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Matthew E. Cohen
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October 20, 2006

VIA EMAIL AND U.S. MAIL

Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Re: Comment Letter - Ballona Creek Bacteria TMDL

Dear Ms. Her:

The City of Beverly Hills ("City") appreciates this opportunity to comment on the Proposed Amendment to the Water Quality Control Plan for the Los Angeles Region Incorporating a Total Maximum Daily Load for Bacteria in Ballona Creek, Ballona Estuary, and Sepulveda Channel ("Bacteria TMDL"). As discussed in its May 19, 2006 letter, the City has serious concerns regarding the Bacteria TMDL. These concerns were not fully addressed or resolved by the Regional Board prior to its adoption of the Bacteria TMDL. Rather than restate those arguments in this letter, the City is attaching its May 19, 2006 comment letter for the purpose of reasserting the arguments before the State Board.

Recent studies have indicated that *E. coli* and *Enterococci* regrowth in Storm Drain Water occur even in the absence of human or animal fecal input. For example, in a recent study entitled "*Growth of E. Coli and Enterococci in Storm Drain Water Biofilm*", Donna Ferguson and her associates from the Orange County Public Health Laboratory, Water Quality Department, found that high concentrations of *Enterococcus* and *E. coli* were present on biofilms in the Santa Ana River where human sewage was not present. In an experiment simulating storm-drain conditions, robust growth of *enterococcus* occurred on PVC pipes in the absence of any fecal contamination.

The current methods used to track and determine the presence or absence of unsafe pathogens in waterways is therefore called into question. The implementation plans presently contained in the Bacteria TMDL would require Stakeholders such as the City to be liable for ghost plumes of dangerous bacteria when in fact the waterways are completely safe.

Song Her
October 20, 2006
Page 2

The City respectfully requests that the State Board postpone incorporating the Bacteria TMDL into the Water Quality Control Plan for the Los Angeles Region until such time as the Regional Board and affected Stakeholders can conduct a thorough scientific study on the reliability of current bacteria tests and the effectiveness of the Regional Board's plan at eliminating bacteriological pollutants. Requiring Stakeholders to go forward with this plan without conducting further study would be an inefficient and unproductive use of public resources.

The City is dedicated to putting forth the resources required to properly address and mitigate excess bacteria discharges which may emanate from the City's storm drain system. Prior to dedicating the significant amount of resources required for this undertaking, however, the City asks that the State and Regional Board take the time to ensure that the prescribed cure is scientifically proven to achieve results. The City does not believe that the Bacteria TMDL as it is presently written is sufficient to adequately address the problems of alleged bacteria exceedances.

We look forward to your response to these comments as well as other comments submitted by the other Stakeholders.

Respectfully,



Matthew E. Cohen

Attachment

B0785-1317925650v1.doc

cc: Lawrence Weiner, Esq. (*w/attachment*)
Shana Epstein, Esq. (*via email, w/attachment*)
Lisa Bond, Esq. (*w/attachment*)
David Gustavson (*via email, w/attachment*)

ATTACHMENT

Matthew E. Cohen
mcohen@rwglaw.com

May 19, 2006

Via E-Mail and U.S. Mail

Ginachi Amah
California Regional Water Quality Control Board
Los Angeles Region
320 West Fourth Street, Suite 200
Los Angeles, CA 90013

Re: Comments on Draft Ballona Creek Total Maximum Daily Loads for
Bacterial Indicator Densities in Ballona Creek, Ballona Estuary, &
Sepulveda Channel

Dear Ms. Amah:

The City of Beverly Hills ("City") appreciates this opportunity to comment on the Draft "Total Maximum Daily Loads for Bacterial Indicator Densities in Ballona Creek, Ballona Estuary, & Sepulveda Channel" ("Draft TMDL"). We understand that the County of Los Angeles, Caltrans, and the City of Los Angeles are also submitting comments under separate cover. As discussed below, the City has serious concerns regarding the legality and viability of carrying out this TMDL.

1. **The Draft TMDL Fails to Comply with Relevant Provisions of the California Environmental Quality Act**

The City believes that the Draft TMDL violates the California Environmental Quality Act, set forth in Public Resources Code §§ 21000, *et seq.* ("CEQA"). CEQA requires the Regional Board to review any significant potential environmental impacts created by its actions. In the Draft TMDL, the Regional Board staff generally relies on a certification from the Secretary of Resources set forth in 14 California Code of Regulations section 15251(g) to avoid most of the documentary and procedural requirements of CEQA. We do not believe that the exemption applies here.

Ginachi Amah

May 19, 2006

Page 2

Public Resources Code section 21080.5(d)(2) provides that, in order to qualify for certification, a regulatory agency must ensure that:

“The rules and regulations adopted by the administering agency for the regulatory program do all of the following:

(A) Require that an activity will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the activity may have on the environment.

(B) Include guidelines for the orderly evaluation of proposed activities and the preparation of the plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program.

(C) Require the administering agency to consult with all public agencies that have jurisdiction, by law, with respect to the proposed activity.

(D) Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process. . . .”

The Regional Board’s Draft TMDL fails to comply with even these basic requirements. The Draft TMDL does not list feasible alternatives or mitigation measures, nor does it include guidelines on how to prepare plans. This constitutes a violation of CEQA. Pub. Resources Code § 21080.5(d)(3)(A).

Even if the certification exception were to apply, the Draft TMDL still fails to satisfy CEQA. With a certified regulatory program, the Regional Board must satisfy the applicable regulatory requirements of CEQA, and conduct the equivalent of the required analysis of the environmental impacts and effects. Cal. Code Regs., tit. 14 §§ 15250, 15252. As part of this analysis, the Regional Board must conduct the equivalent of a preliminary review and initial study. Cal. Code Regs., tit. 14 § 15252, subd. (a). The preliminary review and initial study must include a description of the proposed activity, an analysis and informed determination with

Ginachi Amah
May 19, 2006
Page 3

respect to potential significant environmental impacts, a completed "environmental checklist," and a report providing a description of the proposed activity, reasonable alternatives, and mitigation measures to minimize any significant adverse impacts. Cal. Code Regs., tit. 14 §§ 15250, 15252. The checklist prepared by the Regional Board fails to meet these basic CEQA requirements.

Under CEQA, the Regional Board must (1) determine whether the proposed TMDL will have a significant effect on the environment; and (2) prepare the functional equivalent of an Environmental Investigation Report ("EIR") if there is substantial evidence that any aspect of the project may cause a significant effect on the environment. Cal. Code Regs. §§ 15063, 15250, 15252. The Regional Board's checklist does not provide sufficient analysis of the impacts or offer evidence of ways in which the impacts can be mitigated to a level of insignificance. Pub. Resources Code §§ 21064.5, 21080.5, 21080 (c), Cal. Code Regs. §§ 15063, 15250, 15252.

The potential significant environmental effects that the Draft TMDL fails to adequately analyze include, but are not limited to, the following: (i) significant changes in the water quality as a result of the proposed implementation plans, including water flow disruptions, soil displacement, an increase in noise and traffic levels, changes in absorption rates, drainage patterns, and the amount of surface water runoff; (ii) significant impacts on public service and facilities such as fire and police protection, schools, parks and other recreational facilities, maintenance of public facilities and roads, and other governmental services; (iii) significant impacts on utilities and service systems for water and storm water drainage. The failure of the Regional Board to undertake a proper study of these impacts and consider the feasibility of alternative impacts results in the Draft TMDL's invalidation. *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal. App. 4th 1392, 1426.

2. The Draft TMDL Fails to Consider Other Sources of Pollution

As discussed in U.S. Environmental Protection Agency's ("EPA's") "Guidance for Developing TMDLs in California", 40 C.F.R. § 130.2(i) and 40 C.F.R. § 130.7(c)(1) require that point, nonpoint and background sources of pollutants of concern be described in the TMDL, including the magnitude and location of such sources. The Draft TMDL assumes that the vast majority of bacteria present in the

Ginachi Amah
May 19, 2006
Page 4

impaired creek and estuary is attributable and subject to the sole control of the alleged dischargers. There appears to be no mention of the affects, for example, that storm water runoff from Franklin Canyon Park will have on Reach 1. Also, little, if any, effort appears to have been made to quantify other non-point sources such as direct inputs from birds and other wildlife.¹

Specifically, no effort appears to have been made to determine the bacteria, nutrient, and sediment contribution from facilities over which neither the City nor any of the other named dischargers have jurisdiction, such as school districts, water districts, state entities, and private landowners. The Regional Board could feasibly exercise regulatory jurisdiction over these facilities. As a matter of public policy, it is inequitable to place the entire burden of monitoring and mitigating these facilities solely on the alleged dischargers enumerated in the Draft TMDL.

3. Compliance Within the Proposed Time Frame Would be Unrealistic

The Draft TMDL imposes stringent time limits for the coordination, funding, submission, and realization of a TMDL Implementation Plan. According to the Draft TMDL, monitoring plans must be in place within twelve months and the parties have ten years to reach full compliance. Furthermore, the City is expected to undertake massive infrastructure projects to meet the stated goals for year six, while the entire plan itself is subject to revision at year four. Given the size of the project, the number of agencies involved, and the lack of solid data underlying the TMDL goals, such a timeframe is highly unrealistic.

4. The Draft TMDL Amounts to an Unfunded Mandate

By requiring compliance with the Draft TMDL, the Regional Board has imposed new programs and/or has required a higher level of service of existing programs that are not required or mandated under the Clean Water Act or any federal regulations thereunder. The imposition of unfunded programs and mandates in the Draft TMDL is inconsistent with the provisions of the California Constitution, specifically Article XIII B, Section 6, which requires a state agency which mandates a new program or a higher level of service to provide a “subvention” of

¹ The Draft TMDL acknowledges as much on page 21 of the Staff Report, when it states: “Data do not currently exist to quantify the extent of the impact of wildlife on bacteria water quality in the Estuary.”

Ginachi Amah
May 19, 2006
Page 5

funds to reimburse local governments for the costs of the program or increased level of service.

The Draft TMDL does not fully consider the fiscal impact on cities. The Draft TMDL will require a substantial capital investment, which individual cities will have to fund, despite the fact that no funding mechanism, nor any assistance, financial or otherwise, is being provided to the cities. To our knowledge, the Regional Board has made no provision for funding the massive public works projects it has proposed in the current draft.

The Regional Board purports to rely on Water Code section 13267 as well as section 303(d) of the Clean Water Act for the authority to undertake this investigation.² Article XIII B, Section 6 of the Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a “subvention of funds to reimburse that local government for the costs of the program or increased level of service . . .” State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose costs upon a local agency as a means of implementing a federal program, then those costs should be reimbursed by the state agency. *See Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-1594. If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. *See Lucia Mar Unified School District v. Honig* (1988) 44 Cal. 3d 830, 833-834.

The Draft TMDL contains new programs and mandates that go beyond the specific requirements of either the Clean Water Act or the EPA’s regulations implementing the Clean Water Act. This includes, but is not limited to, the development of massive public works projects to alter the normal flow patterns of the Ballona Creek watershed as well as the rigorous requirements to monitor unimpaired waters. If the Regional Board wishes to impose this program, it needs to provide a means to pay for its implementation.

² Section 303(d) of the Clean Water Act is codified at 33 U.S.C. section 1313(d).

Ginachi Amah
May 19, 2006
Page 6

The Draft TMDL contains numerous data collection requirements. These activities go beyond the requirements of EPA's regulations implementing the Clean Water Act. Any information collection demands mandated by federal regulations must be submitted for approval to the Office of Management and Budget under the provisions of the Paperwork Reduction Act. 44 U.S.C. §§3501 *et seq.*

Implementing the programs outlined in the Draft TMDL would require the Permittees to collectively hire dozens of additional employees to implement these mandates. The City does not believe that these additional burdens were contemplated by EPA, nor are they consistent with the requirements of the federal Paperwork Reduction Act. *See* 44 U.S.C. §3507. Accordingly, these requirements may be invalid for failure to comply with the Paperwork Reduction Act.

5. The Draft TMDL Does Not Undertake a Cost/Benefit Analysis

By mandating compliance with this Draft TMDL, the Regional Board is asking the City to undertake efforts in excess of its requirements under the federal Clean Water Act. For example, section 303(d) of the Clean Water Act does not obligate States to undertake costly and detailed mitigation of unimpaired waters such as Centinela Creek and Del Rey Lagoon. *See* 33 U.S.C. § 1313. For this authority, the Regional Board relies on Water Code section 13267. When the Regional Board relies on California state law, consideration of economic factors is appropriate. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 627-628. The Regional Board has not properly analyzed the cost and economic impact of the Draft TMDL in the manner contemplated by the Clean Water Act and Water Code § 13241.

As part of the development and implementation of water quality control plans, federal and state law provide that a Regional Board must consider specific factors in formulating appropriate water quality objectives. 33 U.S.C. § 1313; Water Code § 13241. These factors include, but are not limited to, the following: (1) the past, present, and probable future beneficial uses of water; (2) the environmental characteristics of the hydrographic unit under consideration, including the quality of water available to that unit; (3) water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area; (4) *economic considerations*; (5) the need for developing housing within

Ginachi Amah
May 19, 2006
Page 7

the region; and (6) the need to develop and use recycled water. Water Code § 13241; *See also*, 40 C.F.R. §§ 130-131.

One particular, but by no means the only, example of where the Draft TMDL fails to factor in costs is with respect to the aggressive sampling schedule. It appears that the Operation and Maintenance cost estimates in the Draft TMDL do not factor in the costs to the City of undertaking such sampling. Over the course of the ten to fourteen-year proposed implementation plan period, the costs associated with undertaking such an aggressive program are likely to be significant.

Additionally, although the Regional Board may be able to require a local agency to investigate and report on any technical factors involved in water quality, the economic burden, including the costs of such reports, must bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom. Water Code §§ 13165, 13225(c), 13267(b).

Even if the Draft TMDL did not exceed of the requirements under the federal Clean Water Act, consideration of economic factors would still be appropriate. Section 1251(a)(2) of title 33 United States Code sets as a national goal, “*wherever attainable*,” an interim goal of water quality. Furthermore, section 1313(c)(2)(A) of title 33 United States Code requires consideration of “*use and value*” when revising or adopting a new standard. These statutes obligate the Regional Board to consider economic factors whenever it seeks to alter or adopt water quality standards. *See City of Burbank, supra*, 35 Cal. 4th at 627.

6. The Scientific Methodology Employed is Vague and Incomplete

All TMDLs must be based on sound science and must be established in accordance with state and federal regulations, which provide for informed decision making and opportunities for meaningful public input. 40 C.F.R. 130.7(c) Numeric water quality target(s) for a TMDL must be identified, and an adequate basis for target(s) as interpretation of water quality standards must be specifically documented in the submittal. 40 C.F.R. 130.7(c)(1).

The scientific analysis outlined in the Draft TMDL fails to provide sufficient detail regarding the parameters for establishing a TMDL in the various segments of the Ballona Creek watershed. The Ballona Creek watershed ecosystem is influenced

Ginachi Amah
May 19, 2006
Page 8

by a myriad of environmental factors not applicable to other creeks, lagoons, and beaches in the region. The reference point present in the Draft TMDL for establishing the number of exceedance days appears to be based on information from Leo Carillo beach. This beach exhibits dramatically different ecological conditions than those found in the Ballona Creek watershed. The use of this beach as a reference point does not account for those differences.

Additionally, the data supporting the Draft TMDL is built upon a shaky scientific foundation. In many cases, the data that the Regional Board relied on for the purposes of establishing the TMDL is often based on extremely small sample sizes. For example, in Table 4-4, which provides a summary of bacteria densities from various land uses during wet weather, only one of the thirteen study areas had a sample size of more than ten. By contrast, ten study areas had sample sizes less than or equal to five. Small sample sizes such as these preclude the Regional Board from establishing statistically significant extrapolations. Before mandating a costly and time consuming research order, the Regional Board should undertake further study to develop ecosystem appropriate criteria.

By not subjecting the Draft TMDL to scientific peer review, the Regional Board fails to comply with Health and Safety Code section 57004. Health and Safety Code section 57004(d) provides in pertinent part:

"No board, department, or office within the agency shall take any action to adopt the final version of a rule unless all of the following conditions are met:

- (1) The board, department, or office submits the scientific portions of the proposed rule, along with a statement of the scientific findings, conclusions, and assumptions on which the scientific portions of the proposed rule are based and the supporting scientific data, studies, and other appropriate materials, to the external scientific peer review entity for its evaluation.
- (2) The external scientific peer review entity, within the timeframe agreed upon by the board, department, or office and the external scientific peer review entity, prepares a written report that contains an evaluation of the scientific basis of the proposed rule. If the external scientific peer review entity finds that the board, department, or office has failed to demonstrate

Ginachi Amah
May 19, 2006
Page 9

that the scientific portion of the proposed rule is based upon sound scientific knowledge, methods, and practices, the report shall state that finding, and the reasons explaining the finding, within the agreed-upon timeframe. The board, department, or office may accept the finding of the external scientific peer review entity, in whole, or in part, and may revise the scientific portions of the proposed rule accordingly. If the board, department, or office disagrees with any aspect of the finding of the external scientific peer review entity, it shall explain, and include as part of the rulemaking record, its basis for arriving at such a determination in the adoption of the final rule, including the reasons why it has determined that the scientific portions of the proposed rule are based on sound scientific knowledge, methods, and practices. . . .”

The term "rule" is defined in Health and Safety Code section 57004(a)(1) as either:

“(A) A regulation, as defined in Section 11342.600 of the Government Code.

(B) A policy adopted by the State Water Resources Control Board pursuant to the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code) that has the effect of a regulation and that is adopted in order to implement or make effective a statute.”

Health and Safety Code section 57004(2) defines the terms "scientific basis" and "scientific portions" as:

"[T]hose foundations of a rule that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions establishing a regulatory level, standard, or other requirement for the protection of public health or the environment.”

There is nothing in the Draft TMDL, or related documents, which indicates that the Regional Board has complied with Health and Safety Code section 57004 in drafting or adopting the Draft TMDL, or that there was any scientific peer review of any aspect of the Draft TMDL.

Ginachi Amah
May 19, 2006
Page 10

7. The Draft TMDL Does Not Comply with the Administrative Procedures Act

The Administrative Procedures Act (Cal. Gov. Code § 11340, et seq. (the "APA")) applies to the Regional Board's adoption of the TMDLs. The proposed TMDL does not comply with the requirements of the APA, including, but not limited to making a showing of "necessity," "authority," "clarity," "consistency," "reference" and "non-duplication." *See* Gov. Code § 11349.1(a).

* * *

In conclusion, the Draft TMDL still needs substantial revision and modification. The Draft TMDL does not adequately consider the unique characteristics and challenges present in requiring the City to undertake this regulation. The burdens that the Regional Board seeks to impose will have a profound impact on the City and its residents. This burden is disproportionate to the City's alleged discharges into the Ballona Creek watershed.

The City reserves its right to make objections and request additional information and documents from Regional Board staff at the hearing. Additionally, the City hereby attaches its May 12, 2006 letter to the Regional Board requesting clarification on the hearing procedures for the June 8, 2006 public hearing, as well as the May 19, 2006 written response of Mr. Michael J. Levy, Senior Staff Counsel at the State Water Resources Control Board. The City asks that these documents, as well as all other documents submitted to the Regional Board in response to the Ballona Creek Bacteria TMDL, be incorporated into the Administrative Record.

Despite the concerns, the City is prepared to continue to engage in a constructive dialogue with Regional Board staff to develop a TMDL that will make genuine progress toward our common objective of controlling pollutants in the Ballona Creek watershed to the maximum extent practicable.

Ginachi Amah
May 19, 2006
Page 11

We look forward to your response to these comments as well as other comments submitted by the County and other cities and agencies.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mat E. Cohen', followed by a long horizontal line.

Matthew E. Cohen

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Enclosures

cc: Melinda Becker
Jonathon Bishop