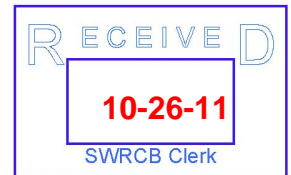


CITY OF CARSON

October 26, 2011

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Subject: Comments on the Proposed Approval of an Amendment to the Water Quality Control Plan for the Los Angeles Region (Basin Plan) 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 Carson (city) is pleased to respond to the State Water Resources Control Board (State Board) invitation to comment on the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxics Total Maximum Daily Load (DC/Harbor Toxics TMDL).

The city's comments are contained in the attached petition that was filed with the State Board in early June of this year. As you may be aware, the State Board rejected the city's petition. This action was based on an opinion from the Assistant Chief Counsel who concluded that Regional Board adoptions of basin plans are not subject to review by petition to the State Board, per CWC § 13320. However, we struggle to find anything in this section that prevents the State Board from reviewing a Regional Board's adoption of a TMDL as a basin plan amendment. It states clearly that:

- a) *Within 30 days of any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), Chapter 5.5 (commencing with Section 13370), Chapter 5.9 (commencing with Section 13399.25), or Chapter 7 (commencing with Section 13500), any aggrieved person may petition the state board to review that action or failure to act. In case of a failure to act, the 30-day period shall commence upon the refusal of the regional board to act, or 60 days after request has been made to the*

regional board to act. The state board may, on its own motion, at any time, review the regional board's action or failure to act and also any failure to act under Article 3 (commencing with Section 13240) of Chapter 4.

It is apparent that nothing in the above suggests the State Board cannot review a Regional Board's adoption of a basin plan amendment as a "failure to act" issue. Further, the city knows of no case law that supports that conclusion. Perhaps one day this issue will be resolved by the legislature.

In any case, beyond the comments expressed in the city's petition as arguments against the Regional Board's adoption of the DC/Harbor Toxics TMDL, the city would also like to raise two additional concerns that are described more particularly below:

1. *The DC/Harbor Toxics TMDL inappropriately requires MS4 Permittees to pay for removal or containment of contaminated sediment in the Greater Los Angeles and Long Beach Harbor Waters and should be revised or clarified to eliminate this possible interpretation*

The DC/Harbor Toxics TMDL references dredging and capping as a means of remediating contaminated sediment in the harbor waters. Some have suggested that the ports of Los Angeles and Long Beach will be primarily responsible for performing this task. However, the DC/Harbor Toxics TMDL contains language that could be interpreted to mean that MS4 permittees – including those that are situated in the Los Angeles and San Gabriel Rivers – will be required to share the cost. MS4 permittees could be required to meet waste load allocations in this TMDL. If the WLAs are not met, affected permittees could be found in violation and could be compelled to fund remediation. This could be achieved through the next MS4 permit by requiring absolute compliance with WLAs – as it had with the Santa Monica Bay Beaches Dry Weather Bacteria TMDL.

It should be noted that the MS4 permit is limited to controlling pollutants in stormwater from the MS4 (to the receiving water) and to prohibiting non-stormwater discharges to the MS4 (not to the receiving water). The MS4 NPDES permit is a point-source permit (see 40 CFR §122.2). Under Clean Water Act section 402 p(iii), *MS4 permits 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.*¹ The MS4 NPDES permit is limited to compliance with water quality standards, including TMDL WLAs, in stormwater at the point of discharge (outfall or at the end-of-pipe) -- not in the receiving water. The MS4 NPDES permit's limitation to controlling discharges at the end of the point source suggests that the Regional Board may, in the alternative, rely on a waste discharge requirement (hereinafter "WDR"), pursuant to the California Water Code (hereinafter "CWC"). If the Regional Board intends to impose the DC/ Harbor Toxics TMDL WLA or an alternative compliance requirement on the city exclusively through a WDR then it

¹ See CWA 402 p(iii).

must first comply with CWC section 13241. Further, if an MS4 permittee is compelled to pay a share of cost associated with remediating contaminated sediment in the harbor waters, an argument could be effectively made that such a requirement constitutes an unfunded mandate under the California Constitution.

2. *The DC/Harbor Toxics TMDL inappropriately includes Los Angeles River and San Gabriel River permittees and its applicability is unclear*

Although the DC/Harbor Toxics TMDL states that the Los Angeles and San Gabriel Rivers are not its focus, it nevertheless includes them. The DC/Harbor Toxics TMDL mentions both of these water bodies as contributing fresh water to the harbor waters. The DC/Harbor Toxics TMDL also references the Los Angeles and San Gabriel Rivers as “responsible parties.” In the DC/Harbor Toxics TMDL (staff report) implementation appears to restrict these responsible parties to submitting a *Report of Implementation, which will directly or indirectly support the goals of this TMDL.*² Regional Board staff has asserted that Los Angeles and San Gabriel Rivers responsible parties are only subject to implementing metals TMDLs. This is reflected in the DC/Harbor Toxics TMDL’s staff report which states that under Phase I (which has no commencement date): *Responsible parties in these watersheds are implementing other TMDLs, which will directly or indirectly support the goals of this TMDL.*³

However, in the staff report under Table 7-2 of the DC/Harbor Toxics TMDL, “responsible parties” are required to meet the interim allocations as of the effective date of the DC/Harbor Toxics TMDL. It is not clear if the term “interim allocations” refer to the metals TMDLs for the Los Angeles and San Gabriel Rivers or to the harbors to which these water bodies contribute freshwater. Table 7-2 of the DC/Harbor Toxics TMDL is titled: *Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxics Pollutants TMDL: Implementation Schedule.* Under Task 2 of this implementation schedule, the Los Angeles and San Gabriel Rivers are required to: *Submit a Monitoring Plan to the Los Angeles Regional Board for Executive Officer Approval 20 months after the effective date of the DC/Harbor Toxics TMDL.*⁴ It is unclear as to whether the monitoring plan refers to the DC/Harbor Toxics TMDL or to the Los Angeles and San Gabriel Rivers Metals TMDLs. The same holds for the tasks 3, 4, and 7.

Further complicating matters, the term “responsible parties” is not referenced in either the Los Angeles or San Gabriel Rivers Metals TMDLs. The Los Angeles River Metals TMDLs uses the term responsible agencies – not responsible parties. The San Gabriel River Metals TMDL, which USEPA was compelled to adopt, makes no mention of either responsible agencies or parties. In fact, no municipal permittees are mentioned all.

Beyond this, including the Los Angeles River and San Gabriel River and, presumably MS4 permittees located therein, ignores the fact that only a few of them are subject to

²Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants, page 110.

³*Ibid.*, page 110.

⁴*Ibid.*, page 119

metals TMDLs. In the case of the USEPA-adopted metals TMDL, which again does not mention what MS4 permittees are subject to it, only Reach 2, the San Jose Creek, and Coyote Creek, have been listed as impaired. Not all of the 32 municipal permittees that are partially or fully situated in the San Gabriel River drain into Reach 2, San Jose Creek and Coyote Creek. Thus, the DC/Harbor Toxics TMDL cannot extend its requirements to the San Gabriel River MS4 permittees based on the mere fact it contributes freshwater to the downstream harbors. As for the Los Angeles River, not all municipal permittees are subject to the metals TMDL. Reach 2 of the Rio Hondo, which is tributary to the Los Angeles River system, is not 303(d) listed for metals. Therefore, the 16 MS4 permittees located in this reach cannot be included in the DC/Harbor Toxics TMDL based on the metals TMDL connection.

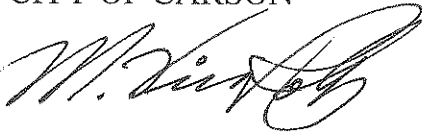
Revisions are suggested for Table 2 (in the staff report) and the identical Table 7-40.2 *Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL: Implementation Schedule* on page 37 of Attachment A to Resolution No. R11-008 in order to more clearly reflect the limited "Report of Implementation" requirements of the Los Angeles River and San Gabriel River "responsible parties" as enumerated on page 33 and more clearly define those responsible parties as described on page 36.

Although these comments were made to the Regional Board prior to its adoption of the DC/Harbor Toxics TMDL and during the public hearing, it failed to adequately respond to them. The city fervently hopes that the State Board will recognize the several deficiencies contained in the DC/Harbor Toxics TMDL and return it to the Regional Board for correction without the need for a State Board hearing.

In closing, the city appreciates the opportunity to comment on this extremely important matter and looks forward to its amicable resolution. In the meantime, should you have any questions, please feel free to call me at (310) 952-1742 or Patricia Elkins, Storm Water Quality Program Manager, at (310) 847-3529.

Sincerely,

CITY OF CARSON



M. Victor Rollinger, P.E.
Development Services General Manager

MVR/PE

Attachment: Petition

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5
6 Attorneys for Petitioner,
City of Carson, a general law city & municipal corporation

7
8 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**
9

10 In the Matter of:) **PETITION FOR REVIEW**
11 California Regional Water Quality Control) **[Water Code § 13320 and Title 23,**
Board, Los Angeles Region Adoption of the) **CCR §§ 2050, et seq.]**
12 Dominguez Channel and Greater Los Angeles)
and Long Beach Harbor Waters Toxics Pollutants)
13 Total Maximum Daily Loads)
14)
15)

16
17 This Petition for Review is submitted by the City of Carson (hereinafter referred to as
18 “Petitioner” or “City”), pursuant to California Water Code § 13320 and California Code of
19 Regulations (“CCR”), Title 23, § 2050, for review of the Dominguez Channel and Greater Los
20 Angeles and Long Beach Harbor Waters Toxics Pollutants Total Maximum Daily Loads
21 (hereinafter “Toxics TMDL”), adopted on May 5, 2011, by the California Regional Water Quality
22 Control Board, Los Angeles Region (hereinafter “Regional Board”), attached herewith as Exhibit
23 1). As of the date of this submittal, the final adopted Toxics TMDL has not been made available
24 for review.

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27 ///
28 ///

1 **I. NAME, ADDRESS, AND TELEPHONE NUMBER OF PETITIONER**

2 All written correspondence and other communications regarding this matter should be
3 addressed to:

4 City of Carson
5 ALESHIRE & WYNDER, LLP
6 Attn: William W. Wynder, Esq.
7 1515 W. 190th Street, Suite 565
8 Gardena, CA 90248
9 Telephone: (310) 527-6660
10 Facsimile: (310) 532-7395
11 Email: wwynder@awattorneys.com

12 With a copy to:

13 City of Carson
14 Attn: M.Victor Rollinger
15 Development Services General Manager
16 701 East Carson Street
17 Carson, CA 90745
18 Email: VRollinger@carson.ca.us

19 **II. SPECIFIC ACTION OF THE REGIONAL BOARD FOR WHICH REVIEW IS SOUGHT**

20 The City is challenging certain requirements contained in the Toxics TMDL adopted on
21 May 5, 2011. Several changes were made to the TMDL during the May 5, 2011, Regional Board
22 public hearing that have not yet been made available.

23 **III. DATE OF REGIONAL BOARD'S ACTION**

24 The Regional Board adopted the Toxics TMDL on May 5, 2011.

25 **IV. STATEMENT OF REASONS WHY THE REGIONAL BOARD'S ACTION WAS INAPPROPRIATE OR IMPROPER**

26 The Toxics TMDL adopted by the Regional Board contains compliance requirements that:
27 are unclear; are inconsistent with TMDLs adopted by other Regional Boards; if incorporated into
28 the next Los Angeles County Municipal Separate Storm Sewer System (hereinafter "MS4")
National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit would exceed
federal stormwater regulations and would be contrary to State law; and where it exceeds federal

1 stormwater regulations would constitute an unfunded mandate under the Article XIII B of the
2 California Constitution. These complaints are described more particularly below.

3 1. The Toxics TMDL includes the Los Angeles and San Gabriel River watersheds.
4 Although the TMDL states that these watersheds are not its focus, it refers to the municipalities
5 therein nevertheless as “responsible parties.” A responsible party is a term used in the
6 Comprehensive Environmental Response, Compensation and Liability Act (hereinafter
7 “CERCLA”). The TMDL, however, does not specify what MS4 permittees in the Los Angeles
8 and San Gabriel River watersheds would be subject to its waste load allocation (hereinafter
9 “WLA”) requirements.

10 2. Further troubling is that it suggests the possibility that the City may be required to
11 pay for the clean-up of pollutants in downstream water bodies. This is an inappropriate use for a
12 TMDL. When implemented through the MS4 NPDES permit, the City’s responsibility is limited
13 to implementing best management practices (hereinafter “BMPs”) and other actions within its
14 jurisdiction to meet the TMDL’s WLA. Requiring downstream clean-up of legacy pollutants
15 exceeds the scope of the MS4 NPDES permit.

16 3. The Toxics TMDL, as with others recently adopted by the Regional Board,
17 improperly requires the City to submit an implementation plan without first having to translate a
18 WLA into a water quality based effluent limitation (hereinafter “WQBEL”); and unlawfully
19 authorizes the Regional Board’s Executive Officer instead of its governing board to consider and
20 approve it. The implementation plan is a procedure that has been unlawfully constructed to allow
21 the Regional Board to bypass the WQBEL development process, a federal stormwater regulatory
22 requirement.

23 4. The implementation plan is to be executed through the MS4 NPDES permit. The
24 City, as an MS4 permittee, is required under the Toxics TMDL to submit an implementation plan
25 with BMPs and a schedule to meet the WLAs. Without the WQBEL, the City would be required
26 to comply with the WLAs by any means necessary, which exceeds federal stormwater regulations
27 (the Regional Board asserts, incorrectly, that 40 CFR §130.2 allows it to define a WQBEL as a
28 WLA). The implementation plan also spares the Regional Board from having to comply with a

1 reasonable potential analysis to determine (in accordance with USEPA's NPDES Permit Writers'
2 Manual), and in this case validate, that the discharge causes or contributes to an excursion above a
3 water quality standard. Further, submitting the implementation plan to the Executive Officer,
4 instead of the Regional Board governing body, denies affected and interested parties a public
5 hearing.

6 5. The Toxics TMDL improperly requires strict compliance with WLAs and other
7 numeric standards, as the following indicates:

8 Compliance with the TMDL for metals and PAHs is based on achieving the load
9 and waste load allocations and/or demonstrating attainment of the sediment quality
10 objectives (SQO Part 1) as multiple lines of evidence. Compliance with the TMDLs
11 for bio-accumulative compounds shall be based on achieving the assigned loads and
12 waste load allocations or, alternatively, by meeting fish tissue targets. Compliance
13 will require the elimination of toxic pollutants being loaded into Dominguez
14 Channel and the harbors, and clean up of contaminated sediments lying at the
15 bottom of greater Los Angeles and Long Beach Harbors. Dischargers and
16 responsible parties may implement structural and or non-structural BMPs and work
17 collaboratively to achieve the numeric targets and allocations.

18 The subject TMDL implies that compliance will require extra-jurisdictional structural
19 controls such as dredging and capping. This compliance requirement would be enforceable once it
20 is incorporated into the MS4 NPDES permit. However, using the MS4 NPDES permit for this
21 purpose is improper. The MS4 NPDES permit is a point-source permit (see 40 CFR §122.2).
22 Under Clean Water Act section 402 p(iii), permits for MS4 discharges are limited to controls to
23 reduce the discharge of pollutants to the maximum extent practicable, including management
24 practices, control techniques and system, design and engineering methods, and such other
25 provisions as the Administrator or the State determines appropriate for the control of such
26 pollutants.

27 Further, the MS4 NPDES permit is limited to compliance with water quality standards,
28 (including TMDL WLAs), in stormwater at the point of discharge, at the end-of-pipe, not in the
receiving water. The MS4 NPDES permit's limitation to controlling discharges at the end-of-pipe
suggests that the Regional Board may, in the alternative, rely on a waste discharge requirement
(hereinafter "WDR"), pursuant to the California Water Code (hereinafter "CWC"). If the Regional

1 Board intends to impose the Toxics TMDL WLA or an alternative compliance requirement on the
2 City through a WDR then it must first comply with CWC section 13241.

3 6. In justifying compliance with WLAs and other numeric standards by any means
4 necessary, the Regional Board has incorrectly bypassed the requirement to identify the
5 appropriate WQBEL necessary to comply with the TMDL WLA. A WQBEL translates a WLA
6 into BMPs or other actions (e.g., surrogate parameters) for implementation through the MS4
7 NPDES permit to attain a water quality standard, per 40 CFR §122.44[d]. The Regional Board has
8 also ignored setting properly established WQBELs for other TMDLs it has adopted. It also has
9 not included WQBEL-related language for TMDLs incorporated into the current Los Angeles
10 County MS4 NPDES permit (viz., the Los Angeles River Trash TMDL and the Santa Monica Bay
11 Beaches Dry Weather Bacteria TMDL).

12 7. Other Southern California Regional Boards such as Santa Ana and San Diego,
13 however, have referenced WQBELs not only in TMDLs they have adopted, but also in recently
14 issued MS4 NPDES permits. WQBELs are also discussed at length in USEPA's Interim
15 Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. The
16 application of WQBELs to MS4 permits is also discussed in a USEPA memorandum issued in
17 November 2010 entitled: Revisions to the November 22, 2002 Memorandum "Establishing Total
18 Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) from Storm Water Sources and
19 NPDES Permit Requirements Based on Those WLAs." The Regional Board, in response to these
20 arguments, defends strict compliance with WLAs by relying on 40 CFR §130.2[h] and USEPA's
21 2010 TMDL guidance memorandum. 40 CFR §130.2[h] defines a WQBEL as a type of WLA. As
22 mentioned above, the Regional Board concluded that a WQBEL is automatically established by
23 the WLA and, therefore, can require compliance with a WLA by any means necessary.

24 8. However, CFR §130.2[h] applies to receiving waters, not to point source
25 discharges. Here, 40 CFR §122.44[k][2] is the controlling federal statute as affirmed in *Divers*
26 *Environmental Conservation Organization v. State Water Resources Control Board*. The
27 Regional Board also claims that the 2010 USEPA TMDL guidance memo gives it, as a permitting
28 authority, discretion to impose numeric limitations to comply with a WLA. In its response to

1 comments to the draft Toxics TMDL, the Regional Board claims that the WQBEL sanctions
2 compliance with numeric effluent limitations, including WLAs. This conclusion is incorrect for
3 two reasons. First, the Regional Board has not conducted a reasonable potential analysis in
4 accordance with USEPA's NPDES Permit Writers' Manual, to establish that a discharge has
5 caused an excursion above a water quality standard. Such an analysis is a prerequisite to
6 establishing a WQBEL pursuant to CFR 40 §122.44[d]. Second, the Regional Board defines a
7 numeric effluent limitation to mean strict compliance with a WQBEL-WLA.

8 9. However, as indicated in USEPA's Interim Permitting Approach for Water
9 Quality-Based Effluent Limitations in Storm Water Permits, a numeric limitation is the same as a
10 numeric WQBEL. Further, the 2010 USEPA TMDL guidance memorandum defines a numeric
11 WQBEL to be a surrogate parameter, which translates a WLA, for example, into flow or
12 impervious cover reduction, and which is achieved essentially through structural and/or non-
13 structural BMPs. Therefore, strict compliance with the WLA numeric target is not required.

14 10. The Regional Board asserts that the adaptive/iterative process does not apply to
15 compliance with TMDLs through MS4 NPDES Permits. In its response to comments regarding
16 the Toxics TMDL, the Regional Board argues that federal regulations do not suggest the
17 iterative/adaptive process is an inherent component of BMP based permit requirements. While
18 federal stormwater regulations do not use the term adaptive or iterative per se relative to BMP
19 implementation in stormwater permits, USEPA's Interim Permitting Approach for Water Quality-
20 Based Effluent Limitations in Storm Water Permits does describe a progressive incremental
21 approach to meeting water quality standards.

22 11. In fact USEPA's first memorandum on TMDL compliance issued in 2002 uses the
23 term iterative as the following excerpt from it reveals: The Interim Permitting Approach Policy
24 recognizes the need for an iterative approach to control pollutants in storm water discharges.
25 Beyond this, the State Board reaffirmed the iterative process in meeting water quality standards in
26 precedential Water Quality Order 99-05.

27 12. The Toxics TMDL improperly calls for the approval of an implementation plan
28 and a monitoring plan by the Regional Board's Executive Officer. However, the CWC does not

1 give the Executive Officer the authority to approve what are essentially water quality control plan
2 elements. CWC section 13240 makes it clear that the Regional Board governing body is
3 responsible for adopting water quality control plans. The governing body of the California
4 Regional Water Quality Control Board, Santa Ana Region, for example, adopted by resolution the
5 Urban Source Evaluation Plan, a requirement of the Middle Santa Ana River Bacteria TMDL. The
6 plan was adopted three years after this TMDL was adopted by this Regional Board in 2008 at a
7 public hearing. Further, the adoption of any water quality control plan associated with the Toxics
8 TMDL would also require compliance with CWC section 13241.

9 13. The Toxics TMDL improperly requires sediment and fish tissue monitoring in
10 receiving waters. Such requirement exceeds federal stormwater regulations as they apply to point
11 sources, which limits monitoring to stormwater discharges from the permittee's outfall or field
12 screening at MS4 input points, per 40 CFR §122.26. Should the Regional Board exceed this
13 requirement, it would raise the issue of an unfunded mandate.

14 14. Since sediment and fish tissue testing is not authorized under federal stormwater
15 regulations, the Regional Board must comply with CWC section 13225[c], which requires a
16 showing that the burden, including costs, of such reports shall bear a reasonable relationship to the
17 need for the report and the benefits obtained therefrom. Further, CWC section 13267 requires the
18 Regional Board to provide the person with a written explanation with regard to the need for the
19 reports, and shall identify the evidence that supports requiring that person to provide the reports.

20 15. The Toxics TMDL proposes requirements that exceed federal stormwater
21 regulations and, therefore, could be subject to unfunded mandate claims, including: (1) preparing
22 and submitting an implementation plan forcing the City to commit to implementing BMPs without
23 having to translate the WLAs into WQBELs; (2) having to implement extra-jurisdictional
24 structural controls, which could even include dredging and/or capping of downstream
25 contaminated sediment; and (3) requiring sediment and fish tissue monitoring.

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1 **V. HOW THE PETITIONER IS AGGRIEVED**

2 1. The City is aggrieved by the Toxics TMDL as it relates to the Los Angeles River
3 because the City is not certain if it is subject to it. The TMDL merely implies that it could be
4 subject because the Los Angeles and San Gabriel River Watersheds have been designated as
5 responsible parties, without naming specifically the subject municipalities. Once the TMDL is
6 placed in the MS4 permit, the City could be surprised to learn that it is subject to one or more of
7 its WLAs.

8 2. The City is aggrieved by the Toxics TMDL requirement to submit an
9 implementation plan. First, it requires the City to propose BMPs and a schedule for
10 implementation without having to establish WQBELs. WQBELs translate the WLAs into BMPs
11 or surrogate parameters. Without this translator, the City would be compelled to comply with the
12 WLAs by any means necessary. In all likelihood, this would represent an impossible-to-meet
13 standard, which would expose the City to Regional Board enforcement action or, much worse,
14 exposure to third party litigation, as was the case in *NRDC v. the County of Los Angeles Flood*
15 *Control District*.

16 3. Second, requiring the submittal of the implementation plan to the Regional Board's
17 Executive Officer, instead of its governing board, denies a public hearing, the purpose of which is
18 to provide the opportunity to allow affected parties, including but not limited to City residents and
19 businesses to comment on the plan and its impact on them in terms of cost and reduction of
20 programs and services.

21 4. Third, the implementation plan circumvents the WQBEL development process.
22 The implementation plan invites the City to propose BMPs, thereby obviating the need for the
23 Regional Board to conduct a reasonable potential analysis to determine if the City's stormwater
24 discharges cause or contribute to an excursion above the water quality standard for pollutants that
25 are the subject of the TMDL. Such an analysis could demonstrate that the City is not causing or
26 contributing to an excursion above the water quality standards, which would relieve the City of
27 having to allocate scarce funding to implement non-structural and structural BMPs to comply with
28 the TMDL's WLAs.

1 5. The City is aggrieved by the Toxics TMDL's intention to require absolute
2 compliance with its WLAs or alternative compliance requirements through the MS4 NPDES
3 permit. It avoids setting WQBELs to translate the WLAs into BMPs or surrogate parameters,
4 which would allow the City to pursue more cost-effective and reasonable BMPs and avoid
5 exposure to Regional Board enforcement action or third party litigation.

6 6. The City is aggrieved by the Regional Board's intention to deny the
7 adaptive/iterative process in progressively meeting the Toxics TMDL through the MS4 NPDES
8 permit. Instead, the Regional Board would require strict compliance with the TMDL's WLAs and
9 other requirements during the term of the permit. Failure to meet these compliance standards
10 could result in enforcement action from the Regional Board and third party litigation from non-
11 governmental organizations.

12 7. The adaptive/iterative process, on the other hand, would allow the City to
13 implement BMPs or surrogate parameters, in accordance with a set schedule, during the term of
14 the MS4 NPDES without risking violation or third party litigation – even if the numeric target is
15 not met. The City, however, would be obligated in the next MS4 NPDES permit to ramp-up
16 BMPs or actions needed to achieve the chosen surrogate parameter in an effort to meet a WLA.

17 8. The City is aggrieved by the sediment and fish tissue requirement, which is not
18 authorized under federal stormwater regulations. Complying with this unauthorized requirement
19 imposes an unnecessary cost burden on the City. The Regional Board could, in the alternative,
20 attempt to impose this requirement by relying on a WDR. If it does, it must comply with CWC
21 section 13241 and be subject to a possible unfunded mandate claim.

22 9. The City is aggrieved by the Regional Board's imposition of requirements that
23 would exceed federal stormwater regulations, which would compel the City to file unfunded
24 mandate claims to recover costs associated with the extra-federal regulatory requirements. Such
25 an action would require an expenditure of scarce City funds, pending the outcome of the
26 unfunded mandate claim, which would risk a reduction of vital programs and services. It would
27 also require the retention of legal counsel and staff time to prepare and submit the claims to the
28 unfunded mandate commission.

1 **VI. ACTION PETITIONER REQUESTS THE STATE BOARD TO TAKE**

2 The City respectfully requests the State Board to direct the Regional Board to revise the
3 Toxics TMDL as is explained below.

4 1. Delete the Los Angeles and San Gabriel River watersheds as being subject to the
5 Toxics TMDL or provide an explanation as to why these watersheds are subject.

6 2. Delete the reference to CERCLA and municipal MS4 permittees as being
7 responsible parties.

8 3. Specify that the Regional Board governing body's, instead of the Executive
9 Officer, adopt the implementation plan, after receiving public comment.

10 4. Insert language to translate the Toxics TMDL WLAs into WQBELS in MS4
11 permits and to perform a reasonable potential analysis prior to requiring the City to submit an
12 implementation plan for execution through the MS4 NPDES permit. The Regional Board may
13 use the same language as in the California Regional Water Quality Control Board San Diego
14 Region's Revised Total Maximum Daily Loads for Indicator Bacteria Project I – Twenty Beaches
15 and Creeks in the San Diego Region (Including Tecolote Creek), Final Technical Report,
16 February 10, 2010.

17 5. Insert language referencing the adaptive/iterative process in executing the Toxics
18 TMDL through the MS4 NPDES permit (such language is contained in the above-mentioned San
19 Diego Bacteria TMDL Final Technical Report).

20 6. Delete from the Toxics TMDL any reference to having to comply with any of its
21 WLAs requiring controls such as dredging, capping, or capture and treat controls outside of the
22 City's jurisdiction.

23 7. Delete from the Toxics TMDL compliance fish tissue and sediment testing.

24 8. If the Regional Board intends to impose any Toxics TMDL-related requirement
25 that exceeds federal stormwater regulations direct it to comply with the aforementioned CWC
26 requirements; and to advise them that they may be subject to unfunded mandate claims in
27 accordance with Article XIII B, Section 6 of the California Constitution.

28

1 **VII. POINTS AND AUTHORITIES**

2 **State Statutes**

3 California Water Code §13225(c)
4 California Water Code §13241
5 California Water Code §13267
6 California Constitution, Article XIII B

7 **Federal Statues**

8 Clean Water Act §402 p(iii)

9 **Federal Regulations**

10 Code of Federal Regulations, §122.21
11 Code of Federal Regulations, §122.44[d]
12 Code of Federal Regulations, §122.44[k][2]
13 Code of Federal Regulations, §122.26

14 **Federal Guidance Documents**

15 NPDES Permit Writer's Manual, USEPA-833-K-10-001, September, 2010
16 Interim Permitting Approach for Water Quality Based Effluent Limitations in
17 Stormwater Permits (EPA 833-D-96-001, September, 1996)

18 Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum
19 Daily Load (TMDL) Wasteload Allocations (WLAs) from Storm Water Sources and
20 NPDES Permit Requirements Based on Those WLAs," USEPA, James Hanlon,
21 Director of the Office of Wastewater Management, November 12, 2010.

22 **State Water Resources Control Board Orders**

23 State Water Resources Control Board Water Quality Order 99-05, June 17, 1999

24 **California Regional Water Quality Control Board Basin Plan Amendments**

25 Santa Ana Regional Water Quality Control Board, Resolution No. R8-2008-0044,
26 Amending the Basin Plan to Incorporate the Middle Santa Ana River Bacterial
27 Indicator TMDL Urban Source Evaluation Plan, April 18, 2008

28 San Diego Regional Water Quality Control Board, Resolution No. R9-2010-0001,
Amending the Basin Plan to Incorporate the Revised Indicator Bacteria TMDLs
Developed in Project I - Twenty Beaches and Creeks in the San Diego Region
(including Tecolote Creek), on February 10, 2010

State Cases

*Diver's Environmental Conservation Organization v. State Water Resources
Control Board et. al.*, 145 Cal. App.3d. 497

1 **VIII. ISSUES PREVIOUSLY RAISED**

2 These issues were raised in comments submitted from the City and in a collective MS4
3 permittee submittal from the Dominguez Channel Watershed Management Committee to the
4 Regional Board prior to and during the May 5, 2011 public hearing.

5 **IX. REQUEST TO HOLD PETITION IN ABEYANCE**

6 Pursuant to California Code of Regulations, Title 23, Section 2050.5(d), the City
7 respectfully requests the State Board to hold this Petition in abeyance to allow the City to attempt
8 to resolve the issues contained in it with the Regional Board. The City shall promptly notify the
9 State Board when the City seeks to have its Petition considered.

10 **X. CONCLUSION**

11 The City has been aggrieved by the Regional Board's action for reasons stated herein.
12 While the City is aware that the Regional Board has broad discretion as a permitting authority
13 under the federal law in establishing TMDLs, the City believes it has exceeded that authority.

14 While the Regional Board may rely on State law to ultimately compel compliance with
15 provisions in the Toxics TMDL that exceed federal law, it must be prepared to comply with
16 aforementioned CWC requirements and be confronted with unfunded mandate claims.
17 Nevertheless, it is the City's hope to resolve these issues with the Regional Board informally before
18 the Toxics TMDL rises to the State Board.

19 **XI. SERVICE OF PETITION**

20 This Petition is being served upon the following parties via electronic mail, facsimile and
21 U.S. mail:


22
23 State Water Resources Control Board
24 Office of Chief Counsel
25 Jeannette L. Bashaw, Legal Analyst
26 Post Office Box 100
27 Sacramento, CA 95812-0100
28 Fax: (916)341-5199
jbashaw@waterboards.ca.gov

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California Regional Water
Quality Control Board
Mr. Samuel Unger
Executive Officer
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Fax: (213)576-6686
sunger@waterboards.ca.gov

Dated: June 3, 2011

ALESHIRE & WYNDER, LLP
WILLIAM W. WYNDER
WESLEY A. MILIBAND
LINDSAY M. TABAIAN

By: 
William W. Wynder
Attorneys for Petitioner,
CITY OF CARSON

1 **PROOF OF SERVICE**

2
3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action. My business address is 1515 W. 190th Street, Suite 565,
Gardena, CA 90248.

5 On **June 3, 2011**, I served the within document(s) described as: **PETITION FOR**
6 **REVIEW** on the interested parties in this action as stated on the attached mailing list.

7 **(BY MAIL)** By placing a true copy of the foregoing document(s) in a sealed envelope
8 addressed as set forth on the attached mailing list. I placed each such envelope for
9 collection and mailing following ordinary business practices. I am readily familiar with this
10 Firm's practice for collection and processing of correspondence for mailing. Under that
11 practice, the correspondence would be deposited with the United States Postal Service on
12 that same day, with postage thereon fully prepaid at Gardena, California, in the ordinary
13 course of business. I am aware that on motion of the party served, service is presumed
14 invalid if postal cancellation date or postage meter date is more than one day after date of
15 deposit for mailing in affidavit.

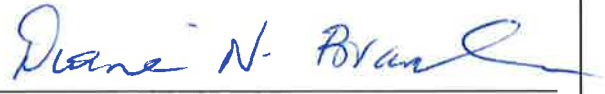
16 **(BY E-MAIL)** By transmitting a true .pdf copy of the foregoing document(s) by e-mail
17 transmission from dbranche@awattorneys.com to each interested party at the e-mail
18 address(es) set forth above. Said transmission(s) were completed on the aforesaid date at
19 the time stated on declarant's e-mail transmission record. Each such transmission was
20 reported as complete and without error

21 **(BY FAX)** By transmitting a true copy of the foregoing document(s) via facsimile
22 transmission from this Firm's sending facsimile machine, whose telephone number is (310)
23 532-7395, to each interested party at the facsimile machine telephone number(s) set forth on
24 the attached mailing list. Said transmission(s) were completed on the aforesaid date at the
25 time stated on the transmission record issued by this Firm's sending facsimile machine.
26 Each such transmission was reported as complete and without error and a transmission
27 report was properly issued by this Firm's sending facsimile machine for each interested
28 party served. A true copy of each transmission report is attached to the office copy of this
proof of service and will be provided upon request.

Executed on **June 3, 2011**, at Gardena, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DIANE N. BRANCHE
(Type or print name)


(Signature)

SERVICE LIST

In the matter of California Regional Water Quality Control Board, et al

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