



County of San Diego

DEPARTMENT OF PUBLIC WORKS

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December 8, 2004

John Minan
California Regional Water Quality Control Board
San Diego Region 9
9174 Sky Park Court, Ste. 100
San Diego, CA 92123-4340

Dear Chairman Minan and Members of the Board:

Thank you for the opportunity to provide comments on the proposed Total Maximum Daily Load (TMDL) for Total Nitrogen and Phosphorous in Rainbow Creek. As your Board is aware, the County of San Diego has been actively involved in the development and refinement of many aspects of this document since its initial public release. We're certain you understand the importance of the support and participation of the County in successfully implementing this TMDL. That recognition was reflected in the direction you gave staff to continue working cooperatively with the County when the TMDL was initially brought to you for consideration in May 2002.

The County very much appreciates the fact that since May 2002 Regional Board staff has demonstrated a willingness to work with the County in moving this TMDL forward, but we are also extremely concerned that the proposed schedule of February 2005 adoption does not provide sufficient time to fully resolve many of the outstanding issues raised by the County and others. We are therefore requesting you not close the public testimony on this matter at the conclusion of your December 8, 2004 meeting, and that you direct staff to work within a more realistic schedule for final adoption. At this time, the County believes a goal of June 2005 adoption is reasonable given the many significant issues yet to be fully explored, and the likely need to re-initiate the public review process to ensure transparency and accountability. In considering this request, we would also like your Board to be aware of several relevant issues.

The County has a demonstrated commitment to improving water quality in the Rainbow Creek Watershed. Over the past year, we've committed significant additional resources

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to monitoring in Rainbow Creek. We were also recently awarded a Clean Water Act Section 319(h) grant that will help to accomplish many of the objectives of the TMDL, and expect to enter into an agreement with the State Water Resources Control Board within the next two months. This work will proceed upon execution of that contract, regardless of the timing of TMDL adoption.

The County has met with Regional Board staff several times since the November 17, 2004 release of the TMDL document. During those meetings, staff has listened to our concerns and indicated a willingness to consider the changes we believe are necessary for the County to support adoption of this TMDL. We are currently working on preparing proposed changes, but were unable to complete them prior to your December 8 meeting. We're committed to providing this input, and to continuing these meetings, but we need the time to do this. Regional Board staff has been working on this TMDL two and a half years since your May 2002 meeting. Had the County and other parties been actively involved in the TMDL development over that entire period, it might be reasonable to seek adoption in February 2005. However, during this period only the County was involved in discussions with your staff, and that interaction ended in October 2003. Between October 2003 and November 2004, significant changes were made to this TMDL; it's only appropriate the County and other parties have adequate time to ensure review of this document is sufficient to adequately consider those changes.

The County is also concerned about staff's proposed use of Water Code Section 13225(c) to require activities we consider to be beyond investigating or reporting on "technical factors involved in water quality control". In particular, the County maintains that Section 13225(c) cannot and should not be used to require submission by the County of a Nutrient Reduction Management Plan. Not only is this beyond the authority expressly or implicitly provided in that section, the County has consistently maintained it is willing to submit this plan voluntarily. In discussions with staff, we've also noted that, in accordance with Section 13225(c), Regional Board staff must demonstrate that the burden, including costs, of required investigations or reports bears a reasonable relationship to the need for them and the benefits to be obtained. Staff has indicated that this burden will be met not in the TMDL, but instead in the 13225(c) letter requiring such activities. This is problematic to the extent that detailed water quality investigations or monitoring are currently required within the TMDL document. We are hopeful this issue can be resolved with further discussion, but again this will require adequate time to enable us to explore and agree upon the legality of use of 13325(c) for this requirement.

As currently drafted, the TMDL relies heavily on the proposed use of a Management Agency Agreement (MAA) between the County and the Regional Board to define their respective roles and responsibilities in implementing this TMDL. While the County

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agrees in principle that a negotiated agreement such as a MAA may be a useful means of achieving this objective, we have not had sufficient time to fully consider the implications of such an agreement, or to discuss the specifics of what both agencies envision the document containing. It is the County's position that a draft MAA must be developed and reviewed by both agencies to ensure that we are in general agreement on content prior to the adoption of the TMDL. Further, the terms and conditions of such an agreement must be fully disclosed to affected stakeholders and regulated entities prior to its execution. We appreciate the willingness of your staff to work with the County in developing a draft, but must insist that we be given sufficient time to complete this process or the County may decline to enter in to the MAA.

We also believe that the TMDL must be amended to clarify that the County's compliance obligations will be defined in the MAA as agreed by both parties. As such, except for those obligations relating solely to the County's role as a municipal stormwater discharger, detailed descriptions of required County actions should be removed from the TMDL. As currently drafted, Section 9.6 of the TMDL contains numerous prescriptive requirements that should instead be discussed during the development of the MAA. It is important to recognize that, should the County and the Regional Board fail to come to agreement in the execution of a MAA, the Board's ability to properly exercise its legal authority in requiring specific County actions at a later date would not be affected.

To summarize, the County supports the development and adoption of a TMDL for Rainbow Creek that will gain the support and participation of those parties necessary to ensure its success. The Regional Board has requested the County take a leadership role in this endeavor that in some cases exceeds our strict legal obligations. The County's desire to provide that leadership is undiminished, but there are issues to be resolved before we can be comfortable in that role. We are encouraged by the willingness of staff to consider our input, and very much interested in continuing to explore the development of a Management Agency Agreement.

At this time, we are requesting your Board to direct staff to allow the time necessary to get this TMDL right. While everyone is understandably anxious to move this process forward, it should not be at the expense of an open and complete public input and review process. We believe that through continued discussion we can resolve the issues and concerns the County and others still have with the TMDL. However, we also believe that a more realistic schedule must be adopted to allow this to happen.

Thank you again for the opportunity to provide input into this process. We look forward to continued interaction with you and your staff. If you have any questions or need additional information, please contact me, at (858) 495-5133.

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Sincerely,

JON VAN RHYN, Water Quality Program Manager
Department of Public Works