11/15/06 Bd Mtg Item ___
San Gabriel River TMDL
Deadline: 10/27/06 12pm

Bryan Speegle, Director

COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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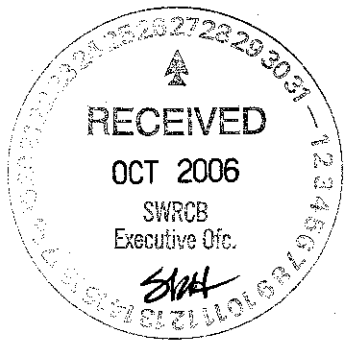

October 27, 2006

Ms. Tam M. Doduc, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Attention: Song Her, Clerk of the Board

Re: Comment Letter – San Gabriel River Metals TMDL

Dear Chairwoman Doduc:

The County of Orange Resources and Development Management Department (County) has reviewed the above referenced Total Maximum Daily Load (TMDL) proposed by the Regional Water Quality Control Board, Los Angeles Region, (LA Regional Board) as well as the LA Regional Board's proposed amendment to its Water Quality Control Plan (Basin Plan) incorporating the TMDL. We appreciate this opportunity to provide comments on the proposed documents.

Overall, we support the efforts of the LA Regional Board toward the development of TMDLs for metals in the San Gabriel River watershed. As a participant in the San Gabriel River Watershed Council, we have been working with other area stakeholders to develop and implement a comprehensive regional monitoring program for the watershed. We remain committed to protecting the beneficial uses of the creeks within our county and look forward to working with all the relevant jurisdictions on reasonable and practical solutions to real impairments. However, the County believes that certain issues should be addressed before the State Board approves the proposed metals TMDL and Basin Plan amendment.

The County's principle concern is that the LA Regional Board's action appears to be overreaching in that it would impose waste load allocations for (1) a *nonimpaired* water segment (2) that is located *outside* the LA Regional Board's jurisdictional boundaries.

1. Under section 303(d) of the Clean Water Act, states are to identify impaired water segments, rank them in order of priority, and then establish TMDLs for those segments according to their ranking. *See, e.g., San Francisco Bay Keeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002).[1] Coyote Creek is in the San Gabriel River watershed. Its upper reach is located in Orange County within the jurisdiction of the Regional Water Quality Control Board, Santa

[1] States may develop "informational" TMDLs for nonimpaired water segments, but these TMDLs are not approved by EPA and are for informational purposes only. There is no indication from the Los Angeles Regional Board that it intends for the San Gabriel River metals TMDL to be an informational TMDL.

Ana Region, (Santa Ana Regional Board), and its lower reach is in Los Angeles County within the jurisdiction of the LA Regional Board. The LA Regional Board has listed the lower reach as an impaired water segment under section 303(d) of the Clean Water Act.[2] The Santa Ana Regional Board has not listed the upper reach as impaired, nor has it proposed the upper reach for listing as impaired under 303(d). *See 2002 CWA Section 303(d) List of Water Quality Limited Segments, Santa Ana Regional Board* and *Proposed 2006 CWA Section 303(d) List of Water Quality Limited Segments, Santa Ana Regional Water Quality Control Board.* The LA Regional Board's proposed metals TMDL, however, makes no distinction between the impaired segment of Coyote Creek and the nonimpaired segment. Contrary to the Clean Water Act, and without suggesting that the upper reach itself is impaired, it adopts waste load allocations for all of Coyote Creek.[3]

If the LA Regional Board could adopt waste load allocations for nonimpaired water segments that flow into impaired segments for which TMDLs are required, it would render the mechanism for listing water *segments* and then developing TMDLs for those *segments* meaningless. *See, e.g.,* State Water Resources Control Board, *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List*, adopted September 30, 2004. The County, therefore, requests the State Board to require the LA Regional Board to amend its proposed metals TMDL to delete the waste load allocations assigned to the upper reach of Coyote Creek.

2. This raises the second, and potentially more significant, of our concerns with the LA Regional Board's proposed TMDL. Although the LA Regional Board acknowledges that the upper reach of Coyote Creek is located in Orange County and is under the jurisdiction of the Santa Ana Regional Board, it assigns a waste load allocation to the Orange County MS4 permit issued by the Santa Ana Regional Board. The LA Regional Board's purported assignment of waste load allocations to waters outside its jurisdictional boundaries goes beyond the powers of the LA Regional Board as proscribed by the Porter-Cologne Water Quality Control Act. *See, e.g.,* Water Code Sec. 13224 ("Each regional board may issue policy statements relating to any water quality matter *within its jurisdiction.*"); Water Code Sec. 13225 ("Each regional board, *with respect to its region*, shall: . . . "); Water Code Sec. 13226 (Each regional board must review and approve waste disposal sites "*within its region.*"); Water Code Sec. 13227 ("Each regional board, *with respect to its region,* shall review . . . "); Water Code Sec. 13228.15 ("The members of a regional board, or their designees, *with respect to matters within the regional board's jurisdiction*, . . . "); Water Code Sec. 13240 ("Each regional board shall formulate and adopt water quality control plans *for all areas within the region.*") (Emphasis added.)

LA Regional Board staff apparently believe there is precedent for the proposed cross-jurisdictional allocations from the mercury TMDL proposed by the Regional Water Quality Control Board, San Francisco Bay Region (SF Regional Board). It is true that the SF

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[2] The LA Regional Board's current (2002) and proposed (2006) "CWA Section 303(d) List of Water Quality Limited Segments" identifies for the region 13 miles of Coyote Creek as impaired for various pollutants/stressors.

[3] Recent case law has held that a Regional Board may identify an impaired segment at the same time as it adopts a TMDL for such water body. *See City of Arcadia v. State Water Resources Control Board*, 135 Cal.App.4th 1392 (2006). The LA Regional Board has not indicated that the upper reach of Coyote Creek is being identified as impaired as it adopts the proposed TMDL.

Regional Board has proposed a waste load allocation for the Central Valley Watershed. However, at the same time, the Central Valley Regional Board is developing its own mercury TMDL. The SF Regional Board's waste load allocation for the Central Valley Watershed, in effect, represents the reduction that will be obtained once the Central Valley Regional Board's TMDL is implemented.[4] In other words, the SF Regional Board's allocation is more of an accounting mechanism that assures sources within the jurisdiction of the SF Regional Board are credited with the reductions that will be obtained through the Central Valley Regional Board's TMDL.[5] To the extent the Santa Ana Regional Board designates the upper reach of Coyote Creek as impaired (presuming it is impaired) and develops TMDLs to address the impairment, the County believes it could be appropriate for the LA Regional Board to acknowledge the resulting load and waste load reductions in its own Basin Plan. At the present time, however, the County requests the State Board to require the LA Regional Board to delete any waste load allocations to the upper reach of Coyote Creek, which is outside the LA Regional Board's jurisdiction.

In addition to the above "nonimpaired segment" and "jurisdictional" concerns, the County also would like to raise the following issues for the Board's consideration:

3. EPA made it clear in adopting the California Toxics Rule (CTR) that Water Quality Based Effluent Limitations, including those necessary to meet the CTR criteria, should be expressed as BMPs in MS4 permits, rather than as numeric limits. *See, e.g.*, 62 Fed.Reg. 42160, 42186-87 (August 5, 1997) (Proposed Rule); 65 Fed.Reg. 31682, 31703 (May 18, 2000) (Final Rule). Additionally, the recent Blue Ribbon Panel's report to the State Board concluded that numeric effluent limits are not appropriate for municipal storm water discharges at this time. *See Storm Water Panel Recommendations to the California State Water Resources Control Board: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*, June 19, 2006. Accordingly, it should be made explicit in the proposed metals TMDL that in implementing the TMDL, municipal dischargers will meet their allocations through BMPs and not numeric limits.

4. The proposed metals TMDL does not actually establish a maximum daily load that receiving waters can assimilate as required by the CWA. Rather, the so-called wet weather TMDL is a concentration limit based on the CTR applied to a daily storm volume. Thus the TMDL developed by the LA Regional Board does not meet the CWA requirements for developing a TMDL and the State Board should not approve the metals TMDL as presently calculated.

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[4] SF Regional Board staff refused to assign allocations to individual Central Valley sources, stating that "these sources are outside our jurisdiction, and the Central Valley Water Board is developing mercury TMDLs that will more effectively address these sources . . ." *Staff Report, Proposed Amendment to the Water Quality Control Plan (Basin Plan) for the San Francisco Bay Region to Establish San Francisco Bay Mercury Total Maximum Daily Load (TMDL) and Implementation Plan*, Meeting Date: September 15, 2004.

[5] A better example of how to address impaired waters crossing jurisdictional boundaries might be the Tennessee E. Coli TMDL recently approved by EPA. That TMDL identifies impaired waters in the watershed that are located in Virginia. Tennessee did not attempt to adopt a TMDL for these waters or impose waste load allocations. Rather, it simply acknowledges the issue and indicates that Virginia is addressing it through its own TMDL for fecal coliform.

5. In developing the National Toxics Rule, EPA received extensive comment regarding the most appropriate approach for expressing the aquatic life metals criteria, the principal issue being the correlation between metals that are measured and metals that are bioavailable and toxic to aquatic life. 65 Fed.Reg. 31682, 31690 (May 18, 2000). In adopting the CTR, EPA concluded that "the use of dissolved metal to set and measure compliance with aquatic life water quality standards is the recommended approach, because dissolved metal more closely approximates the bioavailable fraction of the metal in the water column than does total recoverable metal." *Id.* The LA Regional Board has not provided an adequate explanation for why the proposed metals TMDL, while purportedly based on the CTR, is expressed in total recoverable metals instead of dissolved metals.

6. The proposed metals TMDL assigns a load allocation for direct atmospheric deposition of metals onto surface waters. It makes atmospheric metals deposited on land surfaces and then washed off into receiving waters the responsibility of storm water permittees, as part of their waste load allocation. However, just over one year ago, in the development of the Los Angeles River and Ballona Creek metals TMDLs, the LA Regional Board acknowledged that the issue of atmospheric deposition should be studied for five years before considering whether reductions in atmospheric metals should be included in the waste allocations for MS4 permits. Given the State Board's own concerns about atmospheric deposition, and the possibility of working in concert with the Air Resources Board and other air agencies on this issue, the County believes it premature to assign responsibility for this nonpoint source to MS4s.

7. The proposed metals TMDL addresses "potential" beneficial uses of receiving waters. However, in establishing water quality objectives, the Water Board only is to consider "probable" future beneficial uses. Water Code § 13241(a). If, for example, Wildlife Habitat (WILD) is only a potential beneficial use, the water segment may need fewer load and waste load reductions than if WILD was a probable future beneficial use.

Thank you for your consideration of the County's concerns. We look forward to discussing these issues at the Board's hearing on this matter.

Sincerely,

FOR

Larry McKenney, Manager
Watershed and Coastal Resources Division

cc: Geoff Hunt, County Counsel
Tim Carlstedt, Counsel, Bingham McCutchen
Bryan Speegle, Director RDMD
Gerard Thibeault, Santa Ana Regional Water Quality Control Board
Jonathan Bishop, Los Angeles Regional Water Quality Control Board
Celeste Cantu, State Water Resources Control Board
Coyote Creek Watershed Cities in Orange County