



NEWPORT COAST
COMMUNITY ASSOCIATION

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February 26, 2002

Mr. Stan Martinson
Chief of the Division of Water Quality
State Water Resources Control Board
1001 I Street Sacramento, CA 95814
P.O. Box 100 Sacramento, CA 95812

DWG Received
Division of Water Quality

MAR 11 2002

Dear Mr. Martinson:

As members of the Newport Coast Community Association, we are writing in opposition to the State Water Resource Control Board's process for adding intermittent streams in the coastal foothills near our community to the 303(d) Impaired Waters list. We have included a letter detailing our specific concerns for your review. Our concerns include the following:

Due Process Failure

We believe due process has not been followed, and that it is not appropriate for these watersheds to have the beneficial uses assigned to them. Our residents thoughtfully purchased their homes because of the natural environment around Newport Coast, and we want to ensure the integrity of the Coastal Creeks. However, we are deeply concerned that the pending designation of the Coastal Creeks will place a severe burden on our residents without providing an improved quality of the watershed or coastal waters in the area. We also believe there is no basis for the Coastal Creeks to be placed on the list of impaired waters. There has been no local basin planning procedure whereby residents would have the opportunity to work with the Regional Board to assess the relevant and appropriate beneficial uses and water quality standards for the Coastal Creeks. This important step, which facilitates local participation, cannot simply be stopped. We strongly urge the State Board to refrain from taking action in Sacramento until the proper local procedures are followed as outlined by state and federal laws.

Photos Show No Recreational Uses Or Municipal Drinking Water

We have included photographs and a map showing where each of the images was taken. You will note that the pending designations of the Coastal Creeks are not reflective of reality. There are absolutely no recreational uses and the creeks clearly are not potential sources of municipal drinking water. In addition, the large areas of habitat that surround



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our community support significant wildlife that contributes to the level of bacteria found in the creeks. This final fact creates a "Catch 22", in that if all run off water were cleaned to absolute purity the creeks may still fail to meet the proposed standards due to the presence of the wildlife.

Newport Coast Development Plan

The Coastal Creeks are located in an area governed by the Newport Coast Development Plan, which was created under the close watch of the State and Regional Boards, the California Coastal Commission, the courts and the Orange County Board of Supervisors. In Heal the Bay's most recent beach water quality survey, "A" grades were received for the beaches below Los Trancos Canyon and Muddy Canyon.

Statewide Implications

We also are concerned that the State Board may not have adequately thought through the statewide implications of the proposed action. There are hundreds, maybe thousands, of small watersheds throughout the State with similar flows and bacteria concentrations that, like our Coastal Creeks, cannot meet the standards of the beneficial uses preserved for these creeks even in their natural condition. Placing these watersheds on the impaired waters list would create TMDL gridlock without any commensurate real-world benefit. The State Board's action therefore would set an imprudent precedent.

Please do not hesitate to call me if you have any questions or would like additional information regarding the attached letter.

Best regards,



Philip Bettencourt
President
Newport Coast Community Association

PB/tm

Enclosure

**DETAILED ANALYSIS
PREPARED FOR STATE WATER QUALITY CONTROL BOARD**

**APPEAL OF THE PROPOSED PLACEMENT OF COASTAL CREEKS ALONG NEWPORT
COAST ONTO THE LIST OF IMPAIRED WATERS**

February 26, 2002

The Newport Coast Community Association (the "Association") provides community services to the residents of approximately 1600 homes in the Newport Coast area located in the City of Newport Beach, California. The Association provides numerous services to this community, including maintenance of private streets, landscaping services, and other maintenance of common property. We are writing to express our concern about the Santa Ana Regional Water Quality Control Board's (the "Regional Board's") recommendation to add Buck Gully Creek, Muddy Creek, and Los Trancos Creek (the "Coastal Creeks") to California's list of impaired waters under Section 303(d) of the federal Clean Water Act (the "303(d) List").

These creeks are located along the Newport Coast area and drain small coastal watersheds in or adjacent to the areas served by the Association. Our residents thoughtfully selected homes in our area in part because of the natural environment around Newport Coast, including extensive open space and resulting habitat, our adjacent natural watersheds, and the nearby ocean beaches. Just 21 percent of Newport Coast is allocated for residential use; the remaining 79 percent is being permanently preserved as open space or for recreational activities. We are concerned that the pending designation of the Coastal Creeks will have a severe economic impact on our residents, and will do little that is meaningful to improve the quality of the watershed or coastal waters in our area. Further, we do not believe that there is a basis upon which the Coastal Creeks may currently be placed on the list of impaired waters, and we ask the State Board to refrain from any such listing at least until such time as the proper procedure has been followed.

You should be aware that there are simply no water contact recreational uses, and the creeks clearly are not now and never will be potential sources for municipal drinking water. The streams range from being largely dry to carrying 50 to 210 gallons per minute of primarily urban runoff, so a Recreation 1 use also is not appropriate. The areas around Pelican, Los Trancos, and Muddy creeks are heavily vegetated and have not been improved for hiking or other Recreation 2 category uses, so such a use designation is also inappropriate. There can be no provision to tap these creeks for drinking water, as they flow extremely sporadically, typically with very low volumes, through protected natural areas that would preclude the construction of collection facilities, so a Municipal Drinking Water beneficial use also is clearly inappropriate.

Process Concerns

Waters can be placed on the 303(d) List only when they have been shown to be in violation of applicable water quality standards adopted in accordance with state and federal law. The Coastal Creeks are on the Regional Board's list because of reported exceedances of bacteria standards. However, bacteria standards have not been established for any of the Coastal Creeks. None of the Coastal Creeks are identified by name in the applicable Basin Plan. Thus, there are not specific water quality standards assigned to the creeks, as is the case for other water bodies

expressly named in the Basin Plan. Nor can a bacteria standard for the Coastal Creeks be implied by operation of any of the general provisions of the Basin Plan. In the absence of a bacteria standard applicable to the Coastal Creeks, neither the Regional Board nor the State Board can assume beneficial uses and associated bacterial standards for purposes of the current listing exercise. Those uses and standards must be subject to formal notice and comment rulemaking, just like all other aspects of the basin planning process and should more appropriately be included in a larger process of re-evaluating all of the Regional Basin Plans to reflect the real uses and needs. The Regional Board should give the public an opportunity to participate in the adoption of the standards to be applied to the Coastal Creeks in accordance with the procedural mandates of the federal Clean Water Act and California's Porter Cologne Water Quality Control Act.

- Following correct process is essential because the Regional and State boards must be able to evaluate the public's input and concerns in their decision-making. The mandatory procedures for establishing water quality standards are an important pre-condition to the 303(d) listing process because they give the public an opportunity to weigh in on the appropriate level of water quality for a particular water body, taking into consideration factors such as the water's existing and future uses, as well as the efficacy of existing pollution controls

The basin planning process provides the appropriate forum to evaluate whether, as the Regional Board proposes, the Coastal Creeks should achieve the standards associated with a municipal drinking water beneficial use, a level of purity that hardly seems obvious, practical or prudent on its face, given that the Coastal Creeks are not currently a source of drinking water and are unlikely to be in the future. By proposing to place the Coastal Creeks on the 303(d) List before designated uses and bacteria standards for them have been properly established, the Regional Board has short circuited procedural safeguards which are designed to ensure that designated uses and water quality criteria are assigned to particular waters in light of the overall public interest.

The naturally occurring flow in the Coastal Creeks is extremely sporadic, ranging from a trickle during the dry season, to intense flooding during large rain events. Nevertheless, the Regional Board has proposed to place these waters on the 303(d) List because they are not currently "drinkable." The Association would support the adoption of water quality controls needed to protect the existing and future, real-world uses of the Coastal Creeks, but must object to standards that are hopelessly out of touch with real-world conditions and would impose costs on our members with minimum if any significant benefit. In addition to considering the fact that the creeks are not now and never will be a likely source of drinking water, the Regional and State Board should consider the impact of the San Diego Mission Bay which showed that runoff from undeveloped lands contains fecal coliform levels indistinguishable from runoff from urban lands. The Coastal Creeks drain a largely undeveloped area, and it can be expected that fecal coliform from wildlife, that benefit from this extensive habitat, will constitute a considerable component of any fecal coliform count measured in any of the Coastal Creeks. The Association does not feel it should be responsible for any costs associated with cleaning naturally occurring conditions that have been a part of these watersheds' natural ecology for time immemorial.

The following discussion sets out the regulatory framework under federal and state law with respect to the 303(d) listing process, and describes in more detail our concerns regarding the proposed addition of the Coastal Creeks to the 303(d) List.

Federal Regulatory Framework

Water quality standards under the federal Clean Water Act consist of the designated uses of the navigable waters within a state's boundaries and the water quality criteria designed to protect those uses. (CWA § 303(c)(2)(A).) States have primary responsibility under Section 303 of the federal Clean Water Act to establish water quality standards for waters within their boundaries and are required to hold public hearings for the purpose of revising applicable water quality standards at least once every three years. (CWA § 303(c)(1).) When promulgating water quality standards, states must comply with notice and comment rulemaking procedures established under state law and the federal Clean Water Act. (40 C.F.R. § 131.20(b).) Once a state has revised its water quality standards, it must submit the revised standards to the U.S. Environmental Protection Agency (the "EPA") for final approval. (CWA § 303(c)(2), (3).) Once the EPA approves the standards as consistent with the substantive and procedural provisions of state and federal law, the standards are then considered to be water quality standards applicable to waters of the United States within the jurisdiction of the state. (CWA § 303(c)(3).)

Section 303(d) of the federal Clean Water Act governs the listing process for impaired waters under the federal Clean Water Act and provides that waters must be placed on the 303(d) List when existing pollution controls are not stringent enough to ensure compliance with "applicable water quality standards." EPA regulations define "applicable water quality standards" as water quality standards promulgated under Section 303 of the federal Clean Water Act. (40 C.F.R. § 130.7(b)(3).) Thus, the state and/or EPA must first establish water quality standards for a particular water body in accordance with Section 303 of the federal Clean Water Act before such a watercourse can be placed on the 303(d) List. As explained by EPA regulations and guidance documents, water quality standards "serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by [the federal Clean Water Act]" and "form the basis and 'yardstick' by which states can assess the water status [under the TMDL program]" (40 C.F.R. § 131.2; *Guidance for Water Quality-Based Decisions – The TMDL Process*, at Ch. 2, p. 3 (April, 1991).) The 303(d) listing process is part of the TMDL program – not part of the water quality standards program.

State Regulatory Framework

Water quality standards for California waters are adopted by each of the nine Regional Water Quality Control Boards through Water Quality Control Plans. (Cal. Water Code §§ 13240, et seq.) Amendments to Water Quality Control Plans are subsequently approved by the State Water Resources Control Board (the "State Board") and the Office of Administrative Law. (Cal. Water Code §§ 13245; *SWRCB v. Office of Administrative Law*, 12 Cal.App.4th 697, 702 (1993).) Amendments to water quality standards on which 303(d) listing decisions are based must be approved by the EPA. (CWA § 303(c)(3).) The Regional Board's most recent version of its Water Quality Control Plan (the "Basin Plan") was approved by the State Board on July 21, 1994, and by the Office of Administrative Law on January 25, 1995. According to the latest

version of the Basin Plan, it “establishes [water quality standards] for all the ground water and surface waters in the [Santa Ana] region.” (Basin Plan, p. 1-1.)

As stated above, water quality standards under the federal Clean Water Act include both the designated uses of navigable waters and the water quality criteria established to protect those uses. (Basin Plan, p. 1-1.) The Basin Plan refers to these two elements of water quality standards as “Beneficial Uses” and “Water Quality Objectives,” respectively. (Basin Plan, pp. 1-1, 3-1.) With respect to Beneficial Uses for inland surface waters, the Basin Plan specifically sets forth the Beneficial Uses for all “significant surface streams and bodies of water” within the Santa Ana Region. (Basin Plan, p. 3-5.) Surface waters which are not given specific Beneficial Uses in the Basin Plan are declared to have “the same [B]eneficial [U]ses as the streams, lakes or reservoirs to which they are tributary” (Basin Plan, p. 3-5.) With respect to Water Quality Objectives, the Basin Plan lists pollutant- and/or Beneficial Use-specific Objectives which apply to inland surface waters. (Basin Plan, ch. 4.) The Basin Plan contains both narrative and numeric Water Quality Objectives. (Basin Plan, p. 4-4.) If more than one Water Quality Objective is applicable, the more stringent Objective controls. (Basin Plan, p. 4-4.)

The Regional Board’s Proposed Action

Regional Board staff recommends that the State Board place each of the Coastal Creeks on the 303(d) List on the basis of “High Coliform Count.” (Draft 303(d) List for Santa Ana Region.) Staff only can arrive at this recommendation by applying the stringent municipal drinking water standards to the Coastal Creeks. Our main concern with staff’s proposition is that there are currently no applicable water quality standards (i.e., applicable Beneficial Uses or Water Quality Objectives under state terminology) for these waters with respect to coliform bacteria. Therefore, because applicable water quality standards are a prerequisite for a water body being placed on the 303(d) List, the state has not established the predicate necessary for placing these waters on the 303(d) List.

Regional Board staff acknowledged in past communications that there are currently no water quality standards for coliform bacteria which have been specifically adopted with respect to the Coastal Creeks. Nevertheless, staff believe that the proposed listing is proper under either the so-called “tributary rule” or on the basis of the State Board’s “Drinking Water Policy” (SWRCB Resolution No. 88-63). As discussed below, neither rationale is sufficient to establish an applicable water quality standard for the Coastal Creeks with respect to coliform bacteria, and neither rationale complies with controlling federal law.

The “tributary rule” establishes Beneficial Uses for certain waters not specifically listed in the Basin Plan. The rule provides as follows:

The listing of waters within the basin attempts to include all significant surface streams and bodies of water, as well as the significant groundwater basins and subbasins which are recognized as water supply sources or which are receiving waters. Specific waters which are not listed have the same beneficial uses as the streams, lakes or reservoirs to which they are tributary or the

groundwater basins or subbasin to which they are tributary or overlie. (Basin Plan, p. 3-5.)

In order to fall within the tributary rule, a water body must either be tributary to "stream, lake or reservoir" which has an applicable Beneficial Use or must overlie a groundwater basin with an applicable Beneficial Use. Because none of the Coastal Creeks are tributary to any stream, lake or reservoir, or overlie any listed groundwater basin, the tributary rule does not operate, to attach water quality standards to them.

Likewise, the State Board's Drinking Water Policy does not provide a legal basis on which the Coastal Creeks may be added to the 303(d) List. The State Board's "Policy" is not an "applicable water quality standard" adopted pursuant to Section 303 of the federal Clean Water Act. The State Board's Drinking Water Policy does not establish Beneficial Uses or Water Quality Objectives for any particular water or class of waters. (SWRCB Resolution No. 88-63.) The State Board's Drinking Water Policy merely instructs the Regional Water Quality Control Boards to make future amendments to their Water Quality Control Plans in a particular fashion. (SWRCB Resolution No. 88-63.) To implement this Policy, the Regional Board adopted revised Beneficial Uses and Water Quality Objectives for specific waters and/or pollutants through amendments to the Basin Plan in 1989 and 1995. (Basin Plan, p. 3-1.) While Beneficial Uses and Water Quality Objectives were established for many waters within the Santa Ana Region, none of these amendments established applicable Uses or Objectives for any of the Coastal Creeks in question. (Basin Plan, ch. 3, 4.) Therefore, neither the State Board's Drinking Water Policy, nor the various Basin Plan amendments which implement this Policy, establish a legal basis on which the State can place the Coastal Creeks on the federal Clean Water Act's 303(d) List for bacteria impairment.

Impacts of Proposed Placement on the Association

Should the Regional and State Boards continue in their proposed action, the Association will suffer harm, which may force it to seek redress. As mentioned earlier, the Sub-Associations of this Association are already responsible for the cost of maintaining filters, retention basins, riparian plantings, swales, back flow systems, litter control, street vacuum sweeping and numerous other activities to protect the Coastal Creeks. We believe these controls are sufficient in that they likely define "maximum extent practicable" insofar as community association involvement in water quality is concerned. In addition agreements have been entered into to provide for the diversion to a sewer treatment plant for most of the flows of Muddy and Los Trancos Creeks during most of the year and steps are being taken to reduce flows and divert the remaining flows to a sewer treatment plant on Buck Gully. The imposition of municipal drinking water standards on the Coastal Creek will require additional Best Management Practices, at additional costs to our residents, who already are paying a considerable sum for water quality programs.

Impacts of the Proposed Placement on the State of California

Our Coastal Creeks are not unique. Throughout California, along the coast and inland, there are thousands, or even tens of thousands of very similar small watersheds that are very similar to our Coastal Creeks in terms of type of channel, flow, concentration of bacteria and other measures.

These creeks, even in their natural state, will not meet the standards for municipal drinking water, recreation 1 or recreation 2.

If the State Board institutes a TMDL on our Coastal Creeks based on the support materials provided to it by the Regional Board, it is setting a precedent for similar TMDL's throughout the state. The costs of such a program are unfathomable, and the benefits are negligible. We therefore strongly recommend that the State Board consider the broader implications of its pending action before committing the State of California to such a large and useless exercise.

Conclusion

In light of the foregoing, we do not believe that the State can place the Coastal Creeks on the 303(d) list at this time. If the Regional Board chooses to recommend that the Coastal Creeks be added to the 303(d) List, it may do so only after establishing water quality standards for them via a public process, in accordance with state and federal law. If you would like to discuss this matter further, please do not hesitate to contact me at your convenience.