

1 be an effective tool for addressing storm water quality, without evidence in the record that they always
2 are better, they should not be mandated to the exclusion of other effective tools.

3 Accordingly, the State Board should remand the Permit to the Regional Board to revise
4 Section XII.C to allow Permittees the flexibility to choose the best control measures to meet the MEP
5 standard.

6 **B. It Is Inappropriate and Improper for the Permit to Implement**
7 **Technical TMDLs; the Clean Water Act Does Not Require that MS4**
8 **Permits Implement TMDLs.**

9
10 **1. TMDLs Must be Adopted Into the Basin Plan with**
11 **Implementation Plans.**

12 Section XVIII.B of the Permit implements so-called “technical” TMDLs. These are
13 EPA-developed TMDLs that do not have implementation plans. The Regional Board has not adopted
14 these technical TMDLs into the Basin Plan.

15 Under federal law, the Regional Board must incorporate TMDLs into its Basin Plan. *See*
16 40 C.F.R. § 130.7(d)(2). Under state law, the TMDLs must include implementation plans. *See, e.g., Do*
17 *TMDLs Have to Include Implementation Plans?*, Memorandum dated March 1, 1999, from William R.
18 Attwater, Chief Counsel, State Board Office of Chief Counsel, to Gerard J. Thibeault, Executive Officer,
19 Santa Ana Regional Water Quality Control Board (“The Regional Water Quality Control Boards
20 (Regional Water Boards) are required to incorporate TMDLs in their water quality control plans (Basin
21 Plans). Implementation plans are a required component of basin plans.”). *See also* State Water
22 Resources Control Board. *Total Maximum Daily Loads(TMDL) Questions & Answers*, April 2001
23 (“Before a TMDL is enforceable it must be incorporated into the appropriate Basin Plan by amending
24 the Basin Plan in accordance with state law. If TMDLs are not incorporated into Basin Plans, they have
25 no legal standing under state law.”).

26 U.S. EPA recognizes that in California even EPA-developed TMDLs must be
27 incorporated into the Basin Plan. *See* U.S. EPA Region 9, *Guidance for Developing TMDLs in*
28 *California*, Sections 3.2 and 3.4, January 7, 2000.

///

1 Because the Regional Board has not adopted into the Basin Plan the technical TMDLs
2 referenced in Section XVIII.B of the Permit, they are not enforceable and should not be included in the
3 Permit. Accordingly, the State Board should remand the Permit to the Regional Board to remove the
4 technical TMDLs.

5 **2. EPA’s Technical TMDL for an Impaired Segment of Coyote**
6 **Creek in the Los Angeles Region Cannot be Implemented in**
7 **the Permit.**

8 One of the technical TMDLs implemented in Section XVIII.B of the Permit is a technical
9 TMDL for an impaired segment of Coyote Creek located in the Los Angeles Region, not the Santa Ana
10 Region. The Regional Board has not listed the segment of Coyote Creek that is located in the Santa Ana
11 Region as impaired. In addition to the argument above for why it is inappropriate and improper for the
12 Regional Board to implement technical TMDLs in the Permit, implementation of the Coyote Creek
13 TMDL in the Permit is inappropriate and improper for several additional reasons.

14 First, it is not appropriate under the CWA to implement a TMDL for water segment that
15 is not listed as impaired. Under the CWA and U.S. EPA’s implementing regulations, states are to
16 identify impaired water segments, rank the segments in order of priority, and then establish TMDLs for
17 those segments according to their ranking. *See, e.g., San Francisco Bay Keeper v. Whitman*, 297 F.3d
18 877, 880 (9th Cir. 2002). The Regional Board has not listed the upper reach of Coyote Creek as an
19 impaired segment, nor has it proposed the upper reach for listing as impaired under section 303(d).
20 Accordingly, it is inappropriate to implement a TMDL for the segment.

21 Second, by means of Section XVIII.B of the Permit, the Regional Board appears to be
22 attempting to implement a TMDL for the upper reach of Coyote Creek without going through the
23 rigorous public process required to establish and implement a TMDL. If the Regional Board intends to
24 establish, implement, and enforce TMDLs for the upper reach of Coyote Creek, it needs to conduct a
25 water body assessment for the segment, develop load and waste load allocations for the segment,
26 develop an implementation plan for meeting the allocations, amend the Basin Plan to incorporate the
27 TMDLs, and allow public participation in the process. It cannot simply incorporate into the Permit the
28 allocations developed by or for another Regional Board for a downstream waterbody.

1 Accordingly, the State Board should remand the Permit to the Regional Board to remove
2 the Coyote Creek TMDL from the Permit.

3 **3. Because the Clean Water Act Does Not Require TMDLs be**
4 **Implemented in MS4 Permits, the Regional Board Must**
5 **Comply with State Law to Implement TMDLs in the Permit.**

6 Neither the CWA nor U.S. EPA's storm water regulations require that MS4 permits
7 include provisions to implement TMDLs. It is true that where water quality-based effluent limitations
8 ("WQBELs") designed to meet Water Quality Standards ("WQS") are included in an NPDES permit,
9 the limits must be consistent with the assumptions and requirements of any available wasteload
10 allocations ("WLAs") prepared by the state and approved by U.S. EPA. 40 C.F.R. §
11 122.44(d)(1)(vii)(B). This provision applies to NPDES permits "when applicable." 40 C.F.R. § 122.44.
12 However, the applicable standard for MS4 permits is the MEP standard; federal law does not require
13 that MS4 permits include conditions designed to meet WQS. *See Defenders of Wildlife v. Browner*,
14 191 F.3d 1159 (9th Cir. 1999). Thus, the federal regulation does not require that MS4 permits include
15 WQBELs consistent with available WLAs. In other words, federal law does not require that MS4
16 permits implement TMDLs.

17 To the extent the Regional Board has discretion to implement TMDLs in MS4 permits, it
18 must comply with state law requirements. These requirements include considering the economic effects
19 of such implementation (*see, e.g., City of Burbank v. State Water Resources Control Board* (2005) 35
20 Cal.4th. 613), and complying with the California Constitution's prohibition against unfunded mandates
21 (i.e., the Regional Board must provide funding for such implementation).

22 Accordingly, the State Board should remand the Permit to the Regional Board to revise
23 Section XVIII to comport with state law.

24 **VIII. NOTICE TO REGIONAL BOARD**

25 As indicated in the attached Proof of Service, a copy of this Petition is being
26 simultaneously served by Federal Express upon the Executive Officer of the Regional Board.

1 **IX. ISSUES PREVIOUSLY RAISED**

2 As noted in Section IV above, the substantive issues raised in this Petition were presented
3 to the Regional Board before the Regional Board acted on May 22, 2009.

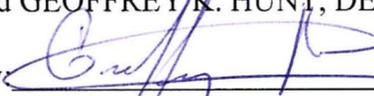
4 **X. CONCLUSION**

5 For the reasons stated herein, Petitioners have been aggrieved by the Regional Board's
6 action in adopting several provisions in the Permit. However, depending on Regional Board staff's
7 actions regarding these provisions, the issues raised in this Petition may be resolved or rendered moot.
8 Accordingly, until such time as Petitioners request the State Board to consider this Petition, Petitioners
9 request the State Board hold this Petition in abeyance.

10
11 DATED: June 22, 2009

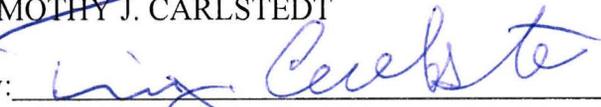
12 Respectfully submitted,

13 NICHOLAS S. CHRISOS, COUNTY COUNSEL
14 and GEOFFREY K. HUNT, DEPUTY

15 By: 
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PROOF OF SERVICE BY EMAIL

I am over 18 years of age, not a party to this action and employed in San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067.

On June 22, 2009, at approximately 3:00 p.m., I served by email a copy of:

PETITION FOR REVIEW
(Re: COUNTY OF ORANGE AND ORANGE COUNTY FLOOD CONTROL DISTRICT FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION, IN ADOPTING ORDER NO. R8-2009-0030, NPDES PERMIT NO. CAS618030 (Without Exhibits))

on the following:

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
1001 "I" Street, 22nd Floor
Sacramento, CA 95814
Email: jbashaw@waterboards.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 22, 2009.



Connie L. Noble

*