the major contributors". Given the difference in location within the watershed of institutional and industrial land uses, impacts from constructing works to remediate storm water from these uses would differ.

COMMENTS ON OTHER ISSUES

A. Aerial Deposition of Pollutants

The project as adopted by the San Diego Regional Board also leads to one other concern of the City – that of how to deal with storm water which picks up contamination from open space canyon walls from aerial deposition and then sheet flows down the canyon walls and into receiving waters. The City notes that the State Board recently remanded the TMDL for metals adopted by the Los Angeles Regional Board back to the Regional Board for modifications because the Regional Board failed to consider evidence regarding aerial deposition as a major source of metals. See Resolutions 2005-0077 and 2005-0078. The City requests that, at a minimum, changes be made to the Chollas Creek metals TMDL similar to the changes made to the Los Angeles area TMDLs.⁸

⁸ The City also notes that the environmental impacts of capturing these pollutants were considered by the Regional Board. Absent works to capture these flows before they enter Chollas Creek or its tributaries, we are concerned that the levels in these flows by themselves could cause the TMDL to be exceeded downstream even if all other flows (flows that enter the storm drain collection system) are treated to meet the TMDL. Diverting these flows to works before they reach the receiving waters would result in significant impacts to the native upland habitats in the canyons adjacent to the waters, from both construction of dikes to divert the flow to a detention works and from construction of the detention works. Impacts from construction of

B. Modifications to Storm Water Conveyance Systems To Reduce Erosion

The determination that works are prohibited in "receiving waters" may also have one other consequence. Representatives of the environmental community in San Diego are concerned that the outfalls of existing storm drains at the top of canyon walls has led to erosion on canyon walls and at the base of the canyon walls. To address these concerns, in some situations the City may wish, in conjunction with constructing storm drain improvements including detention basins, to extend the storm drains to the canyon floors in order to minimize this erosion. While it could be expected that, in general, erosion on these canyon walls would decrease because of to-be-constructed upstream detention works, a prohibition on works in waters of the US/State would preclude the City from addressing this community concern.

C. Reasonableness of the Implementation Plan

As the City has explained in some detail, achieving compliance with the TMDL reductions will require considerable efforts, including the potential for condemnation. Based on the City's experience in constructing public improvement, a 10-year time schedule is not a reasonable time schedule to implement the necessary measures. The City and Caltrans all presented information showing that a reasonable timeline based on the necessary work in an urbanized area is between 17 and 22 years. Condemnation proceedings in and of themselves require significant time, much less bidding and constructing public works. Accordingly, the City requests the State Board to modify the TMDL implementation plan to impose a reasonable time schedule considering the efforts involved.

these works to the biological resources that exist near the floor of canyons will be significant and have not been identified in the Regional Board's CEQA document.

CONCLUSION

The City of San Diego is committed to improving water quality; however, the City as a responsible agency does not have the luxury to consider only water quality when it acts. CEQA requires *all* agencies to consider the consequences to all resource areas when making decisions. The information provided to the Regional Board and now to the State Board does not do an adequate job of informing the decision-makers of all the environmental consequences of this activity.

Given the requirements of the California Environmental Quality Act and the State Board's own regulations, and the structure of Water Code regarding basin plan amendments, the City contends that the administrative record for the Chollas Creek metals TMDL is still open. Notwithstanding that contention, the environmental analysis prepared by the Regional Board for the Chollas Creek metals TMDL is so fundamentally flawed that the analysis should have been recirculated. As detailed above, the analysis failed to consider the impacts of constructing the very treatment works the operation of which the Regional Board has analyzed, some of which would be significant.

Accordingly, the City requests that this action be remanded back to the Regional Board for reconsideration in light of an adequate environmental analysis. Alternatively, the City requests the State Board modify the Chollas Creek metals TMDL to be consistent with the recently adopted Los Angeles metals TMDLs in consideration of new evidence regarding the impact of aerial deposition on metal loading and the challenges to implementing controls in urbanized areas.

Best Regards

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