

Comments In Re: Dominguez Channel/Los Angeles Harbor Toxics TMDL

I. Dredging

The DC/LAH-TTMDL discusses dredging to remediate contaminated soil in the harbors. It is not clear, however, if municipal NPDES permittees are responsible for paying for this activity. Erring on the worst-case, the City cannot dismiss the possibility that it could be included as a cost sharing participant. The City must point out that the MS4 limits responsibility to controlling stormwater within a jurisdiction, specifically at the end of pipe. It does not require eliminating a pollution source located downstream of it; nor does it require eliminating a source of stormwater pollution or the pollutant itself. As it relates to stormwater, MS4 permits, per WQA section 402(p)(3)(B)(iii):

shall require 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.

In view of this, it should be clear that dredging is not an action that can be imposed on municipal permittees through the municipal NPDES permit. Controls must be implemented intra-jurisdictionally.

Recommendation/Action Required

Make it clear: (1) that none of the municipal NPDES permittees is responsible for contributing to dredging or any other clean-up activity mentioned in the TMDL; (2) which municipal permittees would be responsible for funding dredging; and (3) that requiring a municipal permittee to participate in dredging exceeds federal stormwater regulations and, therefore, should be required through a waste discharge order pursuant to Porter-Cologne.

2. Scope of TMDL Applicability

The inclusion of municipal permittees as responsible agencies that must comply with the DC/LAH-TTMDL requirements appears arbitrary and capricious. There is no explanation as to why Regional Board staff elected to include the municipal permittees, both specifically identified as responsible agencies and those that may be subject by merely being situated in the Los Angeles and San Gabriel River Watersheds.

The City and others are concerned that the Regional Board is likely to require an implementation plan imposed on permittees who have no idea as to why they are

being included. As is with other TMDLs the Regional Board has adopted, determining inclusion as based on exceedances detected at a mass emissions station and from samples taken from other points within receiving waters. However, it is our understanding that federal regulations require outfall monitoring or, if not possible, from a manhole within a jurisdiction. Basing TMDL “collective” inclusion on downstream sampling results is neither fair nor useful in determining whether a permittee is causing or contributing to water quality standard excursion.

Recommendation/Action Required

First, provide an credible explanation as to why permittees situated in the entire Los Angeles River and San Gabriel Rivers, including those are located over 40 miles away from the harbors, and in the case of those that are situated above spreading grounds, may subject to the requirements of this TMDL. Second, build into the TMDL outfall/manhole monitoring, together with a reasonable potential analysis (RPA) to determine to what extent, if any, a permittee is causing or contributing to an exceedance. Once this information is made available the Regional Board could then identify who the responsible jurisdictions really are.

3. Meeting TMDL WLAs

The City is concerned with the compliance approach the DC/LAH-TTDMML proposes. It in effect determines compliance by meeting WLAs, as the following excerpt indicates:

MS4 permittees, Caltrans, and other NPDES dischargers will be required to meet the WLAs at the designated compliance locations as defined in the TMDL monitoring plan. To achieve the necessary reductions to meet the allowable waste load allocations, permittees could balance short-term capital investments directed to addressing this and other TMDLs in the Dominguez Channel watershed and greater Los Angeles and Long Beach Harbor waters with long-term planning activities for stormwater management in the region as a whole. It should be emphasized that the potential implementation.

Once again, as a municipal NPDES permittee, the City cannot be compelled to comply with the WLA as strict numeric limit. Instead, compliance is determined through a water quality based effluent limitation (WQBEL) a device specified under federal stormwater regulations device that in effect translates WLAs, which apply to the receiving water, into BMPs, quantifiable BMPs, or surrogate parameters (viz., a numeric WQBEL). These translated WQBELs can be evaluated through end-of-pipe and in stream monitoring. However, it must be made clear that compliance is determined by the implementation of the translated WQBELs and not by meeting the WLA at the outfall or receiving water by any means necessary -- as stated in this and other Regional Board TMDLs.

Recommendation/Action Required

Delete from the TMDL any mention that when incorporated into the municipal NPDES permit, compliance with the TMDL and its WLA must be accomplished by any means and that, instead, compliance shall be determined by appropriately translated WQBELs.

4. No WQBEL or RPA

We note that Regional Board TMDL staff did not conduct a reasonable potential analysis (RPA) and not did it develop a water quality based effluent limit (WQBEL), which is a by-product of the RPA analysis. This is inconsistent with the *USEPA's NPDES Permit Writers' Manual* and USEPA's 2010 revised memorandum on establishing TMDLs. The former document makes it clear that:

EPA regulations at § 122.44(d)(1)(i) state, "Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any [s]tate water quality standard, including [s]tate narrative criteria for water quality." [emphasis added] Because of that regulation, EPA and many authorized NPDES states refer to the process that a permit writer uses to determine whether a WQBEL is required in an NPDES permit as a reasonable potential analysis.

TMDL staff indicated during a meeting on February 7, 2011, that an RPA was not conducted, which also explains why a WQBEL was not established for this TMDL as well. USEPA's 2010 memo makes it very clear that a WQBEL must be established by the NPDES authority when it *determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality excursion and recommends that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards.*

It should be noted that USEPA Washington D.C. NPDES permit and TMDL development staff agreed that a numeric a numeric WQBEL and a TMDL WLA allocation are not to be considered one of the same. In fact, this issue has been raised by several local congressional representatives who have asked USEPA headquarters to provide a written "clarification" response. We are confident that USEPA will make it clear that a WQBEL is an effluent limitation that is required to address a WLA through BMPs, performance BMPs, or surrogate parameters such as flow or impervious cover (known as a numeric WQBEL). When placed in an MS4 permit a WQBEL does not require strict compliance with the receiving water WLA. This is because MS4 permits limit responsibility at the end-of-pipe – not the receiving water. The WQBEL actually bridges the gap between the end-of-pipe and the receiving water.

This is why the City does not believe that the TMDL can impose dredging or any other extra-jurisdictional control on a permittee. However, we are concerned that this could be achieved if the Regional Board places strict compliance with the WLA into the MS4 permit. Such an action would immediately open municipal permittees to third party litigation – something that has already been attempted by NRDC vis-à-vis the County of Los Angeles Flood Control District.

However, if the Regional Board is intent on demanding strict compliance with the WLA, by any means necessary, for this or any other TMDL, it will have to rely on Porter-Cologne to compel compliance with it.

Recommendation/Action Required

It is understood that the Regional Board is operating under a compressed timeline to adopt this and other TMDLs by the consent decree deadline. Therefore, the City recommends that the Regional Board defer adoption of this and other TMDLs to USEPA. USEPA would be able to better perform the RPA and discuss with affected permittees what WQBEL variant should be included into the next MS4 permit. The City expects WQBELs to be effectuated through the MS4 permit's stormwater quality management program plan (e.g., low impact development through the development planning program, enhanced street sweeping through the public agency programs, etc.).

By deferring to USEPA, the Regional Board can assure compliance with the consent decree deadline date while avoiding administrative and legal challenge from affected permittees. It should be noted that if the permittees challenge the TMDL and delay its adoption, USEPA would have to adopt it anyway, as it had for the trash TMDL and as it has for the San Gabriel River metals TMDL.

5. Responsible Parties/Agencies Terminology

The TMDL references responsible parties and agencies, but the distinction between them is not clear.

Recommendation/Action Required

Provide an explanation of what the difference is between the two terms. If there is no difference, explain that the two are used interchangeably or delete one of them.

6. Responsible Parties/Agencies Responsibilities

The TMDL sets an interim waste load allocation for toxicity (≤ 2 TUc) that must be met by the effective date of the TMDL by all responsible parties. It is not clear to the City why this allocation must be set. The TMDL admits that this target should be easy to meet based on Los Angeles County monitoring data, which

begs the question as to why it is necessary. Further, what if the WLA is not met? Would the Regional Board issue a notice of violation based on a receiving water exceedance? The City is concerned that this could open affected MS4 permittees to third party litigation.

Recommendation/Action Required

If the Regional Board is requiring compliance with the WLA for toxicity then it must rely on Porter-Cologne and, as a consequence comply with the “balancing of factors” requirement under §13241.

7. Implementation Plan

As with other TMDLs adopted by the Regional Board, this TMDL requires the submittal of an implementation plan per §13242, in this case two years after its effective date. The purpose of the plan is to show how the TMDL WLAs are to be met.

It is recognized that Porter-Cologne requires an implementation plan (IP) for TMDLs. However the version presented in this and other TMDLs adopted by the Regional Board are inconsonant with Porter-Cologne and federal storm water regulations. First, the IP requires only approval by the Regional Board’s Executive Director. And since the IP involves best management practices (BMPs) or other actions to meet a WLA, federal stormwater regulations require a reasonable potential analysis and the development of a WQBEL.

Porter-Cologne requires not only a TMDL but any component thereof to be adopted by the Regional Board’s governing body. This is because they are basin plan amendments. For example, the Santa Ana Regional Board’s governing body adopted Bacterial Indicator Source Evaluation Plans and Water Quality Monitoring Plans after the Middle Santa Ana River Bacterial TMDL three years it was adopted. Because the IP and the MRP require an expenditure of public funds to comply with the TMDL, a public hearing is necessary to, among other things, address §13241, which requires a balancing of factors, including cost. By only requiring Executive Officer approval side-steps that process which the State legislature clearly intended to be followed. It should be noted that Resolution No. 98-08 was adopted by the Regional Board in April of 1998 to approve BMPs required to implement several MS4 SQMP elements including illicit connection and discharge detection and elimination, development planning, development construction, and industrial/commercial inspection programs. The same must be done for each of the TMDLs. IP should be discussed at the time of adopting the TMDL, since it is part of the basin plan amendment, but could be deferred after it is adopted.

With respect to federal stormwater regulations, a reasonable potential analysis and a WQBEL should be discussed during the TMDL development process.

Resulting from the discussion should be a determination of appropriate BMPs (quantifiable and enforceable) or surrogate parameters needed to address the WLA. The Regional Board could also defer such discussion after the TMDL has been adopted. It is recommended, however, that the WQBEL expressed as BMPs or surrogate parameters should be incorporated into the MS4 within the framework of its stormwater quality management program (SQMP) and not be referenced as a separate attachment. For example, LID, as a BMP or as flow or impervious cover reduction surrogate parameter, should be implemented through the development planning/SUSMP program. The WQBEL is to be implemented over the 5 year term of the MS4 permit.

The bottom line is that Regional Board cannot require implementing BMPs in the IP once the TMDL is placed into the next MS4 permit without performing the required analysis and discussion and obtaining Regional Board approval.

Recommendation/Action Required

A workshop is needed discuss the several issues raised in this letter, including how to meet the WQBEL requirement and the kinds of BMPs or surrogate parameters that can be applied to address the WLA. This is a very different compliance approach from the one specified in the toxics TMDL, which essentially requires strict compliance with WLAs through BMPs. It is understood that Regional Board TMDL staff is operating under a compressed time line. However, not addressing these valid issues could result in an administrative and legal challenge from permittees, which could cause an unacceptable delay and force USEPA to adopt the TMDL to avoid being in contempt of the consent decree deadline (as it had for the Los Angeles River trash TMDL and as it has for the San Gabriel River metals TMDL).

Given that USEPA has greater expertise in translating WLAs into WQBELs Regional Board staff should give serious consideration to letting it adopt this TMDL.

7. Inclusion of Lomita

Why is Lomita included in this TMDL? It is already included in the Machado Lake Toxics TMDL.

Recommendation/Action Required

Please provide an explanation as to why Lomita is subject to this TMDL.