COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

"To Enrich Lives Through Effective and Caring Service"

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IN REPLY PLEASE
REFER TO FILE: WM-9

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Dear Ms. Townsend:

COMMENT LETTER – SANTA CLARA RIVER INDICATOR BACTERIA TOTAL MAXIMUM DAILY LOAD

Thank you for the opportunity to comment on the proposed Amendment to incorporate the Indicator Bacteria Total Maximum Daily Load for the Santa Clara River Estuary and Reaches 3, 5, 6, and 7 into the Water Quality Control Plan for the Los Angeles Region. On behalf of the County of Los Angeles, enclosed are our comments.

We look forward to your consideration of these comments. If you have any questions, please contact me at (626) 458-4300 or ghildeb@dpw.lacounty.gov or your staff may contact Ms. Angela George at (626) 458-4325 or ageorge@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works

GARY HILDEBRAND
Assistant Deputy Director
Watershed Management Division

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Enc.

cc: Chief Executive Office (Dorothea Park)
County Counsel (Judith Fries)

COMMENTS OF THE COUNTY OF LOS ANGELES ON THE PROPOSED INDICATOR BACTERIA TOTAL MAXIMUM DAILY LOAD FOR SANTA CLARA RIVER AND ESTUARY

These comments are submitted on behalf of the County of Los Angeles. The County is a separate entity from the Los Angeles County Flood Control District, which is not named as a responsible party under the TMDL.

1. **Stormwater agencies are responsible only for their own discharges**

The proposed TMDL provides that the responsible parties that have co-mingled storm water are jointly and severally responsible for meeting the waste-load allocations (WLAs) assigned to the Municipal Separate Storm Sewer System (MS4) discharges. This provision is unlawful, ill-conceived and unnecessary.

First, there is no authority for joint liability under the federal Clean Water Act or the California Water Code. The former directs its prohibitions against a "discharger," and no others. 33 U.S.C. §§ 1319 and 1342. The courts have provided that a party is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Snell Contractor, Inc.*, 333 F.Supp.2d 1344, 1348 (N.D. Ga. 2004); *United States v. Sargent County Water Dist.,* 876 F.Supp. 1081, 1088 (D.N.D. 1992). See also *United States v. Michigan,* 781 F. Supp. 1230, 1234 (E.D. Mich. 1991) ("There is nothing in federal law that requires the Counties to accept responsibility for discharges that ... are appropriately within the province, jurisdiction and responsibility of local municipalities.").

Indeed, the Clean Water Act regulations applicable to MS4 permits specifically provide that co-permittees under an MS4 permit are required to "comply with permit conditions relating to discharges from the municipal separate storm sewers *for which they are operators.*" 40 C.F.R. § 122.26(a)(3)(vi) (emphasis supplied). Consistent with this requirement, the current MS4 permit issued to the County and other MS4 permittees provides, in Finding G.4, that "[e]ach Permittee is responsible only for a discharge for which it is the operator."

Similarly, under the Porter-Cologne Act, Water Code § 13000 et seq., waste discharge requirements are issued to the person or entity that is "discharging." Water Code § 13260(a)(1) provides that "any person discharging waste, or proposing to discharge waste" shall file a report of waste discharge. After hearing, the Regional Board issues waste discharge requirements to "the person making or proposing the discharge." Water Code § 13263(f). Enforcement is directed towards "any person who violates any cease and desist order, cleanup and abatement order . . . or . . . waste discharge requirement." Water Code § 13350(a). See also Water Code § 13300 (the regional board may require the discharger to submit for approval a detailed time schedule of specific actions); Water Code § 13301 (cease and desist order directed at "those persons not complying with the requirements or discharge prohibitions"). Under the Porter-Cologne Act, a discharger is not responsible for discharges of pollutants over which it has no authority or control.

Moreover, courts have held that joint responsibility means that liability for all exceedances of bacteria standards can be imposed on one discharger even if that discharger is not solely responsible and even if that discharger has no control over the source of the bacteria. It is unlikely that the Regional Board intended such an inequitable result and, in fact, the Board members indicated at the hearing that such a result was not their intent.

Therefore, to better reflect what appears to have been the Regional Board's intent, the County of Los Angeles and the County of Ventura have drafted the following clarifying language that they have submitted to the Regional Board's executive officer for consideration:

> "Jointly and severally responsible" means the cities and counties that have co-mingled stormwater, except for those that demonstrate that their discharges did not cause or contribute to exceedances, are responsible for implementing programs in their respective jurisdictions to meet the MS4 wasteload allocations in such co-mingled stormwater. No city or county shall be individually required to ensure that co-mingled stormwater meets the applicable MS4 wasteload allocations unless such city or county is shown to be solely responsible for the exceedances.

This suggested language does not resolve all of the County's objections to the imposition of joint and several responsibility on responsible parties with co-mingled storm water, and the County requests the deletion of joint and several responsibility in its entirety. If the State Board does not order the Regional Board to remove the joint and several responsibility provision of the TMDL, however, then the State Board should add this language to the TMDL to ensure that the counties and local governments are responsible for implementing programs within their own jurisdictions and are not responsible for the actions of others over whom they have no control. The Regional Board will still retain the ability to proceed against any party that is a source of the bacteria.

In its response to comments, the Regional Board stated that "the Clean Water Act, recognizing that permittees may seek permits based on system-wide, not jurisdiction-by-jurisdiction, discharges, imposes additional roles and responsibilities upon those permittees. By accepting this type of permit, the permittees implicitly agree to accept the responsibilities necessary to control and reduce the discharge of pollutants in commingled discharges." Accepting a system-wide permit, however, is far different from agreeing that one will be jointly and severally responsible for bacteria sources over which one has no control.

The County did not seek a system-wide permit, which benefits the Regional Board as much as if not more than the co-permittees. In accepting a system-wide permit, the County hoped that efficiencies would be achieved by having one rather than more than one permit. The County did not agree to be responsible for the conduct

of other parties and there was no way for the County to know that it was assuming such responsibility under the Permit. Nothing in the Permit stated that the permittees were agreeing to joint and several liability. Instead the permit provided just the opposite, namely, that "[e]ach Permittee is responsible only for a discharge for which it is the operator." Permit, Finding G.4.

The State Board should remand the TMDL to the Regional Board and direct it to remove the imposition of joint and several responsibility in the TMDL. At a minimum, the State Board should add the clarifying language proposed by the County and the County of Ventura as set forth above.

2. **The geometric mean should not be calculated daily**

The U.S. Environmental Protection Agency (EPA) originally intended the use of the geometric mean as a tool to determine the condition of a water body over a longer period of time and to detect chronic problems. Section 40 of the Code of Federal Regulations Part 131, Vol. 69, No. 220, states that "because a geometric mean provides information pertaining to water quality that looks backwards in time, it is not necessarily useful in determining whether a [water body] is safe for swimming on a particular day." Further, EPA states that "it would be technically appropriate to apply the averaging period on a set basis such as monthly or recreational season." In other words, the geometric mean is intended as an assessment tool for condition over time and not from day to day. Therefore, the proposed TMDL's use of the rolling 30-day period is inconsistent with EPA's original intent.

In its response, the Regional Board did not address the issue that the geometric mean should be used as an assessment tool, not to determine compliance on a daily basis, or the fact that it was using the geometric mean for a purpose other than what it was designed for.

The State Board should remand the TMDL and order the Regional Board to revise the proposed TMDL so that the geometric mean is calculated once per month or once per season.

3. **Establishment of the WLAs should consistently follow the reference system approach**

The proposed TMDL sets the geometric mean WLA at zero days without providing adequate justification. According to a Los Angeles River Watershed study conducted by Cleaner Rivers through Effective Stakeholder-led TMDLs, significant exceedances of the geometric mean were detected at the reference sites. The same reference sites were also used for this proposed TMDL. When the results from the so-called minimally impacted sites are included, the reference system exceeded the geometric mean numeric target 16 percent of the time; the number of exceedances is reduced to 1.5 percent when results from the minimally impacted sites are excluded. Additionally, arbitrarily setting the geometric mean WLA at zero

(0) exceedances for the proposed TMDL would require the treatment or diversion of nonanthropogenic sources of bacteria.

A reference system-based geometric mean standard has been used by other California Regional Water Quality Control Boards, such as the San Diego Regional Board. Therefore, the Regional Board's assertion that EPA would not support allowable exceedance days for geometric mean targets is unsubstantiated.

The State Board should remand the TMDL and direct the Regional Board to revise the proposed TMDL so that the geometric mean WLAs are established in accordance with the reference system approach, including results from minimally impacted sites in the calculation of allowable exceedance days for both single sample and geometric mean targets.

4. The TMDL should recognize the ongoing scientific progress for bacteria

There are ongoing scientific studies of the bacteria indicators currently being used in the TMDLs. Recent studies conducted in Southern California have indicated the absence of a correlation between traditional bacteria indicators and human health risks. EPA recognizes the lack of sound science on bacteria and is currently conducting necessary scientific studies to establish new bacteria indicators and associated criteria for recreational waters by 2012. Further, the Southern California Coastal Water Research Project is also currently conducting an epidemiological study in Southern California and is expected to address some of the existing scientific limitations. Thus, developing the Santa Clara River Bacteria TMDL based on traditional indicators, which do not accurately predict the risk of illness, lacks scientific justification and needs reconsideration as new findings are made available.

In its response to this comment, the Regional Board stated that it would reconsider this TMDL within four years if monitoring or any local reference system studies justifies a revision, EPA publishes revised recommended bacteria criteria, or the Regional Board adopts a separate Basin Plan Amendment suspending recreational uses during high flows. It must be recognized, however, that the Regional Board has failed to reopen a singleTMDL even though over twenty TMDLs adopted for the Los Angeles Basin currently have reopeners. The date to reopen eight of these TMDLs, as required by their implementation schedules, has already passed, in one case by as much as six years.

Accordingly, the TMDL should provide a firm, concrete date by which the Regional Board must reopen the TMDL. The TMDL should also provide that the TMDL will be reopened within one year after EPA issues new water quality criteria; EPA is currently scheduled to issue those new water quality criteria by October 15, 2012.