

Comment Summary and Responses  
 LA River Indicator Bacteria TMDL  
 Comment Deadline: June 20, 2011

List of Commenter's:

Comment Reference	Company	Representative
1	City of El Monte	Rene Bobadilla
2	City of Carson	Clifford W. Graves
3	City of Duarte	Darrell George
4	City of Irwindale	Sol Benudiz
5	City of San Fernando	Al Hernandez
6	City of Commerce	Joe Aguilar
7	City of Arcadia	Tom Tait
8	City of Signal Hill	Kenneth C. Farfsing
9	City of Vernon	Samuel Kevin Wilson, P.E.
10	City of Pico Rivera	Ronald Bates
11	City of Bell Gardens	G. Steve Simonian
12	City of Alhambra	Mary K. Swink
13	City of Duarte	Darrell George
14	City of Sierra Madre	Bruce Inman
15	County of Los Angeles	Gary Hildebrand
16	City of South Gate	George Troxcil
17	City of San Gabriel	Steven Preston
18	Flow Science on behalf of Cities of Signal Hill and Downey	Susan Paulsen
19	Heal the Bay	Mark Gold
20	California Department of Transportation (Caltrans)	Scott McGowen
21	City of Los Angeles, Bureau of Sanitation	Enrique Zaldivar
22	General Public	Joyce Dillard
23	Rutan & Tucker, LLP on behalf of Cities of Signal Hill and Downey	Richard Montevideo

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Response to Comments:

No.	Author	Comment	Response
0.1	Multiple	<p>Many of the comments submitted in opposition to the State Board's approval of this BPA were previously submitted to the Los Angeles Water Board and submitted verbatim to the State Board, without further explanation.</p>	<p>Many of the individual comments submitted to the State Water Resources Control Board (State Water Board) on this matter are identical to a comment submitted to the Los Angeles Water Quality Control Board (Los Angeles Water Board) at the time the draft version of this TMDL was under consideration. As part of its consideration process, the Los Angeles Water Board provided written responses to all of the comments it received. The Los Angeles Water Board's responses either indicated that changes would be made to the regulatory provisions or to the related documentation in response to the comment (in which case corresponding changes were made), or the Los Angeles Water Board's written responses indicated that changes would not be made, and the responses included the reason.</p> <p>Where a commenter merely repeats a comment that was originally submitted to the Los Angeles Water Board on a prior version of a BPA, but fails to disclose what complaint, if any, the commenter has with the response provided or the action taken by the Los Angeles Water Board in response to the comment, the State Water Board is unable to address the comment. Specifically, in those cases where the Los Angeles Water Board made changes in response to a comment, the commenter has failed to explain how the changes were inadequate. Likewise, where the Los Angeles</p>

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			<p>Water Board did not make changes, the commenter has failed to explain how the response or explanation that the Los Angeles Water Board provided was inadequate, or even whether the commenter believes that the response was inadequate.</p> <p>Where a commenter has merely repeated a comment submitted before the Los Angeles Water Board, the State Water Board cannot divine what the commenter believes has been adequately addressed and what has not, nor can it determine the reason for any remaining dissatisfaction. State Water Board staff will review the Los Angeles Water Board's responses to ensure that they are thorough and address the specific question presented.</p>
1.1	Rene Bobadilla	<p><b>MS4 Permit Compliance Point is at Outfall (End-of-Pipe).</b>          According to the Los Angeles River Bacteria Total Maximum Daily Load ("LAR-B-TMDL"): <i>The final WLAs are expressed as exceedance days of the numeric targets measured in the receiving water (i.e., river segment or tributary).</i> This applies to storm water and non-stormwater. However, the receiving water cannot be the compliance point because, beyond the Natural Resources Defense Council ("NRDC") v. Los Angeles County Flood Control District ("LACFCD") ruling, federal stormwater regulations establish the compliance point for MS4 permits in the discharge from the outfall. The MS4 permit is a point source permit. The point of discharge is the outfall. Federal stormwater regulations make it clear that <i>co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators -- not discharges in the receiving water.</i></p>	<p>Staff disagrees with the assertion that the TMDL only allows the compliance point for MS4 discharges to be located in the receiving water. As indicated on page 6 of the Basin Plan Amendment, MS4 dischargers can demonstrate compliance with the final dry weather WLAs by demonstrating that final WLAs are met instream or by demonstrating one of the three specified conditions at MS4 outfalls to the receiving waters. For wet weather WLAs, page 9 of the TMDL requires that responsible parties provide an Implementation Plan to the Regional Board outlining how each party intends to cooperatively achieve compliance with the wet weather WLAs. As part of that Implementation Plan, responsible parties may propose wet-weather load-based compliance at MS4 outfalls. Thus, the TMDL provides MS4 permittees flexibility to demonstrate compliance with the WLAs either in the receiving water or at the</p>

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			<p>MS4 outfall to the receiving water.</p> <p>Staff further disagrees with the assertion that “federal stormwater regulations establish the compliance point for MS4 permits in the discharge from the outfall.” Federal regulations do not establish a compliance point for storm water discharges.</p>
1.2	Rene Bobadilla	<p><b>Waste Load Allocation and Water Quality Based Effluent Limitations (WQBELs) Not Included in TMDL.</b> The LAR-B-TMDL's requirement of complying with numeric targets measured in the receiving water by any means necessary would require, if necessary, treatment controls in the receiving water as the following excerpt from the LAR-B-TMDL indicates:</p> <p><i>The downstream methods use a single structural control to directly reduce bacteria concentrations in receiving waters (e.g., constructing a treatment control at the mouth of a tributary just upstream of its confluence with the Los Angeles River), as opposed to constructing multiple controls at storm drain outfalls along the segment or tributary.</i></p> <p>Again, such a requirement exceeds the scope of MS4 permits because the MS4 permit requires compliance with discharges at the outfall, not in the receiving water. Further, under Clean Water Act section 402(iii), permits for MS4 discharges are limited to 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. This limitation, therefore prohibits in-stream treatment controls.</p>	<p>The quoted text is not a requirement of the TMDL but is one of three different Load Reduction Strategies which an MS4 discharger could use to treat waters at the end of tributaries. According to the TMDL, it was included because there may be circumstances where it has the potential to lead to more reliable, faster, and less-expensive solutions for protection of recreational users when compared to a more spatially distributed approach.</p> <p>See also response 1.1.</p>
1.3	Rene Bobadilla	<p>Further, compliance with the LAR-B-TMDL does not allow for the application of water quality based effluent limitations (WQBELs)</p>	<p>See response 1.1.</p>

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	<p>that operate to translate the WLA into best management practices (BMPs) in accordance with either the 2002 or 2010 USEPA TMDL compliance guidance memorandum. The LAR-B-TMDL was adopted by the Region Board on July 8, 2010 and, therefore, should have followed the 2002 USEPA memorandum, as did the San Diego Regional Water Board's <i>Revised Total Maximum Daily Loads for Indicator Bacteria Project I - Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)</i>. This TMDL states clearly that:</p> <p style="text-align: center;"><i>Federal regulations require that NPDES requirements incorporate water quality based effluent limitation (WQBELs) that must be consistent with the requirements and assumptions of any available WLAs which may be expressed as numeric effluent limitations, when feasible, and/or as a best management practice (BMP) program of expanded or better-tailored BMPs.</i></p> <p>Therefore, against this background the LAR-B-TMDL the State Board should direct the Regional Board to: (1) eliminate any reference to requiring compliance with the WLA in the receiving water and, therewith, specifying treatment or other controls in the receiving water to meet a WLA; and (2) reference instead the use of WEQBELs expressed as BMPs or other devices such as surrogate parameters to comply with the WLA.</p>	<p>The exact manner in which WLAs are incorporated into permits is not established at the time of TMDL development, because the means of incorporating the WLAs depends in part on the supporting evidence in the permit's administrative record. Thus, at this time, the TMDL does not require a single method of translating the WLAs into permit requirements (e.g. as numeric WQBELs or, alternatively, as BMPs) in the MS4 permit. Such a determination will be made when the TMDL is incorporated into the LA MS4 permit at a future date. In addition, the Los Angeles Water Board added a finding to its Resolution in response to comments received at the hearing that describes the potential methods for translating WLAs into permit requirements. Finding 7 of the Resolution states:</p> <p style="text-align: center;">“The Los Angeles River Bacteria TMDL does not dictate whether an NPDES municipal separate storm sewer system (MS4) permit expresses the TMDL’s waste load allocations (WLAs) as best management practices or numeric effluent limitations. The means of expression will be determined when NPDES MS4 permits are revised to incorporate provisions consistent with the assumptions and requirements of the WLAs to effectively implement the TMDL. Federal regulations require that NPDES permits must contain requirements necessary to achieve water quality standards (40 CFR § 122.44(d)(1)) and that water quality based effluent limitations are set consistent with the assumptions and requirements of any available WLA for the discharge (40 CFR § 122.44(d)(1)(vii)(B)).</p>
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			<p>While federal regulations allow the permitting authority to specify – as conditions of a NPDES permit – the use of BMPs to control or abate the discharge of pollutants in stormwater pursuant to Clean Water Act section 402(p) (40 CFR § 122.44(k)(2)), this is only supportable as an expression of a TMDL’s WLA where the permit’s administrative record substantiates that the BMPs are expected to be sufficient to fully implement the WLA in the TMDL, consistent with the implementation schedule established in the TMDL (US EPA 2002). Iterative approaches without such a record to substantiate them shall not qualify for consideration as an expression of a TMDL’s WLA. Furthermore, this does not substitute for the permitting authority’s obligation to include other requirements such as numeric effluent limitations that may be necessary to achieve water quality standards.</p> <p>The State Board recently addressed the issue of translating TMDL waste load allocations into effluent limitations in NPDES MS4 permits and concluded that, “whether a future municipal storm water permit requirement appropriately implements a storm water wasteload allocation will need to be decided based on the regional water quality control board’s findings supporting either the numeric or non-numeric effluent limitations contained in the permit” (Order WQ 2009-0008).”</p>
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1.4	Rene Bobadilla	<p><b>Absence of the Adaptive/Iterative Process.</b> The LAR-B-TMDL makes no mention of an adaptive/iterative process as it relates to stormwater discharges, but does, oddly, discuss it in the context of meeting the dry weather bacteria WLA through non-stormwater discharge prohibitions. The Regional Board apparently is taking the position that the adaptive/iterative process is not a requirement for meeting the stormwater WLA. The Regional Board has even stated in comments made in connection with the Dominguez Channel? Los Angeles Harbor Toxics TMDL that the federal regulations do not suggest the adaptive/iterative process is an inherent component of BMP based permit requirements. The City does not agree with this conclusion.</p> <p>The adoptive/iterative procedure is necessary to prevent enforcement action from the Regional Board or exposure to third party litigation while BMPs are being implemented. As long as the BMPs or numeric WQBELs expressed in the form of surrogates or other actions are implemented in the MS4 permit, the permittee is to be deemed be in compliance with the WLA.</p> <p>The Regional Board must reference the adaptive/iterative process in the LAR-B-TMDL and other TMDLs.</p>	<p>State Board staff agrees with the Los Angeles Water Board's response in regards to the absence of an Adaptive/Iterative process. Here is the Regional Board response:</p> <p>"Federal regulations do not suggest that the iterative/adaptive process is an inherent component of BMP-based permit requirements. The Regional Board has provided permittees under the LA County MS4 NPDES permit 19 years, since the first MS4 Permit was adopted in 1990, to iteratively apply BMPs to achieve water quality standards. TMDLs are the backstop for the Clean Water Act in cases where effluent limitations, or BMPs in the case of MS4 permits, have been inadequate to achieve water quality standards. Indefinitely continuing such an iterative/adaptive approach without greater specificity in terms of implementation schedules and numeric limitations is not necessarily in the best interest of water quality."</p> <p>The TMDL provides a 25-year implementation schedule, which supports adaptive stormwater management while providing a firm date for reaching compliance with the WLAs.</p>
1.5	Rene Bobadilla	<p><b>Meeting Dry Weather LAR-B-TMDL WLA through Non-Stormwater Discharge Prohibition.</b> As with the Santa Monica Bay Beaches Dry Weather TMDL that was placed in the current MS4 permit in 2007, the LAR-B-TMDL proposes to meet the dry</p>	<p>See responses 1.1, 1.3, and 1.4.</p> <p>The TMDL does not require a single method of translating the WLAs into permit requirements (e.g. as</p>

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	<p>weather WLA by prohibiting any non-stormwater discharge that exceeds the daily limit for bacteria. It also provides for "a stepwise and iterative process" which is contrary to the Office of Chief Counsel's opinion that non-stormwater discharges are not subject to the iterative process.</p> <p>The coordinated monitoring plan ("CMP") referenced in the LAR-B-TMDL requires for compliance purposes an in-stream monitoring station in each Los Angeles River segment, reach, and tributary... But as mentioned, the Ninth Circuit Court affirmed in NRDC v. LACFCD that the point of compliance is at the outfall (end-of-pipe), not in the receiving water.</p> <p>Furthermore, federal stormwater regulations do not treat non-stormwater in the same manner as non-stormwater. Whereas stormwater discharges within a permittee's municipal boundaries must be "controlled" from the MS4 to maximum extent practicable, through best management practices, non-stormwater discharges need only be prohibited to the MS4 [see Clean Water Act section 402(p)(3)(ii)]. The LAR-B-TMDL exceeds this requirement by prohibiting non-stormwater discharges containing levels of bacteria that exceed the dry weather WLA from the outfall to the receiving water.</p> <p>The LAR-B-TMDL also does not contemplate numeric or non-numeric WQBELs to translate the dry weather WLA into BMPs or other actions. However, the Office of Chief Counsel (OCC) has acknowledged that a WQBEL is required to translate the dry weather WLA for the Baby Beach bacteria TMDL for implementation through the South Orange County MS4 permit. The San Diego Regional Board, which adopted this TMDL and the South Orange County Permit, obviously chose to comply with federal law in this instance. It stated: <i>non-storm water discharges from the MS4 that are not authorized by separate</i></p>	<p>numeric WQBELs or, alternatively, as BMPs) in the MS4 permit. The exact manner in which WLAs are incorporated into permits and how such WLAs will be enforced is not established at the time of TMDL development, because the means of incorporating the WLAs depends in part on the supporting evidence in the MS4 permit's administrative record. Such determinations will be made when the TMDL is incorporated into the LA MS4 permit at a future date. Furthermore, as stated above, the Los Angeles Water Board added Finding 7 to its Resolution in response to comments received at the hearing that describes the potential methods for translating WLAs into permit requirements.</p> <p>Clean Water Act section 402(p)(3)(B)(ii) requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges into the MS4. The commenter appears to incorrectly assert that the Regional Board only has authority to prohibit non-stormwater discharges <i>into</i> the MS4, but lacks the authority to prohibit non-stormwater discharges <i>from</i> the MS4. Staff disagrees with this assertion. A permit provision that prohibits non-stormwater discharges to waters is a logical extension of the federal requirement prohibiting non-stormwater discharges into the MS4. A different interpretation would lead to untenable results. For example, following the commenter's assertions, the Regional Board could only regulate the non-stormwater that gets into a storm drain but not what comes out of the outfall into the receiving water though the Regional Board is responsible for regulating pollutant discharges to waters. Under the Clean Water Act, a "discharge of pollutant" is defined as "any addition of any pollutant to</p>
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	<p><i>NPDES permits, nor specifically exempted, are subject to requirements under the NPDES program, including discharge prohibitions, technology-based effluent limitations and <u>water quality-based effluent limitations</u> (40 C.F.R. § 122.44.) It is understood that this specifically applies to MS4 permits. Nevertheless, discussion of how the dry weather bacteria WLA is to be met should have taken place in the LAR-B-TMDL to the same extent as in the aforementioned San Diego Beaches bacteria TMDL.</i></p> <p>Beyond this, the LAR-B-TMDL's requirement of a stepwise and iterative" procedure for meeting dry weather discharges, which are in effect, non-stormwater discharges contradicts State Board Order WQ 2009-0008, as pointed-out in the OCC's November 5, 2009 memorandum to the San Diego Regional Board, which states:</p> <p style="padding-left: 40px;"><i>... the Clean Water Act and the storm water regulations make it clear that a regulatory approach for storm water - such as the iterative approach we have previously endorsed - <u>is not necessarily appropriate for non-storm water.</u></i></p> <p>This conclusion was made in response to a petition to the State Board from the County of Los Angeles challenging the Los Angeles Regional Board over a violation of the Santa Monica Bay Beaches dry weather bacteria TMDL. The County was found to be in violation of this TMDL after an in-stream monitoring station detected an exceedance of the dry weather bacteria WLA. In its defense, the County pointed-out that the current MS4 permit procedure for addressing a receiving water limitation exceedance calls for an iterative process that allows for ramping-up BMPs to address the exceedance. The State Board held that this could not be used as defense because the iterative process <u>only applies to storm water discharges.</u></p>	<p>navigable waters from any point source.” (33 U.S.C. § 1362(12)). Under the Clean Water Act, the MS4 is a “point source.”</p> <p>Further, the commenter’s assertions concerning State Board Order WQ 2009-0008 are misplaced and incorrect. First, that Order is no longer in effect because the State Board voided and set aside that Order in 2010 in response to a writ of mandate. Second, the petition that resulted in the Order concerned the Los Angeles Water Board’s incorporation of the Santa Monica Bay Beaches Dry Weather Bacteria TMDL into the LA MS4 permit; it did not concern any violations of the TMDL.</p> <p>Lastly, the permit provisions that were the subject of the NRDC case concerned exceedances of water quality standards, not effluent limitations.</p>
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		<p>The State Board should require the Regional Board to eliminate absolute compliance with the dry weather bacteria TMDL WLA either in the receiving water or end-of-pipe.</p>	
1.6	Rene Bobadilla	<p><b><u>Implementation Plan and Collective Compliance.</u></b> The LAR-B-TMDL calls for each affected MS4 permittee to submit an implementation plan to be approved by the Regional Board Executive Officer which is to achieve collective compliance through the MS4 permit. This is interpreted to mean that if the wet or dry weather WLA in the receiving is not achieved, that all permittees will be held collectively responsible and subject to enforcement action by the Regional Board and third party litigation - even if the permittee is meeting the WLA at the end-of-pipe.</p> <p>This is inappropriate for the following reasons:</p> <ol style="list-style-type: none"> <li>1. The State's water code (Porter-Cologne) does not confer upon the Regional Board's Executive Office the authority to approve implementation plans, which are essentially water quality control plans. CAC §13240 makes it clear that the Regional Board governing body is responsible for adopting water quality control plans. The California Regional Water Quality Control Board, Santa Ana Region, for example, adopted by resolution the Urban Source Evaluation Plan, a requirement of the Middle Santa Ana River Bacteria TMDL. The plan was adopted three years after the TMDL was adopted in 2008 at public hearing.</li> <li>2. The implementation plan prevents the City and other MS4 permittees from working with Regional Board staff to develop WQBELs expressed as BMPs or other actions such as surrogate parameters (e.g., flow or impervious reduction achieved through stormwater control measures such as low impact development strategies). The implementation plan should be proposed at the time the</li> </ol>	<p>The TMDL allows responsible parties to use alternative compliance strategies, subject to approval by the Executive Officer. Nothing prevents a responsible party from planning and executing a strategy to comprehensively address all watershed areas under its authority earlier than the required TMDL deadlines. However, any alternative compliance strategies implemented by responsible parties must demonstrate compliance with final wasteload allocations within each segment by the specific compliance deadline. The Regional Board staff's proposed implementation strategy is not "one size fits all," but is designed with sufficient flexibility to embrace the many ideas generated and preferred by the cities in the low Los Angeles River including ideas that are included in a "Lower Los Angeles River Water Conservation Alternative." The implementation strategies presented and the implementation schedule are the result of a stakeholder effort facilitated by CREST through which responsible agencies worked together to compile potential implementation scenarios and to provide cost estimates on the selected implementation options.</p> <p>The implementation plan does not prevent the City and other MS4 permittees from working with Los Angeles Water Board staff. The parties involved in this process are encouraged to have an open line of communication and work with each other to achieve the goals set forth in this TMDL.</p>

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		<p>MS4 permit's stormwater quality management program (SQMP), instead of being appended to the MS4 as a plan apart from the SQMP.</p> <p>3. Requiring collective compliance among permittees is inappropriate because, once again, the MS4 permit requires compliance with the WLA (as any other water quality standard) in the discharge from the outfall not the receiving water. Further, the City is only required to meet the WLA at the outfall through the implementation of WQBELs as expressed as MBPs or other actions such as surrogates. As long as they are implemented during the term of the permit the City would be in compliance - even if the actual WLA metric is not met at the outfall or in the receiving water.</p>	
1.7	Rene Bobadilla	<p><b>Monitoring Requirements.</b> The LAR-B-TMDL would require the City to conduct outfall and receiving water monitoring in excess of what federal stormwater regulations call for. Receiving water monitoring is used for compliance purposes. As mentioned, monitoring includes at least one monitoring station (in-stream) in each Los Angeles River segment, reach, and tributary. Samples are to be taken once a month at each station during the first implementation phase. After this phase, weekly monitoring is to be performed to determine compliance with in-stream WLA targets. In addition, a "load reduction strategy" is required to determine E. coli loadings from MS4 outfalls and to evaluate the effectiveness of actions in attaining WLAs.</p> <p>Requiring in-stream compliance monitoring exceeds federal stormwater regulations for reasons already stated. Compliance with <u>stormwater</u> discharges is determined at the outfall not in the receiving water. Ambient monitoring in the receiving water should be performed to determine where it stands with the WLA. Furthermore, the cost of conducting ambient monitoring should be borne by the State since it exceeds the federal requirement and</p>	<p>The TMDL gives the option of two different types of monitoring: Compliance Monitoring and Load Reduction Strategy. The Los Angeles Water Board also allows for alternative compliance strategies as long as the proposed monitoring supports the plan and compliance with wasteload allocations are achieved. The choices provided by the Los Angeles Water Board are adequate and do not require alterations to be made. Also, federal regulations do not prevent local authorities from making compliance monitoring more stringent.</p>

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		<p>because the State assesses a monitoring surcharge on the MS4 permit fee that municipal permittees are required to pay annually.</p> <p>The State Board should compel the Regional Board to amend monitoring tasks to conform to federal stormwater regulations to the following extent: (1) use ambient monitoring to determine the health of the receiving water against the receiving water stormwater WLA; and (2) use outfall monitoring to evaluate the performance of WQBELs expressed as BMPs or actions such as surrogate parameters in meeting the WLA in the discharge from the outfall.</p>	
1.8	Rene Bobadilla	<p><b>LAR-B-TMDL Requirements Exceed Federal Regulations and Constitute Unfunded Mandates</b> As mentioned, the proposed LAR-B-TMDL exceeds federal stormwater regulations to the following extent: (1) establishing the WLA compliance determinant in the receiving water instead of the outfall or end-of-pipe; (2) requiring compliance with WLAs by any means necessary, without translating them into WQBELs expressed as BMPs or other actions such as surrogate parameters; (3) prohibiting non-stormwater discharges to the MS4 and not to the receiving water as a means of requiring compliance with the dry weather bacteria WLA; and (4) requiring in-stream monitoring. The Regional Board may require compliance with WLAs using these regulatory mechanisms, but so doing would constitute unfunded mandates under the California Constitution. To avoid this, the Regional Board may rely on the State's water code to compel compliance.</p>	<p>State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.</p> <p>Please see response to comment 0.1 and Los Angeles Water Board's response to comment 6.11 (Attachment 1)</p>
2.1	Clifford W. Graves	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See responses 1.1 to 1.8.
3.1	Darrell George	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See responses 1.1 to 1.8.
4.1	Sol Benudiz	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See responses 1.1 to 1.8.

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5.1	Al Hernandez	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See responses 1.1 to 1.8.
6.1	Joe Aguilar	The State and Regional Boards have several options to assist in making this TMDL reasonable. The State Board should first reevaluate the propriety of the designated beneficial uses, since people should not swim in - at the very least - the concrete-lined portions of the River, and revise the water quality standards accordingly. This would eliminate the need for most, if not all, aspects of the TMDL. If the State Board rejects the important task of revising the Basin Plan to address the problem of recreating in the LA River, it could remand the TMDL back to the Regional Board and direct that the Regional Board not to use the TMDL's targets and allocations as numeric limits in the next MS4 Permits and instead provide that the Cities implement the TMDL through a non-numeric, "deemed compliant" best management practices (BMPs) approach.	The scope of the requested changes goes beyond what the State Water Board and the Regional Executive Officer (EO) are able to do. The Resolution does give the Regional EO authority to make EO corrections only for the sake of making the TMDL clear and concise. The requested changes would go beyond what the EO would be able to change with only an EO correction.
6.2	Joe Aguilar	<b>CREST Effort - The River will Continue to Exceed Standards even with MS4 Dry-Weather Flows Diverted at a Cost of over \$1.1 Billion to Local Government.</b> The CREST study revealed that human sources of bacteria to the Los Angeles River are not the main reason the river exceeds the REC-1 and REC-2 standards, particularly in certain reaches. Bacteria are prolific and regrow in the environment. Non-human sources are significant according to the CREST BSI study. This study found that in Reach 2 only 10-50% of bacteria present in the River enter it from storm drains and tributaries. Since storm drain and tributary inputs account for only a fraction of the bacteria loading, controlling the MS4 storm drains or eliminating inflows from storm drains and tributaries will not attain water quality standards. Natural sources of bacteria, bacteria re-growth, and bacteria in sediment are significant and uncontrollable sources. However, the TMDL does not allow revisions to be made to allocations until diversions to sewers are made, even though existing evidence is sufficient to conclude that such diversions will not attain the TMDL	State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.  See response 0.1 and Los Angeles Water Board's response 3.8 (Attachment 2) and 16.9 (Attachment 3).

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		requirements. The Regional Board estimated the cost of the dry weather diversions to be \$1.1 billion, which we believe to be a low estimate. This fact alone argues for the State Board to remand the TMDL back to the Regional Board in order to review and revise the designated beneficial uses.	
6.3	Joe Aguilar	<b>Wet Weather TMDL - A \$5.4 Billion Problem.</b> The Regional Board has failed to provide a workable response to how the cities are supposed to deal with wet weather flows given the TMDL targets and allocations and compliance time schedule in the TMDL. However, the suspension applies only to major rain events (those with 0.5 inches of rain or more). The region deals, on average, with 32 days of rain annually, with storms varying in size. A close review of the storms that fall below the High Flow Suspension reveals major rain storms would have to be impounded and treated in order to comply with the TMDL's wet weather requirements. For example, based on 2004-2005 rain data and even without accounting for the allowed exceedance days, roughly 507 million gallons of water per day would be subjected to the TMDL on the Arroyo Seco alone (where the High Flow Suspension does not apply) -- enough water to fill 7 Rose Bowls.	See response 6.2 and Los Angeles Water Board's response 3.12 (Attachment 4).
6.4	Joe Aguilar	<b>Root of the Problem - REC-1 and REC-2 Uses are Impractical</b> We believe that the REC-1 and REC-2 uses are improperly designated for the concrete-lined channels of the Los Angeles River and its tributaries. The Basin Plan lists many of the REC-1 and REC-2 uses as "potential" or "intermittent". In many of the channels, it is dangerous to enter and access is illegal. Despite this, the TMDL indicates that cities are to take "aggressive action to restore" the river to allow for "water contact recreation (REC-1)".  The Regional Board's July 9, 2010 hearing on the proposed	The Regional Board is currently evaluating recreation in the Los Angeles River and its tributaries to determine if a re-evaluation (subcategorization, removal of a potential recreational use or determination that a potential beneficial use is existing) of recreation beneficial uses shall be undertaken.  In addition, this issue should be addressed on a case-by-case basis during the triennial review of the Los Angeles Water Board's Basin Plan. State Board staff has recommended that the Regional Board consider

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		<p>TMDL highlighted the problem of adopting the TMDL without first evaluating the propriety of the designated "uses" in the Basin Plan. At the hearing the Regional Board directed its staff to move forward with a recreational use survey, even while the Board approved the TMDL. We believe that this is tacit recognition by the Regional Board that many of the REC-1 and REC-2 uses are impractical. This places the cities in the impossible position of having to invest scarce public resources in developing implementation plans, while use surveys and possible use re-designations are underway.</p>	<p>evaluating appropriate recreational beneficial uses for storm channels with conditions that may not be conducive to fully supporting their REC-1 designation. Any such evaluations would be conducted with the recognition that existing beneficial uses cannot be removed, and in conformance with federal regulations at 40 C.F.R. § 131.10(g) and US EPA's recommendations for conducting use attainability analyses and developing a subcategory of a designated use that is not an existing use.</p>
6.5	Joe Aguilar	<p><b>Public Notice.</b> The City is concerned that the State Board's public notice on the TMDL indicates that "the commenter must explain why and in what manner each of the responses provided by the Los Angeles Water Board's response was inadequate or incorrect" or else "the State Water Board will presume that the Los Angeles Water Board's response adequately addressed the commenter's concern." We do not believe that this precondition to public comments is sanctioned either by CEQA or elsewhere in the law. The City has commented on several past TMDLs and other State Board actions and no such pre-condition was ever required. We believe that the State Board should respond to all relevant public comments that are presented in good faith and with reasoned analysis, and that the burden should not be on the general public to ferret through all of the Regional Board's responses to comments, various changes to the TMDL, and hearing transcripts to determine whether the Regional Board properly addressed concerns regarding the TMDL. It is evident that most if not all of the Cities' substantive comments on the TMDL were not addressed; nor did the Regional Board adequately explain the reason for not addressing such comments. The Cities and the public should not be required to, in effect, provide legal briefs and respond to all Regional Board comments. Instead, we believe that the merits or lack thereof of the TMDL should be determined by the record. This new pre-condition</p>	<p>The State Water Board's Notice of Opportunity to Comment concerning this Basin Plan amendment accurately informs interested persons of the procedural requirements used to implement the State Water Board's regulatory programs. According to the State Water Board's CEQA Regulations (23 Cal. Code Regs. § 3779, subd. (f)):</p> <p style="padding-left: 40px;">The state board, when considering approval of a regional board's adoption of an amendment to its water quality control plan or guideline, shall prescribe a comment period of not less than 30 days. The state board may refuse to accept any comments received after the noticed deadline. All comments submitted to the state board must be specifically related to the final amendment adopted by the regional board. If the regional board previously responded to the comment, the commenter must explain why it believes that the regional board's response was inadequate. The commenter must include either a statement that each of the comments was timely raised before the regional board, or an explanation of why the commenter was unable to raise the specific</p>

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		<p>dampens public comments and is contrary to encouraging collaboration.</p>	<p>comment before the regional board. The state board may refuse to accept any comments that do not include such a statement. The state board is not required to consider any comment that is not in compliance with this section.</p>
6.6	Joe Aguilar	<p><b>Dry-Weather Diversions - In Excess of \$1.1 Billion in Costs to Local Governments.</b> It was assumed that the diversions could be located within 300 feet of the River; that flows would be 0.15 cfs per outfall and that no local/regional sewer upgrades would be required. <u>The total estimated costs of this program were estimated to be \$1.1 billion.</u> The annual capital costs of the program were estimated at \$37 million over the 30-year time frame. Operational costs grow to \$57 million annually in the later years of the TMDL. The County Sanitation Districts also provided cost information, stating that an additional \$122 million in connection charges and annual surcharge fees of \$3.1 million would apply. The County Sanitation District trunk sewers are actually located as far as 4,900 feet from the River, and the costs to reach these trunk sewers were not included. Thus, we believe that the dry weather cost estimate is unrealistically low.</p> <p>The Regional Board's response appears to be that municipal finances will improve in the next 15 to 25 years, yet our community is facing budget decisions for this TMDL in the upcoming year. In addition to this TMDL, our community is currently investing in implementing the Trash TMDL. We are also investing in funding the Coordinated Monitoring Plan and Special Studies for the Los Angeles River Metals TMDLs, which is a \$2.6 million local government funded scientific effort. We have submitted Implementation Plans for the Metals TMDLs and we are reviewing the draft Toxics TMDLs for the Los Angeles/Long Beach Harbors. The Reality is that our City is struggling to fund</p>	<p>The Regional Board staff report included a reasonable range of costs but did not, and is not required to, detail all actual costs for every possible implementation possibility. Cost estimates for dry weather are based on reduction of bacteria levels in 20% of the outfalls. Responsible parties have sufficient flexibility to develop a plan to include diversion and source reduction or treatment that considers costs and avoids the less cost-effective projects. Those potential diversion projects that are further from sewer lines or that would have to cross bridges are not likely to be the most cost-effective projects to include in an implementation plan or load reduction strategy. The CREST/Regional Board Staff implementation schedules include sufficient time for planning (2.5 years for each segment) specifically to include time to identify priority drainages or subwatersheds and to evaluate practicalities of potential implementation methods.</p> <p>Staff acknowledges the time and effort the city has spent in complying with other TMDLs. Staff would like to point out that certain BMPs, targeting source and flow reduction and discussed in the staff report, may also treat other pollutants along with bacteria.</p>



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		multiple TMDLs.	
6.7	Joe Aguilar	<b>No Scientific Basis for the Wet Weather TMDLs Requirements - the \$5.4 Billion Solution?</b> The Regional Board argued that the cities would be protected from the extremely high costs of controlling wet-weather flows by the High Flow Suspension. However, even some lower volume storms in streams subject to the high flow suspension are impossibly large to control. Flow Science analyzed storm flow volumes measured in the Los Angeles River in 2004-2005 and found that 924 million gallons per day (enough water to fill the Rose Bowl 11 times) would have required diversion and/or treatment, even after application of the High Flow Suspension and natural source exclusion. Further, in other streams, the High Flow Suspension does not apply. For example, in the Arroyo Seco, the volume that would have required diversion and treatment in 2004-2005 was 507 million gallons per day (enough to fill the Rose Bowl 7 times). The Regional Board has not responded directly to these comments.	State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.  See response 0.1 and Los Angeles Water Board's responses 3.7 (Attachment 5) and 3.12 (Attachment 4)
7.1	Tom Tait	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.
8.1	Kenneth C. Farfsing	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.
9.1	Samuel Kevin Wilson, P.E.	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.
10.1	Ronald Bates	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.
11.1	G. Steve Simonian	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.
12.1	Mary K. Swink	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.
13.1	Darrell George	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte	See response 6.1 to 6.7.

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14.1	Bruce Inman	Have the urban Los Angeles River and its urban tributaries been so extensively modified for flood control purposes that it is neither practical nor advisable from a public policy perspective to require that they be modified to accommodate REC-1 and REC-2 beneficial uses?	See response 6.4.
14.2	Bruce Inman	Are the REC-1 and REC-2 Beneficial Uses realistic in the concrete-lined portions of the River? Does a Los Angeles River Watershed Master Plan exist that provides comprehensive projects and funding to achieve goal that the River be "swimmable?" Should the REC-1 and REC-2 Beneficial Uses be removed from the concrete-lined and other portions of the Los Angeles River and its tributaries? Should the Regional Board evaluate these standards prior to the implementation of the TMDL?	See response 6.4.
14.3	Bruce Inman	<p>Is it reasonable to expect that local municipal governments should bear the costs of achieving the water quality objective that would support "swimmable" uses, when the Federal government extensively modified the river and its tributaries for flood protection uses that prevent the attainment of the REC-1 and REC-2 uses? Is the Los Angeles River currently regulated under improper beneficial use designations and inappropriate Water Quality Objectives? Should municipal governments be expected to address natural sources such as wildlife?</p> <p>Practically speaking, when is it possible to swim in these concrete lined channels? In dry weather, flows are generally too shallow in which to swim, and in wet weather, flows are so fast and so deep that they are too dangerous to enter for risk of drowning.</p>	State Board Staff agrees with the Regional Board's response (response 3.2 (Attachment 6)) where they state that this issue should be addressed on a case-by-case basis during the current triennial review of the Basin Plan. Regional Board staff recommended that the Regional Board consider evaluating appropriate recreational beneficial uses for storm channels with conditions that may not be conducive to fully supporting their REC-1 designation. Any such evaluation would be conducted with the recognition that existing beneficial uses cannot be removed, and in conformance with federal regulations at 40 CFR 131.10(g) as well as US EPA's recommendations for conducting use attainability analyses and developing a subcategory of a designated use that is not an existing use.
14.4	Bruce Inman	<p>The City would also like the Regional Board to reconsider the sources of the pollutant and the ability for MS4 permittees to affect change.</p> <p>Non-point sources are a significant source of the bacteria in the</p>	State Water Board Staff recognizes, and the TMDL recognizes, that there are natural sources of bacteria that may cause or contribute to exceedances of the single sample objectives and that is not the intent of the Water Board to require treatment of natural sources of

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		<p>River and are attributable to wildlife, equestrian activities, and birds, in both the urban flood control system and the creeks in the forest area. Although the Regional Board states that the contribution of in-channel sources of bacteria, including re-growth or re-suspension from sediments, is unknown, studies have shown that dry weather conditions indicate that even if all inflows to the river were eliminated, water quality criteria would continue to be exceeded in some reaches. Bacteria exceedances exist in the Angeles National Forest, miles upstream of any human interface. The City of Sierra Madre is very troubled by the notion that the funds and resources that it may be required to contribute would go towards an effort with no effective solution.</p>	<p>bacteria from natural areas. As such, a reference system approach has been proposed in the Basin Plan amendment, which includes allowable exceedances of single sample bacteria objectives.</p>
14.5	Bruce Inman	<p>The Regional Board estimated that compliance costs with the full TMDL, including wet-weather compliance, would be \$5.4 billion, excluding amortization and inflation. The City of Sierra Madre currently participates with the regional efforts to address the Los Angeles River Trash TMDL, the Los Angeles River Metals TMDL, and the Peck Park Lake Toxics TMDL. The general cost sharing formulas that Sierra Madre has followed in its current TMDL compliance efforts would produce a cost of the City of approximately 1 million dollars per year for the next 32 years. To put this financial burden to the City of Sierra Madre in perspective, <u>this Bacteria TMDL alone</u> would comprise about 50% of our entire General Fund after paying for Police and Fire services.</p>	<p>See response 6.3.</p>
14.6	Bruce Inman	<p>The State Board has other options including remanding the TMDL back to the Regional Board to, at a minimum, delete the wet-weather component of the TMDL. The State Board should also instruct the Regional Board to rely on non-numeric deemed compliant Best Management Practices to implement the TMDL either through the MS4 permits, or alternatively through a Memorandum of Agreement or other legal contract.</p>	<p>State Water Board staff defers to the Los Angeles Water Board's judgment on including the wet-weather component of the TMDL. In addition, it is not appropriate for the State Water Board to instruct the Regional Board how to translate the WLAs into permit requirements. The State Water Board recently addressed the issue of translating TMDL WLAs into effluent limits in MS4 Permits and concluded that, "whether a future municipal storm water permit</p>

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			<p>requirement appropriately implements a storm water WLA will need to be decided based on the regional water quality control board's findings supporting either the numeric or non-numeric effluent limitations contained in the permit." (Order WQ 2009-0008). As such, the determination of whether WLAs should become BMPs or numeric WQBELs will be made when the TMDL is incorporated into the LA MS4 permit at a future date. At the LA MS4 permit stage, the State Water Board staff urges the commenter to continue working with the Los Angeles Water Board staff to examine the feasibility of the commenter's preference for BMPs over numeric WQBELs.</p>
14.7	Bruce Inman	<p>The State Board should further specify that the cities are not to be responsible to controlling any natural sources of bacteria. The State Board also should direct that the Regional Board extend the High Flow Suspension to a more representative set of rain days, and should extend the High Flow Suspension to all of the concrete portions of the River and its tributaries, including the Arroyo Seco wash.</p>	<p>The TMDL takes into consideration and accounts for natural sources of indicator bacteria under the reference system approach for bacteria, and the targets for this TMDL allow for occasional exceedances due to natural non-point sources.</p> <p>The TMDL also takes into consideration the discovery of new and improved science. If it is deemed that certain reaches need to have High Flow Suspension extended, the Regional Board has the authority to make those changes.</p>
15.1	Gary Hildebrand	<p><b><u>REC-1 and REC-2 Use Designations Should Not Apply To Flood Control Channels With Restricted Access</u></b> The Basin Plan recognizes the restricted access to these engineered channels by denoting them as "access prohibited by Los Angeles County DPW". Further, most of these channels are dry or effluent dominated in the absence of rain, which is during most of the year.</p> <p>The REC-1 and REC-2 uses in these engineered channels have</p>	<p>See response 6.4.</p>

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		<p>never been attained and are unlikely to be attained in the future. Requiring attainment of water quality standards for REC-1 and REC-2 uses in these channels should not be required where access is prohibited as it serves no purpose, yet the cost is significant. Because access is prohibited in those reaches; no REC-1 and REC-2 activity could lawfully take place.</p> <p>The Regional Board is currently reviewing the propriety of REC-1 and REC-2 uses in engineered flood control channels. The TMDL should not assign waste load allocations to these channels until the Regional Board's review is complete.</p> <p>In its response to comments, the Regional Board states that the removal of beneficial uses was beyond the scope of the TMDL. The Regional Board misconstrued this comment. The LACFCD does believe that the designations should be removed. The comment with respect to the TMDL, however, was that no waste load allocation (WLA) should be assigned to these channels until the Regional Board's review is completed. It makes no sense to be spending money in an attempt to meet REC-1 and REC-2 standards when those designations are currently being reviewed. The State Board should remand the TMDL to the Regional Board with instructions to the Regional Board to complete its review of the appropriateness of the designations before adopting this TMDL.</p>	
15.2	Gary Hildebrand	<p><b><u>Naming the Los Angeles County Flood Control District as a Responsible Party is Inappropriate.</u></b> The TMDL should not name the LACFCD as one of the responsible parties for meeting the TMDL's WLAs. None of the land areas draining to the LACFCD storm drains that empties into the Los Angeles River and its tributaries are under the jurisdiction of the LACFCD. The drains themselves function solely as a conveyance for urban and stormwater runoff from upstream entities and do not generate any of the pollutants of concern at issue in the TMDL. Because the</p>	<p>As the owner and operator of storm drains, LACFCD has responsibility for the routine maintenance of its facilities, including inspections, clean outs and other maintenance. Additionally, LACFCD has the authority to install pollutant controls at the points of entry to its facilities, or within its facilities. These activities are feasible means of preventing the pollutants at issue from entering the Los Angeles River.</p>

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		<p>LACFCD does not control the land uses within the municipalities, it has no practical means of preventing the pollutants at issue flowing from those land uses from entering its facilities and the Los Angeles River.</p> <p>The Regional Board's response to comments below did not address this fundamental point. Although the Regional Board stated that the LACFCD has the authority to install pollutant controls at the points of entry, the Regional Board made no analysis of what would be required, the time it would take to install or the cost, or its effect on flood control. The Regional Board's response is not supported by any analysis or facts to supports its conclusion that assigning a WLA to the LACFCD will further the goals of the TMDL. Accordingly, naming the LACFCD as a responsible party in the long run will hinder rather than promote accomplishing the goals of the TMDL because including the LACFCD as a responsible party diverts responsibility from the other entities that have the control over the sources of the bacteria entering the river.</p>	<p>The staff report contains a program-level analysis, which provides a range of BMPs and compliance methods and cost analysis for BMPs. The Regional Board is prohibited from specifying the manner of compliance or mitigation measures. Other responsible parties located in both the upstream and downstream watershed have also been named and assigned WLAs.</p> <p>Also see response 6.6.</p>
15.3	Gary Hildebrand	<p><b><u>Incorporation of the Comments of Los Angeles County.</u></b> The LACFCD concurs with the comments submitted by the County of Los Angeles and hereby incorporates them by reference.</p>	<p>See response 15.1 and 15.2.</p>
16.1	George Troxcil	<p><u>First</u>, this TMDL does not accurately take cost into account. Regardless of the City of South Gate's intentions to continue its ongoing efforts to reduce pollutant levels in runoff, this TMDL by itself is unaffordable.</p>	<p>State Water Board staff has reviewed the response to comments regarding the cost of this TMDL and feels the response that the Regional Board gave was adequate. That response is as follows:</p> <p>The TMDL Staff Report includes a reasonable range of implementation costs with values presented in present day dollars. While some parts of the Cost Section discussed cost estimates based on dollar values of the late 1990s, most costs were expressed in</p>

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			<p>2007 or 2008 dollar values with the extensive CREST dry weather estimates based on 2009 dollar values. This was maintained for ease of comparison between estimates and implementation plans. It should be noted that the 1.1 billion figure provided by CREST as the dry weather implementation cost with a 3% inflation factor represents dollar values through the year 2042 or 2041 (depending on when implementation begins) which would be \$588 million in 2009 dollars.</p> <p>The Regional Board Staff Report included a reasonable range of costs. The Regional Board Staff Report did not rely solely on CREST cost estimates but the range of costs presented included the CREST developed costs for dry weather and cost estimates for different specific types of implementation methods (e.g. institutional methods, cisterns, filters, treatment plants, etc.) and costs derived from the City of Los Angeles and County of Los Angeles developed cost estimates for the implementation of the Ballona Creek Watershed Bacteria TMDL. The City of Los Angeles and County of Los Angeles developed-costs represented the County and City's most complete estimate of their implementation costs. The \$5.4 billion figure is the upper end of the range and was specifically included in an abundance of caution to be sure to include a "highest possible" cost estimate.</p> <p>The Regional Board staff report included a</p>
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			<p>reasonable range of costs but did not, and is not required to detail all actual costs for every possible implementation possibility. Responsible parties have sufficient flexibility to develop a plan to include diversion and source reduction or treatment that considers costs and avoids the less cost-effective projects. Those potential diversion projects which are further from sewer lines or which would have to cross bridges are not likely to be the most cost effective projects to include in an implementation plan or load reduction strategy. The CREST/Regional Board Staff implementation schedules include sufficient time for planning (2.5 years for each segment) specifically to include time to identify priority drainages or sub-watersheds and to evaluate practicalities of potential implementation methods.</p>
16.2	George Troxcil	<p><u>Second</u>, South Gate and the other affected municipalities are being held to swimming and body-contact standards where swimming and body-contact is prohibited. We believe that the REC-1 and REC-2 uses are improperly designated for the concrete-lined channels of the Los Angeles River and its tributaries. The Basin Plan lists many of the Recreational Designations (REC-1 and REC-2) uses as "potential" or "intermittent." In many of the channels, it is dangerous to enter and access is illegal. Despite this, the TMDL indicates that cities are to take "Aggressive action to restore" the river to allow for "water contact recreation (REC-1)."</p>	<p>See response 6.4.</p>
16.3	George Troxcil	<p>The State Board should remand this TMDL back to the Regional Board along with instructions directing the Regional Board to rely on non-numeric deemed compliant Best Management Practices to implement the TMDL either through the MS4 permits, or</p>	<p>Staff recognizes that there are natural sources of bacteria that may cause or contribute to exceedances of the single sample objectives and that it is not the intent of the Regional Board to require treatment of natural</p>



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		alternatively through a Memorandum of Agreement or other legal contract; and should further specify that the cities are not to be held responsible to controlling any natural sources of bacteria.	sources of bacteria. As such, a reference system approach was included in the Regional Board Adopted Basin Plan Amendment which includes allowable exceedances of single sample bacteria objectives.  See response 14.6.
17.1	Steven Preston	This Comment Letter is identical to comments submitted in the Comment Letter by Rene Bobadilla of The City of El Monte.	See responses 1.1 to 1.8.
18.1	Susan Paulsen	<b>Natural/uncontrollable sources:</b> regardless of the terms that are used, available data for dry weather conditions from the CREST process indicate that in-stream, non-human sources beyond the control of permittees are responsible for many of the observed exceedances of water quality criteria. The Regional Board maintains that the TMDL must be fully implemented (i.e., diversions and/or treatment and other measures must be constructed on an extensive basis) before TMDL revisions to address uncontrollable sources will be considered. Although the TMDL has used reference sites to establish an "allowable exceedance frequency," we believe that the approach used to establish the exceedance frequency was flawed. We further believe that currently available evidence is more than sufficient to indicate that the implementation measures considered by the Regional Board (i.e., those that the Regional Board foresees that MS4 and other permittees may implement in an attempt to comply with the TMDL) will not result in attainment of water quality objectives within the receiving water.	See response 0.1. To see the original response by the Regional Board, please see response 16.2, Attachment 7.
18.2	Susan Paulsen	<b>Wet weather TMDL compliance:</b> The TMDL includes both a High Flow Suspension and allowable exceedance frequencies, which are intended to facilitate compliance during wet weather conditions. Flow Science analyzed available flow data for single water year (2004-2005) and found that, even when the High Flow Suspension and allowable exceedance frequencies are taken into	The reference system approach and reference was used in this TMDL to ensure that water quality would be at least as good as the reference system and the allowable number of wet weather days would cover up to the 90 <sup>th</sup> percentile storm year. The 2004-2005 storm year is not a typical storm year given that the quantity of

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		<p>account, the volume of water that remains to be treated is well beyond the capability of currently known treatment and control measures. The Regional Board's response to these comments has been that the 25-year implementation schedule allows sufficient time to develop implementation measures, and that measures such as flow diversions, treatment, infiltration, source reduction, water reuse, and SUSMP controls "can also significantly contribute to achieving [wet weather] WLAs." However, the Regional Board has provided no evidence to support this assertion, and testimony at the TMDL adoption hearing confirmed that there is no known means of achieving compliance with the wet weather wasteload allocations.</p>	<p>precipitation during that storm year exceeds the critical condition storm year and only storm years in the largest 7<sup>th</sup> percentile experience greater precipitation. Source reduction remains one of the most effective means of implementing the TMDL. Both sub-regional and regional filtration and infiltration BMPs may be effective in source reduction. In addition treatment BMPs for other TMDLs in the watershed have the capability of treating bacteria as well.</p>
18.3	Susan Paulsen	<p>Response to Regional Board's response to comment 16.2. (Page 3 of the Comment letter submitted to State Board)</p> <p>The Regional Board's claim that bacteria are not likely to exceed objectives as a result of dilution due to wastewater treatment plant discharge is unsupported. In fact, the water in the river is primarily treated wastewater, and concentrations of indicator bacteria frequently exceed standards downstream of wastewater discharges. Although concentrations <u>at the discharge point</u> of the wastewater plants are relatively low, concentrations rise significantly <u>within the channel</u> downstream of the discharge point, and the mass balance analysis performed for dry weather conditions by CREST indicates that inflows (i.e., storm drains and tributary inputs) are much smaller than the increases observed in the river.</p>	<p>The dry weather inflows in the CREST study accounted for the majority of the loading in Reach 4. Loading in Reach 2 was not entirely characterized in the study given the primary emphasis of storm drain flows. An elimination of 50% of the dry weather loading would be a significant reduction of bacteria concentrations instream. Also the study also finds that some of the accounted sources in Reach 2 were human sources. To the extent that additional instream sources may contribute to exceedances of bacteria standards, staff supports additional study into these sources, of which SCCWRP is currently working towards.</p> <p>The Publicly Owned Treatment Works (POTWs) combined, discharge roughly 70 MGD of treated effluent daily, which account for about 72% of the flow in the river during dry weather (Ackerman <i>et al.</i>, 2003). This flow provides significant dilution and assimilative capacity for the river downstream of the discharge during dry weather. Certain storms may contribute elevated loads and elevated concentrations of indicator bacteria. The mass balance approach conducted by</p>

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			<p>CREST was able to account for most of the discharges into Reach 4. In stream and other sources of bacteria for reach 2 were not fully quantified in the BSI study.</p> <p>Additional flow from POTWs confers increased dilution and assimilative capacity. Staff acknowledges that certain undeveloped streams, especially in larger watersheds, may experience exceedances of indicator bacteria standards. Based on SCCWRP reference stream study, allowances were included in the TMDL for exceedances in dry weather.</p>
18.4	Susan Paulsen	<p>Response to Regional Board's response to comment 16.3. (Page 4 of Comment Letter Submitted to State Board)</p> <p>Flow Science presented information on the volumes of flow that would need to be addressed in the river and its tributaries, even given the High Flow Suspension and the allowable exceedance days approach of the TMDL. The Regional Board has provided no data or information to suggest that the proposed alternative controls (e.g., diversion and treatment, source reduction, infiltration, water reuse, etc) will be able to address these tremendously large volumes of water. As states in our comments, and as indicated by the Board at the TMDL adoption hearing, there are currently no known means to handle these volumes of water and to achieve the wet weather WLAs.</p> <p>The claim that modifying TMDL documents "to include the possibility of wet-weather load-based compliance at MS4 outfalls to attain the allowable number of exceedance days instream" will help with wet weather TMDL compliance is not technically supportable. As noted by Flow Science (see detail of comment 16.3), wet-weather flow volumes are <i>too high</i> to allow permittees to achieve compliance with the wet weather WLAs. In addition,</p>	See response18.2.

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		<p>implementing diversion BMPs for wet weather throughout the watershed could result in significant risk of flooding given the amount of water that would need to be diverted. As noted in the TMDL Report, regular exceedances of bacteria criteria during wet weather conditions have occurred routinely in the past. No data or information is provided to indicate that allowing load-based compliance will result in TMDL attainment, as reducing loads would require reducing flows significantly or treating large volumes of water, which does not appear to be feasible.</p> <p>Emphasizing the 25-year compliance period does not address the fact that there are no technically feasible means of meeting the wet weather WLAs.</p>	
18.5	Susan Paulsen	<p>Response to Regional Board's response to comment 16.9. (Page 5 of the Comment Letter sent to State Board)</p> <p>The Regional Board's response appears to suggest that in-stream sources of bacteria in Reach 2 may have been important <i>at the time of the CREST study</i>, but may not be important in the future if a "dramatic" decrease in loadings to the river occurs in the future. However, the crest study demonstrates that dry weather inflows to the river provide only 10-50% of the total loading in the river itself. Thus, even if all inflows were eliminated (which would require extraordinary engineering and expenditures), 50-90% of current loadings would likely remain.</p> <p>The Claim that a "dramatic" reduction in loading (even if achievable) to the river <i>may</i> change bacteria concentrations in the river is unsupported.</p> <p>The CREST process did not examine wet weather loadings, so the Regional Board's response appears to be applicable to the dry weather condition only.</p>	See response 18.3.

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		Reference streams in virtually natural conditions are very different from concrete-lined river channels in a densely-populated urban environment. As discussed in the response to Comment 16.11, it appears that reference streams nearer the urban environment <u>do</u> contain bacteria from non-human sources at higher concentrations than more remote sites.	
18.6	Susan Paulsen	<p>Response to Regional Board's response to comment 16.9. (Page 6 of the Comment Letter submitted to State Board).</p> <p>The Regional Board's response is inadequate. Although it cites the conclusion of the CREST BSI study, i.e., that storm drain and tributary discharges are potentially causing exceedances of bacteria objectives, it does not respond to the actual argument Flow Science made based on the CREST data. Specifically, the fact that only 10-50% of the bacteria measured in Reach 2 originated from storm drains and tributaries (as demonstrated by the CREST data) suggests that the other 50-90% of the bacteria measured in Reach 2 come from different source(s) that would not be affected by reduction (or even elimination) of MS4 discharges. As such, exceedance of bacteria objectives are more plausibly attributed to non-storm drain sources. In short, even if storm drains and tributaries are considered a source of significant loads, there are other, much larger sources to the river; for this reason, even eliminating storm drain and tributary loads is not expected to result in attainment of water quality objectives within the receiving water.</p>	See response 18.3.
18.7	Susan Paulsen	<p>Response to Regional Board's response to comment 16.9. (Page 6 and top of 7 of the Comment Letter submitted to State Board)</p> <p>The Regional Board's response fails to address the main point of the comment, which is that non-human sources are for more important than (non-detectable) human sources in this reach of the river and are much more likely to be responsible for the observed exceedances of water quality criteria. As a result,</p>	See response 18.3.

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		TMDL measures that target human sources will not be effective in reducing indicator bacteria concentrations in the L.A. River, and are not expected to result in TMDL attainment.	
18.8	Susan Paulsen	<p>Response to Regional Board's response to comment 16.9. (Bottom half of page 7 of the Comment Letter submitted to State Board).</p> <p>The Regional Board's response is inadequate. The Regional Board's response infers that the study they cite (Marie Canyon) is more typical than the studies cited by Flow Science (Aliso Canyon and Cottonwood Creek). The Point <u>not</u> addressed by the Regional Board response is that it is unclear (from the data) whether the extremely expensive treatment measures that appear to be required by the TMDL will reduce bacteria concentrations in the stream.</p>	See response18.3.
18.9	Susan Paulsen	<p>Response to Regional Board's response to comment 16.10. (Page 8 of the Comment Letter submitted to State Board).</p> <p>Although the Board helpfully corrected Flow Science's statement that the TMDL took a "natural source exclusion approach"-- in fact the TMDL takes a "reference system approach"-- the Regional Board's response did not address the problems with reference system approaches in urban watersheds, which the comment identified. Specifically, the comment suggested that there are many sources of dry-weather flow in southern California urban watersheds, whereas there is frequently only one source (groundwater flow) in southern California natural watersheds. As such, dry-weather flows are subject to <i>natural</i> sources of bacteria to a much greater extent in urban watersheds than they are in natural watersheds. Put another way, <i>naturally generated</i> bacteria can find their way into urban channel flows from a much larger watershed area, and from a much wider range of sources, than is the case for natural channels. In addition, and as noted in the original comment, many natural streams in undeveloped</p>	See response18.3

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		watersheds exhibit regular exceedances of water quality criteria, even during dry weather (see discussion of Orange County coastal watersheds and streams in Flow Science 2005). Moreover, urban channels seem more conducive to natural bacteria growth and regrowth. Therefore, allowing an urban, concrete-lined flood control channel like the Los Angeles River no more natural bacteria than a reference stream that is far outside an urban area does not make sufficient allowance for the total quantities of bacteria from natural than a reference stream that is far outside an urban area does not make sufficient allowance for the total quantities of bacteria from natural sources in the channel, i.e., bacteria that MS4 dischargers should not be responsible for controlling. The Regional Board's response did not address this issue.	
18.9b	Susan Paulsen	Due to the issues just pointed out, the Regional Board's comment that "natural rivers support habitat and wildlife and do not exceed bacterial standards often" is beside the point: for the reasons noted above, the comparison between natural rivers and urban channels is not appropriate.	See response 18.3.
18.9c	Susan Paulsen	The Regional Board's comment that the CREST study shows that exceedances in Reach 2 are caused by storm drain discharges is inaccurate. As pointed out in comment 16.9, only 10-50% of bacteria in Reach 2 (6 <sup>th</sup> St. to Slauson Ave.) are from storm drains. The other 50-90% are from non-storm-drain sources. As discussed above, the fact that indicator bacteria concentrations increased by more than one order of magnitude in Reach 2 while bacteroidales concentrations did not suggests that bacteria from non-human sources are causing the exceedances. In short, natural non-storm-drain sources seem to be responsible for exceedances in Reach 2.	See response 18.3.
18.9d	Susan Paulsen	The Regional Board suggests that if it could be shown in the future that natural sources of indicator bacteria account for a larger proportion of exceedances than in reference streams, then	See response 18.3.

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		<p>the "Natural Source Exclusion" approach could be pursued. However, this response overlooks the fact that there is already ample evidence indicating that natural sources <i>do</i> account for a larger proportion of exceedances than in reference streams (e.g., evidence from Reach 2, as discussed above, and which indicates that 100% of the monitored events exceeded criteria, and that increases in bacteria were from non-human sources). As such, the Board should apply a well-conceived Natural Source Exclusion approach now, i.e., one that properly accounts for the quantity of bacteria in the L.A. River from natural sources, and that requires compliance with <i>E. coli</i> objectives based on this proper accounting.</p>	
18.10a	Susan Paulsen	<p>Response to Regional Board's response to comment 16.11. (Page 10 of the Comment Letter submitted to State Board).</p> <p>The Regional Board's response is inadequate. The thrust of Flow Science's comment was to point out that the complete data set that formed the basis of the reference watershed exceedance probability was not made available to the public and should be made available. The Regional Board response did not address this comment and we have not received the dataset upon which this analysis was based. Further, as noted below the available information does not appear to indicate that there is an anthropogenic contribution or signal for the excluded samples.</p>	<p>Data was discussed more thoroughly in the appendices to the CREST-developed source assessment available on the CREST website.</p> <p>The water quality standards that apply are for <i>E. coli</i> because <i>E. coli</i> is the most reliable and meaningful indicator of human health risk in freshwater. The Los Angeles Regional Board's previous comment was adequate, given the purpose of choosing undeveloped watersheds for reference system in the absence of the potential impact of anthropogenic sources.</p>
18.10b	Susan Paulsen	<p>The bacteroidales analysis conducted in the SCCWRP study showed that exceedances at the reference sites were due to non-human sources, and so removal of the sites on the basis of anthropogenic influence was inappropriate. Thus, the Regional Board did not give an adequate reason why the sites were removed, and, as noted above, the dataset has not been provided.</p>	<p>See response 18.10a.</p>
18.11	Susan Paulsen	<p>Response to Regional Board's response to comment 16.12. (Page 11 of the Comment Letter submitted to State Board).</p>	<p>See response 18.3</p>



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		Existing information is sufficient to warrant a natural sources exclusion approach now; unnecessary resources and expenditures will likely occur if such an approach is not adopted at this time.	
18.12	Susan Paulsen	<p>Response to Regional Board's response to comment 16.14. (Page 11 of the Comment Letter submitted to State Board).</p> <p>The Regional Board response to comment 11.4 (to which the response to 16.14 refers) essentially says that language has been added to the BPA to clarify compliance with the TMDL for "good actor" dischargers, who might be wrongly impugned for the bacteria-generating activities of upstream dischargers. However, this response does not address the two issues raised in comment 16.14, i.e., how compliance will be determined for two or more MS4 permittees that share storm drains but that use different implementation measures, and thereby have different compliance schedules; and how anomalously high "outlier" bacteria samples will be handled with respect to compliance.</p>	<p>Responsible parties that choose an implementation strategy other than an LRS must demonstrate to the Regional Board that additional loading that would result in exceedances of their WLA is due to upstream contributions and they must submit a report to the Regional Board. Additional dilution, assimilative capacity, and the margin of safety included in the TMDL is sufficient to account for storm drains experiencing unusually high bacteria loading. In fact, when pursuing an LRS, these outfalls with high bacteria load should be amongst the first targeted.</p> <p>In addition, in response to comments, the Los Angeles Regional Board's adopted TMDL made changes to include additional measures to demonstrate differentiation of discharges from different municipalities, and to exclude, from interim compliance calculations, unexpectedly high-loading outfalls.</p>
18.13	Susan Paulsen	<p>Response to Regional Board's response to comment 16.16. (Page 12 of the Comment Letter submitted to State Board).</p> <p>The response fails to address the potentially significant environment impacts that were raised. The response acknowledges that "eliminating, minimizing, or treating flows" may be part of implementation, but does not address the concerns about the potentially significant environmental impacts of the possible treatment and control measures.</p>	<p>The SED acknowledges that potentially significant impacts may occur depending on the foreseeable methods of compliance or mitigation methods chosen to implement the TMDL. Several methods of compliance were discussed in the SED and staff report. Water Code section 13360 prohibits the Regional Board from specifying the manner of compliance with its orders used to implement the TMDL. Responsible parties may also choose to employ methods of compliance and mitigation methods which may result in less than significant impacts to the environment.</p>

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18.14	Susan Paulsen	<p>Response to Regional Board's response to comment 16.18. (Page 12 of the Comment Letter submitted to State Board).</p> <p>The Regional Board's response fails to address the problems posed by the large volumes of water that would need to be addressed. The Regional Board provides no analysis (quantitative or qualitative) to suggest that they have considered the volumes of water or flow rates that could be intercepted and/or treated by the various measures. The Regional Board does not assert that compliance with the wet weather TMDL is achievable, and further fails to account for other significant problems that may arise from diverting large quantities of water away from a major flood control channel, e.g., flooding.</p>	See response 18.2.
18.15	Susan Paulsen	<p>Response to Regional Board's response to comment 16.20. (Page 13 of the Comment Letter submitted to State Board).</p> <p>Flow Science has suggested in a number of venues on multiple occasions that water quality criteria need to be revised to require control of bacteria "as a result of controllable water quality factors," but the Regional Board has repeatedly suggested that such amendments are outside the scope of the action at hand. For example, the Basin Plan amendment to remove fecal Coliform objectives, adopted the day before this TMDL was adopted, was said by Regional Board staff to have been scoped so narrowly that this change could not be considered. Flow Science respectfully suggests to the State Water Board that this change to objectives is necessary to avoid unnecessary expenditures of resources to intercept and/or treat indicator bacteria from sources beyond a discharger's control. The Regional Board's response did not adequately address or resolve the comment.</p>	Standards changes are not being considered as part of this action. The Regional Board always has the option to re-consider a TMDL and make changes to the Basin Plan. For instance, over the course of TMDL implementation, the TMDL may be re-considered to incorporate new information from scientific studies, or address revisions to water quality standards, such as adoption of revised water quality objectives based on recommendations of USEPA.
18.16	Susan Paulsen	Response to Regional Board's response to comment 16.21. (Page 14 of the Comment Letter submitted to State Board).	See response 18.2.

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		<p>As noted throughout this comment letter, it is our opinion that the High Flow Suspension, exceedance days approach, and long implementation timeframe do not result in a TMDL that can feasibly be achieved, particularly for the wet weather condition, when flow volumes are very large. At the TMDL adoption hearing on July 9, 2010, the Regional Board members requested that Regional Board staff conduct use assessments to determine if recreation was occurring in channels subject to the TMDL. Testimony at the TMDL adoption hearing indicated that Regional Board members had concerns about the ability to comply and the cost of compliance, but chose to adopt the TMDL then conduct the use surveys following TMDL adoption. However, as indicated in the attachment to this letter (Attachment 2), we have serious concerns about the process that is underway (the "RECUR" process) to evaluate beneficial uses within the Los Angeles River watershed. We continue to believe that it is more appropriate to evaluate uses and make changes if/as necessary prior to adoption of the TMDL.</p>	
19.1	Mark Gold	<p><b><u>25 years is far too long for Dry and Wet Weather Compliance Deadlines.</u></b></p> <p>The Draft TMDL's proposed <i>Implementation Schedule</i> requires "...within 25 years of the effective date of the TMDL, compliance with the allowable number of exceedances days at all locations during dry weather and wet weather is required." Twenty-five years is far too long for a compliance deadline and is inconsistent with similar TMDLs.</p>	<p>State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.</p> <p>See response 0.1 and Los Angeles Water Board's responses 17.2 (Attachment 8).</p>
19.2	Mark Gold	<p>Additionally, wet and dry weather must have separate compliance deadlines, as dry weather standards will likely be met much faster than wet weather standards. Compliance deadlines for dry and wet weather should not exceed 10 years and 18 years, respectively.</p>	<p>State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.</p> <p>See response 0.1 and Los Angeles Water Board's response 17.3 (Attachment 9).</p>

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19.3	Mark Gold	<p><b><u>Interim Waste Load Allocations (WLAs) should reflect final compliance requirements</u></b></p> <p>The Draft TMDL includes interim WLAs for bacteria reduction that are based on microbial loading. Instead, WLAs should be based on concentration. Final WLAs are based on exceedance days and not enormous inaccurate loading estimates that are irrelevant for public health protection. There is no accurate way to quantify <i>E. coli</i> loading in MPN/day, as grab samples show only a "snapshot" of water quality from a particular storm drain or tributary on a particular day and time. The interim WLAs conditions should reflect final compliance requirements in order to acclimate dischargers to final requirements. The approach that has been used in many other TMDL's is a percentage of the final target (exceedance days) or receiving water concentrations.</p>	<p>State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.</p> <p>See response 0.1 and Los Angeles Water Board's responses 17.7 (Attachment 10).</p>
19.4	Mark Gold	<p><b><u>Compliance Monitoring Should be Strengthened.</u></b></p> <p>Monitoring stations should be increased from one station per river segment to at least 3 stations per segment (upstream, downstream, and middle) to better improve the assessment of problem areas. Furthermore, outfall monitoring needs to be a requirement for discharger compliance assurance. A recent court ruling regarding MS4 discharges' storm drains (Natural Sources Defense Council (NRDC), Inc., et al. Versus the County of Los Angeles et al.) deemed that <i>"standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit."</i> This ruling supports the need for monitoring outfalls in addition to receiving water, in order to determine compliance.</p>	<p>State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.</p> <p>See response to comment 0.1 and Los Angeles Water Board's response to comment 17.8 (Attachment 11).</p>
20.1	Scott McGowen	<p><b><u>Not a Source of Waste Loads to the Los Angeles River.</u></b></p> <p>The June 4, 2010 letter submitted by Caltrans included our concern that any bacterial indicator loads from Caltrans roadways</p>	<p>State Water Board staff reviewed the Los Angeles Water Board's responses to these comments and agrees with its responses.</p>

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	<p>located in the Los Angeles River watershed are from natural background sources, such as wildlife and birds. The Response to Comments released by the LARWQCB on July 2010 identifies domestic pets, horses, and direct human inputs--all of which contribute to indicator bacteria loads in urban runoff, in addition to leaks and overflows from wastewater collection systems, illicit connections, failing septic systems, and sediments. Caltrans does not allow anthropogenic activities (e.g., domestic waste), domestic pets (e.g., cats and dogs), and livestock (cows, horses, pigs, etc.) within the state highway right-of-way that could contribute pathogens from these sources. The LARWQCB references a system/antidegradation approach that recognizes natural sources and focuses this TMDL on anthropogenic sources. Any potential bacteria discharge would be due to natural sources.</p> <p>The Response to Comments released by the LARWQCB also states that "the U.S. EPA does not distinguish between human and nonhuman sources of bacteria in its recommended water quality criteria for bacteria in ambient waters." The response includes a citation from a U.S. EPA document released in 2009 but does not include the reference information for the document. This document is also not included as a reference in the staff report. The response also states that "No recreational water quality criteria have been established by the U.S. EPA for these pathogens as reliable indicators of human health risk." Although the indicators and epidemiological studies do not currently distinguish between human and non-human sources of bacterial indicators, the U.S. EPA has recognized that the criteria and implementation guidance need to "prove a way for addressing and discounting pathogen and indicator data not associated with anthropogenic sources of fecal contamination" and discusses approaches "for discounting those waters that were identified as having limited or no anthropogenic fecal loading, thereby avoiding</p>	<p>See response to comment 0.1 and Los Angeles Water Board's response to comment 2.2 (Attachment 12).</p> <p>The full citation of (USEPA, 2009) is: U.S. EPA (Environmental Protection Agency) 2009. Review of Published Studies to Characterize Relative Risks from Different Sources of Fecal Contamination in Recreational Waters.</p>
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		<p>those waters being listed as impaired inappropriately" (U.S. EPA 2007). Dischargers should not be required to address loads from non-anthropogenic sources. The U.S. EPA is currently conducting a review of bacterial indicators and will release new recommendations in 2012.</p> <p><i>Discharges of indicator bacteria from Caltrans roadways located in the Los Angeles River watershed are from natural background sources. Caltrans requests that the waste load allocations assigned to Caltrans in the TMDL be set equal to existing loads or that Caltrans be removed as a stakeholder in this TMDL. The TMDL should also include a requirement for the LARWQCB to review the bacterial indicators included in this TMDL once the U.S. EPA recommendations are released. In addition, justification should be provided for the unsubstantiated claim that several types of permitted discharges are not sources of bacterial indicators.</i></p>	
20.2	Scott McGowen	<p><b>Need for Consistent Stormwater Program.</b></p> <p>The requirements in this TMDL for Caltrans are not consistent with those of TMDLs for the same pollutant in other regions of the State. For example a TMDL established by San Francisco Bay Regional Water Quality Control Board for Pathogens in Richardson Bay "acknowledges that the source of bacteria in highway runoff is wildlife" and that "the Water Board will not hold discharging entities responsible for uncontrollable Coliform discharges originating from wildlife/natural background sources." Other TMDLs for bacterial indicators where the requirements for Caltrans are different include TMDLs for Bacterial Indicators in San Lorenzo River Watershed (Central Coast Region, Coachella Valley Storm Channel (Colorado Region), and the San Diego Beaches and Creeks Project I TMDL.</p> <p>Caltrans is required to maintain a statewide stormwater program</p>	<p>The State Water Board appreciates the commenter's concerns. However, TMDLs cannot be applied consistently across different waterbodies and watersheds in California. Pursuant to Clean Water Act section 303(d), each state must identify, rank, and list the waters within its boundaries that do not meet water quality standards. For each listed waterbody, the state is required to establish a TMDL for each pollutant impairing the water quality standards in that waterbody. It would be very difficult for the Los Angeles Water Board to issue a bacteria TMDL that is consistent with bacteria TMDLs that other regional water boards have issued, because the Los Angeles River bacteria TMDL considers the specific anthropogenic and natural background sources of the pollutant, and it is highly unlikely that the wasteload and load allocations of bacteria into the Los Angeles River would be identical to</p>

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		<p>approach for transportation throughout the state. The US EPA's Finding of Violation and order for compliance (EPA docket #CWA-09-2011-0001) cited Caltrans for implementing an inconsistent program. Varying requirements for bacteria TMDLs from the same land use type (highway transportation) restricts Caltrans' ability to use a comprehensive statewide approach.</p> <p><i>Caltrans requests that the TMDL have consistent requirements for bacterial indicator TMDLs for Caltrans throughout the state. The approach taken by the San Francisco Regional Board should be recognized as valid, and applied for bacterial indicator TMDLs, as it recognizes that sources of bacterial indicators from Caltrans roadways originate from wildlife/natural background sources.</i></p>	<p>the wasteload and load allocations entering other state waterbodies impaired with bacteria. In other words, a bacteria TMDL for Richardson Bay will be fundamentally different than a bacteria TMDL for the LA River because these are distinct waterbodies, each with its own separate pollutant loading problems. As such, the Los Angeles Regional Board must develop its load and wasteload allocations specific to each waterbody in order to issue a TMDL that will meet water quality standards. Here, the Los Angeles Regional Board is charged with developing a TMDL specific to bacteria in the Los Angeles River.</p>
20.3	Scott McGowen	<p><b>Alternative Compliance Schedule</b></p> <p>The June 4, 2010 letter submitted by Caltrans included our concern that the TMDL Compliance Schedule includes a fragmented approach that is cumbersome for Caltrans to comply with and that would lead to duplication of time, effort, and funds. The LARWQCB response to our comment does not address the requirement for Caltrans to provide one complete approach instead of a fragmented approach. Instead, the LARWQCB offers an alternative where Caltrans must move up the deadlines on each of the segments in order to coordinate the schedules. This is not a feasible alternative and places a disproportional burden on Caltrans. Caltrans is generally less than 2 percent of the area within each of the sub watersheds and is approximately 1 percent of the area in the total watershed. Further, Caltrans load is insignificant compared to the total loads.</p> <p>Caltrans should be allowed to comply with the TMDL by implementing a consistent and structured program for its facilities within the Los Angeles River watershed. Caltrans would benefit from an independent comprehensive, uniform approach</p>	<p>The State Water Board staff has reviewed the response by the Regional Board and agrees that response was adequate and addressed Caltrans' concerns. The TMDL allows responsible parties to use alternative compliance strategies, subject to approval by the Regional Water Board Executive Officer. Nothing prevents a responsible party from planning and executing a strategy to comprehensively address all watershed areas under its authority earlier than the required TMDL deadlines. However, any alternative compliance strategies implemented by responsible parties must demonstrate compliance with final waste load allocations within each segment by the specific compliance deadline.</p>

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		<p>consistent with our statewide monitoring and program requirements.</p> <p><i>Caltrans requests that the BPA include an alternative compliance schedule that allows Caltrans to develop a watershed-wide approach, rather than an inconsistent approach that varies by watershed. We suggest assigning one set of reasonable compliance dates that are commensurate with the amount of work and time required to achieve compliance (rather than pushing all compliance dates for other segments forward to match up with the first segment deadlines that must be met.)</i></p> <p><i>In addition, Caltrans requests that the compliance schedule for this TMDL be made consistent with other Bacterial Indicator TMDLs within the surrounding areas (i.e., Malibu Creek and Ballona Creek). This would allow all affected dischargers, including Caltrans, to implement a truly consistent approach for Bacterial Indicators in the region.</i></p>	
20.4	Scott McGowen	<p><b>Complying with Dry Weather Conditions</b>        The June 4, 2010 letter submitted by Caltrans included our concern that Caltrans already meets dry weather flow waste load allocations and should not be required to implement controls and monitor for dry weather conditions. The LARWQCB response does not adequately address our concern and leaves the TMDL requirements unchanged.</p> <p>Caltrans' existing program meets dry weather flows, and has insignificant dry weather discharge potential, which should exclude Caltrans from being required to implement controls and monitor for this TMDL. The BPA requires dry weather monitoring. Caltrans' area is approximately 1% of the Los Angeles River watershed, and the facilities that would have potential to discharge would be considerably less, making the dry weather</p>	<p>State Water Board staff agrees with the Regional Board that if Caltrans demonstrates no discharge from its facilities and activities during dry weather to the MS4, it will be considered in compliance with the dry weather allocations.</p>



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		<p>impact insignificant. Caltrans facilities typically do not have dry weather discharges. Caltrans conducted field investigations of facilities within the Los Angeles River, Ballona Creek, Santa Monica Bay, Malibu Creek, and Marina Del Rey watersheds to document if any dry weather runoff occurred from Caltrans facilities and activities, such as landscape irrigation. Over 59 miles of roadway and a maintenance station were inspected over a two-year period from April through October. Areas with landscaping were mapped, and any instances of dry weather flow were noted. Only eight occurrences of dry weather runoff from Caltrans irrigation systems at four locations were identified. Steps were taken to eliminate these discharges. Other observations of dry weather runoff were identified, primarily originating from run-on from commercial and residential facilities. The local MS4 Permittees were informed of their discharges.</p> <p>Caltrans has an ICIID program in place to follow-up on any observances of dry weather runoff from its facilities and submit notice of observances of dry weather runoff to the appropriate MS4 jurisdictions. Caltrans will continue to perform prompt maintenance on all reported dry weather discharges to quickly address and correct any problems. As a result, Caltrans is currently meeting the waste load allocations during dry weather periods and will continue to perform maintenance as needed to eliminate any nonstormwater discharges.</p> <p><i>Caltrans' existing ICIID program already meets dry weatherflows, and has insignificant dry weather discharge potential. Therefore, we request to be exempted from implementation and monitoring during dry weather conditions.</i></p>	
20.5	Scott McGowen	<p><b>Clarify REC-1 and REC-2 Significance</b>          The problem statement identifies the concerns for recreating in waters with elevated bacterial indicators, but the LARWQCB</p>	<p>The segments of the watershed that have high flow suspension are listed in Attachment A to Resolution 2003-010 as well as the staff report.</p>

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		<p>Basin Plan implies that there is minimal to no recreation activity within almost all of the Los Angeles River segments. The LARWQCS adopted the <i>Amendment to the Water Quality Control Plan/or the Los Angeles Region to Suspend the Recreational Beneficial Uses in Engineered Channels during Unsafe Wet Weather Conditions</i> (SWRCS Resolution No. 2003 0071), in 2003. Table 2-IA of this BPA, identifies almost all of the TMDL segments requiring waste load allocations or load allocations having access prohibited by Los Angeles County in channelized areas.</p> <p><i>Ca/trans requests that the LARWQCB clearly represent what TMDL segments are subject to the BPA for suspension of recreational beneficial uses during unsafe wet weather conditions and include justification for engineered segments of the Los Angeles River not subject to the suspension. If there are planned projects to remove public access recreation restrictions within the TMDL segments, they should be appropriately documented. Historical recreation of the TMDL segments should only provide a basis for attaining REC-1 or REC-2 standards if there are plans for removal of public access restrictions.</i></p>	See response 6.4.
21.1	Enrique Zaldivar	As such, the Bureau would like to <u>express our support for the schedule in the TMDL.</u>	Comment noted.
21.2	Enrique Zaldivar	The Bureau very much wants to avoid the situation that an Unexpected Discharge is observed during WLA compliance monitoring, and the City is found to be in violation even though we acted in good faith and implemented a large suite of bacteria control BMPs that wer well-designed and executed. These types of discharges were acknowledged in the TMDL when evaluating compliance with interim WLAs but <i>not</i> final WLAs. <u><i>The Bureau simply requests that the language on the bottom of page 5 of the BPA beginning with "Unexpectedly high-loading outfalls may be excluded from interim compliance calculations under the following circumstances..." be revised to state "Unexpectedly high-loading</i></u>	See response 1.3.

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		<u>outfalls may be excluded from interim and final compliance calculations under the following circumstances...</u> . Addressing this remaining issue is important to having an implementable and effective TMDL.	
22.1	Joyce Dillard	What needs to be recognized is the General Plan and its Elements, the CEQA mitigations and infrastructure planning and maintenance in relationship to those municipal General Plans and the permittees.	The State Water Board fails to see how this comment pertains to the topic of this TMDL.
22.2	Joyce Dillard	The source points of the TMDLs need to be addressed for each permittees. Regular testing points- microbial and genetic- should be addressed as well as the analytical relationships of the results- microbial, geologic and land use.	The TMDL implements Water Quality Objectives which includes Geometric Mean Limits and Single Sample limits. These limits are monitored regularly to ensure that the Water Quality Objectives are being met.
22.3	Joyce Dillard	The Federal Clean Water Act is about navigable uses. The mitigation and monitoring may not be addressed in the General Plan and its Elements CEQA documents.  That presents a problem of execution and compliance to standards set by this Board that was not considered in the CEQA processes of the municipalities.	The State Water Board fails to see how this comment pertains to the topic of this TMDL.
22.4	Joyce Dillard	Consideration is needed to the Board approach to new permitting and the flexibility in the approach and standards presented in the 5.25.2011 meeting on the development of the updated Los Angeles County MS4 permit.	The Regional Board will consider how to implement the TMDL during renewal of the LA MS4 permit.
22.5	Joyce Dillard	BMP Best Management Practices may not mitigate the TMDL reductions and be too expensive to maintain without consideration of revenue, staffing and monitoring-by each individual municipality.	The TMDL requires the responsible parties to determine appropriate BMPs to implement the TMDL
22.6	Joyce Dillard	Broken sewers may be a problem that is not addressed in this amendment. Sewer pipes are not under this Board's jurisdiction. Property owners are responsible for their pipes to the municipal	Broken sewers would become a discharge point which would be covered under the TMDL. The owner of the broken sewers would be held responsible for bringing

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		connection.	the discharge into compliance.
22.7	Joyce Dillard	Oil and its toxics, prevalent in the region, may not be addressed properly. Migrating gases have effects on oil and tar rising to surface. Fracking and oil and gas extraction has not been addressed by this Board as a source point.	Fracking and oil and gas extraction and resulting adverse environmental impacts are not known to exist within the watershed and are not known to be a significant source of bacteria.
22.8	Joyce Dillard	Landfills and exemptions to allow disposal have not been addressed as a source point. No studies have been presented to our knowledge. Sunshine Canyon Landfill should be analyzed.	Landfills are typically sited in locations not known to contribute significant loading to surface waters. In addition, landfills typically contain compacted clay or other liners designed to prevent leachate from migrating offsite. As such, landfills are not known to be a significant source of bacteria loading in the region or watershed.
22.9	Joyce Dillard	Has the Basin Plan been adopted by all municipalities involved and incorporated into the General Plan and its Elements.	The Basin Plan does not become effective until approval by OAL.
22.10	Joyce Dillard	More science and monitoring should be established. The public cannot be expected to foot an assessment on strategy alone nor should they be asked to pay property taxes for Clean Water when there are no measurable results, such as Proposition O in the City of Los Angeles in the amount of \$500,000,000.	The Regional Board has the option to consider new science and to reopen the TMDL to make any adjustments needed.
22.11	Joyce Dillard	US EPA, Heal the Bay and Santa Monica Baykeeper consent decree execution may be more odor control from sewer spills and not TMDL mitigation leading to reduction.	Comment noted.
23.1	Richard Montevideo	Except as discussed below, all of the 2010 Comments provided to the Regional Board are hereby reiterated and incorporated herein for the State Board's consideration of the proposed TMDL.	See response 6.5.
23.2	Richard Montevideo	Initially, as a matter of due process and procedure, the Cities reject the State Board's suggestion in its May 18, 2011 Notice of Opportunity to Comment that "the commenter must explain why and in what manner each of the responses provided by the Los	See response 6.5.

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		<p>Angeles Water Board to each comment was inadequate or incorrect" or else "the State Water Board will presume that the Los Angeles Water Board's response adequately addressed the commenter's concern." (State Board's May 18, 2011 Notice of Opportunity to Comment - hereafter "State Board Notice," p.1)        This attempt by the State Board to unilaterally limit the identified concerns of opponents of the proposed TMDL is not sanctioned anywhere in State law. As such, the State Board cannot lawfully adhere to its stated position, and to do so is an attempt to inappropriately restrict the Cities' and the public's rights to due process of law.</p>	
23.3	Richard Montevideo	<p>The Basin Plan must be reviewed and revised before the Bacteria TMDL can lawfully be adopted.</p> <p>The Regional Board's response in Staff's Responses to Comments never directly addressed the Comments under this heading, but simply asserted that the TMDL Program "is critical to achieving the ultimate goal of the Federal Clean Water Act," and that it is "essential to set forth a plan and schedule for remedying impairments and restoring full support for the beneficial uses of these waterbodies." The Regional Board then concluded that because the TMDL is a "planning tool, it can be revised when and if the designated beneficial uses for the LA River are 'adjusted.'" (Regional Board Response to Comments (hereafter "Response to Comments") pp. 124-25.) These Responses to Comments thus ignore the Cities' Comments in this regard and their importance. For example, if the beneficial uses were properly designated to be consistent with the "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards" (40 CFR § 131.3(e)), and if the water quality objectives were thereafter revised accordingly, the TMDL would then either need to be completely revised or would become entirely unnecessary.</p>	<p>The State Water Board disagrees with the commenter's assertions. First, the Basin Plan cannot be reviewed and revised before this TMDL is approved because a court-established Consent Decree requires that this TMDL be approved by March 2012. Second, TMDLs are indeed essential planning tools that set forth goals and a schedule for reducing pollution and achieving water quality standards in impaired waterbodies. As noted in the Staff Report, the LA River "is highly contaminated by fecal pollution. Many reaches and tributaries exceed the bacterial water quality standards 80 or 90 or even 100% of the time, that is, most or all of the time. The reaches or tributaries with better water quality exceed the indicator bacteria water quality standards roughly 50% of the time. This severely limits the potential for recreational uses of the river. Bacterial concentrations in the Los Angeles River and tributaries exceed water quality standards during both dry and wet weather." (p. 13).</p> <p>With respect to the potential and designated beneficial uses of the LA River, see response to comment number 20.5. Commenter's dispute with</p>

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	<p>The compulsion to force the parties to restore the LA River apparently from its existing use as a flood control channel, is even more alarming given the fact that, as admitted in the TMDL Report itself, none of the desired recreational activities in the concrete-lined sections of the River (which include all of Reaches 1 and 2 of the River) are even lawful, given that "access is prohibited to much of the Los Angeles River and the concrete channelized areas of Tujunga, Verdugo, Burbank Western Channel, Arroyo Seco, and Rio Hondo." (TMDL Report, p. 15.) In effect, one would need to "trespass" i.e., to engage in illegal activity, in order to recreate in the concrete-lined portions of the LA River, as now apparently envisioned by the Regional and State Boards. In short, the proposed bacteria TMDL is designed to "restore" the LA River to protect swimmers from exposure to bacteria, even though such a goal is directly at odds with the very purpose of the past seventy years of development for most of the LA River, i.e., its development into a concrete-lined flood control channel, where "access is prohibited to much of the LA River." (TMDL, p. 15.)</p> <p>From a legal perspective, a decision to approve this TMDL, in this present form, is even more arbitrary when one considers that many of the REC-1 and REC-2 designated uses of the River are labeled as mere "potential" or "intermittent" beneficial uses. These conditional use designations only confirm that large portions of the LA River are not appropriate for REC-1 and REC-2 activities. Moreover, the designated "existing" beneficial uses of the River are similarly highly questionable, as none of these so-called "existing" beneficial uses for any portion of the concrete-lined sections of the River were, in fact, "actually attained in the water body on or after November 28, 1975," as required under the federal regulations. (40 CFR § 131.3(e))</p> <p>EPA's interpretation of the "existing use" regulations (40 CFR §</p>	<p>the designation of existing and potential beneficial uses is misdirected because the proposed action does not include the evaluation of such designations. Moreover, Commenter's reference to 40 C.F.R. section 131.3, subdivision (e), which defines "existing uses," incorrectly argues that designated beneficial uses must only include "existing uses." In so doing, Commenter ignores the subsequent pertinent definition, contained at 40 C.F.R. § 131.3, subdivision (f), which provides, "Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained." Further, the state's water quality standards must "consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act." (40 C.F.R. § 131.3(i).) Commenter's focus on the illegality of access to portions of the LA River fails to consider the following federal mandate, at 40 C.F.R. § 131.10(b): "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."</p> <p><i>In City of Arcadia v. State Water Resources Control Board</i> (2010) 191 Cal.App.4th 156, as modified on denial of rehearing (Jan 20, 2011), the Court of Appeal held that the Los Angeles Regional Board was authorized to develop water quality objectives based on "potential" beneficial uses in accordance with Water</p>
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		<p>131.3(e)), and the purpose and process laid out by EPA to be followed when designating "existing uses" under the CWA should be followed before the Bacteria TMDL in question is adopted and when evaluating the propriety of the designated "existing" uses presently included in the Basin Plan.</p>	<p>Code section 13241. As such, the Regional Board can develop a plan of implementation and develop wasteload and load allocations based on potential beneficial uses.</p>
23.4	Richard Montevideo	<p>The above proposed approach to evaluating the designated uses in the Basin Plan is further supported by the Use Attainability Analysis provisions provided for in the federal regulations, where the regulations allow states to "remove a designated use which is not an existing use . . . if the state can demonstrate" any one or more of the following factors, among others: (40 CFR § 131.10(g).)</p> <ul style="list-style-type: none"> <li>(1) Naturally occurring pollutant concentrations prevent the attainment of the use: or</li> <li>(2) <b>Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use ...; or</b></li> <li>(3) <b>Human caused conditions or sources of pollution prevent the attainment of the use</b> and cannot be remedied or would cause more environmental damage to correct than to leave in place; or</li> <li>(4) <b>Dams, diversions or other types of hydrologic modifications preclude the attainment of the use ...; or</b></li> </ul> <p style="text-align: center;">***</p> <ul style="list-style-type: none"> <li>(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in <b>substantial and widespread economic and social impact.</b></li> </ul> <p>A decision to adopt a TMDL as a means of forcing "aggressive</p>	<p>See response 6.5 and 23.3</p>

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		<p>action to restore" the LA River to allow for water contact recreational uses at a cost of \$5.4 billion, and to, in effect, reverse the billions of dollars (in today's dollars) invested to develop and convert the LA River into a very large concrete-lined flood control channel, without first properly evaluating the propriety of the designated REC-1 and REC-2 uses therein, is a completely arbitrary decision and entirely irresponsible public policy.</p>	
23.5	Richard Montevideo	<p>It should be recognized that at the July 9, 2010 hearing, the Regional Board was so concerned about the propriety of the designated beneficial uses that it directed staff to reevaluate the designated uses in the Basin Plan for the entire River, albeit it failed to see the adverse consequences of pushing ahead with the adoption of the TMDL prior to completing the study of the uses.</p> <p>Instead, the Regional Board decided to move forward and adopt the TMDL prior to completing the study, based on the false assumption that if it did not, EPA would do so and the Cities would then be forced to "comply with the TMDL right away." (Transcript of July 9, 2010 hearing before the Regional Board (hereafter "Transcript"), Board Member Diamond, p. 166.)</p>	See responses 6.5, 6.6, and 23.3.
23.6	Richard Montevideo	<p>In addition to the acknowledged "problem" of imposing impossible wet weather limits to achieve the currently designated REC-1 and REC-2 uses in the Basin Plan, the Regional Board Members also recognized that the TMDL was simply not affordable (similar to the concerns expressed by Board Member Blois).</p> <p>The Regional Board has thus clearly recognized that the cost to comply with the Bacteria TMDL will be prohibitive to the municipalities. The Regional Board also plainly recognized the importance of conducting additional studies in order to formulate</p>	<p>See response 6.6, 18.2, and 23.4.</p> <p>The commenter is correct that a reopener does not guarantee or automatically result in any changes to the TMDL. Nonetheless, reopeners are necessary because they provide added flexibility to examine and incorporate additional insight obtained through studies, pilot projects, and other developments. The TMDL may be reopened at any time to incorporate new information as it is brought forth, examined, and deemed significant.</p>



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		<p>a proper TMDL, but concluded it was, in effect, doing the Cities a favor, all based on the <b>invalid assumption</b> that if the Regional Board did not immediately act, EPA would need to develop the TMDL and that the Cities would then immediately need to start writing the "checks" and could then "get into violation immediately."</p> <p>Further, the Regional Board at the hearing seemed to have taken solace in the fact that there would be "reopeners" at the 4 year and 10 year level and that those reopeners could be used as a means of finding "ways to afford it."</p> <p>The Regional Board's reliance on "reopeners" to avoid its perceived dilemma of needing to adopt a TMDL to protect improperly designated and unachievable beneficial uses, is clearly misplaced given that once a TMDL is finally adopted (as recognized by Regional Board staff), applicable NPDES Permits will need to be revised or reissued to incorporate provisions that are to be consistent with the assumptions and requirements of the wasteload allocations.</p> <p>Finally, it must be recognized that the reopeners will not assure any changes to the TMDL, and in fact if any changes ever result from a reopener, such changes will clearly only occur years into the future and only after the reopener has gone through a formal hearing before both the Regional and State Boards and thereafter has been approved by the Office of Administrative Law ("OAL") and U.S. EPA.</p>	<p>A 13-year schedule for development of TMDLs in the Los Angeles Region was established in a consent decree (<i>Heal the Bay Inc., et al. v. Browner, et al.</i> C 98-4825 SBA) approved on March 22, 1999. The TMDLs for these segments of the Los Angeles River and tributaries with impairments related to Coliform bacteria are required to be final by March 22, 2012. If EPA does not approve a state TMDL or establish a TMDL, themselves, by March 22, 2012, EPA will be in violation of the consent decree.</p> <p>A TMDL established by the Los Angeles Water Board includes an implementation program with a schedule for compliance under Water Code section 13242, a TMDL established by USEPA does not include an implementation program.</p> <p>The Staff Report acknowledges that the estimated costs associated with implementing the TMDL may be significant, given the various methods of compliance available to responsible parties. However, the TMDL as currently written includes sufficient flexibility and a long enough compliance schedule to complete implementation to attain water quality standards.</p>
23.7	Richard Montevideo	<p>The Proposed Bacteria TMDL Should Not Be Adopted Until Such Time as the Review and Revision Process of the Standards, as Required by the Superior Court in the Arcadia Case, Has Been Completed.</p>	<p><i>City of Arcadia v. State Water Resources Control Board</i> (2010) 191 Cal.App.4th 156, as modified on denial of rehearing (Jan 20, 2011), reversed the decision of the trial court with instructions to dismiss the petition. addresses the issue of whether the entire Basin Plan must be reconsidered to consider the Water Code</p>

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			<p>section 13241 factors, as they apply to storm water dischargers, and the appropriateness of the uses in the Basin Plan that are designated as “potential” (versus “past present and probable future” uses), even in the absence of any evidence that any particular water quality objective is not currently set at an appropriate level of protection, or that any designated beneficial use is not properly being protected. The absence of such evidence caused the trial court to acknowledge that compliance with its writ may appropriately result in no actual changes to the water quality standards. The matter is currently on appeal, and therefore there is presently no final judgment. Moreover, the writ is stayed during the appeal. As such, the Regional Board’s obligations under the case are not yet finally determined, and the writ does not impose obligations currently. When the matter is resolved, the Regional Board will determine what actions to take.</p>
23.8	Richard Montevideo	<p>A 2008 Report by the National Academics of Science Further shows the importance of evaluating the propriety of the proposed TMDL before its adoption.</p> <p>In its Response to Comments, the Regional Board simply noted the existence of these comments regarding the National Academy of Science's 2008 Report, and claimed that one of the recent Triennial Review priorities is to review the REC designations for certain portions of the Los Angeles River. (Response to Comments, p. 126.) However, the Response to Comments further provide that the review of the REC designations of the Los Angeles River was not the purpose of the TMDL proceeding. (Id.) Regional Board staff entirely missed the point of the Comments regarding the 2008 National Academies of Science Report.</p> <p>In short, the concerns raised by the NRC in its 2008 Report are</p>	<p>See responses 6.4, 6.6, and 20.5.</p>

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		<p>consistent with many of the same concerns raised by the Cities in their 2010 Comments in connection with the subject TMDL. Most importantly is the need to consider the appropriateness of designating concrete-lined flood control channels for REC-1 and REC-2 use, given that such designated uses cannot reasonably or economically be achieved, (particularly given the estimated costs in the TMDL Report for implementing the bacteria TMDL in question, i.e., that the costs for implementation "could range up to \$5.4 billion for full, inclusive, implementation costs")(TMDL Report, p. 76.).</p>	
23.9	Richard Montevideo	<p>The Regional Board has failed to comply with the requirements of CWC §§13000, 13240, and 13241 In Developing a Bacteria TMDL for the Los Angeles River</p> <p>In their Response to Comments, Regional Board staff asserts that they were not required to consider Section 13241 in developing the TMDL, claiming that said Water Code section only applies to the establishment of water quality objectives, and that the TMDL is not proposing to establish a water quality objective but only to implement it. The fallacy of this contention is that by definition the adoption of a TMDL is an amendment to the water quality objectives in the Basin Plan, and TMDLs thus do not simply implement the water quality objective.</p> <p>Instead, by definition, a TMDL converts a water quality objective into a wasteload allocation for purposes of incorporating the assumptions and requirements of the wasteload allocation into an NPDES Permit. As such, the Regional Board staff failed to recognize that a TMDL is not simply the implementation of an existing water quality objective, but beyond that is an amendment to a water quality objective with a series of substantive changes being made to the objective. Accordingly, Water Code section 13241 was required to have been complied with.</p>	<p>The State Water Board disagrees with this comment's assertions and conclusions. First, regarding the commenter's assertion that the Regional Board failed to comply with the requirements of Water Code § 13000, that statute contains general statements of legislative intent and does not impose affirmative duties on the regional boards. (See <i>City of Arcadia v. State Water Resources Control Board</i> (2010) 191 Cal.App.4th 156, 175-76)</p> <p>Regarding Water Code § 13240, the Regional Board has adopted a water quality control plan which conforms with the policies of the Porter-Cologne Act.</p> <p>Water Code § 13241, by its express terms, only requires consideration of the listed factors when "establishing water quality objectives." The Porter-Cologne Act defines "water quality objectives" to mean "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (Water Code § 13050(h).) The Regional Board's adoption of a TMDL is not an</p>

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			<p>amendment to water quality objectives, TMDLs and the assigned wasteload/load allocations are a <i>means of implementing</i> water quality objectives that have <i>previously</i> been established in order to achieve water quality standards. (See <i>City of Arcadia v. State Water Resources Control Board</i> (2010) 191 Cal.App.4th 156, 175-79 as modified on denial of rehearing (Jan 20, 2011).) A program of implementation for achieving water quality objectives must include, at a minimum: (a) a description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any public or private entity; (b) a time schedule for the actions to be taken; and (c) a description of surveillance to be undertaken to determine compliance with objectives. A TMDL is considered such a program of implementation, as it constitutes a program to implement existing federal water quality standards. Thus, the factors to be considered when establishing a water quality objective, contained in § 13241, are inapplicable.</p> <p>In addition, the Regional Board's adoption of the TMDL is compelled by federal law. (Clean Water Act, § 303(d)(1)(C).) As the Court of Appeal in <i>City of Arcadia</i> explained, a section 13241 analysis is only required when water quality objectives are more stringent than what federal law requires. (191 Cal.App.4th at 178-79.) The TMDL does not set forth any requirements that exceed federal law, because the TMDL merely sets forth water quality goals that will be implemented in, <i>inter alia</i>, NPDES permits.</p>
23.10	Richard	Water Code section 13000 requires an analysis not only of the	The Commenter's assertions concerning Water Code

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	<p>Montevideo "reasonableness" of the TMDL, but also a consideration of all demands being made and to be made on the subject waters, "and the total values involved, beneficial and detrimental, economic and social, tangible and intangible."</p> <p>Moreover, as to the issue of "reasonableness," the Regional Board staff cited to no evidence other than to its naked assertion that the TMDL is "reasonable," but without any findings or evidence to support its claim of "reasonableness." Moreover, significant evidence has been referenced in not only the 2010 Comments attached hereto, but also in comments submitted by other commentors, all of which show that the TMDL is not practical or reasonably achievable, and is, in fact, impossible to comply with. (See Transcript, Chair Lutz, p. 172 ["I - I truly don't know how they're going to truly be able to do this.,"] and Board Member Blois, p. 162 ["I find it very difficult to approve something that everybody, at least I think everybody, acknowledges is impossible."].) As such, the TMDL fails the "reasonableness" standard under Water Code section 13000, and was further not developed in accordance with the other considerations required under said section.</p>	<p>section 13000 are incorrect. Water Code section 13000 contains statements of legislative policy and do not impose any specific duty on the Regional Board. See also response 23.09.</p> <p>Nonetheless, the TMDL is not only reasonable (considering all factors), but also necessary to carry out the express requirements of Congress to establish TMDLs at a level that achieves water quality standards. The Regional Board recognized that it would be costly to implement and therefore, adjusted the schedule to provide additional time and opportunities to comply with the TMDL.</p> <p>At the Regional Board adoption hearing, as evidenced in the transcripts, all the Board members expressed concern about costs for municipalities.</p> <p>However, Board members also acknowledged 1) the length of the schedule 2) the flexibility built in for responsible parties and 3) the scheduled "re-openers" to re-consider aspects of the TMDL.</p> <p>On flexibility and the length of the implementation period, for example, Board Member Diamond said: <i>I mean, truly, 25 years from now is a long time, and I think that we can invest in the future of this great city and this nation by giving us the time to do the studies and give the cities the -- the -- the understanding and the comfort that once the studies come in, there's flexibility to look at what the flows are, what the numbers are. We're not -- we're not making any decision on those numbers today other than giving a lot of time and flexibility to achieve this TMDL. So I am in</i></p>
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			<p><i>favor of doing it. I wish it were less time. I have a feeling that we're going to see some cities do some great things and that the time will be less for them, and I hope that will be. I think the Gateway cities showed us an example of how that can happen with the trash TMDL. So I'm in support of this. [transcript page 166 lines 23-24 and page 167 lines 1-11]</i></p> <p><i>On scheduled re-openers and further studies and the flexibility offered, for example, Board Member Lutz said: The wet weather studies are imperative, because we do not have enough studies right now for the wet weather. So the numbers that are there, I anticipate to be probably changed based on studies. I hope they're changed based on studies. I hope that the studies will create the things that need to be done so that the science will hold up and we will have the -- the limits that can be attained. [transcript page 174 lines 7-13]</i></p> <p><i>And also, These reopeners, the four-year and the ten-year, are key, and we have to keep in mind that we're not going to be holding anybody to numbers until we've gotten these studies in the reopeners, and that is the most important thing right now because we can't afford this, but maybe in the next 4, 10 years, we'll find ways to afford it. Maybe we'll be able to find studies that will help us and maybe things will happen along the way that will attain us there. [transcript page 175 lines 12-19]</i></p> <p><i>In addition, on flexibility, Board Member Diamond said I -- I think that this TMDL is -- is an effort based on science, based on the kind of collaboration that we -- we've seen rarely in the region. I think we've seen it in the Calleguas Creek. We've seen it here in the</i></p>
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			<p><i>C.R.E.S.T. studies, and I believe that the TMDL that -- that is before us today is the one way that the cities can have some flexibility and know what -- what's going to happen in the next few years, which is basically figuring out through studies what can be accomplished is the best thing that we can offer. [transcript page 166 lines 4-13]</i></p> <p>In fact, since the Board hearing, the Regional Board has begun an evaluation of recreational uses of the Los Angeles River and tributaries which may provide impetus for reconsideration of beneficial uses and federal agencies have begun the <i>Urban Water Federal Partnership</i> including the Los Angeles River.</p> <p>The Board adopted the TMDL unanimously</p> <p>State Board staff find the TMDL to be reasonable because the reference conditions used to set the numeric targets in this TMDL are based on credible independent scientific studies that have identified and evaluated reference conditions in the Los Angeles Region (i.e. Natural Landscapes Study (Schiff <i>et al.</i>, 2006)). The wet weather targets will be challenging to meet. The City of Los Angeles and County of Los Angeles implementation plans for Ballona Creek are credible plans for meeting wet weather targets, although they do acknowledge the difficulty in final compliance. The 25-year implementation plan not only leaves time for the many implementation actions which will be required including source control and LID implementation methods but also provides sufficient time for refinement of implemented methods. Furthermore, this timeframe allows opportunities for</p>
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			<p>reconsidering the TMDL if studies are undertaken to re-evaluate recreational beneficial uses, or if US EPA publishes revised recommendations regarding ambient water quality criteria for bacteria.</p> <p>The fourth appellate district court has affirmed what statutory authority commands: "The statute applicable to establishing a TMDL, 33 United States Code section 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional board is required to establish a TMDL 'at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety.'" (<i>City of Arcadia v. State Water Resources Control Bd.</i> (2006) 135 Cal.App.4th 1392, 1428.)</p>
23.11	Richard Montevideo	<p>The Proposed Bacteria TMDL is deficient as it fails to "reflect" the fact that it may be complied with through the use of a Best Management Practices approach, rather than through numeric effluent limits.</p> <p>The Regional Board, in its Responses to Comments, asserts that the TMDL does not address whether an NPDES Permit implementing the TMDL is to use BMPs or numeric effluent limits, suggesting that the method of implementation will be determined at the time the NPDES Permits in issue are revised. (Response to Comments, p. 126-127.)</p> <p>The Responses to Comments also suggest that even though federal regulations allow the permitting authority to specify, as part of an NPDES Permit, the use of BMPs to control or abate the discharge of pollutants in stormwater, that this approach is only supportable "under specified circumstances where the Permit's administrative record supports that the BMPs are expected to be sufficient to implement the WLA and the TMDL (U.S. EPA 2002)."</p>	<p>There is no evidence that TMDLs alone and an iterative BMPs based approach will be able to meet final WLAs instream.</p> <p>The proposed TMDL does not address whether an NPDES permit implementing the TMDL uses best management practices or numeric effluent limits. The commenter's reference to and discussion of <i>Drivers' Environmental Conservation Organization v. State Water Resources Control Board</i> (2006) 145 Cal.App.4th 246 supports the premise that the method of implementation will be determined when NPDES permits are revised to reflect an adopted TMDL. Federal regulations require that NPDES permits contain requirements necessary to achieve water quality standards (40 CFR § 122.44(d)(1)). Additionally, federal regulations require that water quality based effluent limits are set consistent with the assumptions and requirements of any available WLA for the discharge (40</p>



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	<p>(Responses to Comments, p. 127) Regional Board staff then goes on to contend that they have an obligation to include other requirements such as numeric limits that may be necessary to achieve water quality standards, and that EPA has recently issues a Comment Letter supporting the use of numeric limits in connection with the Ventura County MS4 Permit. Regional Board staff also asserted that the State Board had recently addressed the issue of translating a TMDL's WLAs into effluent limits in an MS4 Permit, and that such a determination is to be based on the Regional Board's findings either supporting the need for numeric or non-numeric effluent limitations.</p> <p>Finally, Regional Board staff asserted in its Response to Comments that federal regulations do not suggest that the iterative/adaptive process is an inherent component of the BMP-based permit requirements, and that the BMP approach that has been used since 1990 has "been inadequate to achieve water quality standards" and that "indefinitely continuing such an iterative/adaptive approach without greater specificity in terms of implementation schedules and numeric limitations is not necessarily in the best interest of water quality." (Response to Comments, pp. 128-129.)</p> <p>The Regional Board in its Responses to Comments thus appears to simply disagree that an iterative BMP approach should ever be referenced in the TMDL as being the approach to be utilized to implement and incorporate the wasteload allocations into an MS4 Permit, or that iterative deemed-compliant BMP approach is even appropriate given the amount of time (in the Regional Board's eyes) that has transpired without sufficient progress since the first LA County MS4 Permit was issued in 1990.</p> <p>Unfortunately, the Regional Board continues to fundamentally misunderstand the point of such comments and, more</p>	<p>CFR § 122.44(d)(1)(vii)(B)).</p> <p>While federal regulations allow the permitting authority to specify - as conditions of a NPDES permit - the use of BMPs to control or abate the discharge of pollutants in stormwater pursuant to Clean Water Act section 402(p) (40 CFR §122.44(k)(2)), this is only supportable under specified circumstances where the permit's administrative record supports that the BMPs are expected to be sufficient to implement the WLA in the TMDL (US EPA 2002). Furthermore, this does not substitute for the permitting authority's obligation to include other requirements such as numeric effluent limits that may be necessary to achieve water quality standards.</p> <p>The Regional Board correctly noted that US EPA recently stated in a comment letter dated May 29, 2008 on the tentative Ventura County MS4 Permit, "EPA supports the approach used for incorporating TMDL WLAs in the August 28, 2007 second draft of this permit, in which the WLAs were incorporated as numeric water quality-based effluent limits (WQBELs)...Under this approach, clear compliance determinations may be made, and the effectiveness of stormwater controls on water quality may be assessed. As a general matter, MS4 permits, many of which represent the fourth generation of permits to control municipal stormwater, should enable permitting authorities to more effectively determine compliance and evaluate impacts on water quality."</p> <p>The State Board also recently addressed the issue of translating TMDL wasteload allocations into effluent</p>
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		<p>importantly, the intent of Congress in amending the Clean Water Act in 1987 to cover urban runoff. In the case of <i>Drivers' Environmental Conservation Organization v. State Water Resources Control Board (Drivers' Environmental)</i> (2006) 145 Cal.App.4<sup>th</sup> 246, the plaintiff brought suit claiming that an NDES Permit issued to the United States Navy by the San Diego Regional Board was contrary to law because it did not incorporate wasteload allocations ("WLAs") from a TMDL as numeric effluent limits into the Navy's permit. After discussing the relevant requirements of the Clean Water Act, as well as governing case authority, the Court of Appeal acknowledged that in regulating stormwater permits, EPA <b>"has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."</b> (<i>Id.</i> At 256.) The Court went on to find that <b>"it is now clear that in implementing numeric water quality standards, such as those set forth in CTR, permitting agencies are not required to do so solely by means of a corresponding <u>numeric</u> WQBEL's."</b> (<i>Id.</i> At 262.)</p>	<p>limits in MS4 Permits and concluded that, "whether a future municipal storm water permit requirement appropriately implements a storm water wasteload allocation will need to be decided based on the regional water quality control board's findings supporting either the numeric or non-numeric effluent limitations contained in the permit" (Order WQ 2009-0008).</p> <p>Furthermore, federal regulations do not suggest that the iterative/adaptive process is an inherent component of BMP-based permit requirements. That notwithstanding, the Regional Board has provided permittees under the LA County MS4 NPDES Permit 19 years, since the first MS4 Permit was adopted in 1990, to iteratively apply BMPs to achieve water quality standards. TMDLs are the backstop for the Clean Water Act in cases where effluent limitations, or BMPs in the case of MS4 permits, have been inadequate to achieve water quality standards. Indefinitely continuing such an iterative/adaptive approach without greater specificity in terms of implementation schedules and numeric limitations is not necessarily in the best interest of water quality. (See also Clean Water Act, § 402(p)(3)(B)(iii) (providing that a NPDES permit for a municipal discharge into a storm drain "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 EPA or State determinates appropriate for such pollutants.").)</p>
23.12	Richard Montevideo	<p>In the Responses to Comments, the Regional Board is asserting that it is not required to address the issue of how the wasteload allocations within the TMDL are to be utilized to amend the Permit</p>	<p>State Water Board Staff agrees with the Regional Board's response 20.5 (Attachment 13)</p>

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	<p>to address the WLAs, but then goes on to assert that it does not believe that continuing with the iterative/adaptive approach without the use of numeric limits is "necessarily in the best interest of water quality." (Responses to Comments, pp. 128-129.) In fact, it may be true that the Regional Board is not required to include a discussion of how the wasteload allocations within the TMDL will be incorporated into a municipal stormwater permit. On the other hand, however, as reflected in EPA's 2002 Memorandum discussed in the 2010 Comments, at the time EPA was recommending that a TMDL reflect the fact that the wasteload allocations may be obtained through the use of an iterative BMP approach. (See <u>Exhibit 28</u> to 2010 Comments, p. 5.)</p> <p>In addition, the Regional Board, although asserting in its Responses to Comments that it does not believe the iterative/adaptive BMP approach has been sufficiently protective of water quality, and that, therefore, "numeric limits" may in fact be necessary at this time to implement the subject TMDL, its logic in assuming that "numeric" limits must now be required because iterative BMPs do not do the job, is fundamentally flawed.</p> <p>To merely conclude that iterative BMPs are not sufficiently protective of water quality ignores reality. In fact, the only means municipalities have to improve water quality is through the use of iterative BMPs. The use of numeric effluent limits in a municipal NPDES Permits will not improve water quality given that numeric limits are not a means of complying with a TMDL, but instead are simply the proposed end goals or desired targets of the BMPs. In short, the only means an MS4 permittee has available to comply with a wasteload allocation within a TMDL is through the use of iterative BMPs, and yet the Regional Board has failed to recognize this obvious fact.</p>	<p>The Regional Board's Response to Comments, states that it is not required to address the issue of how the wasteload allocations within the TMDL are to be utilized to amend the Permit to address the WLAs. As the Commenter notes, the Regional Board's Response to Comment further provides that "indefinitely continuing such an iterative/adaptive approach without greater specificity in terms of implementation schedules and numeric limitations is not necessarily in the best interest of water quality."</p> <p>Also see response to comment 23.11.</p> <p>Contrary to the Commenter's assertions, the Regional Board's logic is not "fundamentally flawed" and does not "ignore reality." Rather, the Commenter's arguments fail to recognize the vital distinction between the purpose behind a basin plan amendment as a planning document to implement the policies and requirements of the Porter-Cologne Act, and the Regional Board's issuance of a permit to evaluate appropriate methods for a discharger to comply with a basin plan's numeric targets. (See <i>City of Arcadia v. State Water Resources Control Bd.</i> (2006) 135 Cal.App.4th 1392, 1415 ("A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. A TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies." (internal citations and quotation marks omitted)).) "Best management practices' are generally pollution control measures et</p>
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23.13	Richard Montevideo	<p>Finally, the Cities hereby amend their 2010 Comments involving "numeric limits" in light of the following three additional documents which are attached hereto and marked as Exhibits "A," "B," and "C." Exhibit "A" is EPA's November 12, 2010 Memorandum entitled "<i>Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on those WLAs.</i>" In Exhibit "A," EPA revises its 2002 Guidance Memorandum and specifically provides guidance and a recommendation that: "NPDES Permitting authorities should use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges." (Exhibit "A" hereto, p.3.) In Exhibit "B" the EPA asserts that its discussion contained in the November 12, 2010 Memorandum is guidance and is not legally binding. In Exhibit "C" contains comments to the legal propriety of the November 12, 2010 memorandum. With those exhibits, the Cities assert EPA's 2010 Memorandum should be rescinded and that the 2002 Memorandum should remain unchanged and request that any TMDL for bacteria for the LA River include a clear direction to the permit writers that the WLAs may be complied with through the use of iterative BMPs and that numeric limits will not be required by any municipal NPDES holder.</p>	<p>forth in NPDES permits." (<i>Id.</i>, at 1427.)</p> <p>Commenter amends its comments previously submitted to the Regional Board without providing an explanation of how such amendment varies the substance of its comments or the responses previously provided. See response to comment 6.5. In the absence of such explanation, the State Board shall presume no further response is sought or warranted.</p>
23.14	Richard Montevideo	<p>The development of the Bacteria TMDL to protect mere "potential" beneficial uses, regardless of whether the uses are formerly designated as "potential," is directly contrary to law, and all designated "uses" of the LA River must be reviewed and revised.</p> <p>Nor did the Regional Board identify any evidence anywhere in the record throughout the entire proceeding involving the subject TMDL, to substantiate the REC-1 or REC-2 designations for the</p>	<p>See responses 6.5, 20.5 and 23.3.</p>

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		<p>concrete-lined portions of the LA River. Instead, the evidence is entirely to the contrary as recognized in the TMDL Staff Report itself, where it acknowledges that "most of the Los Angeles River was lined with concrete between the 1940's to 1950's," with "only three sections of [the] main channel remaining soft-bottom." (TMDL Report, p.5.) Approving the TMDL in its present form would be an arbitrary and capricious decision, and contrary to law.</p>	
23.15	Richard Montevideo	<p>The Bacteria TMDL is not suitable for calculation, and fails to provide [sic] include "Total Maximum Daily Loads"</p> <p>The Cities hereby incorporate and reassert all of the points asserted in their 2010 Comments in connection with the Bacteria TMDL not being suitable for calculation, including the lack of a "total maximum daily load" having been specified in accordance with the Clean Water Act.</p> <p>In Response to Comments, Regional Board staff asserted they believe bacteria pollution is suitable for calculation, with Regional Board staff then explaining how the interim and final WLAs were calculated. The Regional Board's Response to Comments also take issue with the discussion in the District of Columbia Court of Appeals Decision in <i>Friends of the Earth, Inc. v. Environmental Protection Agency</i> (D.C. Circuit 2006) 446 F.3d 140, but did so relying solely based on a decision issued by the Second District Court of Appeal some five years earlier, in <i>Natural Resources Defense Counsel v. Muscznski</i> (2d Cir. 2001) 268 F.3d 91. Of course, a decision by the Second Circuit Court of Appeal issued five years prior to the D.C. Circuit Court of Appeal's decision has no legal impact on the validity of the D.C. Circuit Court of appeal's determination. In fact, the exact opposite is true, <i>i.e.</i>, the D.C. Circuit Court of Appeal's later decision should be given far more weight than a prior decision of the Second District Court of Appeal.</p>	<p>See response 6.5.</p> <p>The Commenter made essentially the same comment to the Los Angeles Water Board and that Board adequately responded to the comment. The Regional Board disagreed with the commenter and stated, "Bacterial pollution is suitable for calculation. The Staff Report details how the interim WLA were calculated in MPN/day and details how the allowable exceedance days for the final WLA and LA were calculated. The interim WLA are based on daily loads (MPN/day) and the final WLA are based on exceedance days. The TMDL describes how the exceedance days could be translated into a daily load which is, therefore, sufficiently equal to a daily load. The Staff Report and BPA also make clear how the final WLA could be translated into a loading of MPN/day for the NPDES permit. The applicable federal regulation states that "[TMDLs] can be expressed in terms of either mass per time, toxicity, or other appropriate measure." (40 CFR § 130.2(i).) The commenter's reference to <i>Friends of the Earth, Inc. v. Environmental Protection Agency</i> (D.C. Circuit 2006) 446 F.3d 140, is inapposite. In <i>Friends of the Earth</i>, the court stated that "daily means daily, nothing else." The court clarified that a "daily" load means "daily" and not "annual" or "seasonal" which has</p>

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		<p>The Regional Board in its Responses to Comments goes on to dispute the contention that the TMDL is not “suitable for calculation.” Yet, the Regional Board fails to directly respond to the various reasons provided in the 2010 Comments as to why the TMDL is not suitable for calculation. Specifically, the Response to Comments fails to provide any “response” to the following arguments: (1) the level of regrowth and/or resuscitation of E.Coli in the various reaches of the LA River have not been analyzed; (2) even with all of the study conducted by CREST in connection with the dry weather TMDL, presently there is no known technical, let alone economical, means of achieving the wet weather Wasteload Allocation proposed in the TMDL: (3) no analysis has been conducted on how and to what extent reducing or eliminating the total load of bacteria entering the LA River from storm drains will ultimately have on the actual amount of bacteria that will exist in the River; and (4) no attempt has been made to establish a “daily” load of bacteria that may be discharged to the LA River from the storm drains; nor have any “daily” wasteload allocations of “total” bacteria been established.</p>	<p>no bearing on the Commenter’s assertion that this TMDL is not suitable for calculation. However, the Second Circuit found that same interpretation “absurd” and stated that for some pollutants “effective regulations may best occur by some other periodic measure than a diurnal one.”</p> <p><i>(Natural Resources Defense Council v. Muszynski (2d Cir. 2001) 268 F.3d 91, 98-99.)</i> In this case, the Staff Report in Section 3 and other documents in the record adequately explain the justification for using the targets and daily loads to implement the water quality objectives and is consistent with the federal regulations. The TMDL documents describe in detail the technical basis for using the targets and load to implement the water quality objectives.</p> <p>The commenter’s statement that the TMDL is not “suitable for calculation” is incorrect. The TMDL describes the analytical methods, the modeling techniques, and the data used to develop the TMDL. The State Water Board and USEPA have approved other similar bacterial TMDLs in the Los Angeles Region. The approach used by the Regional Board is consistent with the Trash TMDL, which has been upheld against a legal challenge. See <i>City of Arcadia v. State Water Resources Control Board (2006)</i> 135 Cal.App.4th 1392, 1434.</p> <p>In respect to regrowth or resuscitation, the CREST Bacterial Source Identification (BSI) Study examined potential dry weather sources of bacteria to Reaches 2 and 4 of the main stem of the river. Using a mass balance approach, the study determined that in-stream sources of bacteria in dry weather were minor compared</p>
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			<p>to storm drain loading and tributaries in Reach 4. Using the same approach in Reach 4, the study characterized by up to 55% of the loading with the outfall and tributary monitoring. The uncharacterized sources attributed to in-stream sources were assess and ranked; groundwater discharges, homeless persons, illicit/illegal direct discharges, wildlife and birds, regrowth and/or suspension of sediment associated bacteria, and resuscitation of injured bacteria discharged with disinfected wastewater effluent.</p> <p>In respect to wet weather, the City of Los Angeles and County of Los Angeles implementation plans for Ballona Creek are credible plans for meeting wet weather targets, although they do acknowledge the difficulty in final compliance. The 25-year implementation plan not only leaves time for the many implementation actions which will be required including source control and LID implementation methods but also provides sufficient time for refinement of implemented methods.</p> <p>With respect to the response of the Los Angeles River to the reduction in bacterial loading to the River, the Linkage Analysis in the Regional Board Staff Report.</p> <p>With respect to "daily loads," the interim WLA are directly daily numbers (MPN/day) and the final WLA are in exceedance days. The TMDL describes how the exceedance days could be translated into a daily load and which is, therefore, sufficiently equal to a daily load. The Staff report and BPA also make clear how the final WLA could be translated into a loading of MPN/day for the NPDES permit.</p>
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23.16	Richard Montevideo	<p>The Bacteria TMDL is contrary to law because no implementation plan or other means of reducing non-point sources of bacteria have been developed for the "load allocations" assigned to non-point sources, and because not all non-point sources of bacteria have even been identified.</p> <p>The Regional Board's Response to Comments are largely unresponsive, i.e., that the Cities as the MS4 WLA responsible parties "will provide more detailed implementation plans during the [TMDL implementation] schedule," and that there is no implementation schedule for "nonpoint sources because the [load allocation] responsible parties will be held to the load allocations when the TMDL becomes effective." (Response to Comments, pp. 130-131.) The Response to Comments response go on to reference the State's 2004 Nonpoint Source Pollution Control Plan as being the basis for LA implementation, and suggests that it is not necessary to identify all sources of bacteria and that WLA." (<i>Id.</i> At 131.) The Responses to Comments completely misses the point of the argument, and are entirely nonresponsive to the Cities' contentions in this regard.</p>	<p>The State Board disagrees with the commenter's assertions. This issue has already been adjudicated: "[T]he Cities cite no authority for the proposition the Water Boards are required to identify an implementation program for nonpoint pollution sources. Again, where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (<i>City of Arcadia v. State Water Resources Control Board (Arcadia I)</i> (2006) 135 Cal.App.4th 1392, 1430 (Clean Water Act does not require states to regulate non-point source pollution).)</p> <p>The TMDL includes an overall implementation strategy and schedule. The MS4 WLA responsible parties will provide more detailed implementation plans during the schedule. There is no implementation schedule for non-point sources because the LA responsible parties will be held to the load allocations when the TMDL becomes effective. The State's 2004 Nonpoint Source Pollution Control Program will be the basis for LA implementation.</p> <p>It is not necessary to have all sources of bacteria identified and staff has conducted a sufficient source assessment to assign appropriate LA and WLA. There always is some level of uncertainty in environmental science but the TMDL must go forward to reduce bacteria exceedances of water quality objectives.</p>
23.17		[Following the preceding comment]...The point of these Comments on these issues, is that the Bacteria TMDL contains very little discussion of non-point sources of bacteria, such as	See response to comment 23.16.



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		<p>natural loads or bacteria arising from unpermitted sources, such as school districts and State and federal facilities.</p> <p>...the entirety of the scientific discussion concerning "natural sources" of bacteria is limited to a single study, and even worse, to dry weather alone. The issue is of particular importance when the subject pollutant, such as bacteria, is widespread throughout the environment.</p> <p>...the result is that the Cities, who must comply with the wasteload allocations in some fashion in the TMDL, will be in jeopardy of being considered in violation of the bacteria standards in part because of nonpoint source and naturally occurring bacteria loads.</p>	
23.18	Richard Montevideo	<p>The proposed bacteria TMDL was not developed in consultation with local agencies as required by law.</p> <p>The Regional Board staff asserts in the Responses to Comments that it has been working to develop the TMDL for four years and that numerous municipal stakeholders have participated in the process through CREST (i.e., Cleaner Rivers Through Effective Stakeholder-Led TMDLs). The Regional Board also asserts that the CREST Stakeholder's process developed "several aspects" of the wet weather TMDL and that generally local and State agencies have been consulted at numerous steps. Unfortunately, however, the Responses to Comments fail to recognize that there was very little consultation, if any real consultation, involving the development of the wasteload allocations for wet weather, and it is indisputable that the efforts of CREST were focused nearly exclusively on dry weather, not wet weather.</p>	<p>The commenter mischaracterizes the process used to develop the bacteria TMDL. The Regional Board staff developed this TMDL over the course of four years. Numerous municipal stakeholders participated in the process leading to the development of this TMDL, including the stakeholder-led effort noted by the commenter – "Cleaner Rivers Through Effective Stakeholder-Led TMDLs" (CREST). CREST conducted a groundbreaking study of the dry weather storm drain system and established dry and wet weather reference conditions. The Cities represented by the commenter were provided opportunities to participate in the CREST efforts and did, in fact, participate in CREST technical and Steering Committee meetings. In addition, the CREST stakeholder process developed several aspects of the wet-weather TMDL including wet-weather exceedance rates and wet-weather exceedance day modifications due to the High Flow Suspension. Local and state agencies have been consulted at numerous</p>

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			<p>steps. The Regional Board is not bound by Water Code section 13144, but it took its outreach efforts to local agencies seriously. These efforts have satisfied the requirements of section 13240 of the Water Code. These consultations have resulted in lengthy compliance schedules for municipal dischargers, and significant adjustments to the TMDL.</p> <p>Contrary to the commenter assertions, the TMDL staff report evaluates the achievability of the TMDL, including attaining the objective in both dry and wet weather conditions. Water Code section 13360 prohibits the Regional Board from specifying the manner of compliance with its orders used to implement the TMDL. The TMDL, consistent with CEQA (Public Resources Code section 21159), describes reasonably foreseeable methods of compliance. The Staff Report identifies reasonably foreseeable implementation strategies. In addition, affected responsible agencies worked together to compile potential implementation scenarios and cost estimates. The Bacteria Source Identification (BSI) Study evaluated feasible and effective methods to implement the TMDL. The Staff Report explains that achieving the objectives during wet weather requires completion of dry weather implementation. See Section 9.5 of the Staff Report. A very lengthy schedule and a phased approach are proposed to assure achievability. The time schedule is primarily based on a CREST-developed schedule. In addition, many of the responsible entities for the bacteria TMDL are currently implementing a previously adopted metals TMDL for the Los Angeles River. Implementation of the metals TMDL will address much of the bacterial impairment. The schedule for wet</p>
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			<p>weather is based on stakeholder and Regional Board experience with implementing other bacterial TMDLs. The TMDL includes dry weather interim allocations in bacteria loading targets and the possibility of development and use of wet weather bacteria loading targets for MS4 permittees that would be sufficient to achieve exceedance day targets, but more straightforward for permittees to plan for and achieve.</p> <p>The TMDL does evaluate the effectiveness of the methods of compliance. However, federal law does not require practicality to be a consideration in developing a TMDL. (See <i>Arcadia I</i> at p. 1428 (the regional boards are authorized to “use water quality, and not be limited to practicability as the guiding principle for developing limits [in a TMDL] on pollution.”).)</p>
23.19	Richard Montevideo	<p>The monitoring provisions in the bacteria TMDL are contrary to law because no cost benefit analysis has been conducted, as required by CWC §§ 13165, 13225(c) and 13267.</p> <p>Regional Board staff in the Responses to Comments asserts that these statutes do not require a "cost/benefit analysis." Yet, on its face, for example, Water Code section 13225(c) requires that the Regional Board, before it imposes any investigation or reporting obligation, including monitoring obligations, upon a State or local agency, must first make a determination that the <b>"burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom."</b> (Water Code § 13225(c).)</p> <p>Similarly, although the Regional Board asserts that Water Code section 13267 does not yet apply at this time because no specific order has been issued under 13267, clearly the justification for</p>	<p>The commenter accurately quotes Water Code section 13225(c) statutes that “the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained there from” with respect to monitoring and technical reporting. However, the statutes do not require a “cost-benefit analysis.” Staff has set forth the water quality impairment and evidence supporting the necessity for the TMDL and thus has shown a reasonable relationship between the burden and the benefits to be obtained from the monitoring, i.e. compliance with the TMDL and thus reduction of bacteria indicator densities. Further, section 13267 is inapplicable at this stage because the TMDL does not impose any orders under section 13267. See <i>Arcadia I</i> at p. 1414 (“The Water Boards persuasively contend Water Code section 13267 is inapplicable, and references to that statute in the Trash</p>

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		<p>imposing the monitoring and reporting requirements, and the other required studies, is intended to be provided at this time as a part of the TMDL. To not conduct the analysis at this time, and to instead assert that it is not technically required until a 13267 Order is issued, although potentially technically correct, is practically and from a policy perspective, entirely irresponsible.</p>	<p>TMDL are to contemplated future orders.”)</p>
23.20	Richard Montevideo	<p>The proposed TMDL, neither in the TMDL Report nor otherwise, contains any discussion of the benefits that will be obtained from reversing 70 years of work to develop the LA River into a major concrete-lined flood control channel, in order to enable swimming and other recreational uses in this concrete channel in relation to the costs of doing so, i.e., \$5.4 billion or more. The asserted benefit is even more tenuous in the concrete-lined areas when one considers the fact that these areas are, in many cases, fenced off with access being prohibited, i.e., with the suggested beneficial use being illegal. As such, the purported "benefit" is, at best, undefined, and at worse, not a benefit at all but in fact a threat to health and safety, i.e., it is dangerous for people to swim in the concrete-line flood control channels.</p> <p>In addition, the costs are exorbitant. Regional Board staff's estimate is \$5.4 billion, with the Regional Board itself recognizing that even with this expense it still may be "impossible" for the Cities to meet the TMDL. The "cost/benefit" analysis requirements under the California Water Code have not been complied with the TMDL should not be approved until such time as these requirements have been met.</p>	<p>State Water Board disagrees with the commenter's assertions. There are enormous public health, water quality, and other environmental benefits to be obtained once this TMDL is implemented. It is the intent of the Clean Water Act to achieve fishable and swimmable waters of the United States, and thus the Los Angeles Regional Board is taking appropriate action to restore the Los Angeles River for the benefit of current and future generations. It is imperative to restore not only the recreational uses of the river itself, but also the downstream beaches that are heavily used for recreation. The public health benefit to improving water quality to support REC-1 is real. REC-1 activities take place now both in the river and at downstream beaches, and will continue into the future.</p> <p>See also response to comments 23.9 and 23.19</p>
23.21	Richard Montevideo	<p>The proposed bacteria TMDL, if adopted, would be a violation of the requirements of the administrative procedures act.</p> <p>Initially, it is clear that the TMDL is not "necessary" as required under the APA, particularly in light of the prior representations of the State and Regional Boards, counsel in open court that: "No authority existed to compel the Water Boards to establish the</p>	<p>First and foremost, federal law compels the adoption of the TMDL. Clean Water Act Section 303(d) requires states to adopt TMDLs for impaired waterbodies. The LA River is on the 303(d) list because it is impaired for bacteria, and so the Los Angeles Board was required to adopt the TMDL in order to attain and maintain water quality standards in the LA River.</p>

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		<p>TMDL." (See Exhibit 24 to 2010 Comments, p. 10.)</p> <p>... The Regional Board Staff's comments that a TMDL is "necessary" to achieve water quality standards for impaired water bodies, and that a TMDL, in part, is a program of implementation fails to recognize that this TMDL is not required, i.e., is not necessary to be established by the State of California. As such, the TMDL fails the "necessity" test under the APA.</p>	<p>Moreover, the regulatory action meets the "Necessity" standard of the Administrative Procedures Act, Government Code section 11353, subd. (b). Federal law and regulations require that TMDLs be incorporated, or referenced, in the state's water quality management plan. The Regional Board's Basin Plan is the Regional Board's component of the water quality management plan, and the Basin Plan is how the Regional Board takes quasi-legislative, planning actions. Moreover, the TMDL is a program of implementation for existing water objectives and is, therefore, appropriately a component of the Basin Plan under Water Code section 13242. The necessity of developing a TMDL is established in the staff report for the TMDL, the Section 303(d) List, and the data contained in the administrative record documenting the indicator bacteria impairments of the Los Angeles River.</p>
23.22	Richard Montevideo	<p>... The TMDL is not "necessary" because the designated beneficial uses it is designed to achieve are inappropriate.</p> <p>Further, although certain changes were addressed to attempt to comply with the "clarity" requirements of the APA, the TMDL remains ambiguous and lacks the clarity required by the APA in its description of the "allowable number of exceedance days" for high-flow suspension water bodies, as discussed in the 2010 Comments. In addition, the responses to Comments fail to address the lack of clarity as a result of the ambiguity created by the deficient explanation on how the "load reduction strategy" or "LRS" would apply or may be in any way be effective for wet weather discharges.</p>	<p>See responses 23.3 and 23.21 above.</p> <p>The Basin Plan amendment clearly identifies the allowable number of exceedance days during wet weather for high flow suspension waterbodies and waterbodies not subject to the high flow suspension. While the Staff Report also explains the method by which exceedance days for High Flow Suspension waterbodies were calculated, it is not in contradiction to the Basin Plan amendment.</p>
23.23	Richard Montevideo	<p>The proposed bacteria TMDL, once effective and enforceable, would result in an unfunded state mandate, in violation of the</p>	<p>See response 6.5</p>

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		<p>California Constitution.</p> <p>In the responses to Comments, regional Board Staff simply indicated it disagreed with this contention and that the "appropriate venue" to determine whether a claim is an unfunded State mandate is with the Commission on State Mandates.</p> <p>The cities agree that the Commission on State Mandates is the entity with jurisdiction to determine whether a claim is an unfunded State mandate or not. However, the Cities believe that in deciding to impose a TMDL of this magnitude, i.e., at a cost of \$5.4 billion or more, with the actual benefits from these expenditures being unclear at best, that the State should be apprised of the fact that ultimately it may be required to reimburse the municipalities for the cost of implementing such a TMDL.</p>	<p>The State Water Board disagrees with the commenter's assertions. Commenter provides no authority for its theory that the TMDL would result in an unfunded state mandate, in violation of the state's constitution. Consequently, the State Board assumes the proposition is without any foundation.</p> <p>Furthermore, the TMDL does not result in an unfunded state mandate.</p> <p>Article XIII B, Section 6 of the California Constitution provides, "[w]hensoever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service." The TMDL does not require subvention for various reasons.</p> <p>First, as a threshold matter, it does not require a new program or higher level of service. The Los Angeles Water Board's adoption of the TMDL was a nondiscretionary duty required by the federal Clean Water Act. Clean Water Act section 303(d) requires each state to identify and rank the waters within its boundaries that do not meet water quality standards. These substandard waters are placed on the state's 303(d) List, where for each listed waterbody, the state is required to establish a TMDL for each pollutant impairing the water quality standards in that waterbody. Both the identification of impaired waters and TMDLs established for those waters must be submitted to U.S. EPA for approval. If U.S. EPA disapproves a state's submitted TMDL, U.S. EPA must establish its own</p>
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			<p>TMDL. Even if the TMDL was interpreted as going beyond federal law, any cost increases that result solely from additional state requirements are <i>de minimis</i>. The California Supreme Court has held that, “[f]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, <i>de minimus</i>—should be treated as part and parcel of the underlying federal mandate.” (<i>San Diego Unified School District v. Commission on State Mandates</i> (2004) 33 Cal.4th 859, 890.)</p> <p>Second, the TMDL is not an unfunded state mandate because it applies generally to public and private entities and does not involve requirements imposed uniquely upon local government. Laws of general application are not entitled to subvention. (<i>County of Los Angeles v. State of California</i> (1987) 43 Cal.3d 46, 56-58.) Reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required. (See <i>City of Richmond v. Commission on State Mandates</i> (1998) 64 Cal.App.4th 1190, 1197.)</p> <p>Third, any requirements imposed by the TMDL would not be subject to reimbursement because the commenter’s cities have the independent authority to levy service charges, fees, or assessments sufficient to</p>
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			<p>pay for any cost increases. Subvention would only be required if expenditure of tax monies is required, and not if the costs can be reallocated or paid for with fees. (<i>County of Los Angeles v. Commission on State Mandates</i> (2003) 110 Cal.App.4th 1176, 1189; <i>Redevelopment Agency v. Commission on State Mandates</i> (1997) 55 Cal.App.4th 976, 987.)</p> <p>And fourth, while water quality standards and TMDLs are federally compelled, they themselves are not executive orders directly enforceable against a discharger. This is because water quality standards and TMDLs are not self-implementing under the Clean Water Act or the Porter-Cologne Act. TMDLs established under section 303(d) of the Clean Water Act function primarily as informational tools and planning devices for the state or U.S. EPA to establish further pollution controls. Water quality objectives and TMDLs form the framework for further administrative actions with respect to particularized pollutant discharges and waterbodies. (See, e.g., <i>City of Arcadia v. U.S. Environmental Protection Agency</i> (9th Cir. 2005) 411 F.3d 1103, 1105 (citing <i>Pronsolino</i>, supra, 291 F.3d at p. 1129 (“TMDLs are primarily informational tools that allow states to proceed [with additional planning] . . . . TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint source pollution reduction”).))</p>
23.24	Richard Montevideo	The substitute documents ("SED") violated the California Environmental Quality Act.	The Commenter made essentially the same comment to the Los Angeles Water Board and that Board adequately responded to the comment. Commenter



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		<p><b>A. The Response to Comments Were Deficient</b></p> <p><b>a. Alternatives</b></p> <p><b>i. The Cursory Rejection of Alternatives Violated CEQA</b></p> <p>For example, the Cities commented that the SED did not consider a range of reasonable alternatives because it failed to consider <i>any legitimate</i> alternatives. The two "alternatives" included in the SED (USEPA TMDL and "no project") were not legitimate alternatives because they did not come close to meeting the <i>Goleta II</i> requirements of (i) potentially offering substantial environmental advantages over the project proposed, and <i>Board of Supervisors</i> (1990) 52 Cal.3d 553, 566.) The Board's response did not explain why the Cities' objection was not well taken or why the two alternatives were legitimate.</p>	<p>misstates the standard for the alternatives analysis. Agencies are to be guided by the doctrine of "feasibility," not concepts of "legitimacy." (Pub. Res. Code § 21002.) As the <i>Goleta II</i> court reiterated, "Both the California and the federal courts have further declared that the statutory requirements for consideration of alternatives must be judged against a rule of reason." (52 Cal.3d at 565.) Such rule of reason shall be informed by the type of project at issue. The <i>Goleta II</i> court was evaluating a proposed development of a resort on ocean front land, in which case the alternatives analysis would include an off-site alternatives analysis which would offer substantial environmental advantages over the project proposal. The Court's explanation that alternatives usually fall into one of two categories—on-site alternatives and off-site alternatives—demonstrates that its alternatives discussion is inapplicable to the development of a TMDL because it does not involve a development-type project. (Id., at 566.) Here, the Clean Water Act section 303(d) requires the state to identify impaired water bodies and to establish a TMDL for those water bodies. If the state fails to act, then USEPA would establish the TMDL. As a result, there are three alternatives to consider under CEQA – a TMDL established by the Los Angeles Water Board that includes an implementation program with a schedule for compliance under Water Code section 13242, a TMDL established by USEPA without an implementation program, and a no project alternative.</p> <p>In addition, under Public Resources Code section 21159(a)(1)-(3), the SED must contain an analysis of the reasonably foreseeable environmental impacts of the methods of compliance, an analysis of reasonably</p>
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			<p>foreseeable feasible mitigation measures, and an analysis of reasonably foreseeable alternatives means of compliance with the rule or regulation. Section 21159(d) specifies that CEQA does not require the agency to conduct a project-level analysis. The SED for this TMDL includes an analysis of the three alternatives and the analyses required by Section 21159(a). It also includes an analysis of alternative numeric targets to be used to implement the Basin Plan water quality objectives that have been exceeded resulting in the finding of impairment. And, it includes, an analysis of implementation alternatives. The SED explains the basis for selecting the alternatives. It does not include project-level analysis. The “alternatives” suggested by the commenter, are either project-level type actions that should be considered by the agencies that implement the TMDL or are “alternatives” that do not meet the statutory requirements for a TMDL.</p> <p>For your information, the Los Angeles Water Board response to comment is included as follows: The CEQA Guidelines require the Regional Board to consider a “range of reasonable alternatives” which would “feasibly attain most of the objectives of the project” using a “rule of reason.” See Tit. 14 Cal. Code Regs. §15126.6(a). In this case, as described in the staff report, the Regional Board is obligated to prepare the TMDL to address impairment due to bacterial pollution. The feasible alternatives are those that would meet this objective. The Regional Board reasonably chose the proposed TMDL and a TMDL prepared by USEPA because those are the only feasible alternatives. The Regional Board also evaluated various alternatives to implementing the water quality objectives that it could use in the TMDL.</p>
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			<p>The TMDL also has a very detailed description of the purpose of the project and the Regional Board's legal responsibility to prepare the TMDL, including the consequences if it does not. The CEQA Guidelines also require consideration of a "no project" alternative. For projects that are a revision of an existing policy, the project would be the continuation of the existing policy. Tit. 14 Cal.Code Regs. §15126.6(c). Consistent with this regulation, the TMDL discussed the existing conditions and what would be expected to happen if the TMDL was not implemented. In a case implementing the National Environmental Policy Act (NEPA), the Ninth Circuit Court of Appeals noted that the "NEPA alternatives requirement must be interpreted less stringently when the proposed agency action had a primary and central purpose to conserve and protect the natural environment, rather than to harm it." (<i>Kootenai Tribe of Idaho v. Veneman</i> (9<sup>th</sup> Cir. 2002) 313 F.3d 1094, 1120.) A narrow range of alternatives was also supported by the California Supreme Court in <i>Mountain Lion Foundation v. Fish &amp; Game Commission</i> (1997) 16 Cal. 4th 105, 135- 136, where the agency is legally constrained. In addition, it is acceptable to have less detail for plan-level CEQA documents. (See e.g., <i>Al Larson Boat Shop, Inc. v. Board of Harbor Commissioner</i> (1993) 18 Cal.App.4th 729.) The TMDL's range of alternatives is consistent with the CEQA Guidelines and case law.</p>
23.25	Richard Montevideo	Although it was the Board's duty to formulate alternatives for inclusion in the SED, the Cities suggested other alternatives that <i>would</i> satisfy the requirements of CEQA. Rather than analyzing those alternatives or otherwise explaining why the alternatives	See responses 6.5 and 23.24.

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		would not be appropriate for analysis, the Board's response summarily stated that the Regional Board was "not required to evaluate the alternatives proposed by the commenter." Even were that technically true with regard to some of the specific alternatives proposed, the Board offered no explanation as to why other suggested alternatives were rejected (i.e., it did not explain why they did not offer substantial environmental advantages over the projected proposed or why they could not feasibly attain most of the basic objectives of the project). In any event, if the Regional Board did not think that any of the suggested alternatives were appropriate, the Regional Board was still required to come up with legitimate alternatives of its own so that a reasonable range of legitimate alternatives could be considered. That requirement was simply ignored.	
23.26	Richard Montevideo	<p>The Regional Board's responses offered various other excuses as to why the SED failed to consider a reasonable range of alternatives. All of the excuses are without merit.</p> <p>First the Regional Board asserted, without explanation, that it was "legally constrained" as to what it could adopt: The proposed TMDL and a TMDL prepared by USEPA "are the only legal alternatives." That response is insufficient because it does not explain by what law "constrained" the Board. Moreover, it is false on its face. The suggested alternatives advanced by the Cities (e.g., the Lower Los Angeles River Water Conservation Plan, the Lengthier Implementation Schedule, the MEP-Compliant BMP Iterative Approach, the Dry Weather Only TMDL, the Indicator Bacteria Standards Based on Controllable Water Quality Factors, the In-City BMPs, the Phased-In TMDL, the Watershed TMDL, etc.) were all alternatives that could have been legally implemented by the Board.</p>	<p>See responses 6.5 and 23.24.</p> <p>The Los Angeles Water Board did in fact consider aspects of the suggested "alternatives" mentioned in this comment, including the length of compliance schedules. For example, the Lower Los Angeles River Water Conservation Plan was submitted with comments in response to the draft TMDL and included BMPs such as dry-weather diversions, LID, outreach/education which are discussed in the Regional Board Staff Report implementation section. The Regional Board considered several implementation periods such as the lengthier, CREST developed, 31 year implementation period. In addition, the Regional Board staff and many stakeholders participated in the CREST sponsored implementation workshop in October of 2009 which considered the length of implementation.</p>
23.27	Richard Montevideo	Second, the Board asserted that it "also evaluated various alternatives to implementing the water quality objectives that it	See response 23.24.

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		<p>could use in the TMDL." That may be true, but it is irrelevant. As pointed out by the Cities in their comments, the Regional Board frequently, but incorrectly, assumed that it was complying with the obligation to analyze alternatives to the "project" (the TMDL), by purportedly analyzing alternative "methods of compliance" with the TMDL. Under both CEQA and the Board's certified regulatory program, the SED must analyze alternatives to the project to minimize any potentially significant adverse impacts of the project. (Pub. Res. Code §§ 21002, 21080.5(d)(3)(A); 23 Cal. Code Regs. §§ 3777(a)(2), 3780.) ... By attempting to analyze alternative <i>methods of compliance</i> with the TMDL, the SED does not fulfill its obligation under CEQA to analyze alternatives <i>to the project</i>.</p>	
23.28	Richard Montevideo	<p>Third, the Board cited <i>Kootenai Tribe of Idaho v. Veneman</i> (9<sup>th</sup> Cir 2002) 313 F.3d 1094, for the proposition that under the National Environmental Policy Act ("NEPA"), an alternatives analysis must be interpreted less stringently when the action conserves and protects the environment, rather than harms it. The SED, however, is not a NEPA document. Although NEPA cases were important in some early California decisions that established principles for interpreting CEQA, NEPA precedents are not applied when, as here, the NEPA provisions in question do not parallel CEQA's provisions. (<i>Mountain Lion Foundation, supra</i>, 16 Cal.4<sup>th</sup> at 121.) Thus, the Board's stated rationale is meaningless here. Moreover, in <i>Kootenai</i>, the Court found (i) that in advancing conservation of the environment, the Forest Service was not required to consider alternatives that were less restrictive of <i>developmental interests</i>, and (ii) that budgetary and safety considerations supported the review of the three legitimate alternatives that were evaluated by the Service. (<i>Id.</i> At 1120-1121.) In contrast, here (i) there has been no suggestion by the Cities that the Board consider alternatives that would be less restrictive of developmental interests, (ii) the Board has offered no budgetary or safety reasons that would support consideration of</p>	<p>The State Water Board agrees with the commenter that, under <i>Kootenai</i>, NEPA cases are not precedents to CEQA. However, state courts have frequently looked to NEPA cases to interpret CEQA. The case is appropriate to consider in the context of TMDLs since, as noted in response to Comment 23.24, Clean Water Act section 303(d) requires the state to identify impaired water bodies and to establish TMDLs, similar to the requirements imposed on the U.S. Forest Service in the case cited.</p>

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		only the USEPA alternative, and (iii) the SED failed to consider a single legitimate alternative, as opposed to the three legitimate alternatives analyzed in <i>Kootenai</i> . Thus, that case undermines the Board's position rather than supports it.	
23.29	Richard Montevideo	Fourth, the Board asserted that in <i>Mountain Lion Foundation, supra</i> , 16 Cal.4 <sup>th</sup> at 135-136, the Supreme Court sanctioned a narrow range of alternatives where the agency is "legally constrained." Not so. There, a county petitioned the Fish & Game Commission under the California Endangered Species Act ("CESA") to delist a squirrel species from the threatened species list. The Commission argued it was empowered only to grant or deny the petition, and thus did not have to consider alternatives under CEQA. ( <i>Id.</i> At 135.) The Court expressly rejected that argument, stating that "CEQA's substantive requirement that the public agency consider feasible project alternatives can be used in conjunction with CESA." Thus, the Board's suggestion here that it need not consider legitimate alternatives because it was somehow legally constrained" as the commission was in <i>Mountain Lion</i> , where it could only grant or deny the delisting petition. And, as pointed out above, the Regional Board did not even explain why and to what extent it purportedly was "legally constrained."	See response 23.24.
23.30	Richard Montevideo	Finally, the Board asserted that less detailed discussion of alternatives is required at the plan level, citing <i>Al Larson's Boat Shop, Inc. v. Board of Harbor Commissioners</i> (1993) 18 Cal.App.4 <sup>th</sup> 729. The Board's reliance on that case is misplaced. There, the EIR considered <i>five legitimate alternatives</i> ( <i>id.</i> At 741), whereas here <i>not one legitimate alternative</i> was evaluated. Merely because less detailed discussion of alternatives is required at the plan level does not allow the agency to dispense with all meaningful discussion of legitimate alternatives.	See response 23.24.
23.31	Richard Montevideo	<b>Completely Ignoring Alternatives Violated CEQA</b> Further, the Regional Board also <i>completely ignored</i> (provided <i>no</i>	See response 23.24.  The SED contains a detailed description of the

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	<p><i>response</i> to) the Cities' comments that the SED:</p> <ul style="list-style-type: none"> <li>• Did not adequately set forth project objectives, which is the basis for formulating legitimate alternatives. (<i>See Bay-Delta Etc., supra</i>, 43 Cal.4<sup>th</sup> at 1163-1164.)</li> <li>• Did not explain why it did not undertake a comprehensive alternatives analysis similar to the one undertaken in <i>Bay-Delta, supra</i>, 43 Cal.4<sup>th</sup> 1143, which also concerned a long-term plan to restore the Bay-Delta's ecological health. There, primary objectives were developed to measure the acceptability of alternatives; actions were identified to achieve the project's objectives; alternative approaches were defined to resolve critical conflicts among the beneficial users of the water; and ultimately, the program EIR evaluated the proposed project and twelve variations of three basic alternatives, as well as a "non action" alternative. Here the SED does not clearly define project objectives, and cursorily analyzes only one project "alternative" (the USEPA TMDL is effectively the same as the "no project" alternative), which is not a legitimate alternative under CEQA for the reasons set forth above.</li> <li>• Did not describe its methodology for selecting alternatives, or explain why it selected/rejected potential alternatives.</li> <li>• Did not identify the environmentally superior alternative.</li> <li>• Did not support its conclusions regarding the "alternatives" that it did evaluate with analysis in each resource area.</li> <li>• Did not compare the alternatives' impacts in each resource area to the proposed project's impacts in those areas.</li> <li>• Did not explain why it assumed the "no project" alternative would simply maintain the status quo, and failed to analyze the practical effect of not approving the proposed project.</li> <li>• Did not comply with 14 California Code of Regulations</li> </ul>	<p>applicable law, physical setting, scope of the problem, and basis for taking the action. The Bay-Delta proceeding had much broader project objectives than the Bacteria TMDL. The SED adequately set forth project objectives based on the scope of the problem to be addressed (water body impaired for bacteria). As explained in response to comment 23.24, the Los Angeles Water Board adequately considered alternatives.</p>
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		(CEQA Guidelines), section 15123.	
23.32	Richard Montevideo	<p><b>Flooding, Housing, and Governmental Services</b></p> <p>The Board elected not to respond substantively to the Cities' comments regarding the proposed project's impacted on flooding, housing, and governmental services, asserting that it could not specify the manner of compliance with the TMDL, and that the local agencies will address those issues later. However, the Cities' comments made clear that because the primary methods of compliance with the TMDL were diversion and treatment, and because County Sanitation Districts have made clear that they lack treatment capacity for the diverted flows, the project will necessitate building storage tanks or mini-treatment plants along the River. Thus, rain water would be diverted away from the River by the project, contrary to the design and operation of the River as a flood control channel, which diversion would potentially create major flooding problems in the areas adjacent to the River. The potential flooding impacts of the project are significant and include disruption of transportation infrastructure and other critical services.</p> <p>Diversion also has the potential to cause displacement of existing housing and the elimination of potential housing sites near the River due to (i) flooding issues; (ii) the need to locate wetlands, settling areas, spreading grounds, detention basins, storage tanks, or mini-treatment plants near the River; and (iii) the need to construct new water lines and treatment plants to address the bacteria issues.</p> <p>Moreover, the impacts of the project on the provision of government services were not adequately evaluated. Local government agencies within the watershed area do not have sufficient resources to fund the construction of the facilities necessary to comply with the project (with costs estimated at over</p>	<p>The Regional Board adequately responded to and addressed the concerns expressed by the commenter. According to the Regional Board, local agencies that will be implementing the TMDL will be required to conduct environmental review, including taking into account flooding, and mitigate for flooding issues.</p> <p>Impacts to housing and public services were analyzed in the SED. Impacts to housing are not anticipated given the size and scope of the BMPs analyzed. In addition, as demonstrated by the City of Los Angeles, flow and treatment BMPs may also be diverted and located in existing open spaces like parks which and may provide the potential for multiple uses. Potential significant impacts to public services related to the construction and operation and maintenance of BMPs may occur depending on the methods of compliance and mitigation measure chosen. However, Water Code section 13360 prohibits the Regional Board from specifying the manner of compliance with its orders used to implement the TMDL.</p> <p>See also Regional Board response to comment 20.14 (Attachment 14).</p>



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		<p>\$5 Billion), and consequently the project will necessarily result in a diversion of funds from other governmental services, such as police, fire, capital improvements, etc. The project will also necessitate an increase in expenditures for sanitary services.</p> <p>The Cities commented that none of the above impacts had been evaluated in the SED and none of the potential ways to mitigate those impacts had been identified. CEQA's purposes were clearly not served with the subject SED because the Board could not legally defer consideration of those foreseeable impacts to a time when the TMDL was already in place. The rationale asserted by the Board's for not evaluating those impacts, at least in general manner- that the Board could not specify the manner of compliance with the TMDL, and the local agencies would address those issues later - is fatally flawed because it would permit the Board to defer <i>any and all</i> environmental analysis of the TMDL. CEQA require more. (14 Cal. Code Regs. §15152(b) [tiering does not excuse agencies from analyzing reasonably foreseeable impacts or justify deferring such analysis to a later tier EIR].)</p>	
23.33	Richard Montevideo	<p><b>The SED Failed to Evaluate the Project's Impacts on Greenhouse Gases</b></p> <p>The SED failed to quantify the total GHG emissions from the project because it did not disclose the calculations necessary to determine how much extra carbon dioxide equivalencies would be emitted as a result of the project.</p> <p>The SED underestimated GHG emissions from the project because it did not inventory or quantify emissions from waste, water vapor (from the diversion/detention basins), pumping, construction, or vehicles. Nor did it provide the quantification of GHG emissions for any other alternative methods of complying with the TMDL or their cumulative impacts.</p>	<p>The Regional Board's response to the concerns expressed by the commenter in LA Response to Comment No. 20.15 (Attachment 15). That was as follows: "The SED does evaluate the project's potential impacts on greenhouse gases. See SED, pages 58-59, section on air impacts. The Resources Agency recently revised the CEQA Guidelines to address greenhouse gases. The revised guidelines state that the agency should make a good faith effort to estimate the amount of greenhouse gases from the project, assess the environmental significance of greenhouse gases, and identify mitigation measures. The SED is consistent with these new regulations. It includes an estimate of greenhouse gases, discusses the significance, and identifies potential mitigation with respect to reasonably</p>

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	<p>The SED failed to set forth what threshold of significance it used or to provide the underlying calculations for the quantification it did provide. Thus, there was no way to verify the conclusions in the SED regarding GHG emissions or potential climate change impacts of the project.</p> <p>The SED failed to identify potential reduction opportunities.</p> <p>In response to the Cities' comments, the Board acknowledged its duty to analyze GHG emissions, but in conclusory fashion simply stated that the SED was consistent with the new CEQA regulations that the SED "includes an estimate of greenhouse gases, discusses the significance, and identifies potential mitigation with respect to reasonably foreseeable methods of compliance." Thus, the Board did not even attempt to address the specific objections raised in the Cities' comments. The Board's cursory response hardly qualified as a good faith, reasoned analysis of why the specific comments and objections were not accepted. (<i>Ebbetts Pass Forest Watch, supra</i>, 123 Cal.4th at 943; <i>Gallegos, supra</i>, 76 Cal. App.3d at 954; Pub. Res. Code §21080.5(d)(2)(D).) Thus, the members of the Board did not fully consider the information necessary to render a decision that intelligently look into account the environmental consequences. (<i>Mountain Lion, supra</i>, 16 Cal.4th at 133.)</p> <p>In addition to the Cities' June 4, 2010 comment letter, the Cities also submitted a comment letter dated June 18, 2010 to the Regional Board regarding the Bay Area Air Quality Management District ("BAAQMD") newly-adopted CEQA guidelines for the analysis of air impacts. These guidelines, which became available at the close of the comment period, included guidance on the analysis of potentially significant impacts for GHG emissions. The new guidelines underscored the comments previously submitted by the Cities regarding the deficiencies with</p>	<p>foreseeable methods of compliance.”</p> <p>The Project Description is contained at section 3.2 of the SED. The proposed project is to adopt a regulation that will guide permitting, enforcement, and compliance activities to restore and maintain applicable water quality standards (TMDL). The TMDL sets forth reasonably foreseeable implementation alternatives including various structural BMPs, and non-structural BMPs, as discussed in Section 5 of the SED.</p> <p>As noted by the Regional Board, the SED does comply with the new CEQA regulations on greenhouse gas emissions, the heart of the new regulations is at section 15064.4. The new regulation took effect a few months prior to the Regional Board's adoption of the TMDL, and as noted by the commenter, guidance was provided after the draft SED was developed. Adherence to the standards contained in the new regulation is an evolving process. The new regulation affords state agencies a range of discretion on the evaluation of GHG emissions.</p> <p>Within section 15064.4, the Regional Board has considerable discretion in judging the significance of GHG emissions and selecting a model, methodology, qualitative analysis or performance based standards it considers most appropriate.</p> <p>In this case, the SED evaluated GHG emissions from the production of energy because several of the foreseeable methods of compliance would require energy production. The SED evaluates calculations of energy consumption provided by a county sanitation district and compared those calculations and other</p>
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		<p>the SED's analysis of GHG emissions. The Cities urged the Regional Board to reevaluate the GHG emissions impacts, and to thereafter re-circulate the SED prior to considering the TMDL project for approval.</p>	<p>assessments with the greenhouse gas reduction goals.</p>
23.34	Richard Montevideo	<p><b>The Discussion of Mitigation Measures in the SED was Deficient</b></p> <p>The Cities commented that although the SED concluded that certain mitigation measures would reduce potential project impacts to "less than significant," (i) no performance goals were identified; (ii) performance goals and monitoring to ensure project impacts met those performance goals were required under CEQA; and (iii) methods for achieving the performance goals had to be integrated into the SED as mitigation measures, because the success of those remediation efforts were part-and-parcel of the assumptions underlying the SED's conclusions regarding environmental impacts.</p> <p>In response, the Regional Board emphasized that the SED was a plan-level document, and claimed it "need not ensure that mitigation measures are implemented" and, in fact, could not identify mitigation measures at that early stage.</p> <p>Simply because an agency uses a programmatic EIR, however, is not an excuse to defer analysis of the significant impacts of that program. (14 Cal. Code Regs. §15152(b).) The Cities were not requesting that the Board prepare a <i>project-level</i> environmental document. CEQA requires that with programmatic documents, the agency consider broad policy alternatives and program-wide mitigation measures. (14 Cal. Code Regs. §15168(b)(4).) And, contrary to the Board's response, mitigation measures must be enforceable through conditions of approval, contracts, or other means that are legally binding, such as the <i>incorporating them into the plan</i>. (Pub. Res. Code § 21081.6(b); 14 Cal. Code Regs.</p>	<p>The commenter mischaracterizes the Regional Board's obligation under the certified regulatory program. Under Public Resources Code section 21159(a), the Regional Board must conduct an analysis of the reasonably foreseeable methods of compliance, which shall include (1) an analysis of the reasonably foreseeable environmental impacts of the methods of compliance, (2) an analysis of reasonably foreseeable feasible mitigation measures, and (3) an analysis of reasonably foreseeable alternative means of compliance with the regulation. The SED and other documents contain detailed analysis of these three requirements in Chapter 5 (pages 12-26) of the SED.</p> <p>The Regional Board did identify mitigation measures that could be legally binding in Chapter 6 (pages 26-112) of the SED. The responsible parties may comply with the TMDL in any lawful way consistent with the TMDL and the permits that will be issued that incorporate the TMDLs.</p> <p>As correctly noted by the Regional Board, it was not required to conduct a project level analysis. (14 Cal. Code Regs. § 2159(d).)</p> <p>The commenter's assertion that "CEQA requires that with programmatic documents, the agency consider broad policy alternatives and program-wide mitigation measures" is not an accurate statement of the authority cited. Section 15168(b)(4) contains no mandate; rather,</p>

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		<p>§ 15126.4(a)(2).)</p>	<p>it explains advantages of the use of a program EIR, which includes, in addition to that cited by commenter, “an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action.”</p> <p>Contrary to commenter’s assertion, Public Resources Code section 21081.6(b) and 15 California Code of Regulations section 15126.4(a)(2) do not apply by their express terms. Changes or conditions to the project have not been adopted to mitigate or avoid significant effects on the environment. Additionally, even if the cited authority were applicable, the commenter inaccurately suggests that “incorporating mitigation measures into the plan” is a requirement rather than permissive. (See 14 Cal. Code Regs. § 15126.4(a)(2).)</p>
23.35	Richard Montevideo	<p><b>The SED Failed To Identify and Evaluate Cumulative Impacts of the Project</b></p> <p>The Cities pointed out in their comments that even programmatic environmental documents had to evaluate cumulative impacts for significance. (14 Cal. Code Regs. §15168(b)(2).) Although the SED could leave many <i>specifics</i> of cumulative impacts to future EIRs, it could not defer <i>all</i> consideration to a later time. (<i>Al Larson Boat Shop, supra</i>, 18 Cal.App.3d at 746-750.) That, however, is just what the SED did here. Although it purported to analyze certain resource areas, it did so in an entirely cursory fashion in a single page. (SED, 115.) Not only did the SED ignore several of the resource areas, but it also failed to disclose just what other projects might be contributing to cumulative impacts; indeed, the SED even failed to disclose upon which method of analysis (the list-of-projects approach or the summary-of-projections approach) it was purportedly based. Nor did the SED even consider the impacts of the other TMDLs for the Los</p>	<p>The SED includes an analysis of reasonably foreseeable program level and project level cumulative impacts. The method by which a discharger decides to achieve compliance is a project-level decision that will require an independent environmental review (Pub. Res. C. § 21159.2), which is beyond the scope of analysis that the Regional Board is required to take (Pub. Res. C. § 21159(d).) However, the Regional Board has analyzed the reasonably foreseeable environmental impacts of the TMDL as an overall program, and reasonably foreseeable environmental impacts of feasible methods of implementing the TMDL. The environmental checklist draws on analysis contained in and conclusions reached in the Staff Report. Because the Regional Board does not specify the method of achieving compliance with the TMDL, the Regional Board cannot identify all project-level impacts (and associated mitigation measures) that might occur from the myriad of structural and non-</p>

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		Angeles River that might make the incremental impacts of the project cumulatively considerable. (See Pub. Res. Code §21083(b); 14 Cal. Code Regs. § 15065(c).) These fatal flaws rendered the SED defective under CEQA. ( <i>Whitman v Board of Supervisors</i> (1979) 88 Cal.App.3d 397, 406-411.) Unfortunately, the Board's response to comments completely ignored these objections.	structural implementation strategies that could be used to achieve the TMDL. However, the Regional Board properly considered substantial evidence when conducting CEQA review and identified feasible mitigation measures that would reduce impacts concerning reasonable foreseeable implementation alternatives.
23.36	Richard Montevideo	<b>The SED Failed To Analyze Specific Sites</b>  In response to the Cities' objection, the Regional Board claimed that it did evaluate specific sites. However, it failed to cite to any specific examples of where it purportedly did so.	The SED does evaluate specific sites, including a detailed analysis of reference sites to evaluate methods of compliance and implementation alternatives located in Chapter 5 (pages 12 -26) of the SED.
23.37	Richard Montevideo	<b>The SED Unlawfully Segmented the Project in Violation of CEQA</b>  The Board's response was the conclusory statement that the Board was "not required to conduct one TMDL for multiple constituents." This response was vague, ambiguous, nonresponsive, and unsupported by citation to any authority.	The Regional Board adequately responded to and addressed the concerns expressed by the commenter in LA River Bacteria TMDL Response to Comment 20.20. That response is as follows: "The SED complies with CEQA and does not unlawfully segment the project. The SED is a program-level analysis. The Regional Board is not required to conduct a project-level analysis. Failure to conduct project-level analysis of the reasonably foreseeable means of compliance does not result in segmenting the project. The Regional Board analyzed the entire project – a TMDL for bacteria in the LA River and tributaries. The Regional Board is not required to conduct one TMDL for multiple constituents. This TMDL evaluates the overlap between other TMDLs for the LA River, including ways that each will compliment the other and avoid duplicative efforts. "
23.38	Richard Montevideo	<b>The Findings and Evidence Were Deficient</b>  The Cities pointed out in their comments that because the SED identified potentially significant environmental impacts from the project, the Regional Board had to make specific findings for each impact as follows: That changes had been required in the project	The Regional Board adequately responded to and addressed the concerns expressed by the commenter in LA River Bacteria TMDL Response to Comment 20.21. That response is as follows: "The commenter is incorrect. The SED includes a checklist and detailed evaluation of the potential impacts and appropriate

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	<p>that would avoid or substantially lessen the impacts; that impacts were within the jurisdiction of another agency and the lead agency did not have concurrent jurisdiction to impose the suggested mitigation measures; or that specific economic, social, or other conditions rendered identified mitigation measures or project alternatives infeasible. (Pub Res. Code § 21081; 14 Cal. Code Regs. § 15091; 23 Cal Code Regs. §§ 3777(d), 3779.5(c).) Moreover, the Regional Board had to make findings concerning the project alternatives unless it found that all of the project's significant impacts would be avoided or substantially lessened by mitigation measures. The Resolution was deficient because it failed to make any of the required findings.</p> <p>The Cities also commented that the draft Statement of Overriding Considerations was deficient. Although the SED concluded that the project might result in significant environmental impacts, it concluded that the project had "overriding considerations" that outweighed the project's significant impacts. Thus, it inappropriately predetermined that the undisclosed, unknown, and perhaps unmitigable adverse impacts were outweighed by the necessity of implementing this particular Bacteria TMDL. That determination was unsupported and uninformed by substantial evidence, and thus the analytic route of the Regional Board was not disclosed, because the extent of the impacts had not even been evaluated by the Board (<i>e.g.</i>, there was no hint as to why a different bacteria reduction schedule would not achieve most of the project's objectives at a fraction of the environmental cost).</p> <p>The Cities pointed out that a Statement of Overriding Considerations could not properly be made unless the potentially significant adverse impacts had been fully identified and analyzed and a conclusion had been reached that the impacts were significant and could not be mitigated. Further, such a conclusion could not be reached until the significant impacts had been</p>	<p>mitigation measures that could be implemented. The statement of overriding considerations clearly explains the benefits of the project as required by CEQA Guidelines section 15093. The statement also explains that other public agencies are responsible for implementing specific projects and any appropriate mitigation. The statement explains that alternatives and mitigation are generally available to reduce any impacts of the means of compliance to less than significant. Since, however, the Regional Board is not responsible for the implementation alternatives, or project EIRS, it cannot assure that the adoption of the TMDL will not result in significant impacts at the project level. The Regional Board's Resolution adopting the TMDL provides (at paragraph 26): "The proposed amendment could have a potentially significant adverse effect on the environment. However, there are feasible alternatives, feasible mitigation measures, or both, that if employed, would substantially lessen the potentially significant adverse impacts identified in the substitute environmental documents; however such alternatives or mitigation measures are within the responsibility and jurisdiction of other public agencies, and not the Regional Board. [...] When parties responsible for implementing this TMDL determine how they will proceed, the parties responsible for those parts of the project can and should incorporate such alternatives and mitigation into any subsequent projects or project approvals."</p> <p>The Regional Board's Resolution adopting the TMDL also includes a statement of overriding considerations (at paragraph 29) which satisfies the requirements contained in CEQA Guidelines section 15093(b) and is</p>
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		<p>analyzed in comparison to the benefits that would result from the project. (14 Cal. Code Regs. § 15043.) No such analysis was conducted within the SED. Moreover, the Cities commented that the State improperly preempted the decisions of local agencies, which as the lead agencies on the implementation decisions, were the appropriate bodies to determine whether the impacts of a particular implementation method would be overridden by project benefits.</p> <p>The Regional Board's responses to these objections were nonresponsive to the specific points raised. The Checklist and evaluation of potential impacts referred to by the Board do not constitute findings as required under Public Resources Code section 21081, 14 California Code of Regulations section 15091, or 23 California Code of Regulations sections 3777(d) and 3779.5(c). Nor did the existence of a statement of overriding considerations adequately explain why potential project benefits outweighed undisclosed environmental impacts. Thus, the Board's response was deficient.</p>	<p>supported by the record in the SED at pages 118 through 120 which adequately explains the basis for its statement of overriding considerations.</p>
23.39	Richard Montevideo	<p>In light of the forgoing comments and the comments incorporated herein as made to the Regional Board on June 4 and June 18, 2010, as well as the oral comments presented to the Regional Board as reflected in the July 9, 2010 transcript of the hearing before the Regional Board, the proposed bacteria TMDL for the Los Angeles River Watershed is entirely inappropriate and should not be adopted.</p>	<p>See response 6.5.</p>