

**State of California
California Regional Water Quality Control Board, Los Angeles Region**

RESOLUTION NO. 2005-XXX

~~June 2~~July 7, 2005

**Amendment to the *Water Quality Control Plan for the Los Angeles Region* to
Incorporate a Total Maximum Daily Load for Toxic Pollutants in Ballona Creek
Estuary**

WHEREAS, the California Regional Water Quality Control Board, Los Angeles Region, finds that:

1. The Federal Clean Water Act (CWA) requires the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) to develop water quality objectives, which are sufficient to protect beneficial uses for each water body found within its region. Water bodies that do not meet water quality objectives or support beneficial uses are considered impaired.
2. A consent decree between the U.S. Environmental Protection Agency (USEPA), Heal the Bay, Inc. and BayKeeper, Inc. was approved on March 22, 1999. This court order directs the USEPA to complete Total Maximum Daily Loads (TMDLs) for all impaired waters within 13 years. A schedule was established in the consent decree for the completion of the first 29 TMDLs within 7 years, including completion of a TMDL to reduce toxic pollutants in Ballona Creek and Ballona Creek Estuary by March 22, 2005. The remaining TMDLs will be scheduled by Regional Board staff within the 13-year period.
3. USEPA and the consent decree plaintiffs agreed to extend the completion deadline for the Ballona Creek Estuary Toxic Pollutants TMDL to December 22, 2005, in order to enable the State to complete its adoption process and USEPA to approve the State-adopted TMDL.
4. The elements of a TMDL are described in 40 CFR 130.2 and 130.7 and section 303(d) of the CWA, as well as in USEPA guidance documents (Report No. EPA/440/4-91/001). A TMDL is defined as the sum of the individual waste load allocations for point sources, load allocations for nonpoint sources and natural background (40 CFR 130.2). Regulations further stipulate that TMDLs must be set at levels necessary to attain and maintain the applicable narrative and numeric water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality (40 CFR 130.7(c)(1)). The regulations in 40 CFR 130.7 also state that TMDLs shall take into account critical conditions for stream flow, loading and water quality parameters.
5. The numeric targets in this TMDL are not water quality objectives and do not create new bases for enforcement against dischargers apart from the existing, numeric water quality standards they translate. The targets merely establish the bases through which load allocations (LAs) and waste load allocations (WLAs) are calculated. WLAs are only enforced for a discharger's own discharges, and then only in the context of its National Pollutant Discharge Elimination System (NPDES) permit, which must ~~be contain~~ effluent limits consistent with the assumptions and requirements of the WLA (40 CFR

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122.44(d)(vii)(B)). The Regional Board will develop permit requirements through subsequent permit actions that will allow all interested persons, including but not limited to municipal storm water dischargers, to provide comments on how the WLA will be translated into permit requirements.

6. As envisioned by Water Code section 13242, the TMDL contains a “description of surveillance to be undertaken to determine compliance with objectives.” The Compliance Monitoring and Special Studies elements of the TMDL recognize that monitoring will be necessary to assess the on-going condition of Ballona Creek and its tributaries and to assess the on-going effectiveness of efforts by dischargers to reduce toxic pollutants loading to Ballona Creek Estuary. Special studies may also be appropriate to provide further information about new data, new or alternative sources, and revised scientific assumptions. The TMDL does not establish the requirements for these monitoring programs or reports, although it does recognize the type of information that will be necessary to secure. The Regional Board’s Executive Officer will issue orders to appropriate entities to develop and to submit monitoring programs and technical reports. The Executive Officer will determine the scope of these programs and reports, taking into account any legal requirements, and issue the orders to the appropriate entities.
7. Upon establishment of TMDLs by the State or USEPA, the State is required to incorporate the TMDLs along with appropriate implementation measures into the State Water Quality Management Plan (40 CFR 130.6(c)(1), 130.7). This Water Quality Control Plan for the Los Angeles Region (Basin Plan), and applicable statewide plans, serves as the State Water Quality Management Plans governing the watersheds under the jurisdiction of the Regional Board. Attachment A to this resolution contains the Basin Planning language for this TMDL.
8. Ballona Creek flows as an open channel for just under 10 miles from Los Angeles (South of Hancock Park) through Culver City, reaching the Pacific Ocean at Playa del Rey. Ballona Creek and its tributaries drain a watershed with an area of approximately 128 square miles. The Ballona Creek watershed is comprised of the Cities of Beverly Hills and West Hollywood, and parts of the Cities of Culver City, Inglewood, Los Angeles, Santa Monica, and unincorporated areas of Los Angeles County. The proposed TMDL addresses impairments of water quality caused by toxic pollutants in Ballona Creek Estuary sediments.

~~9. On May 18, 2000, the USEPA promulgated numeric criteria for priority pollutants for the State of California, known as the California Toxics Rule (CTR) codified as 40 CFR section 131.38. Federal water quality standards under section 303 of the Clean Water Act consist of designated uses and criteria to protect those uses (40 CFR 131.3(i)). Designated uses are beneficial uses under state law, and criteria are water quality objectives under state law. The CTR establishes the numeric water quality objectives for various toxic pollutants. These objectives apply to all inland surface waters within the State of California, including the Los Angeles region (40 CFR 131.38(d)(2)).~~

~~10.9. “[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.” (33 U.S.C. 1251(a)(3).) Water quality standards, including the CTR, reflect this express national policy of Congress. When a pollutant is present at levels in excess of the CTR numbers water quality standards, then the pollutant is present in toxic amounts. In this sense, the numeric objectives in the CTR are USEPA’s determination of when priority pollutants are present at toxic amounts in contravention of Congress’s national policy.~~

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- ~~14.10.~~ The Regional Board's goal in establishing the Ballona Creek Estuary Toxic Pollutants TMDL is to protect the aquatic life and wildlife beneficial uses of Ballona Creek Estuary and to achieve sediment quality to protect these beneficial uses.
- ~~12.11.~~ Regional Board staff have prepared a detailed technical document that analyzes and describes the specific necessity and rationale for the development of this TMDL. The technical document entitled "TMDL for Toxic Pollutants in Ballona Creek Estuary" is an integral part of this Regional Board action and was reviewed, considered, and accepted by the Regional Board before acting. Further, the technical document provides the detailed factual basis and analysis supporting the problem statement, numeric targets (interpretation of the narrative and numeric water quality objectives, used to calculate the pollutant allocations), source analysis, linkage analysis, waste load allocations (for point sources), load allocation (for nonpoint sources), margin of safety, and seasonal variations and critical conditions of this TMDL.
- ~~13.12.~~ On ~~June 2~~July 7, 2005, prior to the Board's action on this resolution, public hearings were conducted on the Ballona Creek Estuary Toxic Pollutants TMDL. Notice of the hearing was sent to all known interested persons and published in the Los Angeles Times on March 27, 2005 in accordance with the requirements of Water Code Section 13244.
- ~~14.13.~~ The public has had reasonable opportunity to participate in review of the amendment to the Basin Plan. A draft of the Ballona Creek Estuary Toxic Pollutants TMDL was released for public comment on March 28, 2005. A Notice of Hearing and Notice of Filing were published and circulated 45 days preceding Board action, and Regional Board staff responded to oral and written comments received from the public. The Regional Board held a public hearing on ~~June 2~~July 7, 2005 to consider adoption of the TMDL.
- ~~15.14.~~ In amending the Basin Plan, the Regional Board considered the requirements set forth in Sections 13240 and 13242 of the California Water Code.
- ~~16.15.~~ The amendment is consistent with the State Antidegradation Policy (State Board Resolution No. 68-16), in that it does not authorize any lowering of water quality and is designed to implement existing water quality objectives. Likewise, the amendment is consistent with the federal Antidegradation Policy (40 CFR 131.12).
16. Because the TMDL implements existing water quality objectives, the Regional Board has consistently maintained (along with the State Water Resources Control Board) that adopting a TMDL does not require the water boards to consider the factors of Water Code section 13241. The consideration of the Water Code section 13241 factors, by section 13241's express terms, only applies 'in establishing water quality objectives.' Here the Regional Board is not establishing water quality objectives, but as required by section 303(d)(1)(C) of the Clean Water Act is adopting a TMDL that will implement the previously established objectives that have not been achieved.
- ~~14.17.~~ While the Regional Board is not required to consider the factors of Water Code section 13241, it, nonetheless, has developed and received significant information pertaining to the Water Code section 13241 factors and considered that information in developing and adopting this TMDL. The past, present, and probable future beneficial uses of water have been considered in that Ballona Creek Estuary is designated for a multitude of beneficial uses in the Basin Plan. Various living organisms (including vegetation, fish, invertebrates, and wildlife) are present in, transient through, and will be present in Ballona Creek Estuary. The

environmental characteristics of Ballona Creek Estuary are spelled out at length in the Basin Plan and in the technical documents supporting this Basin Plan amendment, and have been considered in developing this TMDL. Water and sediment quality conditions that reasonably could be achieved through the coordinated control of all factors which affect water and sediment quality in the area have been considered via the discussion of likely means of compliance, and studies indicating that a mix of best management practices (BMPs), rather than advanced treatment plants, would achieve the TMDL. Authorizing certain storm water dischargers to rely on BMPs in the first instances reflects the reasonableness of the action in terms of the ability to implement the requirements, as well as a belief that the water and sediment quality conditions can reasonably be achieved in any event. Establishing a plan that will ensure Ballona Creek Estuary sediments are not toxic is a reasonable water quality condition. However, to the extent that there would be any conflict between the consideration of the factor in Water Code section 13241 subdivision (c), if the consideration were required, and the Clean Water Act, the Clean Water Act would prevail. Notably, national policy established by Congress prohibits the discharge of toxic pollutants in toxic amounts. Economic considerations were considered throughout the development of the TMDL. Some of these economic considerations arise in the context of Public Resources Code section 21159 and are equally applicable here. The TMDL maps out a 15-year approach to implementing national policy prohibiting toxic pollutants in toxic amounts. This implementation program recognizes the economic limitations on achieving immediate compliance—especially for municipal storm water dischargers. The TMDL also authorizes the use of BMPs, to the extent authorized by law, for various storm water dischargers. Again, these recognize the economic limitations on certain storm water dischargers, while remaining faithful to the requirement to implement existing water quality standards and national policy. As part of this economic consideration, the Regional Board considered several studies pertaining to storm water (some submitted by dischargers showing costs as high as several hundred billion to implement all water quality standards in the Basin Plan through advanced treatment plants and some developed by the State Water Resources Control Board and Regional Board through economic studies prepared by professors at the University of Southern California, the University of California at Los Angeles, California State University at Sacramento showing costs of several billion dollars to implement all water quality standards in the Basin Plan using a mix of BMPs). The former studies consist of worst-case assumptions and these studies' high-end figures assume the widespread construction of treatment facilities. Based on existing policy geared toward BMPs and the latter studies, these assumptions are unrealistic. While section 13241 of the Water Code does not require a balancing of the costs and benefits, the latter studies also conclude that any costs would be outweighed by the societal and economic benefits to Los Angeles' coastal economy. Again, these "economic considerations" were all considered and are reflected in an implementation program that is flexible and allows 15 years to comply with the final WLAs. The need for housing within the region has been considered, but this TMDL is unlikely to affect housing needs. Whatever housing impacts could materialize are ameliorated by the flexible nature of this TMDL and the 15-year implementation period. Finally, the TMDL is likely to facilitate the use of recycled water, as demonstrated by the City of Los Angeles' Integrated Resources Plan.

- ~~17.~~^{18.} Pursuant to Public Resources Code section 21080.5, the Resources Agency has approved the Regional Water Boards' basin planning process as a "certified regulatory program" that adequately satisfies the California Environmental Quality Act (CEQA) (Public Resources Code, Section 21000 et seq) requirements for preparing environmental documents. (14 Cal. Code Regs. § 15251(g); 23 Cal. Code Regs. § 3782.) As such, the Regional Water Board's basin planning documents together with an Environmental Checklist, are the "substitute documents" that contain the required environmental documentation under CEQA. (23 Cal

Code Regs. § 3777.) The detailed technical report entitled “Total Maximum Daily Load for Toxic Pollutants in Ballona Creek Estuary,” responses prepared by staff to address comments raised during the development of the TMDL, this resolution, and the Environmental Checklist serve as the substitute documents for this project. The project itself is the establishment of a TMDL for toxic pollutants in Ballona Creek Estuary. While the Regional Board has no discretion to not establish a TMDL (the TMDL is required by federal law) or for determining the water quality standard to be applied, the Board does exercise discretion in assigning waste load allocations and load allocations, determining the program of implementation, and setting various milestones in achieving the waste load allocations.

~~18.~~19. A CEQA Scoping hearing was conducted on June 12, 2003 at the Los Angeles Regional Water Quality Control Board, 320 West 4th Street, Los Angeles, CA 90013. A notice of the CEQA Scoping hearing was sent to interested parties including cities and/or counties with jurisdiction in or bordering the Ballona Creek watershed.

~~19.~~20. The lengthy implementation period allowed by the TMDL, will allow many compliance approaches to be pursued. In preparing the accompanying CEQA substitute documents, the Regional Board has considered the requirements of Public Resources Code section 21159 and California Code of Regulations, title 14, section 15187, and intends the substitute documents to serve as a tier 1 environmental review. Nearly all of the compliance obligations will be undertaken by public agencies that will have their own obligations under CEQA. Project level impacts will need to be considered in any subsequent environmental analysis performed by other public agencies, pursuant to Public Resources Code section 21159.2. If not properly mitigated at the project level, there could be adverse environmental impacts. The substitute documents for this TMDL, and in particular the checklist and staff’s responses to comments, identify broad mitigation approaches that should be considered at the project level. Consistent with CEQA, the substitute documents do not engage in speculation or conjecture and only consider the reasonably foreseeable environmental impacts of the methods of compliance, the reasonably foreseeable feasible mitigation measures, and the reasonably foreseeable alternative means of compliance, which would avoid or eliminate the identified impacts.

~~20.~~21. The proposed amendment could have a significant adverse effect on the environment. However, there are feasible alternatives, feasible mitigation measures, or both that would substantially lessen any significant adverse impact. The public agencies responsible for those parts of the project can and should incorporate such alternatives and mitigation into any subsequent projects or project approvals. Possible alternatives and mitigation are described in the CEQA substitute documents, specifically the TMDL technical report and the Environmental Checklist. To the extent the alternatives, mitigation measures, or both are not deemed feasible by those agencies, the necessity of implementing the federally required toxic pollutants TMDL and removing the toxicity impairment from Ballona Creek Estuary (an action required to achieve the express, national policy of the Clean Water Act) outweigh the unavoidable adverse environmental effects.

~~21.~~22. Health and Safety Code section 57004 requires external scientific peer review for certain water quality control policies. Prior to public notice of the draft TMDL, the Regional Board submitted the scientific basis and scientific portions of the Ballona Creek Estuary Toxic Pollutants TMDL to the University of California for external scientific peer review. A written peer review report was received by the Regional Board. Minor modifications were made to the scientific portions of the TMDL to address concerns identified during the peer review process.

22.23. The regulatory action meets the “Necessity” standard of the Administrative Procedures Act, Government Code, Section 11353, Subdivision (b). As specified above, federal regulations require that TMDLs be incorporated into the water quality management plan. The Regional Board’s Basin Plan is the Regional Board’s component of the water quality management plan, and the Basin Plan is how the Regional Board takes quasi-legislative, planning actions. Moreover, the TMDL is a program of implementation for existing water quality objectives, and is, therefore, appropriately a component of the Basin Plan under Water Code section 13242. The necessity of developing a TMDL is established in the TMDL staff report, the section 303(d) list, and the data contained in the administrative record documenting the toxic pollutant impairments of the Ballona Creek Estuary.

23.24. The Basin Plan amendment incorporating a TMDL for Toxic Pollutants in Ballona Creek Estuary must be submitted for review and approval by the State Water Resources Control Board (State Board), the State Office of Administrative Law (OAL), and the USEPA. The Basin Plan amendment will become effective upon approval by USEPA. A Notice of Decision will be filed with the Resources Agency.

23.25. The Regional Board has previously endorsed integrated water resources approaches to addressing Municipal Separate Storm Sewer System (MS4) implementation of TMDLs. The Regional Board believes integrated approaches require additional time for planning and development and are suitable for the 15-year implementation period discussed in this TMDL. As presently proposed, the TMDL implementation program does not distinguish between integrated and nonintegrated approaches. Further consideration of an implementation schedule incorporating and establishing incentives for an integrated water-resources approach, similar to the Santa Monica Bay Beaches Bacteria TMDL, is appropriate.

THEREFORE, be it resolved that pursuant to sections 13240 and 13242 of the Water Code, the Regional Board hereby amends the Basin Plan as follows:

1. Pursuant to Sections 13240 and 13242 of the California Water Code, the Regional Board, after considering the entire record, including oral testimony at the hearing, hereby adopts the amendments to Chapter 7 of the Water Quality Control Plan for the Los Angeles Region, as set forth in Attachment A hereto, to incorporate the elements of the Ballona Creek Estuary Toxic Pollutants TMDL.
2. The Executive Officer is directed to forward copies of the Basin Plan amendment to the State Board in accordance with the requirements of section 13245 of the California Water Code.
3. The Regional Board requests that the State Board approve the Basin Plan amendment in accordance with the requirements of sections 13245 and 13246 of the California Water Code and forward it to OAL and the USEPA.
4. If during its approval process Regional Board staff, the State Board or OAL determines that minor, non-substantive corrections to the language of the amendment are needed for clarity or consistency, the Executive Officer may make such changes, and shall inform the Board of any such changes.

4.5. Regional Board staff are directed to explore and to propose revisions to the TMDL implementation schedule that incorporate an integrated water resources approach, similar to

the implementation program in the Santa Monica Bay Beaches Bacteria TMDL. The Regional Board will consider any revisions proposed by staff, but is not committing to any particular course of action.

5.6. The Executive Officer is authorized to sign a Certificate of Fee Exemption.

I, Jonathan Bishop, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Los Angeles Region, on ~~June 2~~July 7, 2005.

Jonathan Bishop
Executive Officer

Date