OFFICE OF THE CITY MANAGER

Public Comment
LA INDICATOR BACTERIA TMDL
Deadline: 6/20/11 by 5:00 p.m.

CITY OF CARSON

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June 16, 2011

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

Subject: Comment Letter – Los Angeles Water Board Indicator Bacteria

Dear Ms. Townsend:

The City of Carson ("City") is pleased to respond to the State Water Resources Control Board's ("State Board") invitation to comment on the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") adoption of the Los Angeles River Bacteria Total Maximum Daily Load for the Los Angeles River ("LAR-B-TMDL").

Summary

The City has the following concerns about the LAR-B-TMDL, insofar as how it will be implemented through the municipal separate storm sewer system (MS4) permit:

1. requiring compliance with its waste load allocation (WLA) in the receiving water instead of in the discharge from the outfall (end-pipe);
2. requiring compliance with the WLA by any means necessary by not allowing for its translation into water quality based effluent limitations (WQBELs) expressed as BMPs or other actions such as surrogate parameters;
3. the implicit denial of an adaptive/iterative process to address the WLA while BMPs or other actions such as surrogate parameters are being implemented through the several affected MS4 permit stormwater quality management program (SQMP) components;

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4. requiring compliance with dry weather discharge limitations on bacteria from the MS4 to receiving waters, which exceeds the federal stormwater requirement of only prohibiting non-stormwater discharges only to the MS4;
5. requiring an implementation plan to be adopted by the Regional Board Executive Officer that requires collective compliance with LAR-B-TMDL WLA requirements;
6. requiring monitoring in the receiving water instead of the outfall, exceeds federal stormwater regulations; and
7. exceeding federal regulations for the aforementioned disputed requirements constitute an unfunded mandate.

It is for these reasons that the City requests that the State Board direct the Regional Board to re-open the LAR-B-TMDL for correction. It is understood that other TMDLs adopted by the Regional Board suffer from the same deficiencies and that they too should be corrected.

It should be noted that the City is aware of the United States Court of Appeals for the Ninth Circuit ruling in Natural Resources Defense Council ("NRDC") v. Los Angeles County Flood Control District ("LACFCD"). The ruling here established that a receiving water cannot be used to determine compliance with a water quality standard. Rather, compliance is to be determined at the outfall (end-of-pipe). As affirmed in the ruling: *Outfall means a point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States.*[1] Based on this reason alone, the State Board should compel the Regional Board to remove from the LAR-B-TMDL the receiving water as the point where compliance with LAR-B-TMDL WLA, or any other water quality standard, is to be achieved. Instead, the compliance point should be in the discharge at the outfall. And, therefore, all other similar TMDLs should be corrected of this defect.

I. MS4 Permit Compliance Point is at Outfall (End-of-Pipe)

According to the LAR-B-TMDL: *The final WLAs are expressed as exceedance days of the numeric targets measured in the receiving water (i.e., river segment or tributary).*[2] This applies to storm water and non-stormwater. However, the receiving water cannot be the compliance point because, beyond the NRDC v. LACFCD ruling, federal stormwater regulations establish the compliance point for MS4 permits in the discharge from the outfall. The MS4 permit is a point source permit. The point of discharge is the outfall. Federal stormwater regulations make it clear that *co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators*[3] -- not discharges in the receiving water.

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[1]See *NRDC v. County of Los Angeles Flood Control District*, No. 10-56017 No. 10-56017 D.C. No. 2:08-cv-01467-
AHM-PLA, OPINION, filed March 10, 2011, page 3375.
[2]*Los Angeles River Bacteria TMDL*, California Regional Water Quality Control Board, April, 2010, page 52.
[3]CFR §122.26.

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II. Waste Load Allocation and Water Quality Based Effluent Limitations (WQBELs) Not Included in TMDL

The LAR-B-TMDL's requirement of complying with numeric targets measured in the receiving water by any means necessary would require, if necessary, treatment controls in the receiving water as the following excerpt from the LAR-B-TMDL indicates:

> *The downstream methods use a single structural control to directly reduce bacteria concentrations in receiving waters (e.g., constructing a treatment control at the mouth of a tributary just upstream of its confluence with the Los Angeles River), as opposed to constructing multiple controls at storm drain outfalls along the segment or tributary.*[4]

Again, such a requirement exceeds the scope of MS4 permits because the MS4 permit requires compliance with discharges at the outfall, not in the receiving water. Further, under Clean Water Act section 402(iii), permits for MS4 discharges 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.* This limitation, therefore, prohibits in-stream treatment controls.

Further, compliance with the LAR-B-TMDL does not allow for the application of water quality based effluent limitations (WQBELs) that operate to translate the WLA into best management practices (BMPs) in accordance with either the 2002 or 2010 USEPA TMDL compliance guidance memorandum. The LAR-B-TMDL was adopted by the Regional Board on July 8, 2010 and, therefore, should have followed the 2002 USEPA memorandum, as did the San Diego Regional Board's *Revised Total Maximum Daily Loads for Indicator Bacteria Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek).* This TMDL states clearly that:

> *Federal regulations require that NPDES requirements incorporate water quality based effluent limitations (WQBELs) that must be consistent with the requirements and assumptions of any available WLAs which may be expressed as numeric effluent limitations, when feasible, and/or as a best management practice (BMP) program of expanded or better-tailored BMPs.*[5]

Therefore, against this background, with regard to the LAR-B-TMDL, the State Board should direct the Regional Board to: (1) eliminate any reference to requiring compliance with the WLA in the receiving water and, therewith, specifying treatment or other controls in the receiving water to meet a WLA; and

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[4] Ibid., page 54.

[5] *Revised Total Maximum Daily Loads for Indicator Bacteria Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek): Final Technical Report,* February 10, 2010., page 5.

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(2) reference instead the use of WQBELs expressed as BMPs or other devices such as surrogate parameters to comply with the WLA.

III. Absence of the Adaptive/Iterative Process

The LAR-B-TMDL makes no mention of an adaptive/iterative process as it relates to stormwater discharges, but does, oddly, discusses it in the context of meeting the dry weather bacteria WLA through non-stormwater discharge prohibitions. The Regional Board apparently is taking the position that the adaptive/iterative process is not a requirement for meeting the stormwater WLA. The Regional Board has even stated in comments made in connection with the Dominguez Channel/Los Angeles Harbor Toxics TMDL that the *federal regulations <u>do not</u> suggest the adaptive/iterative process is an inherent component of BMP based permit requirements.*[6] The City does not agree with this conclusion.

While federal stormwater regulations do not use the term adaptive or iterative per se relative to BMP implementation in stormwater permits, USEPA's *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits* does describe a progressive incremental approach to meeting water quality standards. In fact USEPA's first memorandum on TMDL compliance issued in 2002 uses the term iterative as the following reveals: *The Interim Permitting Approach Policy recognizes the need for an iterative approach to control pollutants in <u>storm water</u> discharges.* Beyond this, the State Water Resources Control Board (hereinafter "State Board") affirmed the iterative process in meeting water quality standards in precedential Water Quality Order 99-05, and reaffirmed it in Water Quality Order 2009-08.

The adoptive/iterative procedure is necessary to prevent enforcement action from the Regional Board or exposure to third party litigation while BMPs are being implemented. As long as the BMPs or numeric WQBELs expressed in the form of surrogates or other actions are implemented in the MS4 permit, the permittee is to be deemed be in compliance with the WLA.

The Regional Board must reference the adaptive/iterative process in the LAR-B-TMDL and other TMDLs.

IV. Meeting Dry Weather LAR-B-TMDL WLA through Non-Stormwater Discharge Prohibition

As with the Santa Monica Bay Beaches Dry Weather TMDL that was placed in the current MS4 permit in 2007, the LAR-B-TMDL proposes to meet the dry weather WLA by prohibiting any non-stormwater discharge that exceeds the daily limit for bacteria. It also provides for "a stepwise and iterative process" which is contrary to the Office of Chief Counsel's opinion that non-stormwater discharges are not subject to the iterative process.

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[6]Regional Board *Comment Summary and Responses Total Maximum Daily Load for Toxic Pollutants in Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters*, page 13, posted on the Regional Board web-site shortly prior to the Regional Board pubic hearing on May 5, 2011.

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The coordinated monitoring plan ("CMP") referenced in the LAR-B-TMDL requires for compliance purposes an in-stream monitoring station in each Los Angeles River segment, reach, and tributary ... But as mentioned, the Ninth Circuit Court affirmed in NRDC v. LACFCD that the point of compliance is at the outfall (end-of-pipe), not in the receiving water.

Furthermore, federal stormwater regulations do not treat stormwater in the same manner as non-stormwater. Whereas stormwater discharges within a permittee's municipal boundaries must be "controlled" from the MS4 to the maximum extent practicable, through best management practices, non-stormwater discharges need only be prohibited to the MS4 [see Clean Water Act section 402(p)(3)(ii)]. The LAR-B-TMDL exceeds this requirement by prohibiting non-stormwater discharges containing levels of bacteria that exceed the dry weather WLA from the outfall to the receiving water.

The LAR-B-TMDL also does not contemplate numeric or non-numeric WQBELs to translate the dry weather WLA into BMPs or other actions. However, the Office of Chief Counsel (OCC) has acknowledged that a WQBEL is required to translate the dry weather WLA for the Baby Beach bacteria TMDL for implementation through the South Orange County MS4 permit. The San Diego Regional Board, which adopted this TMDL and the South Orange County Permit, obviously chose to comply with federal law in this instance. It stated: *non-storm water discharges from the MS4 that are not authorized by separate NPDES permits, nor specifically exempted, are subject to requirements under the NPDES program, including discharge prohibitions, technology-based effluent limitations and <u>water quality-based effluent limitations</u> (40 C.F.R. § 122.44.).*[7] It is understood that this specifically applies to MS4 permits. Nevertheless, discussion of how the dry weather bacteria WLA is to be met should have taken place in the LAR-B-TMDL to the same extent as in the aforementioned San Diego Beaches bacteria TMDL.

Beyond this, the LAR-B-TMDL's requirement of a "stepwise and iterative" procedure for meeting dry weather discharges, which are, in effect, non-stormwater discharges contradicts State Board Order WQ 2009-0008, as pointed-out in the OCC's November 5, 2009 memorandum to the San Diego Regional Board, which states:

> *... the Clean Water Act, and the storm water regulations make it clear that a regulatory approach for storm water - such as the iterative approach we have previously endorsed - <u>is not necessarily appropriate for non-storm water.</u>*[8]

This conclusion was made in response to a petition to the State Board from the County of Los Angeles challenging the Los Angeles Regional Board over a violation of the Santa Monica Bay Beaches dry weather bacteria TMDL. The County was found to be in violation of this TMDL after an in-stream monitoring

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[7] *Memorandum from Catherine George Hagan, the Office of Chief Counsel to Chairman Wright and San Diego Regional Board Members*, November 5, 2009, page 3.
[8] *State Board Order WQ 2009-0008*, page 9.

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station detected an exceedance of the dry weather bacteria WLA. In its defense, the County pointed-out that the current MS4 permit procedure for addressing a receiving water limitation exceedance calls for an iterative process that allows for ramping-up BMPs to address the exceedance. The State Board held that this could not be used as defense because the iterative process only applies to storm water discharges.

Although the non-stormwater discharge prohibition addressing bacteria applies only to the permittee's MS4, the Regional Board could use a WQBEL to translate the dry weather WLA into BMPs or numeric WQBELs such as surrogates (it did not for the Santa Monica Bay Beaches dry weather bacteria TMDL). Were it to do this, the City believes that the adaptive/iterative process and MEP could be applied.

The State Board should require the Regional Board to eliminate absolute compliance with the dry weather bacteria TMDL WLA either in the receiving water or end-of-pipe.[9]

V. Implementation Plan and Collective Compliance

The LAR-B-TMDL calls for each affected MS4 permittee to submit an implementation plan to be approved by the Regional Board Executive Officer which is to achieve collective compliance through the MS4 permit. This is interpreted to mean that if the wet or dry weather WLA in the receiving is not achieved, that all permittees will be held collectively responsible and subject to enforcement action by the Regional Board and third party litigation – even if the permittee is meeting the WLA at the end-of-pipe.

This is inappropriate for the following reasons:

1. The State's water code (Porter-Cologne) does not confer upon the Regional Board's Executive Officer the authority to approve implementation plans, which are essentially water quality control plans. CAC §13240 makes it clear that the Regional Board governing body is responsible for adopting water quality control plans. The California Regional Water Quality Control Board, Santa Ana Region, for example, adopted by resolution the *Urban Source Evaluation Plan*, a requirement of the Middle Santa Ana River Bacteria TMDL. The plan was adopted three years after the TMDL was adopted in 2008 at public hearing.
2. The implementation plan prevents the City and other MS4 permittees from working with Regional Board staff to develop WQBELs expressed as BMPs or other actions such as surrogate parameters (e.g., flow or impervious reduction achieved through stormwater control measures

[9]Unless that is a WQBEL is established to address the dry weather bacteria TMDL WLA within the framework of the illicit connection and discharge detection and elimination program, which is the primary programmatic tool for prohibiting non-stormwater discharges to the MS4. Once established, monitoring would only serve to evaluate the performance of the IC/ID DE program tasks to be implemented through the MS4 permit. However, compliance with the TMDL WLA would be determined by complete implementation of the IC/ID DE program. If the IC/ID DE program does not meet the WLA metric, it shall be revised under the next MS4 permit to either intensify existing BMPs or add new ones or actions.

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such as low impact development strategies). The implementation plan should be proposed at the time the MS4 permit is discussed. The plan should be implemented through the MS4 permit's stormwater quality management program (SQMP), instead of being appended to the MS4 as a plan apart from the SQMP.

3. Requiring collective compliance among permittees is inappropriate because, once again, the MS4 permit requires compliance with the WLA (as any other water quality standard) in the discharge from the outfall not the receiving water. Further, the City is only required to meet the WLA at the outfall through the implementation of WQBELs as expressed as BMPs or other actions such as surrogates. As long as they are implemented during the term of the permit the City would be in compliance – even if the actual WLA metric is not met at the outfall or in the receiving water.

VI. Monitoring Requirements

The LAR-B-TMDL would require the City to conduct outfall and receiving water monitoring in excess of what federal stormwater regulations call for. Receiving water monitoring is used for compliance purposes. As mentioned, monitoring includes at least one monitoring station (in-stream) in each Los Angeles River segment, reach, and tributary. Samples are to be taken once a month at each station during the first implementation phase. After this phase, weekly monitoring is to be performed to determine compliance with in-stream WLA targets. In addition, a "load reduction strategy" is required to determine E. coli loadings from MS4 outfalls and to evaluate the effectiveness of actions in attaining WLAs.

Requiring in-stream compliance monitoring exceeds federal stormwater regulations for reasons already stated. Compliance with stormwater discharges is determined at the outfall not in the receiving water. Ambient monitoring in the receiving water should be performed to determine where it stands with the WLA. Furthermore, the cost of conducting ambient monitoring should be borne by the State since it exceeds the federal requirement and because the State assesses a monitoring surcharge on the MS4 permit fee that municipal permittees are required to pay annually.

Outfall monitoring for dry weather discharges exceeds federal stormwater regulations because permittees are only required to prohibit non-stormwater discharges. To that end, monitoring is required to detect and eliminate illicit connections and discharges. If the TMDL's WLA is translated into WQBELs, a dry weather WQBEL expressed as BMPs or other actions such as surrogates could be evaluated through outfall monitoring.

The State Board should compel the Regional Board to amend monitoring tasks to conform to federal stormwater regulations to the following extent: (1) use ambient monitoring to determine the health of the receiving water against the receiving water stormwater WLA; and (2) use outfall monitoring to evaluate the performance of WQBELs expressed as BMPs or actions such as surrogate parameters in meeting the WLA in the discharge from the outfall.

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VII. LAR-B-TMDL Requirements Exceed Federal Regulations and Constitute Unfunded Mandates

As mentioned, the proposed LAR-B-TMDL exceeds federal stormwater regulations to the following extent: (1) establishing the WLA compliance determinant in the receiving water instead of the outfall or end-of-pipe; (2) requiring compliance with WLAs by any means necessary, without translating them into WQBELs expressed as BMPs or other actions such as surrogate parameters; (3) prohibiting non-stormwater discharges to the MS4 and not to the receiving water as a means of requiring compliance with the dry weather bacteria WLA; and (4) requiring in-stream monitoring. The Regional Board may require compliance with WLAs using these regulatory mechanisms, but so doing would constitute unfunded mandates under the California Constitution. To avoid this, the Regional Board may rely on the State's water code to compel compliance.

In conclusion, the City appreciates the opportunity to comment on the LAR-B-TMDL and hopes that the State Board directs the Regional Board to work with the City and other municipalities in resolving the problems identified herein. Should you have any questions, please feel free to contact Mrs. Patricia Elkins, Storm Water Quality Programs Manager at (310) 847-3529.

Sincerely,

Graves

Clifford W. Graves
Interim City Manager

cc: Mayor and City Council