



June 17, 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 San Gabriel (City) is pleased to provide comments on the State Water Resources Control Board's (State Water Board) proposed approval of an amendment to the LA Region Water Quality Control Plan (Basin Plan) that would incorporate the Los Angeles River Bacteria Total Maximum Daily Load (LAR-B-TMDL). The LAR-B-TMDL was adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) through Resolution No. R10-007 on July 9, 2010.

The City is subject to this TMDL and has the following concerns about how it will be implemented through the Municipal Separate Storm Sewer System (MS4) permit:

- 1. In conflict with recent court interpretation, compliance with the waste load allocation would be measured in the receiving water instead of in the discharge from the outfall.**

The recent United States Court of Appeals for the Ninth Circuit ruling in Natural Resources Defense Council (NRDC) v. Los Angeles County Flood Control District (LACFCD) established that *receiving water* cannot be used to determine compliance with a water quality standard. Rather, compliance is to be determined at the *outfall*. 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.<sup>1</sup> Based on this, the State Water Board should compel the Los Angeles Water Board to remove from the LAR-B-TMDL the receiving water as the point where compliance with LAR-B-TMDL load allocation, or any other water quality standard, is to be achieved. Instead, the compliance point should be in the discharge at the outfall. All other similar TMDLs should be corrected of this defect.

According to the LAR-B-TMDL: The final load allocations are expressed as exceedance days of the numeric targets measured in the receiving water (i.e., river segment or

<sup>1</sup>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.

tributary).<sup>2</sup> 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<sup>3</sup> -- not discharges in the receiving water.

**2. The LAR-B-TMDL should use effluent limitations expressed as Best Management Practices (BMPs) or other devices such as surrogate parameters to comply with the load allocation.**

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.*<sup>4</sup>

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.

Compliance with the LAR-B-TMDL does not allow for the application of water quality based effluent limitations that operate to translate the load allocation into BMPs in accordance with either the 2002 or 2010 USEPA TMDL compliance guidance memorandum. The LAR-B-TMDL was adopted by the Los Angeles Water Board on July 9, 2010 and, therefore, should have followed the 2002 USEPA memorandum, as did the San Diego Los Angeles Water Board's Revised Total Maximum Daily Loads for Indicator Bacteria Project I – Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek) which states:

*Federal regulations require that NPDES requirements incorporate water quality based effluent limitations (effluent limitations) that must be consistent with the requirements and assumptions of any available load allocations 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.*<sup>5</sup>

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<sup>2</sup>Los Angeles River Bacteria TMDL, California Regional Water Quality Control Board, April, 2010, page 52.

<sup>3</sup>CFR §122.26.

<sup>4</sup>Ibid., page 54.

<sup>5</sup>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.

Against this background the LAR-B-TMDL the State Water Board should direct the Los Angeles Water Board to: (1) eliminate any reference to requiring compliance with the load allocation in the receiving water and, therewith, specifying treatment or other controls in the receiving water to meet a load allocation; and (2) reference instead the use of effluent limitations expressed as BMPs or other devices such as surrogate parameters to comply with the load allocation.

**3. The Los Angeles Water Board must reference the adaptive/iterative process in the LAR-B-TMDL and other TMDLs.**

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

While federal stormwater regulations do not specifically use the terms *adaptive* or *iterative* 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 storm water discharges. Beyond this, the State Water Resources Control Board (hereinafter "State Water 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 Los Angeles Water Board or exposure to third party litigation while BMPs are being implemented. As long as the BMPs or numeric effluent limitations 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 load allocation.

**4. The LAR-B-TMDL would require compliance with dry-weather (non-stormwater) discharge limitations on bacteria from the MS4 to receiving waters, in excess of the federal stormwater requirement of only prohibiting non-stormwater discharges to the MS4.**

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<sup>6</sup>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 public hearing on May 5, 2011.

As with the Santa Monica Bay Beaches Dry Weather TMDL, placed in the current MS4 permit in 2007, the LAR-B-TMDL proposes to meet the dry weather load allocation by prohibiting any non-stormwater discharge that exceeds the daily limit for bacteria.

The coordinated monitoring plan 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 non-stormwater in the same manner as 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 load allocation from the outfall to the receiving water.

The LAR-B-TMDL does not contemplate numeric or non-numeric effluent limitations to translate the dry weather load allocation into BMPs or other actions. However, the Office of Chief Counsel has acknowledged that an effluent limitation is required to translate the dry weather load allocation for the Baby Beach bacteria TMDL for implementation through the South Orange County MS4 permit. The San Diego Los Angeles Water 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 water quality-based effluent limitations (40 C.F.R. § 122.44).<sup>7</sup> It is understood that this specifically applies to MS4 permits. Nevertheless, discussion of how the dry weather bacteria load allocation 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.

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 Water Board Order WQ 2009-0008, as pointed-out in the Office of Chief Counsel's November 5, 2009 memorandum to the San Diego Los Angeles Water 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 - is not necessarily appropriate for non-storm water.*"<sup>8</sup> This conclusion was made in response to a petition to the State Water Board from the County of Los Angeles challenging the Los Angeles Los Angeles Water 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-

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<sup>7</sup>Memorandum from Catherine George Hagan, the Office of Chief Counsel to Chairman Wright and San Diego Regional Board Members, November 5, 2009, page 3.

<sup>8</sup>State Water Board Order WQ 2009-0008, page 9.

stream monitoring station detected an exceedance of the dry weather bacteria load allocation. 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 Water 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 Los Angeles Water Board could use an effluent limitation to translate the dry weather load allocation into BMPs or numeric effluent limitations 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 Water Board should require the Los Angeles Water Board to eliminate absolute compliance with the dry weather bacteria TMDL load allocation either in the receiving water or end-of-pipe.<sup>9</sup>

**5. The LAR-B-TMDL would require collective compliance with waste load allocation requirements among all permittees.**

The LAR-B-TMDL calls for each affected MS4 permittee to submit an implementation plan to be approved by the Los Angeles Water 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 load allocation in the receiving is not achieved, that all permittees will be held collectively responsible and subject to enforcement action by the Los Angeles Water Board and third party litigation – even if the permittee is meeting the load allocation at the end-of-pipe. We believe is inappropriate for the following reasons:

- a) The State's water code (Porter-Cologne) does not confer upon the Los Angeles Water Board's Executive Officer the authority to approve implementation plans, which are essentially water quality control plans. CAC §13240 makes it clear that the Los Angeles Water 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.
- b) The implementation plan prevents the City and other MS4 permittees from working with Los Angeles Water Board staff to develop effluent limitations expressed as BMPs or other actions such as surrogate parameters (e.g., flow or impervious reduction achieved through stormwater control measures such as low impact development strategies). The implementation plan should be proposed at

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<sup>9</sup>Unless, that is, a WQBEL is established to address the dry weather bacteria TMDL load allocation 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 load allocation would be determined by complete implementation of the IC/ID DE program. If the IC/ID DE program does not meet the load allocation metric, it shall be revised under the next MS4 permit to either intensify existing BMPs or add new ones or actions.

the time the MS4 permit is discussed. The plan should be implemented through the MS4 permit's stormwater quality management program.

- c) Requiring collective compliance among permittees is inappropriate because, once again, the MS4 permit requires compliance with the load allocation (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 load allocation at the outfall through the implementation of effluent limitations 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 load allocation metric is not met at the outfall or in the receiving water.

**6. The LAR-B-TMDL would require monitoring that exceeds federal stormwater regulations.**

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 load allocation 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 load allocations.

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 load allocation. 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 the end, monitoring is required to detect and eliminate illicit connections and discharges. If the TMDL's load allocation is translated into effluent limitations, a dry weather effluent limitation expressed as BMPs or other actions such as surrogates could be evaluated through outfall monitoring.

The State Water Board should compel the Los Angeles Water 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 load allocation; and (2) use outfall monitoring to evaluate the performance of effluent limitations expressed as BMPs or actions such as surrogate parameters in meeting the load allocation in the discharge from the outfall.

**7. The LAR-B-TMDL requirements constitute an unfunded mandate.**

As mentioned, the proposed LAR-B-TMDL exceeds federal stormwater regulations to the following extent: (1) establishing the load allocation compliance determinant in the receiving water instead of the outfall or end-of-pipe; (2) requiring compliance with load allocations by any means necessary, without translating them into effluent limitations 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 load allocation; and (4) requiring in-stream monitoring. The Los Angeles Water Board may require compliance with load allocations using these regulatory mechanisms, but so doing would constitute unfunded mandates under the California Constitution. To avoid this, the Los Angeles Water Board may rely on the State's water code to compel compliance.

**Conclusion**

The City appreciates the opportunity to comment on the proposed Basin Plan amendment and hopes that the State Water Board will direct the Los Angeles Water Board to work with the City and other municipalities in resolving the concerns identified herein. To address the above-stated concerns, the City requests that the State Water Board direct the Los Angeles Water Board to re-open the LAR-B-TMDL for correction. Other TMDLs adopted by the Los Angeles Water Board with the same deficiencies should also be corrected. Feel free to contact me or City Engineer, Daren Grilley, at (626) 308-2806 ext. 4631 with any questions.

Sincerely,



Steven A. Preston  
City Manager

cc: City Council