Waterkeeper Comments: IGP TMDL Wasteload Allocations

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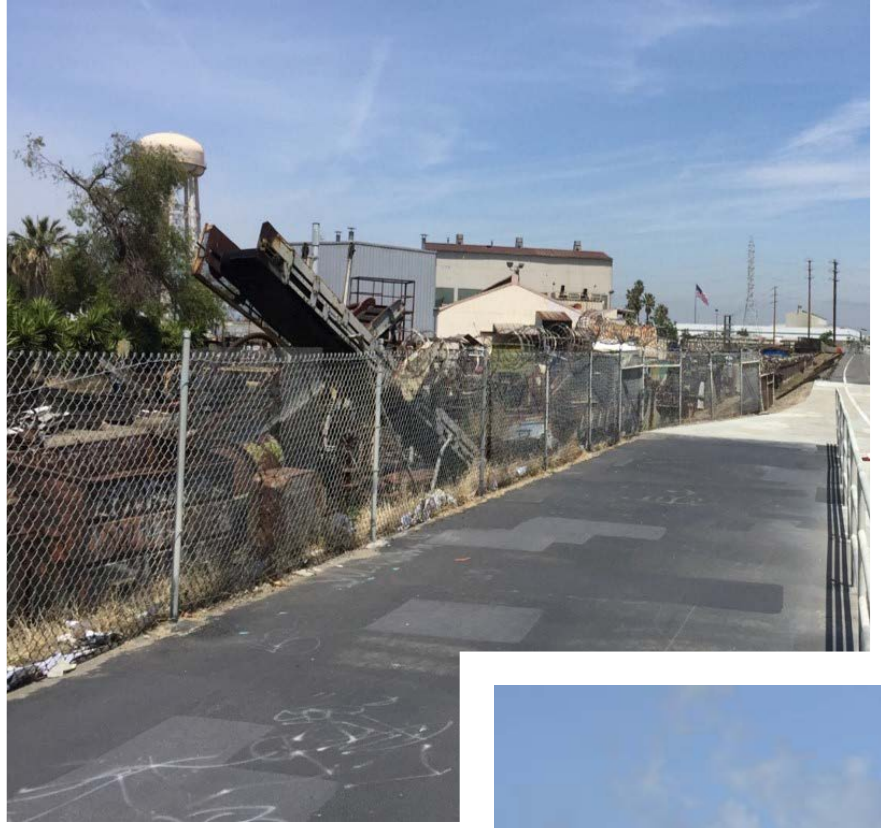
Time Has Run Out for Severely Polluted Waters Impaired by Industrial Pollution



20 Years Later: A Bridge to Nowhere

1997 Previous Industrial Permit Adopted

2000-2012 TMDLs Adopted throughout CA for industrial impairments

2005 Draft Permit considered but not adopted.

2006 Blue Ribbon Panel convened to determine feasibility of NELs:

"The Panel believes that Numeric Limits are feasible for some industrial categories. When there is a TMDL that defines the permissible load for a watershed, the Numeric Limits should be set to meet the TMDL."

2011-2012 Draft Permit considered but not adopted.

2014 Permit Adopted (Without WLAs Incorporated)

Characterized by Board staff at the time as a "bridge permit" to NELs.

2018 Industrial Permit Without Numeric Effluent Limitations that incorporate WLAs

Clean Water Act Requires Incorporation of Wasteload Allocations from TMDLs into NPDES Permits

Once a TMDL with WLAs is developed, the permitting agency *must* incorporate the WLAs into applicable NPDES permits as WQBELs. (40 C.F.R. § 122.44(d)(1)(vii)(B); 40 C.F.R. § 130.2(h).

In doing so, the permitting agency must ensure that the effluent limits of the NPDES permit "are consistent with the assumptions and requirements of any available wasteload allocation [WLA] for the discharge" (40 C.F.R. § 122.44(d)(1)(vii)(B).)

Technology-Based Numeric Action Levels are Illegal

The Clean Water Act - "Once a TMDL with WLAs is developed, the permitting agency must incorporate the WLAs into applicable NPDES permits as WQBELs."

Draft Permit - "NALs/TNALs are not intended to serve as technology-based or water quality-based numeric effluent limitations".

Technology-Based Numeric Action Levels are Illegal

Clean Water Act - the permitting agency must ensure that the effluent limits of the NPDES permit "are consistent with the assumptions and requirements of any available wasteload allocation [WLA] for the discharge".

Draft Permit – TNALs are not "derived directly from either BAT/BCT requirements or receiving water objectives."

The Permit Shields Polluters from the Law

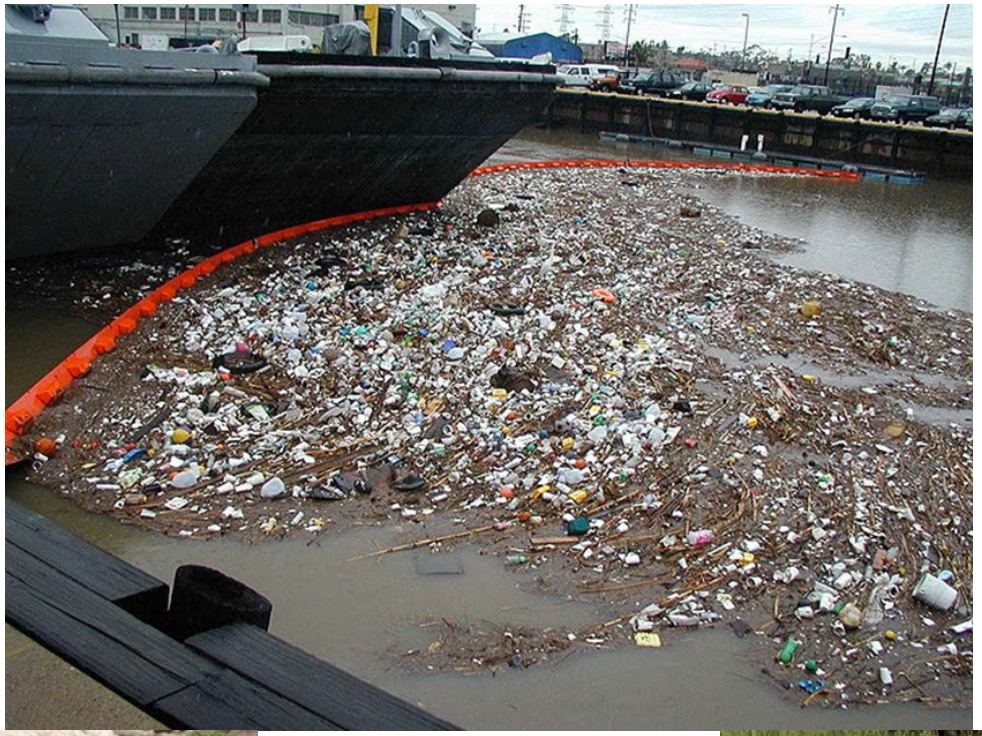
- The Permit concludes that "NAL/TNAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit." Yet the Permit deems compliance with TNALs as compliance with the applicable TMDL WLAs."
- This is counter to the plain language of the permit and law.
- An apparent attempt to shield dischargers from enforcement, rather than to protect communities from pollution.

In Effect, TNALs Perpetuate Impairments

TNALs mean that dischargers will engage in a reporting process rather than meet the WLAs for life of permit.

TNALs can actually prevent stronger Regional Water Board action.

Chollas Creek



Chollas Creek Metals Total Maximum Daily Load (TMDL)

Resolution:	R9-2007-0043
Effective Date:	October 22, 2008
Impaired Water Body:	Chollas Creek
Pollutants:	Dissolved Copper, Lead, and Zinc (Metals)
Responsible Dischargers:	Dischargers within the Chollas Creek watershed.[1] The Chollas Creek Metals TMDL watershed boundaries are defined by those lands in the Chollas HSA (908.22) that drain to the lower 3.5 miles of Chollas Creek and all upstream tributaries to this section.[2]
Required Actions:	Dischargers meet the requirements of the Chollas Creek Metals TMDL provided discharges from their facilities are in compliance with the numeric water quality based effluent limitations (WQBELs) in accordance with Table 3 of this fact sheet; and analyze storm water samples for hardness in order to calculate WQBELs determined by the equations in Table 1 and Table 2 of this fact sheet. The Regional Water Board may require dischargers to implement additional actions to reduce metal discharges based on a site-specific analysis.
TMDL documents are available at: http://www.waterboards.ca.gov/sandiego/water_issues/programs/tmdls/chollascreekmetals.shtml	

Fact Sheet for Chollas Creek Metals TMDL

(NALs) rather than numeric effluent limitations. The San Diego Water Board has determined that enforceable numeric WQBELs are necessary to meet Requirement (1) of the Metals TMDL because WLAs must be met at all point source discharge locations in order to achieve water quality standards in Chollas Creek, and compliance with WQBELs are designed to achieve the WLA. NALs are not enforceable. The applicable WQBELs depend on whether the Discharger is considered new or existing as described in the Compliance Schedule section of this Fact Sheet.

The State Water Board *rejected* San Diego Regional Water Board's numeric WQBEL recommendation—undercutting more protective WLA incorporation.

Because the TNALs are not Water Quality Based Effluent Limitations the Waste Load Allocations Cannot be Incorporated via the TNALs

TNALs are inconsistent with the Clean Water Act on their Face

Why Does this Matter ?

- Because the TNALs reset the Clock for Compliance
- The Tiered Response Process Gives Dischargers at least 4 More years to Implement BMPs to Address Exceedances—well Beyond the Life of this Permit
- Dischargers "deemed in compliance" during process
- Dischargers Already Required to Implement BMPs to meet WQS now Given Another Extension

Draft Permit Proposes Infiltration BMPs with Design Storm

- Waterkeepers Support Infiltration as a Solution
- However the design storm must be adequate to actually meet the Waste Load Allocation

85 Percentile Will Not Achieve Compliance

Design Storm	Copper Level	Compliance
85th percentile, 24-hour	Low (28.5 µg/L)	92%[a]
	Medium (40.8 µg/L)	90%
	High (78 µg/L)	87%
90th percentile, 24-hour	Low (28.5 µg/L)	96%[a]
	Medium (40.8 µg/L)	94%
	High (78 µg/L)	92%
95th percentile, 24-hour	Low (28.5 µg/L)	98%[a]
	Medium (40.8 µg/L)	97%
	High (78 µg/L)	96%

85 Percentile, TNALs Not Equal to Zero for Newport Bay

Table 5-7a. Mass-based Allocation Scheme for Metals in Newport Bay

Category	Type	Copper	Zinc	Lead	Cadmium*
WLA	Urban runoff	3,043	174,057	17,638	9,589
	CalTrans	423	22,866	2,171	1,185
	Boatyards	0	0	0	0
	Other NPDES permittees	190	17,160	1,154	596
	Sub-total	**3,656 lbs/yr**	**214,083 lbs/yr**	**20,963 lbs/yr**	**11,370 lbs/yr**
LA	Ag runoff	215	114	0	0
	Boats	4,542	1,056	0	0
	Air deposition	101	606	68	4
	Undefined (open space, existing sed.)	803	11,414	678	428
	Sub-total	**5,661 lbs/yr**	**13,189 lbs/yr**	**746 lbs/yr**	**431 lbs/yr**
MOS		**2,329 lbs/yr**	**57,068 lbs/yr**	**5,427 lbs/yr**	**2,951 lbs/yr**
Total TMDL		**11,646 lbs/yr**	**285,340 lbs/yr**	**27,136 lbs/yr**	**14,753 lbs/yr**

*values apply to Upper Bay only (estimated as 40% of Newport Bay volume)

Five Boatyards Permitted for Newport Bay

PERMIT_TYPE	APP_ID	WDID	STATUS	NOI_PROCESSED_DATE	NOT_EFFECTIVE_DATE	REGION_BOARD	COUNTY	OPERATOR_NAME	FACILITY_NAME	FACILITY_ADDRESS	FACILITY_ADDRESS_2	FACILITY_CITY
Industrial	457818	8 30I025767	Active	7/2/15		8	Orange	Larsons Shipyard LLC	Larsons Shipyard LLC	2705 Pacific Coast Hwy		Newport Beach
Industrial	209212	8 30I018696	Active	3/16/04		8	Orange	Schock Boat Repair	Schock Boat Repair	2818 Lafayette Rd		Newport Beach
Industrial	209207	8 30I018669	Active	3/8/04		8	Orange	Balboa Boatyard	Balboa Boatyard	2414 Newport Blvd		Newport Beach
Industrial	289032	8 30I019948	Active	11/23/05		8	Orange	Basin Marine Inc	Basin Marine Inc	829 Harbor Island Dr		Newport Beach
Industrial	298241	8 30I020135	Active	3/10/06		8	Orange	Bellport Newport Harbor Ship	Newport Harbor Shipyard	151 Shipyard Way Ste 7		Newport Beach
Industrial	460592		Not Submitted			8	Orange	Sails by Schock Inc dba Schock Boats	schock boats	2900 lafayette ave		Newport Beach

Draft Permit lacks Meaningful Anti-Degradation Analysis

5. Anti-Degradation

The inclusion of Compliance Options and incorporation of TMDL-related requirements of this General Permit will not cause additional degradation of waters of the State. This General Permit requires compliance with water quality standards through implementation of best practicable treatment or control in the form of BPT/BAT/BCT; this General Permit does not authorize an increase in waste discharges to waters of the State from the previous permit.

Staff is Asking the Wrong Question

Not Whether the changes will *increase* current levels of degradation under the Permit

Whether the new Permit will *continue existing* levels of degradation of impaired waters

"To the extent that the Order allows historic practices to continue without change, degradation will continue." *Agua v RWQCB*, 210 Cal App.4th 1255, 1273.

Why Does Anti-Degradation Matter?

- An Anti-Degradation that Complies with Law will Force Staff to face the Impact of the TNAL Scheme
- At least 4 more Years of Continued Degradation of Already Impaired Waters Statewide
- Non-compliance with the TMDL WLAs

The Permit Includes No CEQA Analysis

- NPDES Permits/WDR are exempt from Chapter 3 of CEQA, but not Chapter 1
- Chapter 1 includes the mandate of PRC § 21002, which forbids a project if less damaging feasible alternatives exist
- No analysis or findings on alternatives in draft Permit or record

Why Does CEQA Matter?

- Again, the alternatives analysis would force staff to compare the impacts of TNALs and more years of delay against WQBELs now.
- Integration of CEQA Findings with the Anti-degradation and anti-backsliding analyses will further force staff to confront the water quality impact of their strategy.

The Draft Permit Proposes TMDL Action Levels rather than Numeric Effluent Limitations

"The NALs/TNALs are not intended to serve as technology-based or water quality based numeric effluent limitations. The NALs/TNALs are not derived directly from either BAT/BCT requirements or receiving water objectives." Draft Permit at 77.

"NAL/TNAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit." Draft Permit at 77.

Conclusions

The TNALs and Infiltration design storm are not consistent with the TMDL WLAs and are illegal.

Giving industrial dischargers 4 more years, on top of 4 years already provided, to protect impaired waters, is bad policy.

To the extent truly incorporating WLAs into the General Permit is too complicated an endeavor, Sector Specific Permits continue to be the logical solution.

Recommendations

(1) Incorporate Waste Load Allocations as Water Quality Based Effluent Limitations – NOT TNALs.

(2) We support the infiltration BMP alternative approach, but at a 95th percentile design storm – except where zero WLAs apply.

(3) Make time schedules consistent with the TMDLs – not the arbitrary TNAL tiering schedule.

(4) Conduct a real anti-degradation analysis.

(5) Conduct a real CEQA review.