



January 16, 2014

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

Subject: Implementation Plans and Schedules for the Los Cerritos Channel Metals TMDL and the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL

Dear Ms. Townsend:

The **City of Irwindale** is pleased to submit to you comments for the State Water Resources Control Board's consideration regarding the *Implementation Plans and Schedules for the Los Cerritos Channel Metals TMDL and the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL* ("implementation plans"). The City made "timely" comments in connection with the final version of the implementation plans proposed as a basin plan amendment. The comments were submitted in writing to the Los Angeles Regional Board prior to its public hearing convened on June 6, 2013, as well as in a presentation during the public hearing. Although the Regional Board responded to the comments, they were inadequate or incorrect for reasons that are more particularly described herein.

Summary

The City requests the State Board to either dismiss or postpone adoption of the implementation plans. This request is made in consideration of the following:

1. The implementation plan is based on a TMDL adopted by USEPA that exceeds limitations imposed by the 303(d) list by extending reaches that are impaired to both upstream and downstream reaches that are non-impaired. This requirement is not authorized under federal or state law.
2. The implementation plan is based on a TMDL that requires compliance with both wet and dry weather waste load allocations. Federal regulations supported by State Board water quality orders only require compliance with "ambient" standards, not wet weather ones.
3. The implementation plan is based on a TMDL that requires municipal permittee compliance with non-point sources. Municipal permittees are only required to comply with MS4 point sources.
4. The Los Angeles County MS4 permit is currently under administrative challenge. The permit includes the San Gabriel River and Coyote Creek TMDLs which, along with other TMDLs, are being challenged because of the reasons stated herein: (1) they extend into reaches that are not 303(d) listed as impaired; and (2) they require compliance with dry weather and wet weather standards, the latter of which is not required under federal or state law. The City therefore asks the State Board to defer deciding on the implementation plans until it resolves the administrative challenge.



- **Authentic TMDLs Are Limited to the 303(d) List**

If a pollutant is not 303(d) listed, then it is not subject to a TMDL. However, in its comments the Regional Board essentially defended its policy of extending reaches that are 303(d) listed for pollutant(s) to reaches that are not 303(d) listed for the same pollutant because to do otherwise would be contrary to the thrust of the Clean Water Act. We are concerned that this is mere administrative opinion as the CWA does not state the intention to prevent water quality issues for unimpaired reaches. It is our belief that the Regional Board should not be interpreting the CWA but following the CWA approved 303(d) list? The Regional Board should go through the proper, legal steps should it wish to extend reaches that are not 303(d) listed.

Further, there is no evidence proffered by the Regional Board that any of the reaches not 303(d) listed would be impaired by any of the metals pollutants in the future. In fact, based on the Regional Board SWAMP data there were no ambient exceedances for lead in any reach of the San Gabriel River with the exception of copper for Walnut Creek.¹ Reach 2 of the San Gabriel River is listed for lead apparently because of a mass emissions station exceedance detected during wet weather. Beyond this there are no ambient exceedances recorded for Coyote Creek. Coyote Creek is 303(d) listed for copper, lead, and zinc based on wet weather monitoring from mass emissions stations operated by the County of Los Angeles Department of Works at Mass Emissions Station F354-R. Nevertheless an exceedance for wet weather cannot be used to justify the application of a TMDL to any reach (see explanation below).

Further, there is no urgency to extend a TMDL for an impaired reach to a non-impaired reach. A reach may not be impaired due to a variety of reasons. It may be located, as in the case of reaches in the Upper San Gabriel River, in a low urbanized area. Or an impairment may not exist because of permittee efforts in implementing effective stormwater management program plans. Another fact that the Regional Board overlooks is that the purpose of a TMDL, which is a “super” water quality standard, is to restore the beneficial use of a receiving water. If restoration is not required then why compel a permittee to comply with an illegitimate TMDL?

To assert that a problem “may” arise in a non-impaired reach, without any scientific justification, constitutes “wishful thinking” and would require permittees to spend money needlessly on a non-existent problem. Further, effective outfall monitoring, which is a long-over due MS4 permit requirement, should provide an effective means of determining if there is a problem looming for a metal constituent in any of the reaches. It would also enable permittees, through the iterative process, to address exceedances early-on, thereby preempting a reach from becoming impaired.

- **TMDL Compliance is Limited to Ambient Standards and Does Not Include Wet Weather Standards**

The Regional Board, in its comments, clings to the notion that wet weather waste load allocations must be complied with. It has said that the waste load allocation (“WLA”) assigned to affected cities *in wet weather, and achievement of the WLA must be demonstrated under those conditions*. It provided no legal justification for this view.

Wet weather standards are not recognized under federal or state law. This was affirmed by the State Board in water quality order 2001-15. In response to a petitioner’s claim that State law requires the adoption of wet weather water quality standards, the State Board found:

¹SWAMP data generated in 2005 reported single ambient exceedance for copper in Walnut Creek of 9.88 ug/l, slightly above the California Toxics Rule limit of 9.4 ug/l. The source of the exceedance appears to be Puddingstone Reservoir, which is a non-point source for these constituents.

This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions.²

It should be noted that water quality standards also include TMDLs, which are ambient standards. Although there are numerous sources that point to water quality standards as being ambient standards, perhaps the most conspicuous is CFR 40, 122.44(d)(1)(iii):

When the permitting authority determines...that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

A USEPA commissioned report also notes:

... EPA is obligated to implement the Total Maximum Daily Load (TMDL) program, the objective of which is attainment of ambient water quality standards through the control of both point and nonpoint sources of pollution.³

USEPA defines ambient water quality as the:

Natural concentration of water quality constituents prior to mixing of either point or nonpoint source load of contaminants. Reference ambient concentration is used to indicate the concentration of a chemical that will not cause adverse impact to human health.⁴

Various agencies engaged in water quality monitoring all conduct ambient water quality monitoring during dry weather. These include but are not limited to the State's Surface Water Ambient Monitoring Program (SWAMP), Southern California Coastal Water Research Project, and the Council for Watershed Health.

Further, according to federal stormwater regulations, compliance with TMDLs and other water quality standards is determined by measuring stormwater discharges from the outfall. Ambient standards, which are amply discussed in numerous USEPA guidance documents, are "referents." Given that there is no such thing as a wet weather standard and that ambient standards have been set to protect or, in the case of TMDLs, restore the health of a receiving water and its beneficial uses, then it stands to reason that compliance for an MS4 must be determined by comparing outfall stormwater discharges with ambient (dry weather) referent standards. Unfortunately, the Regional Board does not accept this view but instead clings to the notion that WLAs apply to wet weather.

And while the Regional Board concedes that compliance may be demonstrated at the outfall, if there are no violations, staff has asserted that a violation can only be avoided if there are no exceedances detected by outfall monitoring. In other words, staff is of the opinion that the iterative process does not apply to

²State Water Resources Control Board Order WQ 2001-15, *In the Matter of the Building Industry Association of San Diego County and Western Petroleum States Association*, page 10.

³Assessing the TMDL Approach to Water Quality Management Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, Water Science and Technology Board, National Research Council, page 12.

⁴See USEPA Glossary and Acronyms – Water (<http://water.epa.gov/scitech/datait/tools/warsss/glossary.cfm>).

the stormwater management program plan which is the essential compliance determinant for MS4 permits issue in California. This MS4 permit issue is under administrative challenge.

- **Non-Point Source TMDL Compliance**

The implementation plan specifies non-point source compliance that includes atmospherically deposited metals. It also includes copper, zinc, and lead from Puddingstone Reservoir which are 303(d) listed as non-point sources. The City has noted in its previous comments to the Regional Board that it cannot be subject to a non-point source TMDL. According to the *Clean Water Act Handbook*:

*Congress defines a point source as “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged. It stands to follow that anything that is not a point-source and yet conveys pollutants to our nation’s water is a non-point source ... A point source is generally a discharge from a pipe or similar conveyance. A nonpoint source is diffuse runoff and as described by the United States Environmental Protection Agency (EPA) “is caused by rainfall or snowmelt moving over and through the ground carrying natural and human made pollutants into lakes, rivers, and streams, wetlands, estuaries, other coastal waters, and ground water.” Atmospheric deposition and hydrologic modification are also sources of nonpoint source pollution.*⁵

From this it should be obvious that a non-point TMDL does not apply to an MS4 point source. Also, point sources are only subject to waste load allocations; non-point sources are subject to load allocations. Therefore, the City should not be subject to any loading that is atmospherically-related or related to any other non-point source.

The Regional Board attempts to evade comment on this issue by seeking refuge in the argument that State Board public hearing comments are *limited to the proposed implementation plans for the TMDLs and that comments on the TMDLs, which were previously established by USEPA are outside the scope of the hearing.* The City’s comments are connected to the implementation of a USEPA adopted TMDL through an MS4 permit, as regulatory requirement – not the TMDL as a non-regulatory planning tool. The permit requires USEPA TMDLs to comply with BMPs, as is the case with the Caltrans MS4 permit. However, once made into a basin plan amendment, the TMDL will become a regulatory requirement that is binding on affected permittees through the permit and will require absolute compliance with TMDL numeric targets by any means necessary or, through a watershed management or enhanced watershed management program approach. Regardless of what option the City avails itself of permittees should not be required to comply with any non-point source TMDL through the MS4 permit because it would be extra-legal.

- **State Board Should Not Approve the Implementation Plan or Delay Such Approval Until After It Resolves the Administrative Petitions Challenging the MS4 Permit**

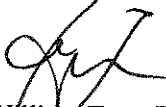
Many of the requirements contained in the implementation plan are under administrative petition. They include the legal validity of requiring: (1) compliance with wet weather waste load allocations in the receiving water; (2) compliance with non-ambient standards; (3) compliance with non-point source TMDLs; (4) denying the iterative process for the stormwater management program; and (5) compliance with limitations on non-stormwater discharges from the MS4. If the State Board finds merit in any of these petition arguments and the implementation plan is adopted before hand, a revision of the implementation plan through a re-opener is likely to be needed.

⁵See the *Clean Water Act Handbook, Second Edition, page 192.*

It should also be noted that the implementation plan as proposed by the Regional Board is unnecessary. The plan could take the form of the one proposed by Caltrans.

In closing, the City is grateful for the opportunity to comment on this very important matter. Should the State Board have any questions, please contact me by phone at (626) 430-2212 and/or email me at wtam@ci.irwindale.ca.us.

Sincerely,

A handwritten signature in black ink, appearing to be 'WT', written over the typed name.

William Tam, PE
Director of Public Works/City Engineer

cc: John Davidson, City Manager
Fred Galante, City Attorney