



CITY OF SIGNAL HILL

2175 Cherry Avenue ♦ Signal Hill, California 90755-3799

February 3, 2012



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Submitted via email to commentletters@waterboards.ca.gov

Subject: 2/7/2012 BOARD MEETING (Agenda Item 7, Consideration of a proposed Resolution approving an amendment to the Water Quality Control Plan for the Los Angeles Region to incorporate a total maximum daily load for toxic pollutants in Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters)

Dear Ms. Townsend:

The City of Signal Hill appreciates the opportunity to provide written comment on the revised Staff Report and revised language for the adopting resolution for the above-captioned item ("Harbor TMDL"). At the suggestion of State Water Resources Control Board (State Board) members at the December 6, 2012 Water Board hearing, City Staff and/or consultants representing the City have attended several meetings with staff of the Regional Water Quality Control Board (Regional Board), including meetings on January 9, 2012, and January 25, 2012. We have also provided recommendations for language that could be included in the adopting resolution for this item to the Regional Board's Executive Officer, per his request during one of these meetings (see Attachment A).

The City has reviewed the adopting resolution language and appreciates the sincere attempt on the part of the State Board to clarify the implementation of the TMDL. Unfortunately, the language of the adopting resolution does not alleviate our concerns with the flawed scientific and legal foundation or with the implementation measures of the TMDL adopted by the Regional Board in May 2011, and varies significantly from the proposed clarification language we had previously provided to the Executive Officer.

In particular, the City continues to have concerns that are unresolved by the language of the adopting resolution as follows:

1. The City came to understand for the first time, via slides presented by Regional Board staff at the December 6, 2011 SWRCB hearing, that the City may actually have primary responsibility for sediment remediation activities within the Los Angeles River Estuary, one of the water bodies regulated by the Harbor TMDL. Yet, neither the revised staff report nor the adopting resolution language include specific mention of the Los Angeles River Estuary segment or implementation subgroup by name, and thus provide little clarification. The City cannot accept responsibility for bed sediment remediation. As shown in Figure 1, the City of Signal Hill is land-locked and does not abut the Harbor or the Los Angeles River Estuary and should not be in any way held responsible for such remedial work.
2. The revised adopting resolution indicates that the Regional Board could reconsider the fish tissue targets in the future, but only after "making significant progress toward achieving the final allocations" (see Whereas Item 9). As detailed in our original comments, the final allocations are based on ERLs (sediment quality guidelines applied to bed sediments), not on the SQO Policy, and we do not believe they are attainable or appropriate targets. The City believes that it is inappropriate to require "significant progress toward achieving" allocations based upon ERLs before the reconsideration of fish tissue targets.
3. The revised adopting resolution states that the TMDL sediment targets "are not intended to be used as 'clean-up standards' for navigational, capital or maintenance dredging or capping activities" (see Whereas Item 6, emphasis added). This language does not clarify that they should not be used as targets for remedial dredging activities. As stated in our original written comments, we believe that the TMDL sediment targets (i.e., ERLs) are inappropriate; in our opinion, the proposed language is wholly insufficient to prevent their application for remedial dredging projects.
4. The language of the revised adopting resolution does not change the primary targets of the TMDL and does not appear to provide alternative means of demonstrating compliance for NPDES permittees. The TMDL targets, as discussed above, are based upon ERLs (for bed sediment) and Fish Contaminant Goals (FCGs for fish tissue), and each of these are discussed separately below.
 - a. Sediment targets. The loading capacities, load allocations, and wasteload allocations of the TMDL continue to be calculated from the ERLs and are not based on the SQO Policy. Although the language of the adopting resolution states that "compliance may be demonstrated using the direct effects SQO assessment approach" (see Whereas Item 5), the direct effects SQO assessment approach is applicable to bed sediments, not to stormwater

discharges, MS4 system discharges, and other discharges regulated by NPDES permits. Instead, and as detailed in item 2 above, the wasteload allocations that will be implemented in NPDES permits are based upon ERLs, and the revised language appears to provide no mechanism for NPDES permittees to show compliance using the SQO Policy.

- b. Fish tissue targets. The language of the adopting resolution references Phase 2 of the SQO Policy (i.e., the human health portion of the SQO Policy that is currently in development) and indicates that compliance may be demonstrated using the "indirect effects SQO assessment methodology" (see Whereas Item 5). The adopting resolution also states that "The State Water Board further acknowledges the Los Angeles Water Board's intention to utilize the assessment methodology developed as Phase 2 of the State's SQOs to determine compliance with the final 'indirect effects' sediment allocations" (see Resolved Item 2). However, the TMDL itself fails to reference the Phase 2 SQOs for human health and has instead referenced the SQOs for resident finfish and wildlife. Thus, the TMDL itself has failed to specify that compliance can be achieved using the SQO Policy.
5. The cities have entered into a Consent Decree with US EPA and the State of California that protects them from any legal or administrative action to force the Cities to undertake assessment, management or monitoring activities or otherwise to conduct dredging or remedial activities in the Harbor areas or in the Dominguez Channel, the Consolidated Slip, the Torrance lateral or the Kenwood drain. We understand that the language in the proposed revised staff report clarifies that the dredging/remedial requirements in the TMDL are to be addressed through the load allocations, rather than the waste load allocations, but believe that it is contrary to the terms of the Cities Montrose Consent Decree for the Boards to adopt a regulation that appears to designate a city as a responsible party in the TMDL for sediment assessment, management, monitoring and removal/dredging activities, where the City has already entered into a Consent Decree and paid funds to address this same (and other) sediment contamination. In short, we believe the Boards are legally without authority to in fact identify and pursue the cities as responsible parties for any such sediment contamination.

For the reasons detailed above, as well as those expressed in the extensive technical and legal comments previously submitted on behalf of the City of Signal Hill (which the record will show were joined in by a number of other Los Angeles County Cities), Signal Hill continues to request that the State Board remand the Harbor TMDL to the Regional Board so that the fundamental flaws with the scientific and legal foundation of the TMDL can be addressed and resolved.

State Water Resources Control Board
February 7 Board Meeting, Item #7
February 2, 2012

Please contact Ken Farfsing, City Manager, at (562) 989-7302, or by email at kfarfsing@cityofsignalhill.org if you have any questions. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Forester". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Larry Forester
Mayor

b
Attachment

DRAFT Language for consideration (Harbor TMDL)
Prepared on behalf of the City of Signal Hill
January 19, 2012

1. The SWRCB hereby resolves as follows:

- a. The waste load allocations of the TMDL shall be implemented in NPDES permits consistent with the requirements of the SWRCB's Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (the SQOs). Specifically, all NPDES permit effluent limitations developed to comply with any waste load or load allocation under this TMDL, shall be developed only after (a) a clear relationship has been established linking the discharge to the degradation, (b) the pollutants causing or contributing to the degradation have been identified, and (c) appropriate loading studies have been completed to estimate the reductions in pollutant loading that will restore sediment quality.
- b. This Basin Plan Amendment ("BPA") is not intended to, and is not to be interpreted as, setting any cleanup levels for sediments or as mandating any removal or remediation action by any person or entity. The TMDL is not to be utilized in any form as a remediation, removal or dredging order, and is not to be interpreted as requiring specific actions at any sites or as establishing cleanup standards to be achieved at those sites. Further, and consistent with the requirements of the SWRCB's Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (the SQOs), any dredging of sediment that exceeds the objectives of the SQO Policy shall proceed only when the Water Boards first determine that (a) the polluted sediment is removed in a manner that prevents or minimizes water quality degradation, (b) the polluted sediment is not deposited in a location that may cause significant adverse effects to aquatic life, fish, shellfish, or wildlife or may harm the beneficial uses of the receiving waters, or does not create maximum benefit to the people of the site, and (c) the activity will not cause significant adverse impacts upon a federal sanctuary, recreational area, or other waters of significant national importance.
- c. The TMDL is intended to be consistent with SWRCB's Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (the SQO Policy) and shall be interpreted to avoid any inconsistencies with the SQO Policy. Compliance with the SQO Policy requires consideration of multiple lines of evidence to determine whether sediment is impacted, and does not involve reliance on the "Effects Range Low" chemical concentration values as in the BPA. SQO Policy compliance requires completion of the step-wise approach to establish a numeric target to properly calculate loading capacity, load allocations, and waste load allocations appropriate for inclusion in a TMDL. This step-wise approach includes stressor identification, studies on

chemical linkage to impairment, identification of pollutant chemicals or classes of chemicals and identifying sources. The SQO Policy shall therefore be used in place of and instead of the ERLs, and shall serve as the basis for assessing the pollutants regulated by the TMDL and for recalculating loading capacities, load allocations, and waste load allocations.

- d. The TMDL references Fish Contaminant Goals (FCGs) seemingly as TMDL targets. However, the SWRCB is in the process of adopting sediment quality objectives for fish tissue to protect human health (i.e., SQO Policy Part II) and believes that compliance with the TMDL may be achieved by demonstrating compliance with the to-be-developed SQO Policy Part II. Pending the development of the SQO Policy Part II, the Regional Board shall suspend and shall not apply or implement the TMDL through the use of any FCGs. In addition, within one year from the final adoption of the SQO Policy Part II, the Regional Board shall re-open the TMDL and adopt regionally appropriate fish tissue targets in accordance with the adopted SQO Policy Part II, and also recognizing that fish swim to surrounding areas, such as the nearby Palos Verdes Shelf, where fish tissue targets already exist.
- e. Within the first required reopener in the BPA, and preferably during the time of the reopening of the TMDL to incorporate the SQO Policy Part II, the modeling upon which the TMDL is based will be reviewed and revised to ensure that proper calibration, validation, and mass balance computations have been performed, and the TMDL shall be revised consistent with the direction provided herein. The Clean Water Act requires that a TMDL be a balance between the assimilative capacity of a water body (i.e., the mass of a pollutant the water body can assimilate without violating water quality standards), on the one hand, and various categories into which that capacity is distributed (e.g., how much mass of the pollutant will be allowed to enter the water body from point and nonpoint sources, considering natural background). There must be equivalency between assimilative capacity and the sum of the distribution categories. This equivalency, required by law, is in effect a mass balance, and the current conceptual model and mathematical modeling approach of the TMDL is to be reviewed and revised during the referenced reopener, as necessary to support this equivalency.
- f. As provided in the BPA and explained in the Regional Board's TMDL Report: *"The goal of this TMDL is to protect and restore fish tissue, water and sediment quality in Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters by removing contaminated sediment and controlling the sediment loading and accumulation of contaminated sediment in the harbors."* (See BPA, p. 2) However, in a Consent Decree approved by the U.S. District Court in and for the Central District of California and entered in August 24, 1999 (hereafter, "Cities Montrose Consent Decree,"), the District Court issued an Order that included two "Covenants Not to Sue" on behalf of the United States and the State of California, including all "agencies and

instrumentalities thereof.” (The Regional Board is a signatory to the Cities Montrose Consent Decree.)

- g. The Covenants Not To Sue prohibit the State of California and the United States from taking any civil or administrative action against the Settling Local Governmental Entities therein (inclusive of the cities in Los Angeles County and the County of Los Angeles and the Los Angeles County Flood Control District and the Sanitation Districts) “to compel response activities” regarding the “Montrose NPL Site (defined in the Decree to include “*the Kenwood Drain; the Torrance Lateral; the Dominguez Channel (from Laguna Dominguez to the Consolidated Slip); [and] the portion of the Los Angeles Harbor known as the Consolidated Slip* from the mouth of the Dominguez Channel south to but not including or proceeding beyond, Pier 200B and Pier 200Y.” The Cities Montrose Consent Decree also contains a Covenant Not To Sue which prohibits the State and U.S. Governments from taking “any other civil or administrative action” against the Settling Local Governmental Entities for any Natural Resource Damages (defined in the Decree to include “damages, including loss of use, *restoration costs*, resource replacement costs or equivalent resource values, and damage assessment costs, and Response Costs incurred by the Trustees, *with respect to injury to, destruction of, or loss of any and all natural resources in and around the Montrose NPL Site and the Montrose NRD Area.*”). The term “Montrose NRD Area” includes the above described areas involving the “Montrose NPL Site,” and includes the remaining portions of the “*Los Angeles and Long Beach Harbors*” in addition to the Consolidated Slip. In return for the Covenants Not To Sue, the “Settling Local Governmental Entities” paid, through funds or in-lieu services, \$45.7 million to resolve all such claims
- h. In light of the Cities Montrose Consent Decree, no portion of the TMDL is to be interpreted and/or applied in any manner that would be in conflict with or inconsistent with the Cities Montrose Consent Decree, i.e., no portion of the TMDL shall be interpreted and/or applied as against a Settling Local Governmental Entity to require the development and/or implementation of any sediment management plan, sediment monitoring program, and/or sediment dredging, removal or remediation program (or other similar or related programs) for any areas referenced under the Cities Montrose Consent Decree as the “Montrose NPL Site” or the “Montrose NRD Area.” Similarly, no portion of the TMDL is to be interpreted as imposing a negative waste load allocation or load allocation on any of the Settling Local Governmental Entities, as a means of addressing existing contaminated sediment, as such an interpretation would be in conflict with the terms and provisions of the Cities Consent Decree. In short, as to the existing contaminated sediments, the subject TMDL should not be utilized to “compel response activities” or compel any action to accomplish the “restoration” or address damages to natural resources, as against the Settling Local Governmental Entities described in the Cities Montrose Consent Decree.

- i. During the first reopener period provided for herein, the TMDL's Substitute Environmental Document (SED) is to be further reviewed and revised to include an analysis of all environmental impacts associated with the proposed TMDL project and all reasonably foreseeable methods of compliance with the TMDL. The SED must also be revised to include an analysis of a reasonable range of environmentally advantageous project alternatives to the TMDL project set forth in the BPA.

- j. Upon final adoption of the BPA herein, the Regional Board is hereby directed to continue with direct collaboration with all interested stakeholders, to facilitate the above directives and promote the use of sound science, modeling techniques and proper data sets, including necessary calibrations and validations. This further direct collaboration shall include periodic meetings with the stakeholders as appropriate to achieve these goals.