City of Duarte

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July 23, 2009

Mr. Ivar Ridgeway
Stormwater Permitting Unit
Los Angeles RWQCB
320 W. 4th Street, Suite 200
Los Angeles, CA 90013

Re: Incorporating the Trash TMDL into the MS4 Permit (Case No. CAS004001)

Dear Mr. Ridgeway:

The City of Duarte is partially located within the Los Angeles River Watershed and is in receipt of your notice of July 6, 2009 regarding the possible incorporation of the Los Angeles River Trash TMDL into the Los Angeles County MS4 Permit. Your notice states that 40 CFR Section 122.44(d)(4)(vii)B requires that NPDES permits be consistent with the assumptions and requirements of any available waste load allocation. However, there is nothing in the regulations you cite that require incorporation of waste allocations as numeric effluent limits in any municipal NPDES permit. We know of no authority and no requirement under state or federal law that compels incorporation of a TMDL's waste load allocation to be enforced as a numeric limit in a municipal NPDES permit.

Our City takes pride in its environmental programs. We are implementing programs that are making significant reductions in the trash from our community's storm drain system, despite the economic recession and the difficulty our City is having in funding basic municipal services. We have been implementing both the TMDL and NPDES permit programs, without the Regional Board formally placing the TMDL into our stormwater permit. We are very concerned about the reopening of our NPDES permit to insert the TMDL and its numeric limitations and the precedent that this will create. We believe that the Board should use a more collaborative approach with the cities to achieve the desired environmental outcome.

Dozens of TMDLs have been adopted or will be adopted in the next several years for the Region's water bodies. These include Metals and Bacteria TMDLs for the Los Angeles River, which are proving difficult and costly to understand and to implement. Understanding the sources and impacts of stormwater pollutants is scientifically challenging, since many sources are diffuse in the urban environment. Controlling these pollutants is proving challenging, since reasonably affordable solutions are not currently available to cities when they attempt to meet numeric requirements imposed by the TMDLs, as strict, not-to-be-exceeded, numeric limits.

League of Cities Policies Oppose Numeric Limits in Municipal NPDES Permits – The Problems of Imposing Strict Numeric Limits on an Uncertain Outcome

Many of the Watershed cities are members of the League of California Cities, an organization representing over 450 municipalities statewide. The League has long-established policies opposed to adding numeric limits to municipal stormwater permits. These policies cite the variable nature of stormwater, as well as both the difficulty and high costs involved in controlling runoff. The League urges water boards to design NPDES permits that rely on the use of best management practices (BMPs) to the maximum extent practicable to reduce pollutants from urban runoff. (See the League's *Guiding Principles- 2008* and *Final Report of the Water Quality Regulatory Task Force – 2003.)*

TMDL implementation is a daunting and costly task for local government. The Regional Water Board has estimated the cost for local government compliance with the Trash TMDL will be hundreds of millions of dollars. The Regional Board has estimated the compliance costs for the Los Angeles River Metals TMDL to be approximately $1.4 billion. No cost estimates have yet been developed for compliance with the yet to be developed Bacteria TMDL, but those figures are expected to be in the billions as well. As an example of these costs, the Watershed communities are currently investing over $6 million in scientific studies in an attempt to understand the science, monitoring and implementation needed to reduce both metals and bacteria in the Los Angeles River.

As evidence of the variable nature of urban runoff and the limited understanding of how to best reduce the discharge of pollutants from urban runoff, even more recently developed devices necessary to capture trash are undergoing frequent review and revision. The County of Los Angeles and several of the cities have invested significant time and funds in the design and testing of "full capture" and "partial capture" devices, since 2002. These devices continue to evolve in an "iterative" process of invention, evaluation, and reinvention. The Regional Board has been a partner in this monitoring and the certification of trash catching devices.

In this context, applying strict numeric limits to the iterative process (invention and reinvention) seeks to hold the cities responsible for numeric certainty in an inherently uncertain process. This action would expose the cities not only to Regional

Board fines for non-compliance, but expose our communities to third-party litigation. We do not understand the Board's need to place numeric limits into our NPDES permit, especially when the science and technology are still being perfected and when other, more appropriate, implementation mechanisms exist that the Board could utilize.

The Regional Board Has Responsibility to Adopt Reasonable Regulations

The NPDES and TMDL programs stems from the Clean Water Act and EPA was given responsibility to implement the programs by Congress, with the ability to delegate the programs to the individual states. California took over the responsibility for managing the NPDES Permit program from EPA over two decades ago. Both EPA policies and state law governing the permits give the Regional Board considerable discretion in how they implement municipal NPDES permits.

Neither EPA policies nor state law provisions require the imposition of numeric limits on municipal urban runoff. Specific state law provisions include the requirement that Regional Boards consider water quality conditions that could be reasonably achieved and take into account economic considerations when making permit decisions (California Water Code Sections 13241 and 13000). We strongly believe that the current economic recession should give the Regional Board great pause in imposing numeric limits in the municipal NPDES Permits, particularly when doing so goes beyond what is required under federal law.

EPA Policy – Numeric Limits Should Be Used Only in Rare Cases

EPA provided a guidance memorandum on establishing TMDL waste load allocations for stormwater sources and NPDES Permit requirements on November 22, 2003. This policy states that numeric limits should be placed into the NPDES Permits only in "rare instances."

"EPA's policy recognizes that because stormwater discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare instances will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges… Therefore EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances." (EPA Guidance Memo, Page 4.)

The Regional Board Should Use BMPs in the NPDES Permit Instead of Numeric Limits

With respect to municipal stormwater discharges, Congress clarified that US EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits. The Regional Board should require implementation of BMPs to reduce pollutant loads to the maximum extent practicable

standard. We fail to understand the "rare instances" which the Regional Board is relying on to propose implementation of the Trash TMDL through our NPDES permit.

The State Water Board issued a series of orders on BMP implementation and commissioned a panel of experts (Blue Ribbon Panel) that studied the feasibility of imposing numeric limits in municipal NPDES permits. We cite the following statements In support of our position, that the TMDL's numeric limits should not be placed into our NPDES permit:

- "Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality based effluent limits." (State Board Order WQ 98-01, pg. 12)

- "Federal regulations do not require numeric effluent limitations for discharges of stormwater." (State Board Order WQ 2006-0012, pg 17)

- "It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and, in particular, urban dischargers." (The Blue Ribbon Panel Recommendations to the State Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater, June 19, 2006, pg. 8)*

The Regional Board approved full and partial trash capture devices which can be placed into the NPDES permit, instead of placing the TMDL into the permit. The Regional Board has already established a precedent in this regard by placing trash reduction BMPs into the current permit, including street sweeping and the placement of trash receptacles at all transit stops.

Implementation of the TMDL by Memoranda of Agreement

We understand that TMDLs are not self-implementing; however, as explained above, EPA's policy does not require that TMDLs be implemented by placing numeric limits into the municipal NPDES permits. While this may be the preference of individual US EPA staff in Region IX, and may also be the goal of environmental organizations, the Regional Board has great discretion in how it chooses to implement the TMDL program in its jurisdiction. The Regional Board, the cities and the environmental community need to eventually move beyond litigation and create a successful model of implementation.

TMDLs can be developed and implemented through a variety of procedures, including the third-party development process established through memoranda of agreements (MOAs). Since the Regional Board and EPA have already entered into a MOA with the City of Los Angeles for the Bacteria TMDL (Cleaner Rivers Through Effective Stakeholder-Led TMDLs or CREST), the precedent already exists.

The Trash TMDL could be generally incorporated into a Municipal NPDES Permit by referencing the need to utilize MEP-compliant BMPs to strive to reach the Waste Load Allocation. More specific implementation measures, however, can if needed by developed through a Memorandum of Agreement (MOA) between the Regional Board and the Cities involved that will more specifically address the particular means of implementing the TMDL, i.e., it will identify the particular MEP-compliant BMPs that will be utilized, over a negotiated implementation schedule, to achieve deemed compliance with the TMDL. The Trash TMDL MOA thus could include a detailed implementation plan of action to be taken by our City to implement the Trash TMDL and a timeline for completing them. In addition, the TMDL MOA could contain financial and other consequences should the City fail to comply. The MOAs also could include a provision to reimburse for administrative fees incurred by the Regional Board to help defray the costs of any TMDL enforcement actions.

We stand ready to help develop and to participate in a TMDL MOA with the Regional Board. In this time of economic uncertainty and limited governmental resources, the Board and the cities must think outside of the "NPDES permit box" and find new ways of accomplishing our mutual goals of improving water quality.

Sincerely,

Darrell George
City Manager

cc: City Council
City Attorney
Mr. Richard Montevideo, Esq
Department Heads