



November 14, 2013

**VIA U.S. MAIL AND E-MAIL (E-mail Receipt Requested)**

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Re: *Comment Letter –Ballona Creek Estuary Toxics Pollutants and Ballona Creek Metals TMDLs Revisions*

Dear Mr. Voong:

The City of Beverly Hills (“City”) submits the following comments to the Los Angeles Regional Water Quality Control Board’s (“Regional Board”) proposed amendment (“Proposed Amendment”) to the Water Quality Control Plan for the Los Angeles Region to Revise the Total Maximum Daily Loads for Metals in Ballona Creek and the Total Maximum Daily Loads for Toxic Pollutants in the Ballona Creek Estuary (“Ballona Creek TMDLs”).

The City reserves the right to make additional legal comments on the Proposed Amendment prior to the close of the public hearing to adopt the Amendment and at the public hearing itself.

The City of Los Angeles has submitted comments regarding the Proposed Amendment which the City joins and incorporates herein, except that: 1) the City supports the Regional Board staff recommendation that selenium not be listed in the Ballona Creek Metals TMDL; and (2) the City is concerned about the standard of liability proposed to be imposed on the Ballona Creek MS4 Permittees.

On behalf of the City of Beverly Hills, we hereby submit the following additional comments on the Proposed Amendments:

**1. Selenium Should Be Removed from the Ballona Creek Metals TMDL**

The City supports the Regional Board staff recommendation that selenium be removed from the Ballona Creek Metals TMDL, especially given that “[r]ecent data indicate that selenium is **not** present at levels exceeding existing numeric targets and is not impairing the designated beneficial uses.” Attachment A to Resolution No. R13-XXX, p. 2.

As the September 2013 Regional Board Staff Report indicates on page 12:

“Since the adoption of the 2002 303(d) List, the State Water Resources Control Board adopted the Water Control Policy for Developing California’s Clean Water Act Section 303(d) List, 2004 (Listing Policy). The Listing Policy uses a weight of evidence approach to evaluate whether to place waters on, or remove waters from, the 303(d) List (SWRCB, 2004).

The re-examined data, described above, satisfies the data quality requirements of sections 6.1.4 and 6.1.5 of the Listing Policy and the frequency of exceedance, 9 exceedances out of 130 samples, does not exceed the allowable frequency listed in Table 4.1 of the Listing Policy. Table 4.1 is the “Maximum Number of Measured Exceedances Allowed to Remove a Water Segment from the Section 303(d) List for Toxicants.” **The data quality and the limited exceedances of the criteria would allow selenium to be delisted based on Table 4.1.**

Emphasis added.

It is entirely appropriate to remove selenium given that it meets the State Water Resources Control Board’s Listing Policy for delisting a toxicant. The removal of selenium from the Ballona Creek Metals TMDL will enable the City, and its fellow permittees, to focus its limited resources on those pollutants that require the most immediate attention in the ongoing effort to improve the water quality of Ballona Creek.

## 2. **The Proposed Amendment’s Imposition of Joint Liability for MS4 Permittees Should be Deleted**

The Proposed Amendment improperly imposes joint and several liability for exceedances under the Ballona Creek TMDLs. Rather than setting specific numeric limits for each individual permittee, the proposed Ballona Creek Metals TMDL sets a waste load allocation for groups of permittees, including a group termed the “Ballona Creek MS4 permittees.” Attachment A to Resolution No. R13-XXX at p. 5 (Waste Load Allocations (for point sources)). This language should be changed to provide for individual Waste Load Allocations for each specific permittee, not a “group” allocation. Thus, the “dry weather” Waste Load Allocation should be segregated between CalTrans and each specific MS4 permittee. A similar rule should apply to the “wet weather” Waste Load Allocations, which should be segregated between CalTrans and each specific (not a group) MS4 permittee which drains (partially or completely) into Ballona Creek.

The Proposed Amendment for the Ballona Creek Metals TMDL specifies that:

“The County of Los Angeles, Los Angeles County Flood Control District, City of Los Angeles, Beverly Hills, Culver City, Inglewood, Santa Monica, and West Hollywood **are jointly responsible for meeting the mass-based waste load allocations** for the MS4 permittees.”

*Id.* at p. 11; Attachment B to Resolution No. R13-XXX at p. 8, emphasis added.

The Proposed Amendment further emphasizes the joint obligations of the MS4 permittee “group” by stating that: “The MS4 . . . storm water NPDES permittees are **jointly responsible**

**for assessing the progress in reducing pollutant loads to achieve the TMDL.** Attachment A to Resolution No. R13-XXX at p. 13, emphasis added.

The references to “jointly responsible” should be deleted in both the Proposed Amendment to the Ballona Creek Metals TMDL and to Toxics TMDL.

The establishment of a group standard applicable to all Ballona Creek MS4 permittees is problematic because the Proposed Amendment essentially adds a joint and several liability provision, thereby exposing each individual permittee to uncertain legal liability from third parties. All Ballona Creek MS4 permittees are “jointly” responsible for the total waste load allocation. The Proposed Amendment makes the City liable for any other permittee’s violation.

As an example, in the proposed Ballona Creek Metals TMDL, the “effectiveness monitoring” provision states that MS4 permittees will be found to be meeting the dry-weather waste load allocations if the “load at the first downstream monitoring point” is less than or equal to the waste load allocation. Attachment A to Resolution No. R13-XXX at p. 5. In other words, if one municipal permittee causes an exceedance at the first downstream monitoring point, then a third party could potentially sue any of the MS4 permittees and allege a violation of the MS4 permit.

It is both unlawful and inequitable to make a permittee liable for the actions of other permittees over which it has no control. A party is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Shell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004). Because the City cannot prevent another permittee from failing to comply with the Ballona Creek TMDLs, the Regional Board cannot, as a matter of law, hold the City jointly or jointly and severally liable with another permittee for TMDL violations.

This Board should not underestimate the ability and desire of various third-parties to seek to impose liability upon a single permittee. *Cf. Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013) (decision after remand from U.S. Supreme Court). Such litigation shifts valuable (but limited) municipal resources to defending court actions, rather than focusing on innovative and constructive ways to improve water quality in Ballona Creek.

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Thank you for the opportunity to comment on the proposed amendments to the Ballona Creek TMDLs. The City is committed to working with the Regional Board to achieve our mutual goals in improving water quality and looks forward to engaging in a constructive dialogue with Regional Board staff on these issues.

Sincerely,



George Chavez  
Director of Public Works Services

cc: Jeff Kolin, City Manager  
Laurence S. Wiener, City Attorney  
Trish Rhay, Utilities Manager