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COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

"To Enrich Lives Through Effective and Caring Service"

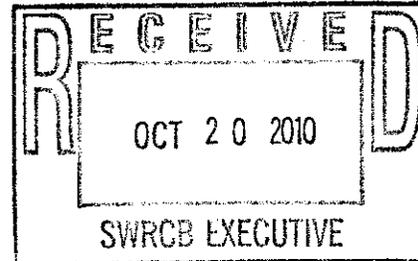
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IN REPLY PLEASE
REFER TO FILE: **WM-4**

October 20, 2010

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
COLORADO LAGOON TOXIC POLLUTANTS
TOTAL MAXIMUM DAILY LOAD**

Thank you for the opportunity to comment on the proposed amendment to the Water Quality Control Plan for the Los Angeles Region to incorporate Total Maximum Daily Load for organochlorine pesticides, polychlorinated biphenyls, sediment toxicity, polycyclic aromatic hydrocarbons, and metals for Colorado Lagoon. The enclosed comments are submitted on behalf of the Los Angeles County Flood Control District.

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. Rossana D'Antonio at (626) 458-4325 or rdanton@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works

GARY HILDEBRAND
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Enc.

**COMMENTS OF LOS ANGELES COUNTY FLOOD CONTROL DISTRICT ON THE
PROPOSED COLORADO LAGOON TOTAL MAXIMUM DAILY LOAD FOR
ORGANOCHLORINE PESTICIDES, POLYCHLORINATED BIPHENYLS, SEDIMENT
TOXICITY, POLYCYCLIC AROMATIC HYDROCARBONS, AND METALS**

While the Los Angeles County Flood Control District (LACFCD) shares the water quality goals of the Regional Water Quality Control Board, Los Angeles Region (Regional Board), and State Water Resources Control Board (State Board), the proposed Total Maximum Daily Load (TMDL) is seriously flawed and should be remanded to the Regional Board for revision for the reasons described below.

1. The LACFCD Should Not Be Responsible For Meeting Waste-Load Allocations (WLAs)

The proposed TMDL inappropriately names the LACFCD as a responsible agency for meeting the TMDLs WLAs. The purpose of the TMDL is to identify discharges and assign waste load and load allocations so that the receiving water, here the Colorado Lagoon, will meet water-quality objectives. The WLAs, therefore, should be allocated in a manner that will further reduction of those pollutant loads to the lagoon. Because the LACFCD does not have jurisdiction over the land areas that drain to the Colorado Lagoon, allocation of WLAs to the LACFCD does not accomplish that objective.

As set forth in Finding No. 9 of Regional Board Resolution No. R09-005, "the Regional Board's goal in establishing the Colorado Lagoon Organochlorine (OC) Pesticides, Polychlorinated Biphenyls (PCBs), sediment toxicity, Polycyclic Aromatic Hydrocarbons (PAHs), and metals TMDL is to determine and set forth measures needed to remove the impairment of fish tissue and sediment quality due to high levels of OC pesticides, PCBs, sediment toxicity, PAHs, and metals in Colorado Lagoon." In order to reach this goal, the TMDL must assign the WLAs to the jurisdictions that have the ability to reduce the contribution of these pollutants to the lagoon. Otherwise the assignment will not result in a reduction in the contribution of these pollutants. This means that the WLAs should be allocated to those jurisdictions that are able to control the land uses, which generate these pollutants, and thus prevent the pollutants from entering the lagoon.

These jurisdictions are the City of Long Beach (City) and California Department of Transportation (Caltrans). As recognized by the Regional Board, the Colorado Lagoon and its Watershed area are located completely within the City. The City has jurisdiction over the land areas that discharge to the lagoon. The Caltrans has jurisdiction over the State highways. These are the agencies that have control over the land uses that generate the pollutants entering the lagoon. For example, the proposed implementation action that targets "specific land uses or critical sources" (proposed TMDL, page10) includes better sediment control at construction sites and improved street cleaning, and reducing watering needs and eliminating pesticide and herbicide use at the adjoining golf course. These are all activities that must be undertaken by Long Beach or Caltrans.

In contrast, the LACFCD functions simply as a conveyance for urban and stormwater runoff from the City and Caltrans and does not generate any of the pollutants of concern. Assigning WLAs to LACFCD does nothing to further the Regional Board's goal of reducing the contribution of these pollutants because the LACFCD cannot control their generation.

Assigning WLAs to LACFCD when LACFCD does not have authority over the land uses generating the pollutants is also inconsistent with the Los Angeles County Municipal Storm Water Permit (MS4 Permit), one of the stated means by which the TMDL will be implemented. (See proposed TMDL, Table 7-30.1 at page 9). The MS4 Permit provides that each permittee "is required to comply with the requirements of this Order applicable to discharges *within its boundaries* . . . and not for the implementation of the provisions applicable to . . . other permittees. (Permit, Part 3.E., page 26). Part 3.D of the MS4 Permit also provides that LACFCD, as principal permittee, is to "coordinate and facilitate activities necessary to comply with the requirements of this Order, but is not responsible for ensuring compliance of any individual permittee." Furthermore, Finding G.4 of the MS4 Permit provides that the LACFCD will coordinate with other municipalities, but "each permittee is responsible only for a discharge for which it is the operator."

The TMDL indicates that it will be implemented through NPDES permits. (Proposed TMDL, Table 7-30.1 at page 9.) Under the MS4 Permit, LACFCD is not responsible for ensuring the compliance of any individual permittee that may be discharging to its system. This would include City and Caltrans. WLAs should be assigned to those jurisdictions. In contrast, assigning WLAs to LACFCD for pollutants that are generated from those land areas will not result in a reduction of pollutants from those land areas because LACFCD has no control over them.

For these reasons, allocation of WLAs to LACFCD is contrary to the TMDL's objectives. LACFCD should be removed from the following sections of the proposed TMDL, set forth as Attachment A to Resolution No. R09-005:

- Page 5, WLAs section
- Page 9, Implementation Plan section
- Page 13, Table 7-30.2, Items 1, 5 and 6

2. LACFCD Cannot Be Held Jointly Liable For TMDL Compliance

Page 9, Table 7-30.1, of the proposed TMDL provides that "The City of Long Beach, the Los Angeles County Flood Control District, and California Department of Transportation (Caltrans) are each responsible for meeting the waste-load allocations. However, to the extent their effluent discharges are commingled, they will be held jointly liable for abating the pollutants in the commingled discharge to the extent any of them are unable to disprove their own contribution of pollutants."

As set forth above, although the City and Caltrans might have commingled discharges, the LACFCD does not. The LACFCD does not generate runoff, but simply conveys urban and stormwater runoff generated by land areas under the jurisdiction of City or Caltrans. Therefore, LACFCD should not be included in any reference to "joint liability" because there is no commingling of discharges containing pollutants generated by it.

Moreover, there is no legal authority to assign "joint liability" in a TMDL. Under the Porter-Cologne Water Quality Act, 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. (Emphasis added.) A regional board issues waste-discharge requirements to "the person making or proposing the discharge." Water Code § 13263(f). (Emphasis added.) Enforcement is directed toward "any person who violates any cease and desist order, cleanup and abatement order . . . or . . . waste discharge requirement." Water Code § 13350(a) (emphasis added). 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"). A discharger is not responsible for discharges over which it has no authority or control. The Clean Water Act is similarly directed to the discharger, not others. See 33 U.S.C. §§ 1319 and 1342.

The proposed TMDL nevertheless purports to make LACFCD jointly responsible for the actions (or inactions) of other responsible jurisdictions. LACFCD, however, has no authority to compel the City, which has the majority of the responsibility for meeting WLAs in the lagoon, to come into compliance. LACFCD cannot be, and under the governing law is not, a guarantor of compliance for other jurisdictions and it cannot be assigned such a role.

In its response to comments, the Regional Board stated that, under the proposed TMDL, LACFCD "is not required to jointly implement any remediation actions. Responsible agencies are only responsible for areas under their management." (Response to Comment No. 2.2.) The Regional Board indicated that it had revised the proposed TMDL to reflect this addition. The Regional Board then went on to encourage the responsible agencies to collaborate or coordinate their efforts to avoid duplication and reduce associated costs.

The Regional Board, however, did not revise the proposed TMDL to reflect its response to Comment 2.2. For the reasons set forth above, there is no basis to assign joint liability to LACFCD and therefore all references to joint liability should be deleted. At a minimum, the proposed TMDL should reflect what the Regional Board stated in its response to comments. Accordingly, at a minimum, Table 7-30.1, in its Implementation Plan section, on page 9, should include as a second paragraph the

Regional Board's following statement in its response to comment, "LACFCD is not required to jointly implement any remediation actions. Responsible agencies are only responsible for areas under their management." (Response to Comment No. 2.2.)

The responsibility of each of the jurisdictions should be clearly specified in the proposed TMDL. All references to LACFCD and to joint liability should be deleted in the TMDL's Implementation Plan set forth on page 9, Table 7-30.1, and all references to the LACFCD should be removed from page 13, Table 7-30.2. Alternatively, at a minimum, the Implementation Plan section should include as a second paragraph, the Regional Board's statement of position that "LACFCD is not required to jointly implement any remediation actions" (Response to Comment No. 2.2.)

3. LACFCD Should Not Be Responsible For Monitoring

The proposed TMDL requires LACFCD to participate in water, sediment, and fish tissue monitoring. While LACFCD is willing to facilitate monitoring through the grant of access to its facilities to the extent that the monitoring does not interfere with flood control activities, LACFCD should not be responsible for conducting monitoring because it is not a responsible agency. As discussed above, the LACFCD does not generate any of the flows being discharged into Colorado Lagoon nor does it own, manage, or operate Colorado Lagoon. Monitoring and implementation actions are properly the responsibility of those entities with authority over the land uses that generate the pollutants entering the lagoon and that possess the means to prevent polluted runoff from entering the lagoon.

Accordingly, LACFCD should be removed from Page 8, Table 7-30.1, and Page 13, Table 7-30.2 (items 2, 3, and 4).

4. The Monitoring Requirement for the Termino Avenue Drain After Its Relocation is Inappropriate

To alleviate local flooding, the LACFCD is in the process of redirecting Termino Avenue Drain away from Colorado Lagoon. When complete, the drain into the Lagoon will be removed and there will be no flows into Colorado Lagoon from Termino Drain. Dry weather flows from the Termino Avenue Drain will be diverted into the sanitary sewer system for treatment while wet weather flows will flow into Marine Stadium, located downstream of Colorado Lagoon.

During the October 1, 2009, hearing on the TMDL, the Regional Board directed staff to modify the draft TMDL to require monitoring of the new Termino Avenue Drain outfall once it has been diverted into Marine Stadium. This requirement is inappropriate because Marine Stadium is a separate water-body and is not subject to the Colorado Lagoon TMDL. In addition, this was a substantive change that had not been properly noticed, and it was improper to include it without first providing the required public notice.

Accordingly, the requirement for monitoring the Termino Avenue Drain outfall after its diversion should be removed from page 7 and 8 of Table 7-30.1.

5. **The Regional Board Failed to Apply the Sediment Quality Objectives for Enclosed Bays and Estuaries When Adopting the Proposed TMDL; The TMDL Should Be Remanded to the Regional Board and the Regional Board Ordered to Apply These Objectives**

The Regional Board has failed to apply the Sediment Quality Objectives (SQOs) for Enclosed Bays and Estuaries adopted by the State Board on September 16, 2008 and effective August 25, 2009. The purpose of the SQOs is to have "scientifically-defensible sediment quality objectives for bays and estuaries, which can be consistently applied statewide to assess sediment quality, regulate waste discharges that can impact sediment quality, and provide the basis for appropriate remediation activities, where necessary." (State Board Resolution No. 2008-0070, paragraph 14.) The Regional Board's failure to apply the SQOs defeats this purpose.

There is no question that the Regional Board is bound by the State Board's SQOs. Water Code Section 13170 provides that, "[t]he state board may adopt water quality control plans in accordance with the provisions of Sections 13240 to 13244 *Such plans, when adopted, supersede any regional water quality control plans for the same waters to the extent of any conflict.*" (Emphasis added.) Water Code Section 13240 specifically provides that water quality control plans adopted by regional boards "shall conform to any state policy for water quality control."

The State Board adopted the SQOs as part of its Water Quality Control Plan For Enclosed Bays and Estuaries. As such, this plan supersedes any regional water quality control plan for sediment toxicity in Colorado Lagoon. Therefore, any TMDL adopted by the Regional Board for sediment toxicity in Colorado Lagoon is required to conform to this state plan.

Nevertheless, the Regional Board failed to apply the SQOs. The Regional Board failed to apply the SQOs in two respects. First, the Regional Board failed to determine if Colorado Lagoon is in fact an impaired water body under the multiple line of evidence (MLOE) approach called for by the SQOs. Second, the Regional Board failed to apply the SQOs in adopting numeric targets and WLAs, instead using the old National Oceanic and Atmospheric Agency (NOAA) sediment quality guidelines that have been superseded by the SQOs with respect to sediment quality in California.

With respect to the first point, the Regional Board improperly developed the TMDL without first determining whether the Colorado Lagoon would still be considered an impaired water body under the SQOs. According to the proposed TMDL, the lagoon was first listed on the 1998 section 303(d) list. At that time, and until the SQOs were adopted in 2008, the listing criteria in the Los Angeles Region did not apply a MLOE approach; instead, NOAAs single line-of-evidence sediment quality guidelines were used in evaluating sediment impairments for 303(d) listing.

The State Board, in the SQOs, recognizes that this prior approach is not reliable. In adopting the SQOs, the State Board specifically said:

None of the individual [Lines of Evidence (LOE)] is sufficiently reliable when used alone to assess sediment quality impacts due to toxic pollutants. Within a given site, the LOEs applied to assess exposure as described in Section V.A may underestimate or overestimate the risk to benthic communities and do not indicate causality of specific chemicals. (SQOs, section V.B)

As a result, the SQOs require the assessment of sediment quality based on three lines of evidence, sediment toxicity, benthic community condition, and sediment chemistry. SQOs, section V.A. The State Board found that, "each LOE produces specific information that, when integrated with the other LOEs, provides a more confident assessment of sediment quality relative to the narrative objective. (SQOs, section V.B.)

The State Board further recognized that the State Board's prior section 303(d) listing policy was also inconsistent with the MLOE approach of the SQOs. The State Board specifically found that: "The State Water Board's Clean Water Act section 303(d) listing policy was adopted prior to the development of SQOs and without the benefit of the scientific evidence supporting their development". (State Board Resolution No. 2008-0070, paragraph 10)

Here, the listing of Colorado Lagoon as impaired water body was never considered based on the MLOE approach set forth in the SQOs. It is not known whether the lagoon would still be considered impaired under the SQOs. The Regional Board, therefore, should have first determined whether the lagoon would still be considered impaired before adopting the TMDL.

In its response to comments, the Regional Board stated that "the listing was consistent with the SQOs because impairments have been identified on the basis of sediment toxicity, benthic impairment, and sediment chemistry and the TMDL was developed to address this suite of impairments". (Response to comment No. 2.3.) This is incorrect. First, benthic data has never been used for listing Colorado Lagoon. Thus, there was no analysis of benthic impairment. Second, the past sediment quality evaluation has never used SQOs triad approach of integrating the three lines of evidence. The SQO requires integrating the three lines of evidence using the methodology set forth in the SQO, (see Attachment B to the SQO), rather than considering each of the lines of evidence separately as the Regional Board purported to do here.

To the extent the Regional Board relies on the consent decree between the United States Environmental Protection Agency (EPA) and Heal the Bay as a reason for adopting this TMDL now (see Resolution No. R09-005, paragraph 3), such reliance is misplaced. The consent decree does not bind the Regional Board and does not obligate it to take any action. The consent decree certainly does not obligate the Regional Board to act contrary to good science. Moreover, according to the

Regional Board, a TMDL for the constituents at issue in the lagoon does not have to be adopted by EPA until March 2012 (Resolution No. R09-005, paragraph 3). The Regional Board therefore has ample time to determine if the lagoon is impaired applying the SQOs and, if necessary, adopt a TMDL.

The Regional Board also failed to apply the SQOs approach in adopting the numeric targets and WLAs. Instead, the Regional Board used the old NOAA sediment quality guidelines in setting targets and WLAs. As described in Long et al. (1995)¹, the NOAA guidelines and objectives were developed based on a single-line-of-evidence sediment chemistry data, and they were intended to be used as a screening tool for identifying and prioritizing the greatest biological risk areas. They were never intended to be used as numeric targets for TMDLs and there is no scientific basis for using them in this manner. The use of NOAA's effects-range-low (ERL) numeric targets for individual pollutants as a measure of toxicity in sediments is unsupported by the scientific literature, as several studies (e.g., Chapman et al., 2001²; Bay et al., 2007³) have noted the lack of association between the ERL values and impacts in sediments. The characterization of sediment toxicity is more complex than can be discerned using the ERL single numeric target for individual pollutants. The fact that a chemical in sediment exceeds the ERL value neither justifies impairment nor establishes the causes for the impairment. Indeed, as noted above, NOAA specifically stated that its guidelines "are not intended as cleanup or remediation targets, nor as discharge attainment targets." [*Sediment Quality Guidelines Developed for the National Status and Trends Program* (NOAA, 1999), page 1.]

In response to the LACFCD's comment on this issue, the Regional Board stated that "the State's SQOs, as set forth in Part 1 of the Plan, do not supersede the ERL values". This is not correct. The State Board clearly stated that it intended to adopt "scientifically-defensible sediment quality objectives . . . which can be consistently applied statewide to assess sediment quality regulate waste discharges that can impact sediment quality, and provide the basis for appropriate remediation activities." (State Board Resolution No. 2008-0070, paragraph 14.) To that end, the State Board recommended "*that the Water Boards develop TMDL allocations using the methodology described herein, wherever possible.*" (SQOs, page 14.) The State Board thus clearly indicated that the regional boards state-wide should use the SQOs wherever possible. The Regional Board did not provide a justification for not following that approach.

As noted, the Regional Board was required to follow the SQOs. (Water Code Section 13170 and 13240). The Regional Board did not do so here.

Accordingly, The State Water Board should remand the TMDL to the Regional Board to do the following:

¹ Long et al., 1995: Incidence of adverse biological effects within ranges of chemical and concentrations in marine and estuarine sediments. *Environmental Management*, 19(1), 81-97.

² Chapman et al., 2001: Assessing sediment contamination in estuaries. *Environmental Toxicology and Chemistry*, 20(1), 3-22.

³ Bay et al., 2007: Comparison of national and regional sediment quality guidelines for classifying sediment toxicity in California. *Technical Report*, Southern California Coastal Water Research Project.

- Using the State's SQO MLOE approach, examine whether sediment impairment in Colorado Lagoon is justified;
- If impairment is justified based on SQO, identify water quality constituents that are responsible for the impairment; and
- Apply SQOs to set the TMDL targets and WLAs for the identified responsible constituents and to evaluate TMDL compliance.

6. There is Insufficient Time Provided in the TMDL for Achieving Final WLAs

The proposed TMDL does not provide adequate time for the responsible jurisdictions to attain the final WLAs. The TMDL calls for attainment of the WLAs in 7 years after the effective date of the TMDL. There is no evidence in the record to support this 7 year deadline. Based on experience with previous TMDLs, it is not possible to develop plans, implement actions, and achieve WLAs in seven-years. The draft TMDL provides no evidence as to how the responsible agencies are to meet the seven-year compliance schedule. There should be sufficient time for the responsible agencies to conduct the necessary monitoring and research needed during the course of implementation of the TMDL. Collaboration and integration with other adjacent regional water resources management programs may also be necessary.

In response to the LACFCD's comment on this issue, the Regional Board stated that "the planning, design and environmental certifications for several key remedial." actions is already complete ... that a 7-year implementation schedule is reasonable. (Response to comment No. 2.8) The Regional Board's response does not identify which actions are being referred to, and whether those alone will be sufficient to meet the WLAs. As noted, there is no evidence in the record as to which actions can be completed within 7 years, the basis for that conclusion. Significantly, the response does not state, but instead implicitly recognizes that the planning, design and environmental certifications have not been completed for all the drains at issue. For example, the "remedial actions" that the Regional Board appears to be referring to does not appear to include the Project-452 storm drain.

Accordingly, we request that the TMDL be remanded to the Regional Board for consideration of evidence to support an appropriate time period for implementation. The LACFCD's experience in designing and contracting projects related to water quality and otherwise, which the Regional Board did not call on in adopting the 7-year period, is that the implementation schedule proposed in Table 7-30.2, item 6, of the TMDL should be no shorter than 15 years.

7. The WLA Section of the TMDL Should Be Revised to Appropriately Reflect the Regional Board's Response to LACFCD's Comment

The proposed TMDL specifies two different approaches for the WLAs for stormwater discharges: (i) mass-based and (ii) concentration-based, as indicated on page 5 of the TMDL. Having two different allocations for the same discharge is unreasonable and impractical, as they demand different implementation measures. In the comment

to the Regional Board on this issue, the LACFCD requested that the WLAs for municipal stormwater discharges be set on the mass basis only, and that the concentration-based WLAs for stormwater discharges be removed from the WLAs Section on page 5 of the TMDL.

The Regional Board granted the LACFCD's request on this issue, stating that "Regional Board staff finds that the reduction of loadings from storm drain systems to the lagoon would be adequately addressed through the assigned mass-based WLAs ... the Basin Plan amendment is revised to include only mass-based WLAs for ... storm drain outfalls that currently discharge to the lagoon." However, the Basin Plan Amendment was not revised as the Regional Board stated it would do in the response.

We request that the WLA section, pages 5 and 6, of the TMDL be revised to correct this error and reflect Regional Board staff's response by removing the reference to concentration-based WLAs for stormwater discharges.

8. The TMDL Schedule Should Include a Re-opener

The proposed TMDL contains many uncertainties, including uncertainties about pollutant sources, loading capacity, allocations, the appropriateness of the water quality standards, and the implementation schedules. These uncertainties stem from the lack of scientific and technical information that was available during the TMDL development.

In response to the LACFCD's request for the TMDL schedule to include a re-opener, Regional Board staff indicated that the WLAs can be revised when additional information warrants it but failed to include new language in the TMDL to reflect this. The LACFCD requests that the TMDL specifically include a reopener in 5 years if the implementation schedule is extended past 7 years, or in 4 years if the implementation schedule continues to require achievement of WLAs in 7 years. The LACFCD further requests that the TMDL be revised to indicate that the TMDL would be revised in the future to reflect new scientific and technical information and/or new standards that may result.

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