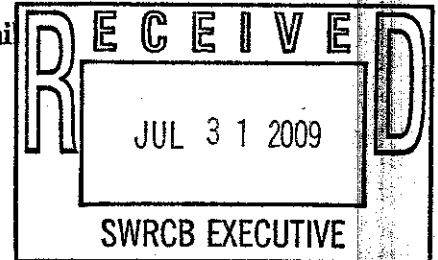




Via E-Mail ([commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)) and Overnight Mail

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
P.O. Box 100  
Sacramento, CA. 95812-0100



Re: *Petition of County of Los Angeles & Los Angeles County Flood Control District  
Re: Amendment NPDES Permit No. CAS004001 for Bacteria TMDL at Santa Monica Bay  
Beaches, SRWCB/OCC File A-1780*

Dear Ms. Townsend:

On behalf of the City of Beverly Hills ("City"), this will provide comments on the revised draft of the proposed Order in the above-referenced matter. The City is a co-permittee under the NPDES Permit issued to the County and various cities in the Los Angeles River Watershed and will become subject to various other TMDLs if the Regional and State Boards incorporate such TMDLs with strict numeric effluent limits into the NPDES permits.

The City further wishes to respond to specific discussion in the revised draft of the proposed Order to certain points:

(1) Strict Numeric Limits for "Dry-Weather" Non-Storm Discharges: The Board staff attempt to distinguish its prior position stated in *In Matter of the Petitions of the Building Indus. Assoc. of San Diego County & Western States Petroleum Assoc.*, State Bd. Order No. WQ 2001-15 ("BIA") on the grounds that those comments applied to "storm water" and that the incorporation of strict numeric TMDLs in this permit deal with "non-storm water" or "illicit discharges." (Revised Draft Order at 8-10) The purported distinctions in the Revised Draft Order are not persuasive for several reasons:

(a) The Revised Draft Order attempts to distinguish EPA Guidance cited by the County in its June 3, 2009 comment letter on the grounds that the cited Guidance deals solely with stormwater and that this NPDES permit regulates only "non-storm water discharges." But, a review of specific EPA guidance documents and fact sheets related to "non-storm water discharges to storm sewers" or to "illicit discharge detection and elimination" demonstrates that even EPA contemplates a "Best Management Practices" (BMP) approach to such "non-storm water" discharges. EPA's "Storm Water Management Fact Sheet: Non-Storm Water Discharges to Storm Sewers" (Office of

Water, Sept. 1999) expressly states that: "identifying and eliminating no-storm water discharges to storm sewers is an important and very cost-effective Best Management Practice (BMP) for improving runoff water quality." (p.1). The rest of EPA's Fact Sheet describes methods to identify and reduce such discharges, but also cautions that identification of non-storm water discharges "may be problematic." (p.2). EPA's NPDES: Illicit Discharge Detection and Elimination" fact sheet describes a "program to detect and eliminate illicit discharges" including an ordinance prohibiting such discharges, a plan to detect and address illicit discharges and an education program on the hazardous associated with illicit discharges. These are the exact types of ordinances and programs that the City currently has in place. Significantly, neither of these EPA documents demand a "zero-level" discharge for such "non-storm" or "illicit" discharges as the Regional Board's TMDL requires. The Revised Draft Order also cites to 40 C.F.R. §122.26((d)(2)(iv)(B). But, a full review of the cited provision is completely consistent with the above-cited EPA references: Educational programs and efforts to detect illicit discharges are required; but, nowhere in the regulation does EPA require 100% reduction or elimination of any illicit discharge. By its very nature, illicit discharge is exactly that—"illicit." It is done without regulatory approval by this City (or any other regulatory entity), often with a deliberate intent to escape detection. To mandate that the City completely end "illicit" discharges is to mandate an impossible task.

(b) The Revised Draft Order cites to federal regulations pursuant to the Clean Water Act, 40 C.F.R. §122.44(d)(1)(vii)(B) as requiring that storm water permit limitations be consistent with "applicable wasteload allocations." (p.9). Of course, to the extent that the Board adheres to a strict distinction between "storm water" regulation and "non storm water" guidance, then it cannot, with any consistency, then resort to justification based upon "storm water" regulation. Moreover, the preface to each subpart of Section 122.44 states that each NPDES permit shall meet the requirements of the subparts "when applicable." In turn, 40 C.F.R. §122.44(k)(3) provides that BMPs shall be adopted when 'numeric effluent limitations' are infeasible. *See Citizens Coal Council v. EPA*, 447 F.3d 879, 896, n.18 (6th Cir. 2006)(en banc)("The EPA's NPDES permit regulations reflect the EPA's longstanding interpretation of the CWA as allowing BMPs to take the place of numeric effluent limitations under certain circumstances.") The Revised Draft Order does not address why 40 C.F.R. Section 122.44(k)(3) is ignored without any discussion or analysis.

(2) Language in the Revised Draft Order about Applying Strict Numeric Limits in TMDLs to Stormwater Permits:

On pages 10-11, the Revised Draft Order engages in speculation about the application of strict numeric TMDLs to *stormwater* permits. While the City believes that no strict numeric limitation is viable even in the context of a "dry weather" presumptive "non-storm water" discharge, certainly this language is not part of nor necessary to the draft Order. It should be stricken as irrelevant to the issue currently before the Board.

Alternatively, if the Board attempts to utilize this particular permit modification as a "model" for the implementation of TMDL numeric limits to all stormwater permits, even in wet weather conditions, then it should clearly state its intention and re-open the entire hearing for a complete discussion with all affected stakeholders.

*(3) Structurally, the Proposed Modification to the NPDES Permit Would Violate EPA Clean Water Act Regulations by Making an Individual Co-Permittee Liable for Operations Beyond Those in Its Own Storm Sewer System*

The proposed modification to Section 2.5 of the permit purports to make any MS4 that "contributes to" an exceedence of a bacteria standard measured at the wave wash area of the Santa Monica Bay liable for such an exceedence. It remains something of a mystery as to how the Regional Board will determine from examining bacteria at the wave wash point where that "excessive" bacteria came from. Rather, based upon the permit's general assertion of joint and several liability among all co-permittees, the proposed modification would structurally appear to make all co-permittees jointly and severally liable without any competent evidence that an individual city's MS4 in fact "contributed" to an exceedence above the TMDL bacteria standard. To the extent that the State Board adopts this implicit standard, it is in direct violation of 40 CFR §122.26(a)(3)(vi), which states that a co-permittee of an NPDES permit is only responsible for discharges from the MS4 system that it operates. *Cf. San Francisco Baykeeper v. City of Saratoga*, 141 F.3d 1178 (1998) ("EPA's regulations implementing the Clean Water Act make clear that the City [of Saratoga] would be liable if it could be considered the operator of the Saratoga-Sunnyvale storm outfall.") (citing 40 C.F.R. §122.26(a)(3)(vi)). EPA's definition of a co-permittee, 40 CFR §122.26(b)(1), limits that co-permittee to responsibility for a "discharge for which it is the operator." The Regional Board's suggested modification to the NPDES Permit would now make a co-permittee municipality jointly and severally liable for someone's unknown discharge that ended up at a downstream measuring point far beyond the municipality's limits of authority, i.e., the wave wash in the Santa Monica Bay. The State Board must adjust the proposed permit modification to avoid this result.

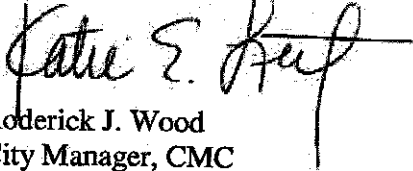
*(3) Conclusion:*


For these reasons, the City respectfully submits that the State Board should:

- (1) Reject the Los Angeles Regional Board's amendment to the extent that it imports into the NPDES permit any strict numeric limit based upon the Bacteria TMDL; and
- (2) Strike the language on pages 10-11 of the Revised Draft Order discussing an "issue [not] before us"; and
- (3) Modify the proposed permit modification to add wording making it clear that the Regional Board can find that a co-permittee is liable for a discharge

that exceeds the bacteria TMDL measured at the wave wash point if and only if the Regional Board can demonstrate by competent evidence that the specific co-permittee's MS4 operations caused that particular exceedence.

Respectfully submitted,



 Roderick J. Wood  
City Manager, CMC  
City of Beverly Hills