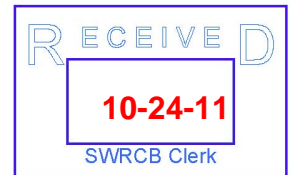




OFFICE of the MAYOR

October 20, 2011

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Subject: Dominguez Channel/Harbor Toxics TMDL

Dear Ms. Townsend:

The City of West Covina is pleased to respond to the State Water Resources Control Board (State Board) invitation to comment on the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters (DC/Harbors Toxics TMDL).

The City's comments are contained in the attached petition the City filed with the State Board in early June of this year. As you may be aware, the State Board rejected the City's petition. This action was based on an opinion from the Assistant Chief Counsel, who concluded that Regional Board adoptions of basin plans are not subject to review by petition to the State Board, per CWC § 13320. However, we struggle to find anything in this section that prevents the State Board from reviewing a Regional Board's adoption of a TMDL as a basin plan amendment. It states clearly that:

- (a) Within 30 days of any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), Chapter 5.5 (commencing with Section 13370), Chapter 5.9 (commencing with Section 13399.25), or Chapter 7 (commencing with Section 13500), any aggrieved person may petition the state board to review that action or failure to act. In case of a failure to act, the 30-day period shall commence upon the refusal of the regional board to act, or 60 days after request has been made to the regional board to act. The state board may, on its own motion, at any time, review the regional board's action or failure to act and also any failure to act under Article 3 (commencing with Section 13240) of Chapter 4.*

It is apparent that nothing in the above suggests the State Board cannot review a Regional Board's adoption of a basin plan amendment as a "failure to act" issue. Further, the City knows of no case law that supports that conclusion. Perhaps one day this issue will be resolved by the legislature.

In any case, beyond the comments expressed in the City's petition as arguments against the Regional Board's adoption of the Dominguez Channel the City would also like to raise two additional concerns that are described more particularly below.

1. ***The DC/Harbor Toxics TMDL Inappropriately Requires MS4 Permittees to Pay for Removal or Containment of Contaminated Sediment in the Harbors and Should Be Revised or Clarified to Eliminate this Possible Interpretation***

The DC/Harbor Toxics TMDL references dredging and capping as a means of remediating contaminated sediment in the harbors. Some have suggested that the Port of Los Angeles and Long Beach will be primarily responsible for performing this task. However, the DC/Harbor Toxics TMDL contains language that could be interpreted to mean that MS4 permittees – including those that are situated in the Los Angeles and San Gabriel Rivers – will be required to share the cost. MS4 permittees could be required to meet waste load allocations in this TMDL. If the WLAs are not met, affected permittees could be found in violation and could be compelled to fund remediation. This could be achieved through the next MS4 permit by requiring absolute compliance with WLAs – as it had with the Santa Monica Bay Beaches Dry Weather Bacteria TMDL.

It should be noted that the MS4 permit is limited to controlling pollutants in stormwater from the MS4 (to the receiving water) and to prohibiting non-stormwater discharges to the MS4 (not to the receiving water). The MS4 NPDES permit is a point-source permit (see 40 CFR §122.2). Under Clean Water Act section 402 p(iii), *MS4 permits are limited to controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*¹ The MS4 NPDES permit is limited to compliance with water quality standards, including TMDL WLAs), in stormwater at the point of discharge (outfall or at the end-of-pipe) -- not in the receiving water. The MS4 NPDES permit's limitation to controlling discharges at the end of the point source suggests that the Regional Board may, in the alternative, rely on a waste discharge requirement (hereinafter "WDR"), pursuant to the California Water Code (hereinafter "CWC"). If the Regional Board intends to impose the DC/ Harbor Toxics TMDL WLA or an alternative compliance requirement on the City exclusively through a WDR then it must first comply with CWC section 13241. Further, if an MS4 permittee is compelled to pay a share of cost associated with remediating contaminated sediment in the harbors an argument could be effectively made that such a requirement constitutes an unfunded mandate under the California Constitution.

¹ See CWA 402 p(iii).

2. The DC/Harbor Toxics TMDL Inappropriately Includes Los Angeles River and San Gabriel River Permittees and Its Applicability is Unclear

Although the DC/Harbor Toxics TMDL states that the Los Angeles River and San Gabriel River is not its focus, it nevertheless includes them. The DC/Harbor Toxics TMDL mentions both of these water bodies as contributing fresh water to the harbors. The DC/Harbor Toxics TMDL also references the Los Angeles and San Gabriel River as “responsible parties.” In the DC/Harbor Toxics TMDL (staff report) implementation appears to restrict these responsible parties to submitting a *Report of Implementation, which will directly or indirectly support the goals of this TMDL.*² Regional Board staff has asserted that Los Angeles and San Gabriel River responsible parties are only subject to implementing already metals TMDLs. This is reflected in the DC/Harbor Toxics TMDL’s staff report which states that under Phase I (which has no commencement date): *Responsible parties in these watersheds are implementing other TMDLs, which will directly or indirectly support the goals of this TMDL.*³

However, under Table 7-2 of the DC/Harbor Toxics TMDL, “responsible parties” are required to meet the interim allocations as of the effective date of the DC/Harbor Toxics TMDL. It is not clear if the term “interim allocations” refer to the metals TMDLs for the Los Angeles and San Gabriel Rivers or to the harbors to which these water bodies contribute freshwater. Table 7.2 of the DC/Harbor Toxics TMDL is titled: *Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxics Pollutants TMDL: Implementation Schedule.* Under Task 2 of this implementation schedule, the Los Angeles and San Gabriel Rivers are required to: *Submit a Monitoring Plan to the Los Angeles Regional Board for Executive Officer Approval 9 months after the effective date of the DC/Harbor Toxics TMDL.*⁴ It is unclear as to whether the monitoring plan refers to the Dominguez Channel/Harbors Toxics TMDL or to the Los Angeles and San Gabriel River Metals TMDLs. The same holds for the tasks 3, 4, and 7.

Further complicating matters, the term “responsible parties” is not referenced in either the Los Angeles or San Gabriel River Metals TMDLs. The Los Angeles River Metals TMDLs uses the term responsible agencies – not responsible parties. The San Gabriel River Metals TMDL, which USEPA was compelled to adopt, makes no mention of either responsible agencies or parties. In fact, no municipal permittees are mentioned all. Therefore, neither of the DC/Harbor Toxics TMDLs should be applicable to the Dominguez Channel/Harbors Toxics TMDL.⁵

Beyond this, including the Los Angeles River and San Gabriel River and, presumably MS4 permittees located therein, ignores the fact that only a few of them are subject to metals TMDLs. In the case of the USEPA-adopted metals TMDL, which again does not mention what MS4 permittees are subject to it, only Reach 2, the San Jose Creek, and Coyote Creek, have been listed as impaired. Not all of the some 32 municipal permittees

²Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants, page 108.

³*Ibid.*, page 108.

⁴*Ibid.*, page 116

⁵This should be of interest to the Office of Administrative Law.

that partially or fully situated in the San Gabriel River drain into Reach 2 and San Jose and Coyotes Creek. Thus the DC/Harbors Toxics TMDL cannot extend its requirements to the San Gabriel River MS4 permittees based on the mere fact it contributes freshwater to the downstream harbors. As for the Los Angeles River, not all municipal permittees are subject to the metals TMDL. Reach 2 of the Rio Hondo, which is tributary to the Los Angeles River system, is not 303(d) listed for metals. Therefore, the 16 MS4 permittees located in this reach cannot be included in the DC/Harbors Toxics TMDL based on the metals TMDL connection.

Although these comments were made to the Regional Board prior to its adoption of the Dominguez Channel/Harbor Toxics TMDL and during the public hearing, it failed to adequately respond to them.

9. *Request for 45 Public Hearing Notice*

The City fervently hopes that the State Board will recognize the several deficiencies contained the DC/Harbors Toxics TMDL and returns it to the Regional Board for correction without the need for a State Board hearing. If, however, the State Board wishes to review the matter at a public hearing, the City requests that it be given 45 days of advanced notice.

In closing the City appreciates the opportunity to comment on this extremely important matter and looks forward to its amicable resolution. In the meantime, should you have any questions, please feel free to call Shannon Yauchzee, Public Work Director/City Engineer, at (626) 939-8425.

Sincerely,



Steve Herfert
Mayor