# LEGAL COMMENTS ON L.A. REGIONAL BOARD'S PROPOSED AMENDMENT TO BASIN PLAN FOR THE LOS ANGELES REGION TO INCORPORATE TOTAL MAXIMUM DAILY LOADS FOR DOMINGUEZ CHANNEL AND GREATER LOS ANGELES AND LONG BEACH WATER TOXIC POLLUTANTS

**Rutan & Tucker, LLP**
**Richard Montevideo, Esq.**
**611 Anton Blvd, Suite 1400, Costa Mesa, CA 92626**
**Telephone No.: Direct Dial: (714) 662-4642**
**Facsimile No.: 714-546-9035**
**Email: rmontevideo@rutan.com**

**Submitted on behalf of the City of Signal Hill and Other Joining Los Angeles County Cities**

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## I. INTRODUCTION

These comments are being submitted on behalf of the City of Signal Hill (hereafter, "City") and other cities who may join in these comments (collectively, "Cities"), in response to the California Regional Water Quality Control Board, Los Angeles Region's ("Regional Board") proposed amendments to the Water Quality Control Plan for the Los Angeles Region ("Basin Plan") to incorporate total maximum daily loads ("TMDLs") for toxic pollutants for the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters, as described in the Regional Board's Notices of Hearing dated December 17 and 30, 2010, the Tentative Resolution, the Tentative Basin Plan Amendment ("Tentative BPA"), the December, 2010 TMDL Staff Report ("TMDL Report"), and the Substitute Environmental Documents for the TMDLs ("SED"). For the following reasons, as further explained in these comments, as well as in technical and other comments submitted on behalf of the Cities and other parties, the subject TMDLs cannot be adopted in their present form, and to do so would be an abuse of discretion and action that is arbitrary, capricious and contrary to law:

(1) The proposed TMDLs, at their core, impose a clean-up/remedial action requirement which compels the removal of sediment in the Los Angeles and Long Beach Harbor areas. Yet, this remedial action is a liability that has already been resolved by Signal Hill and numerous other cities in Los Angeles and Orange Counties through a U.S. District Court approved Consent Decree entered into with both the United States of America and the State of California (including the Regional Board);

(2) The Regional Board has entirely misused the TMDL process, as TMDLs cannot be developed and utilized as a vehicle to compel the clean-up of contaminated sediments caused by alleged past releases of hazardous substances;

(3) The TMDLs have not been developed in compliance with the applicable requirements of the California Administrative Procedures Act ("APA" – Gov. Code § 11340, *et seq.*), and particularly fail the "authority," "clarity," "necessity" and "non-duplication" requirements of the APA;

(4) The Regional Board has failed to consider the factors and requirements set forth in California Water Code ("CWC") sections 13000, 13240 and 13241 in connection with the development of the subject TMDL, including, among other factors, the need to consider whether the TMDLs are "reasonably" and "economically" achievable, and the "environmental characteristics" of the water bodies in issue (including their existing contaminated condition due to contaminated sediment);

(5) The TMDLs, as proposed, appear to be designed to require compliance through the use of strict numeric effluent limits in municipal separate storm sewer system ("MS4") National Pollutant Discharge Elimination System ("NPDES") Permits, a mandate that is not required under federal law and one that is contrary to State Policy;

(6) The Regional Board has failed to develop sufficient scientific data and conduct the necessary studies so that "proper technical conditions" exist to show that the TMDLs are "suitable for calculation," and to develop sound maximum "daily" load allocations, as required by the Clean Water Act;

(7) The TMDLs were not developed after full consultation with affected local governmental agencies, as required by law;

(8) The Regional Board may only impose monitoring and reporting requirements after conducting a cost/benefit analysis in accordance with CWC sections 13165, 13225(c), and 13267;

(9) The proposed TMDLs, once effective and enforceable, would result in Unfunded State Mandates; and

(10) The proposed TMDLs were not developed in accordance with the requirements of the California Environmental Quality Act ("CEQA" – Public Res. Code § 21000 *et seq.*).

## II. THE PRINCIPAL REQUIREMENT OF THE PROPOSED TMDL, I.E., THE REQUIREMENT TO REMOVE CONTAMINATED SEDIMENT FROM THE LOS ANGELES AND LONG BEACH HARBORS, IS A LIABILITY THAT HAS ALREADY BEEN RESOLVED BY THE LOS ANGELES AND ORANGE COUNTY CITIES THROUGH THE ISSUANCE OF A FORMAL CONSENT DECREE BY THE U.S. DISTRICT COURT.

The prime component of the proposed TMDL is the removal of highly contaminated sediment in the Los Angeles and Long Beach Harbors. (*See, e.g.,* Tentative Resolution, p. 5, ¶ 17 ["***Implementation of the TMDL will likely focus on removal of highly contaminated sediment...***"]; Tentative Basin Plan Amendment, p. 2 ["***The goal of this TMDL is to protect and restore*** fish tissue, water and ***sediment quality*** in Dominguez Channel and greater Los Angeles and Long Beach Harbor waters by ***removing contaminated sediment*** and controlling the sediment loading and accumulation of contaminated sediments in the Harbors."]; TMDL Staff Report, p. 127 ["***The overall project cost arising from dredging the contaminated sediment*** and Harbors and pollutant loading reduction in stormwater ***could be in the range of $733 million to $905 million.***"]; and the SED, p. 5 ["***The goal of this TMDL is to protect and restore*** fish tissue and ***sediment quality*** in Dominguez Channel in greater Los Angeles and Long Beach Harbor waters ***by removing contaminated sediment*** and controlling the sediment loading and accumulation of contaminated sediment in the Harbors."].)

The Regional Board's draft TMDL documentation further makes clear that the sediment removal work in the TMDL is closely tied to the efforts of United States Environmental Protection Agency ("US EPA") in requiring "response costs" and other "remedial action"

involving largely what is known as the "Montrose Superfund Site." According to the Tentative BPA:

> Two Superfund sites are located in Dominguez Channel Watershed: **the Montrose Superfund Site (DDT)** and the Del Amo Superfund Site (benzene). Montrose Superfund Site includes multiple operable units (OUs), which are identified as **investigation areas potentially containing site-related contamination. . . .** US EPA has not reached a final remedial decision with respect to certain of the Montrose Superfund operable units (OUs) that remain contaminated with DDT.... ***The* TMDL, its wasteload and load allocations, and other regulatory provisions of this TMDL may be applicable or relevant and appropriate requirements (ARARs) as set forth in section 121(d) of the Comprehensive Environmental Response, Compensation Liability Act (42 U.S.C. § 9621(d)) for those OUs. The TMDL for DDT should be taken into account in the course of the remedial decision-making process.** The Regional Board requires the Cities of Los Angeles and/or Los Angeles County, should they decide to take action that impacts one of the OUs, to consult with US EPA's Superfund Division in advance of such action.

(Tentative BPA, p. 29, emphasis added.) In short, the most critical component of the proposed TMDL involves the "removal" of "contaminated sediment" from within the Los Angeles and Long Beach Harbors, and potentially beyond; it is also the most costly aspect of the TMDL with the Regional Board estimating its cost at approximately $680 million for the removal of 11,173,066 cubic yards of contaminated sediment, but with the total quantity of contaminated sediment ballooning to 35,527,233 cubic yards (at an estimated cost of $2.2 billion) if the TMDLs' targets are to be met. (TMDL Report, p. 125.)

Yet, as partly reflected in the TMDL documents, this contaminated sediment work has for many years, been and continues to be the subject of extensive and exhaustive litigation initiated by US EPA and the State of California. In fact, the City of Signal Hill, along with numerous other cities throughout Los Angeles County (as well as certain cities in Orange County), were involved in this litigation through most of the 1990s. This litigation, as to the

various settling local governmental entities, including the Cities, was resolved through the issuance of a federal Consent Decree by the U.S. District Court in and for the Central District of California in 1993, which Consent Decree was later amended in August of 1999. (A true and correct copy of this Amended Consent Decree is attached hereto as Exhibit "1" – hereafter "Cities' Consent Decree.")

In the Cities' Consent Decree, the Settling Local Governmental Entities (as identified therein) agreed to contribute, either through the payment of funds or in-kind services, $45.7 million dollars to, in part, address the existence of contaminated sediments within the Los Angeles and Long Beach Harbors. These contaminated sediments are now the same sediments that are similarly to be addressed with the proposed TMDLs. In return for this $45.7 million of funds and services, the United States and the State of California, and all "agencies and instrumentalities thereof," covenanted and agreed not to take any civil or administrative action against any of the Settling Local Governmental Entities therein (including the Cities) for any "Natural Resource Damages" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" – 42 U.S.C. § 9601 et seq.), or under any other federal, state or common law. (Cities' Consent Decree, p. 30-31.)

The term "Natural Resource Damages" is defined in the Cities' Consent Decree as including "loss of use, ***restoration costs***, resource replacement costs or equivalent resource values, and Damage Assessment Costs, and ***response costs*** incurred by the [Federal and State Natural Resource] Trustees, with respect to injury to, destruction of, or loss of ***any and all natural resources*** in and around the Montrose NPL Site and the Montrose NRD Area." (Cities' Consent Decree, p. 26, emphasis added.)

The term "Montrose NPL Site" is defined broadly in the Cities' Consent Decree as including, in part, "those portions of the Normandie Avenue Ditch adjacent to and south of 20201 South Normandie Avenue; the Kenwood Drain, ***the Torrance Lateral***; ***the Dominguez Channel*** (from Laguna Dominguez to the Consolidated SLP); ***the portion of the Los Angeles Harbor known as the Consolidated Slip*** from the mouth of the Dominguez Channel south to, but not including or proceeding beyond, Pier 200B and Pier 200Y; ... and any other areas that EPA determines to be part of ***the EPA Montrose NPL Site investigation***;" but excepting those locations or areas designated as hazardous substance release sites under the California Hazardous Substance Account Act, Porter-Cologne Act (other than the area defined as the Montrose NPL Site), and excepting out the proposed Del Amo NPL Site. (Cities' Consent Decree, p. 24-25.)

Further, the term "Montrose NRD Area" is defined in the Cities' Consent Decree to include, in part, "the Channel Islands, the Palos Verdes Shelf, the San Pedro Channel, including Santa Catalina Island, and ***the Los Angeles and Long Beach Harbors as described in the Complaint*** and as described in the draft Damage Assessment Plan and draft Injury Determination Plan published by the Trustees on February 6, 1990 and March 8, 1991, respectively." *(Id.* at 25.) (A copy of the "Complaint" referenced in the Cities' Consent Decree is attached as Exhibit "2".)

In short, under the Cities' Consent Decree, all claims for ***"restoration, resource replacement costs or equivalent resource values,"*** as well as all claims for ***"response costs"*** incurred by the United States and the State of California Natural Resource Agencies, involving the broad areas defined as the "Montrose NPL Site," as well as the Montrose NRD Areas, have been resolved, and any alleged claims against the local agencies covered by the Cities' Consent

Decree, including the Cities joining in these comments, cannot be further legally pursued at this time.

Moreover, in addition to the Natural Resource Damages release language described above, the Cities' Consent Decree also contains a separate and additional covenant not to sue for "response costs" involving the Montrose NPL Site itself. (Cities' Consent Decree, pp. 42-43.) Specifically, "the United States, the State, and agencies and instrumentalities thereof," each covenanted and agreed ***"not to sue or take administrative action against any Settling Local Governmental Entities, to compel response activities or to recover response costs incurred or to be incurred in the future in connection with the Montrose NPL Site,*** including, but not limited to costs for studies and evaluations of the area covered by the ***response activities*** under CERCLA §§ 106 and 107, 42 U.S.C. §§ 9606 and 9607, or pursuant to the California Hazardous Substance Account Act, California Health and Safety Code §§ 25300 *et seq.*, or any other state statute or state common law." (*Id.* at 42-43, emphasis added.)

The Cities' Consent Decree goes on to provide a similar covenant not to sue in connection with any claims that may be asserted under the federal Resource Conservation and Recovery Act (RCRA, 42 U.S.C. 6901 *et seq.*), as well as under California Health and Safety Code section 25187. (*Id.*)

The signatories to the Cities' Consent Decree not only includes the City of Signal Hill along with many cities throughout Los Angeles and Orange Counties, but also a number of federal and State agencies, specifically including, but not limited to, the United States Environmental Protection Agency, Region IX; the State of California, Department of Fish and Game; the California State Lands Commission; the California Department of Parks and

Recreation; the California Department of Toxic Substances Control; and importantly, ***"the California, Regional Water Quality Control Board, Los Angeles Region."*** (*Id.* at p. 59-65.)

In short, the central requirement of the proposed TMDL, i.e. the requirement to "restore" the Los Angeles and Long Beach Harbors, and to otherwise conduct "removal" and "remedial" actions pursuant to CERCLA, to the extent this requirement is sought to be imposed against any Settling Local Governmental Entity, cannot lawfully be required, directly or indirectly, through these TMDLs or through any other federal or State law, as all such claims against these Settling Local Governmental Entities (including the Cities) have been released by the United States and the State of California. The proposed TMDLs are, therefore, fundamentally flawed and their primary requirement of removing contaminated sediment from the Harbor areas or any other areas covered by the Cities' Consent Decree cannot lawfully be required of any of the Cities.

## III. THE BOARD HAS COMPLETELY MISUSED THE TMDL PROCESS, AS TMDLS CANNOT BE USED AS A VEHICLE TO COMPEL THE CLEAN-UP OF CONTAMINATED SEDIMENT CAUSED BY PAST RELEASES OF HAZARDOUS SUBSTANCES.

As described in the Tentative Resolution, the elements of a TMDL are set forth in the federal regulations, 40 CFR 130.2 and 130.7, as well as in section 303(d)(1)(C) and (D) of the Clean Water Act, 33 U.S.C. § 1313(d)(1)(C) and (D). (Tentative Resolution, p. 1, ¶ 4.) According to the Tentative Resolution, "a TMDL is defined as the sum of the individual wasteload allocations for point sources, load allocations for non-point sources and natural background (40 CFR 130.2)." (Tentative Resolution, p. 1-2.) As described by the Ninth Circuit Court of Appeal in *Dioxin/Organochlorine CTR. v. Clarke* (9th Cir. 1995) 57 F.3d 517, 520: "A TMDL defines the specified maximum amount of a pollutant ***which can be discharged or 'loaded'*** into the waters at issue from all combined sources."

Further, 40 CFR, § 130.2(i) of the federal regulations defines a "total maximum daily load" as "the sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background . . .." (40 CFR § 130.2(i).)

A WLA or "wasteload allocation" is defined as being "a portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." (40 CFR § 130.2(h))

In addition, a "load allocation" is defined as: "The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. . .." (40 CFR § 130.2)(g).) The term "loading capacity" then defined as: "The greatest amount of loading a water can receive without violating water quality standards." (40 CFR § 130.2)(f).)

In short, as the process was described by the Court of Appeal in the *City of Arcadia et al. v. State Water Resources Control Board* ("*Arcadia v. State Board*") (2006) 135 Cal. App. 4th 1392, 1404, a TMDL defines the specified maximum amount of pollutant "***which can be discharged or 'loaded'*** into the waters at issue from all combined sources." "A TMDL assigns a *wasteload allocation* ... to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES Permit is required. Once a TMDL is developed, effluent limitations in an NPDES Permit must be consistent with the established wasteload allocations in the TMDL." (*Id.* at 1404.)

The process is thus one of establishing allowable loads through the established wasteload and load allocations that may subsequently be discharged through NPDES Permits into the water bodies at issue. Yet, no aspect of the TMDL process, as described in the Clean Water Act or its regulations, nor as described in any State and federal case discussing the TMDL process,

authorizes either US EPA or a State or Regional Water Board to order or otherwise require the cleanup of existing hazardous substances or other pollutants that have already been discharged into the water body. (See 33 U.S.C. § 1313(d)(1)(C) and (D).) Instead, the TMDL process may only regulate the future discharges of pollutants to impaired waters.

More specifically, nothing in the Clean Water Act TMDL process allows for a look back at prior discharges, with the goal of then requiring alleged responsible parties to remove or remediate previously discharged pollutants. To the contrary, and in accordance with the very clear terms of the Clean Water Act, under section 1313(d)(1)(C) of the Act, each state is to establish, for impaired water bodies, "the total maximum ***daily load***, for those pollutants which the administrator identifies. . . as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonable variations and a margin of safety which takes into account any lack of knowledge concerning the relationship ***between effluent limitations and water quality***." (33 U.S.C. § 1313(d)(1)(C).)

It is thus not the Clean Water Act, but rather the federal Superfund Act, i.e. CERCLA, that authorizes a claim to force the cleanup of hazardous substances, such as in the contaminated sediments in issue. Specifically, under the provisions of CERCLA, both US EPA and the California Department of Toxic Substances Control ("DTSC"), as well as certain private parties, may seek to recover "response costs" against other parties who are considered "responsible" parties under the CERCLA.[1]

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[1] CERCLA defines "responsible" parties as (1) the current owner or operator of the subject facility; (2) the past owner or operator of the facility, if they owned at the time of the disposal of the hazardous substances in question; (3) those parties that transported or accepted for transport the hazardous substances in question; and (4) those persons who, by contract or otherwise, arranged for the disposal or treatment of the hazardous substances in question. (*See* 42 U.S.C. § 9607(a).).

CERCLA defines the terms "respond" or "response" as meaning "remove, removal, remedy, and remedial action . . . ." (42 U.S.C. § 9601(25).) The terms "remove" or "removal" are then defined to include:

> **the clean up or removal** of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of a release of hazardous substances into the environment, such actions as may be necessary to **monitor, assess,** and **evaluate** the release or threat of release of hazardous substances, the disposal of removed material **or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment**, which may otherwise result from a release or threat of release. (42 U.S.C. § 9601(23).)

CERCLA further defines the terms "remedy" or "remedial action" to mean, in part:

> those actions consistent with a **permanent remedy** taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, **to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.** (42 U.S.C. § 9601(24).)

It was specifically because CERCLA is the statute which authorizes the federal and State governments to force the removal or clean-up of previously released hazardous substance (rather than the Clean Water Act), that the lawsuit initiated by the United States and the State of California over the alleged Montrose chemical and other related releases, was brought under the provisions of CERCLA. (*See* Exhibit "2," Complaint.) Accordingly, because nothing in the Clean Water Act authorizes the issuance of a ***"total maximum daily load"*** as a means of requiring removal or remedial action to address previously released pollutants, any attempt at this time to issue the proposed TMDLs in order to compel removal or remedial action to address the contaminated sediments in issue, is entirely contrary to law.

## IV. THE PROPOSED TMDL, IF ADOPTED, WOULD VIOLATE THE REQUIREMENTS OF THE CALIFORNIA ADMINISTRATIVE PROCEDURES ACT

The California Administrative Procedures Act (the "APA"), Government Code sections 11340 *et seq.*, is intended to advance meaningful public participation in the adoption of administrative regulations by state agencies, and to create an administrative record assuring effective judicial review. (*Pulaski v. Cal. OSHA* (1999) 75 Cal.App.4th 1315.) The APA establishes minimum procedural requirements for the adoption and repeal of administrative regulations, and it is designed to give "interested parties an opportunity to present statements and arguments . . . and calls upon the agency to consider all relevant matter presented to it." (*Id.*) In Executive Order S-2-03 issued by the Governor of the State of California in November of 2003, the Governor characterized California's Administrative Procedures Act as requiring "that all adopted regulations be ***easily understandable***, the least burdensome and effective alternative, ***be consistent with underlying legislative authority*** and ***minimize the economic impact*** to the regulated communities." (*See* State of California Executive Order S-2-03, p. 1.)

More specifically, under Government Code section 11349.1, any regulation to be adopted by the State must be shown to meet the following minimum standards: (1) ***necessity***; (2) ***authority***; (3) ***clarity***; (4) consistency; (5) reference; and (6) ***non-duplication***. (Gov. Code § 11349.1.) The principal APA deficiencies concern the lack of "authority," "clarity," "necessity," and "non-duplication" in Regional Board's development of these TMDLs.

To start with, as discussed above, the Board is without "***authority***" to adopt these TMDLs for two reasons. First, as discussed at length above, nothing in the Clean Water Act ***authorizes*** the issuance of a ***"total maximum daily load"*** as a means of requiring removal or remedial action to address previously released pollutants. (33 U.S.C. §1313(d)(1)(C).) Instead, the TMDL process in the Clean Water Act only allows for the establishment of a total maximum

"***daily load,***" and does not provide the ability for the State or any other party to impose a cleanup obligation on parties for past release of "hazardous substances." As such, that "authority" exists in CERCLA, but nowhere does it exist in the Clean Water Act. Second, also as discussed above, the United States of America and the State of California have already entered into a Consent Decree, i.e., the Cities' Consent Decree (Exhibit "1" hereto), wherein said parties covenanted and agreed not to pursue any federal or State claims for the investigation, assessment or cleanup of the contaminated sediments referenced in these proposed TMDLs. As such, by entering into the Cities' Consent Decree, the State and U.S. Governments have relinquished any claims they may have against the Cities as a result of the contaminated sediments to be addressed under the TMDLs. The State and Regional Boards, and US EPA, therefore, have no "***authority***" to issue the subject TMDLs.

Second, the proposed TMDLs lack the necessary "***clarity***" to the regulated community on what is required of any individual entity, or even which waters are the responsibility for which cities, and thus fail the "***clarity***" requirement under the APA. Instead, the TMDLs are devoid of any discussion of the particular likely requirements of a specific city (other than, in certain limited respects, potentially Los Angeles and Long Beach), and what aspects of the TMDL wasteload allocations or load allocations are to be complied with by what particular municipality. Nor does the TMDL identify whether any city or other local agency, outside of the Cities of Los Angeles or Long Beach, have an obligation to conduct dredging of contaminated sediments. In short, the proposed TMDLs fail to identify the particular types of requirements that may be necessary of an individual city for a specific water body, including what may be required of the Cities in connection with the dredging of sediment, or to otherwise meet a particular wasteload or load allocation for specific pollutants. The TMDLs thus fail to provide the required "clarity"

compelled under the California APA, as they does not describe the regulatory requirements to be imposed upon the particular alleged responsible parties.

The TMDLs also contain a series of highly complex proposed calculations and load and wasteload allocations, with some of these requirements being internally inconsistent, and in some cases entirely incomprehensible. For example, the TMDLs include interim allocations based on a TUc unit of measurement, but without the TMDL documents ever explaining how a TUc unit of measurement is to be transformed into a specific load or wasteload allocation or whether or how it could be transformed into any permit term within an applicable NPDES permit. Nor do the TMDLs explain who is to be determining whether TUc exceedances occur, at what location or locations, or whether all responsible parties are to be determining compliance with the applicable TUc for the relevant waters. Further, it is unclear whether the TUc wasteload allocations are to be applied at the receiving water or in the discharge, or both.

In addition, the TMDLs set forth a series of varying complex concentration-based and mass-load based wasteload allocations that are overly vague in terms of how they were calculated, and are entirely ambiguous as to how they are to be complied with and to whom they apply. There are, for example, concentration-based final allocations for certain permittees, mass-based wasteload allocations for other permittees (apparently including certain MS4 permittees), and bed sediment load allocations for yet other permittees.

Moreover, it is entirely ambiguous as to where and at what depths the dredging activity must be conducted. For example, the TMDL Staff Report indicates at one point that ***2 to 8 feet*** of sediment must be dredged (TMDL Staff Report, p. 124), but at another point inconsistently assumes that the dredging depths will be ***2 to 3 feet***. (*Id.* at 125.) Further, the TMDL Staff Report estimates that 11,173,066 cubic yards of sediment is to be dredged (*id.*), but does not

indicate where this dredging activity is to occur, other than a vague and very general reference to Harbor areas. Moreover, the TMDL Staff Report also indicates that 35,527,233 cubic yards of contaminated soil will have to be dredged, rather than the 11,173,066 cubic yard estimate used for the $680 million cost estimate, if the TMDLs' targets themselves are to be complied with. Thus the TMDLs are also ambiguous as to the quantity of contaminated sediment that is to be dredged, as well as the location of dredging.

In addition, for each of the bed sediment load allocations, secondary remediation activities may apparently be required of certain parties including the Cities. For example, for the metals and bio-accumulative compounds, the Tentative BPA provides as follows::

> After remediation activities [the sediment removal work to achieve the bed sediment load allocation] that address existing sediment contamination are complete and when LAs are obtained, if bed sediments are recontaminated as a result of continued polluted discharge from the surrounding watersheds, the WLA compliance monitoring data will be used, along with other available information, to assess the relative contribution of watershed dischargers and determine their responsibility and allocations for secondary remediation activities. (*See e.g.,* Tentative BPA, pp. 13 and 16.)

Yet, there is no explanation as to what "LAs" are to be obtained before any secondary remediation activities are to be required. Are these to be the sediment LAs, the aerial deposition LAs, or both? Further, there is no evaluation of what secondary remediation activities will then be needed, of whom will they be required, the basis for requiring these secondary remediation activities, or the precise cleanup standard that is to be achieved, or even where the cleanup is to be achieved; nor is there any description of what it means to be "re-contaminated," *i.e.*, at what levels or how it will be determined that the water body in issue was "re-contaminated" from discharges from the surrounding watersheds, versus discharges from remaining contaminated

sediment that have been disturbed or from direct aerial deposition. The TMDLs are vague and ambiguous.

Further, in the final wasteload allocations for the Los Angeles River Estuary for metals and PAHs, under the category "LAR Dischargers," a Sediment Quality Value ("SQV") is assigned to be currently set as "Effects Range Lows" or "ERLs," but without there being any description of who the "LAR Dischargers" are intended to be, nor any explanation of how the SQV is to be transformed into a mass-based wasteload allocation (as implied by the table heading). (Tentative BPA, p. 15.) A similar ambiguous mass-based wasteload allocation is set forth on page 19, again under the LA River Estuary TMDL heading, in connection with the DDT and PCB TMDLs. In short, the interim and final wasteload and load allocations provide no "clarity" to the regulated parties, nor even to permit writers, and to the contrary, are largely incomprehensible in terms of what they mean, who they apply to, where they apply and how they are to be complied with. It is particular unclear how concentration-based sediment wasteload allocations are to be applied to MS4 dischargers, or if or how wasteload allocations for bed sediments are to be implemented through the NPDES permitting process.

In addition, the proposed TMDL imposes a number of monitoring obligations and other requirements upon the dischargers thereunder, but is entirely ambiguous as to who is to do what monitoring, where and when. For example, on page 24 of the Tentative BPA, the TMDL provides that: "The Greater Los Angeles and Long Beach Harbors responsible parties are each individually responsible for conducting water, sediment and fish tissue monitoring.... Under the coordinated compliance monitoring option, the compliance point for the stormwater WLAs shall be storm drain outfalls or a point(s) in the receiving water that suitably represents the combined discharge of cooperating parties." Yet, the proposed TMDL does not identify where individual

dischargers are to conduct water, sediment and fish tissue monitoring, at which storm drain outfalls, or within which cities. Nor does the TMDL explain how a suitable alternative compliance monitoring point is to be selected.

To make matters worse, the TMDLs provide that the: "Los Angeles River Watershed and San Gabriel River Watershed responsible parties identified in the effective metals TMDLs for the Los Angeles River and San Gabriel River are responsible for conducting water and sediment monitoring above the Los Angeles River Estuary and at the mouth of San Gabriel River, respectively, to determine the river's contribution to the impairments in the greater Harbor waters." (Tentative BPA, p. 25.) Again however, the proposed TMDLs fail to identify who is to conduct what monitoring and for what constituents, and at which locations.

The TMDLs are also confusing and misleading, i.e., lack "clarity," given the language establishing yet additional metal TMDLs for both the Los Angeles and San Gabriel River MS4 Permittees, even though metal TMDLs have already been established for both of these major water bodies. A metals TMDL has also already been established for the Los Cerritos Channel ("LCC"). As such, how or why additional metal TMDLs for the Los Angeles and San Gabriel River dischargers and the LCC are to be developed, when existing metal TMDL requirements have already been developed and adopted specifically for the Los Angeles River, the San Gabriel River and the LCC dischargers, remains unclear.

In addition, the implementation measures discussed in the proposed TMDL are vague and ambiguous at best. The implementation measures are broken down into Phase 1, Phase 2, and Phase 3. The purpose of Phase 1 for the Dominguez Channel TMDL is described as being necessary "to reduce the amount of sediment transport from point sources that directly or indirectly discharge to Dominguez Channel and the Harbor waters." (Tentative BPA, p. 26.)

Part of the Phase 1 requirements include the development of a "Sediment Management Plan" as needed to meet "necessary reductions in sediment bed loads." Yet, in carrying out the Sediment Management Plan, according to the Tentative BPA: "As management actions are planned for a contaminated site, site-specific cleanup criteria will be determined following port-established protocols that are consistent with State and national guidance. The site will then be managed and the improvements confirmed through a sediment monitoring program." (Tentative BPA, p. 29.)

However, there is no indication as to what the "site-specific cleanup criteria" are to be, and nor is there any indication how this "site-specific cleanup" is to be tied to the sediment bed load allocation assigned in the proposed TMDLs. Is it sufficient to meet the sediment bed load allocation in the TMDLs through a one-time dredging operation, or must the dredging operation but conducted again and again; also, does the bed allocation require compliance with a yet to be determined "site-specific cleanup criteria" in order for the TMDLs to be met? The TMDLs are ambiguous in this regard, and again fail the "clarity" requirement.

In addition, under Phase 1 in the Tentative BPA for the Greater Los Angeles and Long Beach Harbor Waters, the TMDL references the various Superfund sites and the efforts that are being conducted by US EPA in making a "final remedial decision with respect to certain of the Montrose Superfund site Operable Units that remain contaminated." (Tentative BPA, p. 29.) According to the proposed TMDLs, the TMDL for DDT is to be taken into account in the course of the "remedial decision-making process," and the City of Los Angeles and Los Angeles County, if they are taking any action in the Operable Units, are required to consult with the US EPA in advance of their cleanup action. (*Id.*) Yet, it is unclear whether compliance with any work required by EPA to address any particular Operable Unit will constitute compliance with the proposed TMDLs. Again, the TMDLs are ambiguous and lacks clarity.

Further, the implementation measures for the Los Angeles River and San Gabriel River responsible parties are entirely vague and incomprehensible. Under Phase 1 for the Los Angeles River and San Gabriel River responsible parties, said parties are to submit a "Report of Implementation to describe how current activities support the downstream TMDL." (Tentative BPA, p. 30.) It is unclear, however, whether this so-called Report of Implementation is to simply describe the activities that are presently being conducted in connection with the Los Angeles and San Gabriel River Metals TMDLs, or whether some scientific analysis is required to explain how particular pollutants may or may not be reduced that would then result in activities that "support" the subject TMDL. Nor is it clear whether individual Reports of Implementation must be submitted, or joint reports are to be submitted.

Also for the Greater Los Angeles and Long Beach Harbors, the purpose of Phase 3 is to implement "secondary and additional remediation actions as necessary to be in compliance to the final wasteload and load allocations by the end of the TMDL implementation." (Tentative BPA, p. 30.) Yet, there is no indication what these further additional remedial actions are intended to be, and what particular final wasteload and load allocations are to be addressed by any "secondary and additional remedial actions," thus again failing the "clarity" requirement of the APA.

Furthermore, the Cities of Bellflower, Lakewood, Paramount and Signal Hill all appear to have been included under the second category of alleged responsible parties for the "Greater Los Angeles and Long Beach Harbors" (Tentative BPA, p. 32), specifically because they apparently are presumed to discharge directly into a saline receiving water. Yet, this assumption is incorrect (*see* technical comments being submitted on behalf of the Cities), and the TMDLs are moreover unclear in this regard and thus again fail the "clarity" test under the APA. As such,

the TMDLs should not be adopted until these ambiguities are addressed. Because these four Cities do not discharge directly into saline receiving waters, none of these Cities should be included within the Category 2 - Greater Los Angeles and Long Harbor list of responsible parties.

In addition, the proposed TMDL is ambiguous as it requires that the interim allocations be achieved by all responsible parties as of the "Effective date of the TMDL." (Tentative BPA, p. 33.) The assumption apparently is that the TMDLs are automatically self executing (which is not legally correct) and that all alleged responsible parties are either presently in compliance with said interim allocations in the TMDLs, or will be required to come into compliance before the "Effective date of the TMDL." The regulation does not explain, however, whether the alleged responsible parties are presently in compliance; nor does it provide any explanation as to how a party may legally be required to come into compliance with a regulation on its "Effective Date," when the regulation in question, *i.e.*, a TMDL, is not self-executing. (*See*, *e.g.*, Tentative Resolution, p. 2, ¶ 5 ["TMDLs are not generally self-implementing."].)

There is a series of additional ambiguities and uncertainties that exist throughout the TMDL documentation, as explained in the technical comments being submitted on behalf of the City of Signal and other affected cities. Accordingly, the proposed TMDLs fail the "clarity" requirements in the APA and cannot be adopted at this time.

Third, the TMDLs fail the "***necessity***" and "***non-duplication***" tests under the APA, given that no additional metals TMDLs are "necessary" for any discharges applicable to the Los Angeles and San Gabriel Rivers, and the LCC., because metals TMDLs already exist for each of these waters. Imposing yet additional metals TMDL requirements on the Los Angeles and San

Gabriel River dischargers, and the LCC dischargers, for discharging to these same water bodies, is thus not "***necessary***" and would be "***duplicative***" of existing metals TMDLs already adopted.

Further, the TMDL fails the "necessity" and "non-duplication" requirement of the APA in connection with any sediment removal work, given the fact that all such cleanup effort is already under the jurisdiction of US EPA and to be addressed by US EPA, as recognized within the TMDLs themselves. In light of the fact that US EPA has already undertaken extensive investigation and assessment of the impacts of the contaminated sediment, and has already taken action pursuant to the provisions of CERCLA to require responsible parties to address this contaminated sediment, any attempt to impose an additional regulation pursuant to the TMDL process, to address this contaminated settlement or to otherwise "restore" the natural resources of these areas, fails the "necessity" test and the "non-duplication" test under the APA.

Further evidence of this is the footnote contained on page 32 of the Tentative BPA, where it is provided that:

> **As the regulatory oversight agency, US EPA is responsible for choosing an appropriate remedy for these sites. Furthermore, under CERCLA, US EPA is responsible for assuring that the CERCLA PRPs [potentially responsible parties] clean up the site in compliance with CERCLA and applicable or relevant and appropriate requirements (ARARs) (CERCLA, Section 121(d)).**

(Tentative BPA, p. 32, emphasis added.) The proposed TMDLs thus recognize the ongoing jurisdiction of US EPA in connection with the Montrose Superfund Site and the CERCLA process, and plainly fail the "necessity" and "non-duplication" requirements of the APAs, given that the contaminated sediment (both in and outside of the Harbors – *see* the Cities' Consent Decree ) is already required to be addressed through the Superfund process.

Also for the Greater Los Angeles and Long Beach Harbors, the purpose of Phase 3 is to implement "secondary and additional remediation actions as necessary to be in compliance to the

final wasteload and load allocations by the end of the TMDL implementation." (Tentative BPA, p. 30.) Yet, why any secondary cleanup work is at all a "necessity," given US EPA's long recognized oversight of the cleanup work under the Superfund process, has not been explained, nor has it been explained why this cleanup effort is not "duplicative" of US EPA's efforts. Again, the TMDLs fail both the "***necessity***" and "***non-duplication***" tests under the APA.

Further, as discussed above, under Phase 1 for the Los Angeles River and San Gabriel River responsible parties, said parties are to submit a "Report of Implementation to describe how current activities support the downstream TMDL." (Tentative BPA, p. 30.) Yet, there is no explanation as to why any additional metal TMDL requirements of any kind are being imposed on the Los Angeles and San Gabriel River dischargers, when metals TMDLs have already been adopted for these rivers. Moreover, the technical documents prepared on behalf of US EPA confirm that the non-metal pollutant loads from the Los Angeles and San Gabriel Rivers are minimal and are not of concern. As such, these TMDLs are not "necessary" for the non-metal pollutants at least as to the Los Angeles and San Gabriel River responsible parties. The proposed TMDLs clearly fail the "necessity" and "non-duplication" tests under the APA.

Also for the Los Angeles River and San Gabriel River responsible parties, "Implementation actions may be developed and required in Phases II and III as necessary to meet the targets in the Greater Harbor waters. TMDLs to allocate contaminated loads between dischargers in Los Angeles and San Gabriel River watersheds may also be developed, if necessary." (Tentative BPA, p. 30.) There is no indication, however, anywhere in the TMDLs as to what particular types of implementation measures may be appropriate for the Los Angeles and San Gabriel River responsible parties (outside of their existing obligations to comply with other applicable metals TMDLs once these other TMDLs become enforceable), how contaminant

loads will be allocated to the various alleged dischargers, and whether or on what basis and when such allocations would be "necessary" and "non-duplicative."

Accordingly, the proposed TMDLs fail the "authority," "clarity," "necessity" and "non-duplication" requirements of the APA, and cannot lawfully be adopted at this time.

## V. THE REGIONAL BOARD HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF CWC §§ 13000, 13240 AND 13241 IN DEVELOPING THE TMDLS

The Regional Board, through the Tentative Resolution proposed for the subject TMDL, wrongly asserts that the development and adoption of this TMDL "does not implicate California Water Code section 13241." (Tentative Resolution, p. 2, ¶ 5.) Initially, it is important to note that nothing in the TMDL documentation produced to date contains any discussion of the considerations required under CWC section 13000. As such, the proposed TMDL is defective on its face, as there are no findings and no supporting evidence to show the TMDL was developed in accordance with the requirements of CWC section 13000.

Turning to the discussion in the Tentative Resolution of the application of CWC section 13241, the Board's discussion of section 13241 is flawed as it is based on the incorrect assumption that the TMDLs do not represent an establishment of a water quality objective, but rather are simply programs "to implement existing standards (including objectives)." (Tentative Resolution, p. 2, ¶ 5.) The claim ignores the fact that the adoption of the proposed TMDLs will, in fact, result in revisions to the Basin Plan, and specifically revisions to various water quality objectives themselves through the establishment of a series of load and wasteload allocations. In addition, as explained in the technical comments, the TMDLs are establishing various load and wasteload allocations that are not at all based on any existing water quality objectives in the Basin Plan, meaning the TMDLs are clearly, in this instance, not only revising the existing water quality objectives, but also establishing new ones as well. As such, the adoption of the TMDL is

a revision to the water quality standards, thereby requiring compliance with the provisions of CWC section 13241, as well as CWC section 13000.

In addition, the Tentative Resolution attempts to hedge the Regional Board's bet that the requirements of section 13241 do not apply by setting forth a series of wholly unsupported and entirely conclusory findings that the required factors and considerations under section 13241 have been met, *i.e.*, the Regional Board is arguing section 13241 does not apply, but just in case it does, it has been complied with. (See Tentative Resolution, e.g., p. 4-6, ¶¶ 16-17.) Yet, there is no "evidence" anywhere in the record to support these naked conclusions. For example, there are no findings nor evidence to show that the TMDL is "reasonably achievable," or "economically achievable," particularly in light of the "environmental characteristics" of the water bodies in issue, *i.e.*, with the extensive existing contaminated sediment, as required by CWC subsections 13241(b), (c) and (d). In fact, the evidence is to the contrary, as discussed not only in these comments, but also in separate technical comments being submitted on behalf of the Cities.

Under CWC section 13241(b), the Board is required to consider the "environmental characteristics of the hydrographic unit under consideration" when developing TMDLs. In this case, as reflected throughout the TMDL documentation, a key "environmental characteristic" of the subject water bodies is that they contain significant "sediment contamination," with the TMDL estimating the cost to remove this sediment contamination at approximately $680,000,000. (TMDL Staff Report, p. 125.)

CWC Section 13241(c) requires the consideration of the "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." In light of the existing "environmental characteristics" of the water bodies

in question, particularly in light of the contaminated sediment existing in the water bodies, a sincere analysis of the "water quality conditions that could reasonably be achieved" through the establishment of a TMDL would result in the conclusion that no establishment of load or wasteload allocations would result in "water quality conditions that could reasonably be achieved." (§ 13241(b).)

In short, the problem is not with the ongoing discharges of loads or wasteloads to these water bodies, given, as the technical comments show, that the urban runoff flows in issue contain very little of the non-metal pollutants of concern (and with metals already addressed by existing TMDLs), but is rather with the existing contaminated sediment. The technical comments also show that, regardless of the loads from these flows, that the water bodies in issue cannot meet the desired water quality objectives specifically because of the uncontrollable loads from aerial deposition directly to the surface of the water bodies regulated by the TMDLs. Further, even putting aside the aerial deposition loads, the water quality objectives are not achievable unless and until the contaminated sediment has first been removed, which is a requirement that must occur independent of the TMDL process. Accordingly, both the existing "environmental characteristics" of the water body (the contaminated sediment) and the uncontrollable direct aerial deposition load would singularly prevent the water quality objectives from being achieved. The proposed TMDLs have not been properly developed in light of CWC sections 13241 and 13000.

Moreover, no TMDLs can properly be established and load and wasteload allocations determined at this time in accordance with the requirements of CWC section 13241, until US EPA and the State have completed the CERCLA removal/remedial process and the contaminated sediments in question have been finally addressed. Further, some means must be developed to

address direct aerial deposition. As such, the desired "water quality conditions" to be established through the load and wasteload allocations in the TMDLs cannot "reasonably be achieved" at this time, and the TMDLs must be developed only after the CWC section 13000 and 13241 requirements have been complied with.

In addition, although a "Cost Consideration" section is included in the TMDL Report, the enormous costs identified in the TMDL Report not only fail to support the adoption of the TMDLs, they in fact support the opposite, i.e., they support a rejection of the proposed TMDLs, as the estimated costs for the TMDLs are so significant, and the benefits from the TMDLs so tenuous, that it would be an abuse of discretion to adopt the TMDLs in their present form.

The TMDL Staff Report indicates that the cost of dredging the Harbor alone is estimated at a minimum of approximately $680,000,000, and these costs would be much higher if the TMDLs' targets were in fact used to calculate the figure, rather than basing the dredging estimate on the State Board's SQOs being met – see separate technical comments. (TMDL Staff Report, p. 125.) As such, this $680,000,000 dredging estimate is clearly woefully understated, given that it is based on the SQOs Policy established by the State Board, rather than on the actual TMDL targets (ERLs) set forth in the Tentative BPA and in the TMDL Staff Report. If the TMDLs targets as set forth in the Tentative BPA were in fact used to estimate the dredging costs, the actual volume of dredged material would increase from 11,173,066 cubic yards to 35.5 million cubic yards (*see* TMDL Staff Report, p. 125, Table 7-3), thereby causing the dredging costs alone to rise from $680,000,000 to ***$2.16 billion***. Yet, no analysis of the economic impacts of the true dredging costs were considered or even developed in connection with these TMDLs.

Further, the TMDL documentation does not evaluate the expected costs for dredging outside of the Harbor areas. (TMDL Staff Report, p. 125 ["The memo referenced above did not

address any areas outside of Los Angeles and Long Beach Harbors."]) As such, the TMDL documentation does not contains an analysis of the true "economic" impacts of the likely dredging costs for these TMDLs, and thus the barebones "economic" and "reasonably foreseeable" analyzes in the TMDL documentation, what little exists, are defective on their face.

The TMDL Staff Report also estimates the cost for installing stormwater treatment filters to comply with the TMDL as being approximately $225,000,000 in construction costs, with an additional approximately $1,000,000 annually thereafterwards to maintain these treatment filters. The TMDL Staff Report further estimates the cost of installing vegetative swales (apparently as an alternative to the stormwater treatment filters) at approximately $54,000,000, with $235,000 in annual maintenance costs. As such, the Staff Report provides a range of $734,000,000 to $905,000,000 to implement the TMDL, not including the additional dredging costs of $1.5 billion estimated to be needed to meet the TMDLs' ERL targets, nor the annual maintenance costs of $1,000,000 for maintaining the stormwater treatment filters or the $235,000 to maintain vegetative swales, and nor the need for any "secondary remediation activities." (TMDL Staff Report, p. 128.)

In addition to the excessive amount of the Regional Board's estimated costs, combined with the lack of any consideration of the true dredging costs needed to meet the TMDLs' sediment targets (i.e., $2.16 billion), there is yet another problem with the "economic" and "reasonably achievable" analysis in the TMDL Staff Report, and that is the TMDL documentation does not indicate that any of the discussed implementation measures would actually result in attaining the desired targets in the TMDLs, or even that a sufficient cleanup of the contaminated sediment could ever be achieved to reach the desired water quality objectives. In fact, to the contrary, on top of the understated $680,000,000 dredging estimate, the Tentative

BPA also indicates that additional "secondary remediation activities" may be necessary, meaning that additional dredging and sediment removal costs will need to be incurred. Considering the extensive costs admittedly involved, and the serious questions that, even with these expenditures, the water quality objectives could ever be achieved, the proposed TMDLs are neither economically, nor reasonably achievable, and the adoption of the TMDLs under the present circumstances would not be in compliance with CWC sections 13241 or 13000.

Moreover, the Board's limited consideration of the enormous cost of implementing these TMDLs cannot be evaluated in isolation. Rather, the costs must be considered with the recognition that such costs are only a small part of the overall cost of treating urban runoff within the Region. Indeed, a study prepared back in 2002 by the University of Southern California Study, entitled *"An Economic Impact Evaluation of Proposed Storm Water Treatment for Los Angeles County,"* concluded that the cost of treating urban runoff in Los Angeles County could reach as high as $283.9 billion over 20 years. (Exhibit "3,"; *see also* Exhibit "4," "Financial and Economic Impacts of Storm Water Treatment Los Angeles County NPDES Permit Area" presented to California Department of Transportation Environmental Program, Report I.D. #CTSWRT-98-72, November, 1998, by Stanley R. Hoffman Associates; Exhibit "5," "COST OF STORM WATER TREATMENT FOR THE LOS ANGELES NPDES PERMIT AREA," June 1998, by Brown & Caldwell, prepared for the California Department of Transportation [giving "conservatively low" estimates of the costs of treating Los Angeles Area Storm Water of $33-73 billion in capital costs, depending upon the level of treatment, with an additional $68-$199 million per year in operating and maintenance costs]; Exhibit "6," "COST OF STORM WATER TREATMENT FOR CALIFORNIA URBANIZED AREAS," October, 1998, prepared for California Department of Transportation, by Brown & Caldwell [concluding that "Statewide stormwater

collection and treatment costs range from $70.5 billion for Level 1 to $113.7 billion for Level 3. Annual operations and maintenance costs range from $145.2 million/year for Level 1 to $423.9 million/year for Level 3."];. and Exhibit "7," a copy of a Report entitled "*NPDES Stormwater Costs Survey*" by Brian K. Currier, Joseph M. Jones and Glen L. Moelle, California University, Sacramento dated January, 2005 along with Appendix H included therewith entitled "*Alternative Approaches to Stormwater Control*" prepared by the Center for Sustainable Cities University of Southern California.)

In a recent Economic Forecast prepared by the California State University, Long Beach, for the Sixteenth Annual Regional Conference for Southern California and its Counties, May 2010 (Exhibit "8," "Economic Forecast"), a grim picture was painted of the present state of the economy for local governments throughout the Region. According to this Economic Forecast:

> Last year, the region's economy shed 460,000 jobs. This was on top of the 138,000 jobs lost in 2008, raising the cumulative two-year loss to almost 600,000 jobs. The region has not experienced such a devastating job loss since the early 1990's. Over a three year period, 1991-93, the region lost 470,000. At that time it was thought to be the most significant downturn in the Southern California regional economy since the Great Depression."
>
> * * *
>
> This recession is the longest and one of the steepest declines in the post World War II era. What made this recession different is that the economy had not faced a financial crises of such magnitude since the Great Depression. The housing bubble, subprime interest loans, lax lending standards, and securitization of mortgages led to the near collapse of financial markets, crating the first ever downtown in the global economy in the modern era. . . . Unemployment surged as employers shed 4.7 million jobs in 2009. Bringing the total jobs lost since the onset of the recessing to 8.4 million.

(Exhibit "8," Economic Forecast, pp. 4 and 7; *also see* Exhibit "9," which includes a series of PowerPoint presentations presented at the Economic Forecast Conference on May 13, 2010, concerning the poor state of the national and regional economy.)

Furthermore, in a Report entitled "*A Guide to Consideration of Economics Under the California Porter-Cologne Act*," by David Sunding and David Ziberman, University of California, Berkeley, March 31, 2005 (Exhibit "10,"), the authors reviewed the requirements of the Porter-Cologne Act regarding the need to consider "economics" and the other factors under section 13241, and concluded as follows:

> While the requirement to consider economics under Porter-Cologne is absolute, the legislature and the courts have done little to particularize it. **This report is an attempt to fill the gap and provide the Board with guidance as to how economics can and should be considered as required by Porter-Cologne.** We write from our perspective as professional economists and academics who have engaged in water quality research and who have extensive experience with the application of economics to environmental regulation. (Exhibit "10," p. iv.)

The Report's authors further recognized the importance of considering scarce resources when developing water quality regulations, where they concluded as follows:

> **Water quality regulations are necessary in a state like California, and a careful analysis of their consequences can provide a road map for investment of scarce resources.** Ideally, our recommended approach will increase the transparency of the rule-making process under Porter-Cologne. Further, it is our hope that adoption of the approach could help avoid the legal and political conflicts that have adversely affected recent water quality protection efforts in the state. (Exhibit "10," p. v.)

The other conclusory findings regarding the Board's purported attempt at compliance with the remaining factors and considerations under section 13241, are entirely unsupported and deficient. Specifically, the Board has repeatedly failed, either in this TMDL process, in the Basin Plan development process, or in any past triennial review, to comply with its statutory

obligations under CWC sections 13000, 13240 and 13241, by failing to give full and complete consideration to the following, when imposing TMDLs or otherwise when requiring Stormwater discharges to be in strict compliance with numeric effluent limits: (a) the past, present or probable future beneficial uses of the waters in issue; (b) the environment characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) the water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; (f) the need to develop and use recycled water (*see* CWC § 13241), and the various considerations set forth in CWC section 13000.

CWC sections 13000, 13240 and 13241 provide, in relevant part, as follows:

> **§ 13000. Conservation, control, and utilization of water resources; quality; state wide program; regional administration.**
>
> . . .
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the water of the state shall be regulated to attain the highest water quality which is reasonable, **considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.**
>
> **§ 13240 Adoption of plan; conformance with state policy.**
>
> Each regional board shall formulate and adopt water quality control plans for all areas within the region. **Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control.** During the process of formulating such plans the regional board shall consult with and consider the recommendations of affected state and local agencies. Such plans shall be periodically reviewed and may be revised.
>
> **§ 13241 Water quality objectives; beneficial uses; prevention of nuisances.**

> Each regional board shall establish water quality objectives in water quality control plans as in its judgment will ensure the **reasonable** protection of beneficial uses and the prevention of a nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree **without unreasonably affecting beneficial uses**. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:
>
> (a) Past, present, and **probable** future beneficial uses of water.
>
> (b) Environmental **characteristics of the hydrographic unit** under consideration, including the quality of water available thereto.
>
> (c) Water quality conditions that could **reasonably be achieved** through the coordinated control of all factors which affect water quality in the area.
>
> (d) **Economic considerations.**
>
> (e) The **need for developing housing in the region**.
>
> (f) The need to develop and use recycled water.

Pursuant to the above provisions of the Porter-Cologne Act, in any formulation or amendment of a water quality control plan where water quality standards are being adopted or modified (as here, with the adoption of new, specific numeric objectives), the policies set forth in section 13000 must be complied with and the factors set forth in section 13241 fully considered. (*See United States of America v. State Water Resources Control Board, et al.* (1986) 182 Cal.App.3d 82 ("*U.S. v. State Board*"). Compliance with CWC section 13000 is specifically required during Basin Plan development given the express language of section 13240, requiring compliance with the policies under CWC section 13000. (CWC § 13240.) Yet, there is no indication anywhere in the record that the Regional Board has even made an attempt to comply with CWC section 13000.

In *U.S. v. State Board*, the State Board issued revised water quality standards for salinity control and for the protection of fish and wildlife because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento-San Joaquin Delta ("*Delta*"). (182 Cal.App.3d at 115.) The State Board approved these standards with the understanding it would impose more stringent salinity controls in the future. In invalidating the revised salinity standards, the Court consistently recognized the importance of complying with the policies set forth under section 13000 and the factors listed under section 13241. It emphasized the section 13241 need for an analysis of "economics," as well as the importance of establishing water quality objectives which are "reasonable," and adopting "reasonable standards consistent with overall State-wide interests."

> In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality **which is reasonable**, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, **economic and social, tangible and intangible**." (**§ 13000**.) In fulfilling its statutory imperative, the Board is **required** to "establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." (**§ 13241**), a conceptual classification far-reaching in scope. (*Id.* at 109-110 (emphasis added).)

The Court further stated:

> The Board's obligation is to attain the highest reasonable water quality "*considering all demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000, italics added.) (*Id.* at 116 (emphasis in original).)

Finally, the Court pointed out:

> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also *all* competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). In addition, **the Board must consider** . . . "[Water quality conditions

> that could **reasonably be achieved** through the coordinated control of *all* factors which affect water quality in the area." (*Id.* at 118 (italics in original, bolding added).)

In *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613 ("*Burbank*"), the California Supreme Court addressed the issue of whether this Board and the State Board were required to comply with CWC section 13241, which, through section 13263, requires the Boards to consider "economics" when issuing an NPDES permit. (*Id.* at 626.) The *Burbank* Court found that where the State and Regional Boards adopt provisions that "exceed the requirements of the Federal Clean Water Act," State law, specifically section 13241, must be complied with. (*Id.* at 627.) The Court held that unless the specific requirement is mandated by federal law, section 13241 must be complied with even where a permit is being adopted pursuant to federal law. (*Id.*) The Court stated that: "because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a waste water discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards." (*Id.* at 626, (emphasis added).)

In short, the Supreme Court found that State law must be complied with unless it is in conflict with federal law or proposes something that "federal law forbids." (*Id.*) Consequently, as the Regional Board is required to comply with State Law, including specifically section 13241, whenever it adopts requirements that are not required by federal law, and as federal law does not require either the particulars of the subject TMDLs, or that municipalities strictly comply with the numeric limits set forth in TMDL, here, the Board is required to comply with section 13241 and section 13000, prior to adopting these TMDLs.

Moreover, there is no federal requirement that the Water Boards adopt this or any TMDL. As explained by the State and Regional Boards' attorneys in pleadings submitted to the San Diego Superior Court in 2006: "No authority exists to compel the water boards to establish a

TMDL." (Exhibit "11," p. 10.) This position that neither federal law nor any requirement under the Consent Decree compels the Regional or State Boards to adopt a TMDL, was then confirmed by the Water Boards' counsel in open court in a hearing on September 1, 2006, where he stated: "If we don't adopt a Trash TMDL under the Consent Decree I referenced, US EPA would have to adopt one. But we don't have to do one. And we can't guess, as staff, what the Regional Board is going to do on that project." (Exhibit "12," p. 25; (emphasis added).) Accordingly, there can be no dispute that nothing in federal law compels the State or Regional Boards to adopt the subject TMDL. State law requirements must, therefore, be adhered to.

In addition, the State Board's Office of Chief Counsel has confirmed that the Boards must comply with State law when adopting TMDLs. In a memorandum dated January 4, 1994, from William R. Attwater, Office of Chief Counsel, State Water Resources Control Board, to all Regional Board Executive Officers and Board Attorneys, on "Guidance on Consideration of Economics in the Adoption of Water Quality Objectives," (hereafter "Attwater Memo," a copy of which is marked as Exhibit "13," along with a Memo from Sheila Vassey of the Chief Counsel's Office included with the Attwater Memo ("Vassey Memo" attached thereto), the Board's Chief Counsel recognized that, in adopting water quality objectives, Boards "are required to exercise their judgment to 'ensure the reasonable protection of beneficial uses and the prevention of nuisance.'" (*See* Attwater Memo, p. 2.)

The Attwater Memo relies on the legislative history to the Porter-Cologne Act, which provides that although objectives are to be tailored on the high quality side of the needs of the present and future beneficial uses: "**nevertheless, objectives must be reasonable and economic considerations are a necessary part of the determination of reasonableness.**" (*Id.*)

As discussed in the Attwater Memo, the Legislative History to the Porter-Cologne Act recognizes that:

> The Regional Boards must balance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality **which is reasonable**. (Exhibit "13," Attwater Memo, p. 3; (emphasis added).)

The Attwater Memo also specifically cites to the language in Water Code section 13000, including the reference to the need "**to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible**." (*Id.* at 3, emphasis added.)

The Memo similarly reviewed the additional mandate to consider "economics" when adopting objectives set forth in Senate Bill 919 (adopted in 1993), and concluded that the Bill, which amended CEQA to require, whenever the Boards adopt rules requiring the installation of pollution control equipment or establishing a performance standard or treatment requirement, that the Boards conduct an environmental analysis of the reasonably foreseeable methods of compliance and that "[t]his analysis must take into account a reasonable range of factors, **including economics**." (*Id.* at 4; *also see* Exhibit "14," a document prepared by EPA Region 9 dated January 7, 2000 entitled "*Guidance For Developing TMDLs in California*," where EPA Region 9, at page 22, specifically referenced and attached the Vassey Memo referenced above.) (*Id.* at p. 22.)

Although of little consolation, California is not alone in its difficulties in attempting to regulate stormwater, as California's problems are consistent with similar problems occurring throughout the United States. A detailed 500 plus page report was prepared for US EPA in 2008,

by the National Research Council ("NRC") of The National Academies entitled, *Urban Stormwater Management in the United States.* (*See* Exhibit "15," and Exhibit "16," hereto.) This 500 page Report (Exhibit "15") was prepared at EPA's request to "review [EPA's] current permitting program for stormwater discharge under the Clean Water Act and provide suggestions for improvement." (Exhibit "15," p. vii.) EPA's desire for the Report was based upon the recognition that "**the current regulatory framework . . . was originally designed to address sewage and industrial wastes**" and **"has suffered from poor accountability and uncertainty about its effectiveness at improving water quality**." (Exhibit "16," p. 1 (emphasis added).)

EPA's 2008 NRC Report expressly acknowledges that reducing Stormwater pollution has proven to be "notoriously difficult," with the NRC finding that the current approach to regulating Stormwater "**seems inadequate to overcome the unique challenges of stormwater.**" (*Id.* at 23.) The NRC went on to conclude that because of the differences between Stormwater and traditional discharges, the current regulatory approach is a **"poor fit."** (*Id.* at 83.) According to the NRC, compared with traditional effluent streams, "the uncertainties and variability surrounding both the nature of stormwater discharges and the capabilities of various pollution controls . . . make it much more difficult to set precise limits in advance for stormwater sources." (*Id.* at 84.) In sum, the NRC's research showed that **"the technical demands of the TMDL program make for a particularly bad fit with the technical impediments already present in monitoring and managing stormwater."** (*Id.* at 51.)

The policies and factors under CWC sections 13000, 13240, and 13241 are thus all required to be complied with when the Boards develop TMDLs. However, because there are no findings showing that the TMDLs were developed in accordance with CWC section 13000, and

because there is no evidence to support any of the entirely conclusory findings regarding CWC section 13241 compliance, the proposed TMDLs are contrary to law.

## VI. THE APPARENT PROPOSED IMPLEMENTATION OF THE TMDLs THROUGH THE USE OF NUMERIC LIMITS IN MS4 PERMITS IS NOT REQUIRED BY FEDERAL LAW AND IS CONTRARY TO EXISTING STATE POLICY

The Tentative BPA requires that the "final LAs and WLAs" be achieved "twenty years after effective date of the TMDL." (Tentative BPA, p. 34.) It also requires that the "interim allocations" be achieved on the "Effective date of the TMDL." (*Id.* at 33.) Moreover, according to the Tentative BPA, for "each discharger assigned a WLA, the appropriate Regional Board Order shall be reopened or amended when the Order is reissued in accordance with applicable laws, to incorporate the applicable WLA as a permit requirement consistent with federal regulation and related guidance." (Tentative BPA, p. 26.) Accordingly, the proposed TMDLs appear to contemplate strict compliance with the concentration based and/or mass-load based numeric limits set forth in the Tentative BPA and strict compliance with the bed sediment load allocation, rather than allowing for compliance through the use of maximum extent practicable ("MEP") best management practices ("BMPs"). (*See* 33 U.S.C. § 1342(p)(3)(B).)

In *BIA of San Diego County v. State Board* (2004) 124 Cal.App.4th 866, 874, the California Court of Appeal acknowledged that the CWA is to be applied differently to municipal Stormwater dischargers than to industrial Stormwater dischargers, finding as follows:

> **In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent**

**limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable."**

(*Id.*, citing 33 USC § 1342 (p)(3)(B)(iii) and *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163 ("*Defenders*") (bolding added, italics in original).)

In *Defenders*, the Ninth Circuit recognized the different approach taken by Congress for Stormwater, finding that "**industrial discharges must comply strictly with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges.**" (191 F.3d at 1165; (emphasis added).) The Court found that "because 33 U.S.C. §1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. §1311," but instead section 1342(p)(3)(B)(iii) [of the CWA] **"replaces the requirements of §1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable...,'"** "the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. §1311(b)(1)(C)." (*Id.* at 1165; *also see Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246, 256, emphasis added ["***In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations***."].)

In a February 11, 1993 Memorandum issued by the State Board's Office of Chief Counsel by Elizabeth Jennings, subject *"Definition of Maximum Extent Practicable,"* (Exhibit "17," the Office of Chief Counsel provided guidance on determining whether a BMP was consistent with the maximum extent practicable or "MEP" standard and concluded that the following factors may be useful in this determination:

1. **Effectiveness: Will a BMP address a pollutant of concern?**

2. **Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?**

3. **Public acceptance: Does the BMP have public support?**

4. **Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefit to be achieved?**

5. **Technical feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?**

(Exhibit "17," Jennings Memo, p. 4-5.)

Similarly, in a recent EPA-issued draft technical document entitled "*TMDLs Stormwater Handbook, November, 2008*" (Exhibit "18," hereafter "Draft Handbook"), EPA seeks "to provide information to TMDL practitioners and NPDES stormwater permit writers" on various subjects, including:

- TMDL implementation plans including best management practice (BMP) and other stormwater management strategy recommendations.

- Approaches for translating TMDL WLAs and implementation recommendations into NPDES stormwater permit requirements and implementation strategies. (Exhibit "18," p. 1.)

Furthermore, in yet another Report issued by the NRC entitled "*Assessing the TMDL Approach to Water Quality Management,*" 2001 (*see* Exhibit "19"), the NRC concluded as follows:

> Many debates in the TMDL community have centered on the use of "phased" and "iterative" TMDLs. Because these terms have particular meanings, this report uses a more general term – adaptive implementation. Adaptive implementation is, in fact, the application of the scientific method to decision-making. It is a process of taking actions of limited scope commensurate with available data and information to continuously improve our understanding of a problem and its solutions, while at the same

> time making progress toward attaining a water quality standard. (Exhibit "19," p. 90.)

In a recent Appellate Court decision from the State of Oregon, *Tualatin River Keepers, et al. v. Oregon Department of Environmental Quality* (2010) 235 Ore. App. 132 (a copy of which is attached hereto as Exhibit "20"), the Oregon Court of Appeal looked at, among other issues, the need for wasteload allocations contained within developed TMDLs to be enforced as strict numeric limits within a municipal NPDES permit under Oregon law. The petitioners in that case argued that the Oregon Department of Environmental Quality ("DEQ") had erred because it issued a permit that did not "specify wasteload allocations in the form of numeric effluent limits." (*Id.* at 137.) The Oregon Court discussed the purpose of a TMDL, noting it is required to be established for pollutants and waters of the State that are identified pursuant to section 1313(d) of the CWA, and went on to address petitioners' contention that the wasteload allocations were required under State law to have been incorporated into the Permit "in a meaningful way," *i.e.*, through the use of numeric effluent limits. (*Id.* at 147-148.)

What was not even argued in *Tualatin River Keepers* was that federal law required a TMDL to be incorporated into a municipal NPDES Permit as a "numeric effluent limitation." Instead, the Court found that under the CWA, best management practices were considered to be a "type of effluent limitation," and that such best management practices were authorized to be used pursuant to the CWA, section 33 U.S.C. § 1342(p) as a means of controlling "storm water discharges." (*Id.* at 141-142, citing 33 U.S.C. § 1342(p) and 40 CFR § 122.44(k)(2)-(3).)

The Court in *Tualatin* went on to conclude that Oregon law did not require that TMDLs be enforced through the use of numeric effluent limits, finding as follows:

> The applicable TMDLs in this case set forth specific wasteload allocations for municipal storm water. The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL

> for those bodies of water. **The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks) established in the [storm water management plan] to guide the adaptive management process." . . . Adequate progress toward achieving assigned wasteload allocations will be demonstrated through the implementation of best management practices that are targeted at TMDL-related pollutants."** Pursuant to that section, permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [stormwater management plan]."
>
> * * *
>
> **Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the storm water management plans, to make progress towards meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in municipal storm water permits.** *See* 40 CFR § 122.44(k)(2)-(13). Furthermore, the permits incorporate benchmarks, through incorporation of the storm water management plan, which are specific pollutant load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

(*Id.* at 148-149, emphasis added.) The Oregon Appellate Court opinion confirms established authority that numeric limits are not required as a means of implementing wasteload allocations in a TMDL.

In addition, it has long since been the policy of the State of California not to require the use of strict numeric limits for stormwater (urban runoff) dischargers, but rather to apply the MEP standard through an iterative BMP process. (*See, e.g.*, Exhibit "21," State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this

time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; Exhibit "22," State Board Order No. 96-13, p. 6 ["***federal laws does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."]; Exhibit "23," State Board Order No. 98-01, p. 12 ["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 limitations***."]; Exhibit "24," State Board Order No. 2000-11, p. 3 [**"*In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations.*"**]; Exhibit "25," State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; Exhibit "26," State Board Order No. 2006-12, p. 17 ["***Federal regulations do not require numeric effluent limitations for discharges of storm water***"]; Exhibit "27," *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 ["***It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."]; and Exhibit "28," an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"].)

In sum, neither State or federal law, nor State policy, require the incorporation of WLAs as strict numeric limits into an MS4 Permit. Adopting the proposed TMDL without language confirming that, with respect to the Cities and other municipal permittees, the TMDL need not be

implemented through the use of strict numeric effluent limits, but instead may be implemented through the use of an iterative BMP approach, is arbitrary and capricious action, and an abuse of discretion.

## VII. THE TMDLS ARE NOT SUITABLE FOR CALCULATION, AND UNLAWFULLY INCLUDE "LOADS" THAT ARE NOT TOTAL MAXIMUM *DAILY* "LOADS"

A TMDL may be established only when the pollutant in issue is "suitable for [] calculation," and where the load allocations can be established "at a level ***necessary*** to implement the applicable water quality standards." (33 U.S.C. § 1313(d)(1)(C) (emphasis added).) Based on a 1978 EPA-adopted Rule, a TMDL is "***suitable for calculation***" only under "***proper technical conditions***." (43 Fed. Reg. 60662.) According to EPA's Rule, "proper technical conditions" require "the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL." (43 Fed. Reg. 60662.) In EPA's January 7, 2000 *Guidance for Developing TMDLs in California*, it found that:

> An understanding of pollutant loading sources and the amounts and timing of pollutant discharges is vital to the development of effective TMDLs. . . . [P]ollutant sources or causes of the problem need to be documented based on studies, literature reviews or other sources of information. Because the source analysis provides the key basis for determining the levels of pollutant reductions needed to meet water quality standards, and the allowable assimilative capacity, TMDL, wasteload allocations, and load allocations, quantified source analyses are required. . . .

(Exhibit "14," EPA TMDL Guidance for California, p. 4; also see Exhibit "29," US EPA's "*The Twenty Needs Report: How Research Can Improve the TMDL Program,*" dated July, 2002, p. 7-8 [describing the needs relating to the "scientific bases for steps in TMDL establishment and implementation" and providing that the "quality of modeling is one of the essential factors determining the quality of nearly all TMDLs."].)

As discussed in the various technical comments submitted to the Regional Board on these TMDLs, the TMDLs, and specifically the load and wasteload allocations therein, are not supported by the data, and are not scientifically supported by the evidence. In short, the TMDLs are not presently "suitable for calculation," as "proper technical conditions" do not exist at this time to develop the TMDLs.

In an August 9, 2001 Ruling, EPA delayed implementation of a July 13, 2000 TMDL Rule because of concerns expressed by the regulated community that "**there is not enough data to support TMDLs, that some pollutants are not suitable for TMDL calculation, that the section 303(d) lists are not based on scientifically-defensible data, or that the delisting criteria are too inflexible.**" (66 Fed. Reg. 41817, 41819; emphasis added.) Despite comprehensive efforts to address the problem and extensive public commentary on the issue, the unresolved concerns resulted in EPA again delaying (66 Fed. Reg. 41817, 41819), and ultimately abandoning altogether, its proposed Rule, with the EPA recognizing that the controversial regulations could not serve as an "efficient and effective TMDLs program without significant revisions." (68 Fed. Reg. 13609.)

In *Friends of the Earth, Inc. v. Environmental Protection Agency* (D.C. Circuit 2006) 446 F.3d 140 ("*Friends of the Earth*"), the U.S. Court of Appeals for the District of Columbia found that if a total maximum daily load of a particular pollutant for a particular water body is not yet "suitable for calculation," it is not proper for EPA to adopt the TMDL. (*Id.* at 146 [invalidating "non-daily 'daily' loads" and recommending that EPA reconsider its position that "all pollutants . . . are suitable for the calculation of total maximum daily loads"].) There, because EPA conceded "that nothing forecloses the agency from reconsidering" its general position that "all pollutants" are suitable for the calculation of TMDLs, the Court held that "[g]iven that EPA's

entire justification for establishing non-daily loads is **that certain pollutants are unsuitable for daily load limits, we are at a loss as to why it neglected this straightforward regulatory fix in favor of the tortured argument that 'daily' means something other than daily."** (*Id.* at 146 (emphasis added).)

The proposed TMDLs contain a number of load and wasteload allocations that are anything but "total maximum ***daily*** loads." To start with, the TMDLs seek to impose what they describe as a "load" allocation, but in reality is nothing more than a "site specific cleanup criteria," along with unspecified "additional remediation actions as necessary to be in compliance with final allocations by the end of the implementation period." (*See, e.g.*, Tentative BPA, p. 29-30.) Such requirements are neither "loads" nor ***"daily"*** loads.

Further, the TMDL imposes what are referred to as Toxicity Unit, chronic ("TUc"), which are neither concentration-based nor mass-load based "load" allocations, and clearly are not "***daily*** loads." Moreover, the TMDLs impose a series of "concentration-based" load allocations, as well as "annual" mass-load allocations, rather than maximum "daily" load allocations. The TMDLs further impose certain wasteload allocations that are based on Sediment Quality Values ("SQVs") that are currently set at the Effects Range Low ("ERLs"), again, not a "***daily*** load" allocation of a pollutant. The TMDL also allows for the subsequent imposition of "secondary remediation activities." (See, e.g., Tentative BPA, pp. 13 & 16.) None of these described load or wasteload allocations can properly be considered "***daily*** loads" in accordance with the requirements of the Clean Water Act.

In short, the TMDL, as proposed by the Regional Board, suffers from some of the very same deficiencies as the TMDLs that were of concern in *Friends of the Earth.* Thus, for the same reasons the *Friends of the Earth* Court found the TMDLs in that case to be deficient

(EPA's failure to establish a *"daily"* load), the TMDLs in issue are similarly deficient. According to the Court in *Friends of the Earth*:

> Nothing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command. "Daily" connotes "every day." *See Webster's Third New International Dictionary* 570 (1993) (defining "daily" to mean "occurring or being made, done, or acted upon every day"). Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of "Give us this day our daily bread" as a prayer for substance on a seasonal or annual basis. *Matthew* 6:11 (King James).

(*Id.* at 144.) The Court also held that: "EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be a better policy,'" (*id.* at 145,) and held as follows:

> To sum up, noting in this record tempts us to substitute EPA's policy preference for the CWA's plain language. While Congress almost assuredly never considered combined sewer systems when enacting the CWA, it spoke unambiguously in requiring daily loads. If adherence to this mandate leads to unintended consequences for water quality or for municipal pocketbooks, interested parties should direct their concerns to EPA or to Congress, either of which can take steps to mitigate any fallout from the CWA's unambiguous directive. We, however, have no such authority. (*Id.* at 148.)

In a Memo issued to EPA's employees, EPA's Administrator stressed the need to rigorously adhere to sound science and the "rule of law," stating:

> **Science must be the backbone for EPA programs**. The public health and environmental laws that Congress has enacted depend on **rigorous adherence to the best available science**. . . . When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection.
>
> The laws that Congress has written and directed EPA to implement leave room for policy judgments. However, **policy decisions should not be disguised as scientific findings**. I [the new EPA Administrator] pledge that I will **not compromise the integrity of**

**EPA's experts in order to advance a preference for a particular regulatory outcome**. (Exhibit "30," Memo to EPA Employees, p. 1, emphasis added.)

Because the proposed TMDLs are not supported by sound science, and because few of the load and wasteload allocations are both "loads" and "daily" measurements, as required by the Clean Water Act, the TMDLs have not been shown scientifically to be of value in achieving the objectives, and the TMDLs are not therefore "suitable for calculation" as required by the CWA. (*See* 33 U.S.C. § 1313(d)(1)(C)); *also see* Tentative BPA, p. 30 [where the Regional Board acknowledges that: "This TMDL recognizes that as work to understand these waters and the chemical, physical and biological processes, continues, the targets, allocations and the implementation actions to reach those targets and allocations may need to be adjusted."].) The adoption of these TMDLs at this time is contrary to law.

## VIII. THE PROPOSED TMDL WAS NOT DEVELOPED IN CONSULTATION WITH LOCAL AGENCIES AS REQUIRED BY LAW

Pursuant to CWC section 13240, when formulating a basin plan, "the Regional Boards ***shall consult with and consider*** the recommendations of affected state and local agencies." (CWC § 13240, emphasis added.) A similar obligation is imposed upon the State Board under CWC section 13144, whereby the California Legislature provided that during the process of formulating or revising state policy for water quality control, the State Board "***shall consult with and carefully evaluate*** the recommendations of concerned federal, state and local agencies." (CWC § 13144, emphasis added.)

Further, under the CWA, the process of establishing best management practices and a program to control nonpoint source discharge is to include inter-governmental coordination and public participation to identify best management practices, as well as measures to control nonpoint sources so as "to reduce, to maximum extent practicable, the level of pollution

resulting" from such nonpoint sources. (33 USC § 1329(a)(1)(C).) Similarly, EPA's TMDL Guidance for California provides: "EPA strongly encourages the State to develop detailed workplans to guide the technical analysis and stakeholders participation aspects of the TMDL ***before*** starting the TMDL." (*See* EPA's TMDL Guidance for California, Exhibit "14," p. 19.)

In EPA's Draft Handbook, EPA again recognizes that the process for developing TMDLs typically includes: "Stakeholder involvement and public participation to engage affected parties and solicit input, feedback and buy-in for a successful TMDL. This process can occur throughout the TMDL development (and implementation) process." (Exhibit "18," Draft Handbook, p. 5.)

Finally, in the EPA Administrator's recent memo to all EPA Employees, the importance of public trust and connecting with local agencies in meeting their environmental responsibilities is expressly called out:

> Public trust in the Agency **demands that we reach out to all stakeholders fairly and impartially, that we consider the views and data presented carefully and objectively,** and that we further disclose the information that forms the basis for our decisions. . . . **We must take special pains to connect with those who have been historically underrepresented in EPA decision making, including, . . . small business, cities and towns working to meet their environmental responsibilities. Like all Americans, they deserve an EPA with an open mind, a big heart and a willingness to listen.** (Exhibit "30," Memo to EPA Employees, p. 2; (emphasis added).)

Given the enormous complexity and technical problems with the proposed TMDLs, the existence of the Cities' Consent Decree (Exhibit "1" hereto) and the magnitude of the economic, physical and environmental impacts of the TMDLs, along with the limited data upon which they have been based, and given the lack of a single publicly noticed workshop to address these TMDLs, the Regional Board has failed to meet its obligation to coordinate the development of these TMDLs with local agencies. In fact, in spite of the complexity and scope of these TMDLs,

the Regional Board has failed to hold a single noticed public workshop to discuss their terms. Neither the spirit nor the intent of the TMDL development process have been complied with.

## IX. THE MONITORING PROVISIONS IN THE TMDLS ARE CONTRARY TO LAW BECAUSE NO COST BENEFIT ANALYSIS HAS BEEN CONDUCTED, AS REQUIRED BY CWC §§ 13165, 13225(C) AND 13267

As reflected in the various TMDL documents, a series of monitoring, studies, investigation and testing requirements are being imposed by the subject TMDLs. According to the Tentative BPA, within "six months after the effective date of the TMDL," the responsible parties are required to submit a "monitoring plan to the Los Angeles Regional Board for Executive Officer approval." (Tentative BPA, p. 33.) The monitoring plan is to be implemented within six months after it is approved by the Executive Officer, and annual monitoring reports are to be submitted starting fifteen (15) months after commencement of the monitoring. Further, "Report of Implementation" requirements are being imposed upon a number of the alleged responsible parties, along with annual implementation reports on all responsible parties. All of these testing, investigation, and monitoring and reporting requirements are not tied to any particular further action by the Regional or State Boards, but instead are each based on the "***effective date of the TMDL***." (*See* Tentative BPA, p. 33-34, emphasis added.)

The proposed TMDLs specifically require water monitoring, suspended sediment monitoring, fish tissue monitoring, sediment chemistry monitoring, and various other studies and reporting requirements by the various responsible parties. Yet, none of the monitoring, testing and reporting obligations imposed by the TMDL have been developed in accordance with the requirements of California law. Specifically, the California Legislature has mandated that the Boards conduct a cost-benefit analysis before imposing monitoring and reporting obligations, and that the Boards first provide a written explanation for the need for the reports, and identify the evidence that supports requiring the provision of the reports. CWC section 13267, entitled

"Investigation of Water Quality; Report; Inspection of Facilities," provides in relevant part, as follows:

> (a) A regional board, in establishing and reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.
>
> (b) (1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this State . . . that could affect the quality of waters within its region shall furnish, under penalty of perjury, **technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.** In requiring those reports, the regional board **shall provide the person with a written explanation** with regard to the need for the reports, and **shall identify the evidence** that supports requiring that person to provide the reports.

(CWC § 13267, emphasis added.) In addition to section 13267, CWC section 13225(c) mandates that the Regional Board similarly conduct a cost/benefit analysis if it requires ***a local agency*** to investigate and report on technical factors involved with water quality. Section 13225(c) of the Water Code requires that each regional board, with respect to its region, shall:

> (c) Require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; **provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom.**

(CWC section 13225(c) (emphasis added); *see also* Water Code § 13165 [imposing this same requirement on the State Board where it requires a "local agency" to "investigate and report on

any technical factors involved in water quality control; ***provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom***"].)

Because no cost benefit analysis has been conducted anywhere in the TMDL documentation, as required by CWC sections 13267, 13225 and 13165, the adoption of the proposed TMDLs is arbitrary and capricious action that is contrary to law.

## X. THE PROPOSED TMDLs, ONCE EFFECTIVE AND ENFORCEABLE, WOULD RESULT IN THE IMPOSITION OF UNFUNDED STATE MANDATES

Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides in relevant part as follows:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service. . . .

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels. (*County of Fresno v. State* (1991) 53 Cal.3d 482, 487.) Enacted as a part of Proposition 4 in 1979, it "***was intended to preclude the state from shifting financial responsibility to local entities that were ill equipped to handle the task***." (*Id.*)

As noted, the costs to implement the TMDLs will be enormous. Despite the massive compliance and implementation costs, there are ***no*** provisions within the TMDLs that provide any funds or funding mechanisms for the various cities to comply with the mandated load and wasteload allocations imposed by the TMDLs.

Due to the numerous unfunded mandates imposed on the cities through the added responsibilities to be included within their NPDES permits, and through other means to be imposed to comply with the TMDLs, the TMDLs are unfunded mandates that violate Article XIII B, Section 6 of the California Constitution. (*County of Fresno*, 53 Cal.3d at 486; *see also Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1570.)

The unlawful unfunded mandates imposed by the TMDL are underscored by Proposition 218's severe limitations on a City's ability to impose fees upon residents as a means to alleviate the enormous compliance costs imposed. (*Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App.4th 1351, 1353-1354, 1358-59.) There, the Court struck down the City of Salinas' "Storm Water Management Utility Fee" because it was not enacted by a required majority vote of affected property owners. (*Id.*)

Proposition 218 shares identical purposes with Proposition 4, which resulted in the constitutional amendment prohibiting unfunded mandates in 1979, *i.e.*, to provide permanent protection for taxpayers from excessive taxation and to provide discipline in tax spending at both State and local levels. (*See County of Fresno*, 53 Cal.3d at 486.) The Regional Board's attempt to transfer these mandates down to municipalities, which in turn necessarily must attempt to recoup their costs from taxpayers, violates the California Constitution.

Moreover, as discussed above, federal law clearly does not require that numeric limits within TMDLs be included in MS4 permits as "never to be exceeded" effluent limits. Instead, as reflected in State Board Order after State Board Order, municipalities need only control the discharge of pollutants from their storm drain systems in accordance with the "maximum extent practicable" ("MEP") standard. (*See* 33 U.S.C. § 1342(p)(3)(B).) Yet, the Tentative BPA makes clear that all Final LAs and WLAs will need to be strictly complied with (Tentative BPA, pp. 33-

34), but with the TMDL Report acknowledging that: "There are no sediment quality objectives in the Basin Plan or CTR [California Toxics Rule]." (TMDL Report, p. 19.)

The Regional Board's desire to impose State mandates on the Cities and other local agencies that are not compelled by federal law requires funding under the California Constitution. Without the State first providing sufficient funding to comply with these new State mandates, the proposed TMDLs will not be enforceable.

## XI. THE PROPOSED TMDLS VIOLATE THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Cities urge the Board to substantially revise the Substitute Environmental Document ("SED") prepared for the project. As explained below, the SED is flawed in a number of ways and fails to satisfy the requirements of CEQA (Pub. Resources Code, §§ 21000 *et seq.*) and the CEQA Guidelines (14 Cal. Code Regs. §§ 15000 *et seq.*). By providing these comments, the Cities intend to foster a productive dialogue with the Board so that the environmental issues of pressing concern to the Cities and the public at large are fully addressed.

The following comments detail the Cities' general and specific concerns about problems raised by the project and the SED. When responding to these comments, the Regional Board must describe the disposition of the significant environmental issues raised and provide "good faith reasoned analysis." (*See* 14 Cal. Code Regs. § 15088(c); *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1359-1360.)

### A. THE PROJECT DESCRIPTION IS UNCLEAR AND INCONSISTENT

The SED violates CEQA because it contains an unclear and inconsistent project description. Specifically, the SED describes the TMDL as including three inconsistent dredging-requirement scenarios, variously requiring the dredging of:

(i) Just the Long Beach and Los Angeles Harbors ("Harbors"). (Staff Report, 102 [compliance with TMDL "will require the elimination of toxic pollutants being loaded into Dominguez Channel and the Harbors, and cleanup of contaminated sediments ***lying at the bottom of Los Angeles and Long Beach Harbors***"], 107 ["The sediment load allocations for the contaminated bed sediments are assigned to ***the Cities of Los Angeles and Long Beach and the State Lands Commission, which have responsibility for cleanup of the contaminated sediments***"], 125 [estimated volume of dredged material did ***not*** address any areas ***outside of the Harbors***]; SED, 18 [structural implementation alternatives include "removing contaminated sediments ***in the Harbor*** by dredging"], 35 [BMPs include "removing contaminated sediments **in *the Harbor***"], 37 ["Contaminated layers of sediment and soil ***in the Harbor bottom*** will be removed and displaced"], 42 ["Dredging or sediment capping will modify ***the Harbor bed***. . ."];

(ii) The Harbors and the Dominguez Channel Estuary. (Staff Report, 65, 88, 102 [TMDL may require "removal of contaminated sediment areas including identified hotspots within the Dominguez Channel Estuary and Los Angeles and Long Beach Harbors"]; SED, 20 ["Dredging is the removal of contaminated sediments from potentially, the Dominguez Channel Estuary and both the Inner and Outer Harbor areas"]); and

(iii) The Harbors, the Dominguez Channel Estuary, ***and the Dominguez Channel, itself***. (Staff Report, 50-51 [in discussing the restoration of beneficial uses the report discusses numeric targets for freshwater sediment ***for Dominguez Channel***], 81 ["reducing ***freshwater*** input loads may not be sufficient to achieve target concentration in water and sediments; thus decreasing contaminated pollutant levels ***in bed sediments*** may be required"], 107 [the Los Angeles County Flood Control District, which owns and operates the Dominguez Channel, and the cities that discharge to the Channel "shall each be responsible for conducting implementation

actions to address contaminated sediments ***in Dominguez Channel***," and "shall develop a ***Sediment Management Plan*** to address contaminated sediment ***in Dominguez Channel*** and Dominguez Channel Estuary"]; SED, 5 ["The goal of this TMDL is to protect and ***restore . . . sediment quality in Dominguez Channel*** and Greater Los Angeles and Long Beach Harbor waters ***by removing contaminated sediment***. . . ."). Thus, it is unclear whether the TMDL will require dredging of just the Harbors, the Harbors and the Dominguez Channel Estuary, or the Harbors, the Dominguez Channel Estuary, and the Dominguez Channel.

Moreover, the TMDL Staff Report states that 2 to ***8 feet*** of sediment may be dredged (TMDL Staff Report, 124), but inconsistently assumes that dredging depths would be 2 to ***3 feet*** when estimating costs. (*Id.*, 125.) This huge disparity obviously would have a profound difference in the scale of the impacts that would result from dredging. The SED does not facilitate an understanding of these impacts because it does not indicate either the extent or depth to which dredging will occur, merely stating in conclusory fashion and without evidentiary support, that dredging "would not be to the depth or scale which would cause unstable conditions or changes in geological substructures" or in "unstable earth conditions." (SED, 36.) However, the SED does not disclose just what depth or scale *would* cause unstable conditions, or what the depth or scale of the project's dredging would be (*e.g.*, would the dredging depth be 3 feet, 8 feet, or some other number? would dredging occur in just parts of the Harbors, throughout the entire areas of the Harbors, or in the Dominguez Channel Estuary and Dominguez Channel or other areas as well?).

An SED's project description, and the accompanying analyses, must be consistent throughout the SED. Inconsistently describing the project prevents the SED from serving as a vehicle for intelligent public participation in the decision-making process. (*County of Inyo v.*

*City of Los Angeles* (1977) 71 Cal.App.3d 185, 197.) The shifting project description also indicates that the SED is minimizing project impacts by not discussing reasonably foreseeable aspects of the project, which contributes to the SED's inadequacy. The Board must make the project description consistent, clarify just what the TMDL will require in terms of dredging, and recirculate the SED so that the public and the decision makers have a clear understanding of the environmental impacts of the TMDL.

### B. THE SED'S ASSESSMENT OF DREDGING IMPACTS IS INADEQUATE

The TMDL Staff Report (p. 125) estimates that a minimum of 11,173,066 cubic yards of material would likely need to be dredged from areas within the Los Angeles and Long Beach Harbors in order to fulfill the requirements of the TMDL. The TMDL Staff Report further indicates that the cost of dredging the 11,173,066 cubic yards from the Harbor areas alone is estimated at approximately $680,000,000, and provides that the volume of dredging would actually be 35,527,233 cubic yards if the TMDLs' ERL targets are to be met, meaning that the actual dredging costs would be three times higher than what the Regional Board has estimated for purposes of its costs analysis, i.e., that the dredging costs would actually be ***$2.16 billion*** if the TMDLs' targets are to be met rather than the State Board's SQOs. (TMDL Staff Report, p. 125.) Further, the TMDL documentation does not evaluate the expected costs for dredging outside of the Harbor areas. (*Id.* ["The memo referenced above did not address any areas outside of Los Angeles and Long Beach Harbors."]) As such, neither the SED nor the other TMDL documentation contains an analysis of the true economic impacts from dredging to comply with this TMDL project, and thus the analysis is defective on its face.

Further, based on maps showing contaminant concentrations in the Harbor sediments, sediments in every part of the Harbor complex exceed relevant pollutant standards, and thus the entire Harbor complex must be dredged or capped in order to meet the requirements of the

TMDL. Therefore, dredging/capping will not be limited to the areas within the Harbor complex as suggested by the TMDL Staff Report. Indeed, again the dredging required by the TMDLs would be much more extensive than currently envisioned in TMDL documents if the TMDLs' targets are required to be met, with the TMDL Staff Report recognizing the amount of dredged material needed to comply with the TMDLs' targets at 35,527,233 cubic yards, rather than the 11,173,066 cubic yards which the Regional Board used to formulate its dredging costs. It is unclear why the Regional Board used the low cubic yard estimate to calculate costs based on the State Board's SQOs, but based the TMDLs' load and wasteload allocations on the ERLs, rather than the SQOs.

Given the large scale of required dredging, the Regional Board's assessment of the environmental impacts of such dredging in the SED is inadequate, as stated:

a. In response to the question, "Will the proposal result in disruptions, displacements, compaction or overcoming of the soil?", the SED states that planned dredging "will involve the removal of the top layers of contaminated sediment; however this will not be to the depth or scale which would result in disruptions, compactions, or overcoming on the soil." (SED, 37.)

This analysis dismisses too quickly the potential for soil disruption as a result of dredging. By its nature, dredging is highly disruptive to the substrate being dredged. Thus, the potential for disruption and disturbance of soil—and disruption and disturbance of contaminants in the soil—is very high. Dredging activities will disrupt soil such that sediment concentrations in the water column are greatly increased, and may disrupt contaminants in the soil such that contaminant water concentrations are higher on a long-term basis.

Moreover, the SED's claim that dredging will involve removal of only the top layers of sediment (which is belied by the statement that dredging depths will be up to 8 feet) is not based on sufficient data. Indeed, no analysis of pollutant concentrations in deep Harbor sediments has been made. If higher concentrations of pollutants are present below the surface sediment layer (as is likely, given the fact that many pollutants, such as DDT, are legacy pollutants), deeper dredging would likely be required to meet TMDL targets. Deeper dredging would be very disruptive to the sediments, potentially exposing the water column to very high contaminant concentrations and requiring the dredging of significant additional volumes of sediment.

Finally, capping Harbor sediments could cause significant disturbance in the Harbor sediments, resulting in higher contaminant concentrations in the water column. Capping activities on the Palos Verdes Shelf resulted in the disturbance of deeper sediment layers that contained higher concentrations of pollutants. Pollutants in the deeper sediment layers had been less bio-available, since they were buried, but became more bio-available after capping since they were brought closer to the sediment surface.

b. In response to the question, "Will the proposal result in the destruction, covering or modification of any unique geologic or physical features?", the SED states that dredging activities will "require temporary storage of the dredge material near the Harbor prior to disposal. However, these activities are not expected to be of the size or scale that would result in the destruction, covering, or modification of any unique geological or physical features. Moreover, dredging will be a temporary activity taking place in the Harbor[.] [I]t will not permanently change the features of the landscape in the area." (SED, 39.)

This analysis fails to disclose how much total material will need to be dredged, how much material will need to be stored, how many truck and or boat trips will be needed to move the material to temporary and permanent storage locations, and where those locations are. It thus fails to adequately evaluate the impacts of the contemplated storage, including traffic and air quality impacts. Nor is there an analysis of how the storage of toxic, contaminated sediment will impact surrounding uses, including potential sensitive receptors.

The analysis also underestimates the potential for destruction or alteration of landscape areas adjacent to the Harbor as a result of dredge spoil storage. Although storage may be "temporary" (which is inaccurate considering the 20-year TMDL timeframe), very large storage areas will be required, given the large scale of the dredging. Because public spaces would have to bear the burden of such storage, facilities such as parks or open space potentially could be used for such storage (SED, p. 86), to the substantial detriment of the public. Moreover, given the large scale of the dredging, and the fact the TMDL would occur over 20 years, storage requirements would not be brief. Indeed, depending on the dredging and disposal schedule, dredging activities could result in the covering or modification of important physical features (*e.g.*, parks, open space) for years at a time. Because the dredged spoils contain significant concentrations of toxic contaminants, the spoils could permanently contaminate soils at storage locations such that the quality of the storage area might be permanently degraded in some way (*e.g.*, inhibiting vegetation growth).

c. In response to the question, "Will the proposal result in any increase in wind or water erosion of soils, either on or off the site?", the SED states the following: "Dredging or sediment capping will include the temporary storage of dredge materials prior to disposal, and these materials may be subject to erosion

processes. This can be mitigated by covering the dredge materials during rainy or windy conditions. Once the dredge material is dry and disposed of, the potential for erosion at the site will cease. Erosion may occur as a short-term impact but can be mitigated." (SED, 40.)

The SED's response underestimates the difficulty of controlling erosion from dredged spoils stored adjacent to the Harbor. Given the scale of dredging required by the TMDL, and thus the scale of storage areas required, it is conclusory to simply assume that erosion of stored dredged materials can be adequately prevented.

The SED should identify the known or potentially contaminated sites within the proposed Project area, and evaluate whether conditions at the sites pose a threat to human health or the environment. The SED should identify the mechanism to initiate any required investigation and/or remediation for any site that may be contaminated and the government agency to provide appropriate regulatory oversight. All environmental investigations, sampling and/or remediation for the site should be conducted under a work plan approved and overseen by a regulatory agency that has jurisdiction to oversee hazardous substance cleanup. Prior to dredging, sampling may be required. If soil is contaminated, it must be properly disposed and not simply placed in another location onsite. Land Disposal Restrictions (LDRs) may be applicable to such soils. If it is determined that hazardous wastes are or will be generated and the wastes are (a) stored in tanks or containers for more than ninety days, (b) treated onsite, or (c) disposed of onsite, then a permit from DTSC may be required.

Moreover, the SED response overlooks completely the potential for erosion of submerged Harbor sediments during the process of dredging. Dredging will disturb huge areas of the Harbor bottom, loosening soil that is currently compacted, and thereby subjecting Harbor

sediments to erosion due to currents in the Harbor. Such underwater erosion would potentially redistribute contaminants in the Harbor sediments widely throughout the Harbor.

d. In response to the question, "Will the proposal result in changes in deposition or erosion of beach sands, or changes in siltation, deposition or erosion which may modify the channel of a river or stream or the bed of the ocean or any bay, inlet or lake?", the SED claims, "There will be a change in the Harbor bed under this implementation alternative, but it is a positive change and improves the Harbor by removing contaminated sediments. There may be increased sediment resuspension in the Harbor during the actual dredging or capping process. However, this impact is considered short term and temporary." (SED, 42.)

Again, the SED greatly underestimates the potential impacts of dredging. Dredging will bring about significant sediment resuspension and will increase the potential for erosion of submerged sediments. These two processes will greatly increase sediment concentrations in the Harbor water column. These sediments in the water column may then be transported by Harbor currents and deposited adjacent to shorelines near the Harbor. These areas could include bays, inlets, and beaches. Thus, the proposed dredging has the potential to result in significant changes in deposition in near-shore environments adjacent to the Harbor.

e. In response to the question, "Will the proposal result in substantial air emissions or deterioration of ambient air quality?", the SED admits, "Dredging or sediment capping requires the use of heavy equipment (*i.e.*, the dredge itself and trucks to transport dredge material). The adverse impacts to ambient air quality may result from short-term operation of the dredge and an increase in truck traffic for dredge material transportation." (SED, 44.). However, the SED claims that these effects

can be mitigated and proposes a list of measures to reduce the air quality impact of dredging activities.

While it may be correct that the air quality impacts of dredging can be mitigated in various ways (*e.g.*, by using low-emission construction and maintenance vehicles, soot reduction traps, emulsified diesel fuel, etc.), the impacts cannot be eliminated. Even if mitigated, the huge scale of proposed dredging guarantees that there would be a substantial air quality impact as a result of dredging, and that such impacts will persist for years. As stated, the analysis fails to disclose how much total material will need to be dredged, how much material will need to be stored, how many truck and or boat trips will be needed to move the material to temporary and permanent storage locations, and where those locations are. The potential air quality impact is made worse by the fact that the Los Angeles-Long Beach Harbor Complex already has notoriously bad air quality due to the huge volumes of ship and truck traffic associated with the ports. Thus, the additional air quality impacts to result from dredging are particularly concerning. Nor is there an analysis of how the storage of toxic, contaminated sediment will impact surrounding uses, including potential sensitive receptors.

f. In response to the question, "Will the proposal result in changes in absorption rates, drainage patterns, or the rate and amount of surface water runoff?", the SED states, "Temporary staging, use of construction equipment, and maintenance or other vehicles for dredging or sediment capping may cause significant compaction, which may impact absorption rates of surface water runoff. Construction BMPs and mitigation measures are available to mitigate the potential impact." (SED, 49.)

This response is inadequate and conclusory. The SED does not mention any specific BMPs or mitigation measures, so it is wholly unclear whether the impact of dredging activities on soil compaction and surface water runoff can, in fact, be mitigated. Since the potential for soil compaction and alterations in runoff quantities and rates is significant, the SED's failure to specify mitigation measures is a critical shortcoming.

g. In response to the question, "Will the proposal result in discharge to surface waters, or in any alteration of surface water quality?", the SED admits, "Dredging and sediment disposal operations are expected to degrade water quality in the Harbor." However, the SED claims that measures will be taken to minimize the impact (*e.g.*, small cutterhead dredges, sediment curtains, and monitoring), and that impacts will only be temporary, occurring during dredging operations. (SED, 53.)

The SED is correct that dredging operations would significantly degrade water quality in the Harbor. Moreover, the mitigation measures proposed may ameliorate somewhat the impacts during the period of active dredging. However, the SED's claim that impacts will be limited to the period in which dredging is occurring is not be correct. Given that dredging will expose and disturb significant quantities of sediment on the Harbor floor, there is considerable potential for ongoing underwater sediment erosion and redistribution, which could increase turbidity and contaminant concentrations in the water column on timescales significantly longer than the period of active dredging operations. Moreover, newly exposed sediments could significantly increase the flow of contaminants from the soil into the water column, thereby increasing contaminant concentrations in the water column over a longer period, and perhaps permanently.

The SED should also discuss the chemical characterization of the proposed material to be dredged, and special management of the materials. To avoid potential harm to marine resources, materials should be capped and isolated, or additional tests run to demonstrate the materials' suitability for unconfined disposal into marine waters.

In this same vein, the SED should describe compliance with Clean Water Act section 404(b)(1) Guidelines, which requires a clear demonstration that the project represents the least environmentally damaging practicable alternative (LEDPA) that achieves the basic project purpose, showing the project will comply with all restrictions on discharges (*e.g.*, there shall be no dredged materials permitted if there are practicable alternatives to the proposed discharge which would have less adverse impact on the aquatic ecosystem).

The SED should also describe the project's consistency with the goals of the Los Angeles Contaminated Sediment Task Force.

Further, although the SED acknowledges potentially significant impacts to plants and animals, it does not adequately analyze the extent of those impacts. The adverse effects of dredging on essential fish habitat (EFH), which is where the proposed dredging would occur, will include (i) direct removal/burial of organisms; (ii) turbidity/siltation effects, including light attenuation from turbidity; (iii) contaminant release and uptake, including nutrients, metals, and organics; (iv) release of oxygen-consuming substances; (v) entrainment; (vi) noise disturbances; and (vii) alteration to hydrodynamic regimes and physical habitat. The SED does not disclose the number of acres of soft bottom habitat the project dredging would impact. Thus, it is impossible to calculate the number of metric tons of invertebrates living in the sediments that would be lost, and the adverse effects there would be on EFH by reducing the prey resources for various fish species. The exact rate of recovery is unknown for this area, but the range identified

in the literature is a few months *to several years*. Moreover, the SED fails to identify and analyze the impacts associated with any dredging necessary for maintenance. This maintenance dredging could exacerbate all of the above impacts, and could keep the habitat value of the Harbors low by preventing the reestablishment of the benthic community and fish populations. The SED must analyze and quantify all of these impacts of re-suspended contaminants on fish mortality rates, and adopt adequate mitigation. Because it fails to do that, the SED is inadequate.

The SED also glosses over potential impacts on special status birds and marine mammals (*e.g.*, brown pelicans, least terns, seals and sea lions) by characterizing the loss of foraging habitat as temporary. The mischaracterization of the project-related impacts downplays the nature and timeframe of the project. The project's magnitude and protracted schedule proposes an intensive and disruptive array of dredging activities for the next 20 years. Twenty years is not an insignificant amount of time to evict special status species from foraging habitat in and around the Harbors.

Although the SED acknowledges that turbidity can impact water quality and that turbidity would increase during project dredging activities, the SED concludes in each potential instance that the turbidity would be localized to the area of the activity and would thus not result in violation of regulatory standards or guidelines for water quality. However, the conclusion is not supported with evidence. The document fails to report how often and/or for how long the dredging would occur. It is difficult to imagine that all of these "localized" impacts would not combine to constitute an impact to water quality. Given an estimated project schedule of 20 years, or 7,300 days, the proposed turbidity-inducing activities would be extensive. Even if these impacts were localized, water quality in the immediate vicinity of the dredging activities would

be severely affected. Moreover, nowhere does the document analyze the potential for these activities to overlap and the resulting impacts from having multiple activities happening at once.

Finally, the TMDL Staff Report suggests that the requirements of the TMDL can be met via implementation of a range of structural and non-structural BMPs in the basin draining to the Los Angeles and Long Beach Harbors (*e.g.*, timely storm drain catch basin cleaning, improved street cleaning, education of residents and businesses on good housekeeping practices, infiltration trenches, vegetated swales, filter strips, and sand or media filters). (SED, 107). However, the implementation plan provides no evidence that these measures would be sufficient to reduce contaminant concentrations to the levels required by the TMDLs. Thus, it is unclear whether such measures would be adequate, raising the possibility that other more radical and expensive measures would be required.

The TMDL documents are also very unclear about how TMDL requirements would be implemented in NPDES permits for individual dischargers. Thus, it is impossible to know which implementation measures might be required, how the TMDL requirements would be achieved, and what the cost of implementing the TMDLs would be for relevant stakeholders.

### C. THE SED FAILS TO EVALUATE AND MITIGATE GOVERNMENTAL SERVICES IMPACTS FROM THE TMDL PROJECT

The SED also fails to evaluate certain potential impacts of the project, including possible impacts on the provision of government services. Local government agencies within the watershed area do not have sufficient resources to comply with the project - with overall project costs (under)estimated at close to $1 Billion (with the true costs being closer to $2.5 billion), plus additional annual maintenance costs - consequently the project will necessarily result in a diversion of funds from other governmental services, such as police, fire, capital improvements, etc. These potential governmental services impacts have not been evaluated, and thus none of

the potential ways to mitigate these impacts have been identified. CEQA's purposes are clearly not served with the subject SED.

### D. THE SED FAILS TO EVALUATE THE PROJECT'S IMPACTS ON GREENHOUSE GASES

Consistent with AB 32, the California Global Warming Solutions Act of 2006, the SED must fully analyze the project's impacts on greenhouse gas emissions. The project's contribution of these emissions should be evaluated, and impacts and mitigation measures should be analyzed, as the proposed project may contribute to global climate change. (*See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89-96 [the Legislature has expressly acknowledged that greenhouse gases have a significant environmental effect].)

The SED fails in its analysis in that while it concedes that the project will create GHG emissions, it does not quantify the total GHG emissions from the project; *i.e.*, it does not disclose the calculations necessary to determine how much extra carbon dioxide equivalencies would be emitted as a result of the project. (SED, 47.) Rather, it simply states, in conclusory fashion, that "the relative contributions of the implementation program are small and would not conflict with the state's ability to meet the AB32 goals." (*Id.*) There is no evidence in the record to support that finding. What emission factors, fuels, source data, etc., were used? Without disclosure of the calculations and factors utilized in the calculations, it is impossible to evaluate the accuracy of the finding. Thus, the SED fails to (i) adequately inventory greenhouse gas emissions from the project, or (ii) identify potential reduction opportunities.

Moreover, the SED does not provide the quantification of GHG emissions for any alternative methods of complying with the TMDL or their cumulative impacts. Nor does the SED set forth what threshold of significance it uses or provide the underlying calculations. Thus, there is no way to verify the conclusions in the SED regarding GHG emissions or potential

climate change impacts of the project. None of these points have even been attempted to be addressed, and the SED is wholly deficient in its discussion of GHG Emissions.

### E. THE DISCUSSION MITIGATION MEASURES IN THE SED IS DEFICIENT

The SED concedes that there will be significant impacts to plants and animals (some of which are endangered or threatened) and to their habitat. (TMDL Staff Report, 15; SED, 59-72.) As stated above, however, the SED makes no attempt to quantify the impacts or to devise mitigation measures to lessen the potential impacts. That failure violates CEQA.

Throughout the SED, it is represented that certain mitigation measures can reduce potential project impacts to "less than significant." However, no performance goals are identified anywhere in the SED or its attachments. Such performance goals and the monitoring and remediation measures that will be ongoing to ensure project impacts meet those performance goals are required under CEQA. Absent this information, there is no verifiable means to confirm whether the SED's environmental conclusions are accurate. Methods for achieving the performance goals must be integrated into the SED as mitigation measures, because the success of those remediation efforts are part-and-parcel of the assumptions underlying the SED's conclusions regarding environmental impacts.

The SED provides that the TMDLs will rely on a menu of best management practices. Without knowing which of those practices will likely ultimately be implemented, *i.e.,* without assessing the environmental impacts from reasonably foreseeable implementation measures, and without providing any mechanism to monitor the implementation of those practices, there is no device in place to either verify the environmental conclusions in the SED, or to ensure that those forecasted conclusions will come to fruition. The SED is thus deficient for this reason as well.

The SED must provide language that ensures implementation of mitigation efforts so as to ensure that mitigation actually occurs. The details of those efforts must be described in the SED, or specific performance standards must be included to ensure that mitigation works as advertised. (See, e.g., *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793-796; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) Moreover, the SED fails to include a mitigation monitoring or reporting program.

By deferring presentation of this information to the public, the opportunity to assure that the mitigation monitoring and reporting program has sufficient devices in it to ensure implementation of all mitigation measures over time, is lost. This is of critical importance because the project is scheduled to proceed over the course of 20 years. Over that period of time it will be important that a stable, reliable, actively enforced set of enforcement mechanisms are in place. From the mitigation information provided in the SED, it appears that the goals have not been satisfied despite the mandate of 14 California Code of Regulations section 15126.4(a)(2). (*See also* 14 Cal. Code Regs. § 15126.4(a)(1)(A).)

### F. THE SED FAILS TO ADEQUATELY IDENTIFY AND EVALUATE CUMULATIVE IMPACTS OF THE PROJECT

An EIR (including an SED) must evaluate both project-specific and cumulative impacts for significance. There are two methods for satisfying the cumulative impacts analysis requirement: The list-of-projects approach and the summary-of-projections approach. (14 Cal. Code Regs. § 15130 (b).) Under either method, the EIR must summarize the expected environmental effects of the project and related projects, provide an analysis of cumulative impacts, and examine options for mitigating the project's contribution to any significant cumulative impacts.

The SED's cumulative impacts analysis does none of these things:

- Although the SED purports to analyze certain resource areas in its cumulative analysis, it does so entirely in a cursory fashion in 2 pages. (SED, 101-102.) In the resource areas it does consider, the SED erroneously states, in conclusory fashion, that certain impacts, like noise and vibration, would be insignificant "due to the temporary nature of noise increases." (SED, 102.) The implementation of the project, however, will take place over 20 years, which can hardly be deemed to be "temporary."
- Not only does the SED ignore several of the resource areas in its cumulative analysis, but it also fails to disclose just what other projects may be contributing to cumulative impacts; indeed, the SED even fails to disclose upon which method of analysis (the list-of-projects approach or the summary-of-projections approach) it is purportedly based.
    - In its cumulative analysis the SED considers only other TMDLs that will likely occur in the future, while completely ignoring other non-TMDL projects. The Ports of Los Angeles and Long Beach are currently proceeding with certain projects in the Harbors (*see, e.g.*, POLA's China Shipping Project and POLB's Middle Harbor, Gerald Desmond Bridge, and Pier S Projects) that include dredging and filling of various parts of the Harbors. The SED has failed to evaluate whether the cumulative impacts of the project and these Port projects will be significant (*e.g.*, whether the Port projects will also require the disposal of contaminated sediments either in the Harbor or offsite; whether the Port projects' storage requirements will impact the availability of storage sites for the project; whether the project's impacts associated with dredging operations (turbidity,

dissolved oxygen, etc.) will be cumulatively considerable when combined with dredging/filling operations involved with the Ports' projects).

- Although the SED concedes that a Dominguez Channel Bacteria TMDL will likely be developed shortly (SED, 101), the SED fails to evaluate the impacts of that TMDL which could make the incremental impacts of the project cumulatively considerable. (*See* Pub. Res. Code § 21083(b); 14 Cal. Code Regs. § 15065(c).)

These fatal flaws render the SED defective under CEQA. (*Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 406-411.)

## G. THE SED'S ALTERNATIVES ANALYSIS IS FATALLY DEFECTIVE

### 1. The SED Fails to Establish Project Objectives and Unlawfully Confuses the Concept of "Alternatives to the Project" with the Concept of "Alternative Methods of Compliance" With the TMDLs

The purpose of the SED is to give the public and governmental decision makers the information needed to make informed decisions, thus protecting not only the environment, but also informed self-government. (*See In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162; *Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1420-1422.)

CEQA requires that in addition to analyzing the environmental effects of a project, the SED also consider and analyze project alternatives that would reduce adverse impacts. The process of selecting the alternatives to be included in the SED begins with the establishment of project objectives. "A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings. . . . The statement of objectives should include the underlying purpose of the project." (*Id.*, 1163, quoting 14 Cal. Code Regs. § 15124(b) (emphasis added).)

Although the SED includes a general statement of the ultimate purpose of the project, it does not include a clearly written statement of project objectives, which is a separate, more detailed requirement than the statement regarding the purpose of the project.

This defect has led to a flaw in the fundamental approach to the "alternatives analysis." An "alternatives analysis" and the application of "mitigation measures" are two separate means of identifying ways to avoid the potential environmental impacts of a project. The SED improperly treats mitigation measures and alternatives analyses as overlapping approaches to mitigation. Thus, while the SED acknowledges impacts to several resource areas, the "alternatives" in the SED were clearly not selected in a manner calculated to address those potentially significant environmental impacts.

Indeed, the methodology for selecting potential alternatives is not clearly defined at all in the SED. Because the SED fails to include an alternatives analysis designed to address the potentially significant environmental impacts of the project, the SED fails to evaluate a "reasonable range of alternatives," and therefore is legally flawed. Consequently, the process of selecting the alternatives to be included in the SED has been irreparably impacted. The SED must be revised to include "project" alternatives designed to reduce identified environmental impacts from the project.

The alternatives analysis is further legally flawed by the fact that the SED frequently, but incorrectly, assumes that it is complying with the obligation to analyze alternatives to the "project" (the TMDL), by purportedly analyzing alternative "methods of compliance" with the TMDL. The SED must analyze alternatives to the project to minimize any potentially significant adverse impacts of the project. (Pub. Res. Code § 21080.5(d)(3)(A) [regulatory program must include alternatives "to the activity"]; 23 Cal. Code Regs. §§ 3777(a)(2) [environmental review

under regulatory program must include alternatives "to the proposed activity"], 3780 [board shall not approve an activity if there are feasible alternatives to the activity that would lessen any significant impacts of the activity].)

In addition to evaluating alternatives to the project, Public Resources Code section 21159(a)(3) requires that the SED also evaluate the reasonably foreseeable "alternative methods of compliance" with the TMDLs. The SED conflates the two concepts of alternatives analysis, and thus fails to include either a legally adequate alternative "project" analysis, or a legally sufficient alternatives analysis of the "methods of compliance" with the TMDLs. By attempting to analyze alternative *methods of compliance* with the TMDLs, the SED does not fulfill its obligation under CEQA to analyze alternatives *to the project*.

### 2. The SED Fails to Analyze a Reasonable Range of Legitimate Project Alternatives

#### a. The *Goleta II* Criteria

Under CEQA, the SED must evaluate a reasonable range of alternatives to the proposed activity being considered by the Board, here the Toxic Pollutant TMDLs. (14 Cal. Code Regs. § 15126.6 (a).) If the documents do not contain a discussion of legitimate alternatives, including a "no project" alternative, the documentation is deficient. (*Arcadia v. State Board, supra,* 135 Cal.App.4th at 1422; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1404.)

The alternatives selected must meet certain criteria to be considered legitimate alternatives. In *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 ("*Goleta II*"), the California Supreme Court held that to satisfy CEQA, the alternatives considered in an EIR must meet two requirements: (i) They must potentially offer substantial

environmental advantages over the project proposed; and (ii) they must be potentially capable of being feasibly accomplished in a successful manner considering the economic, environmental, social, and technological factors involved. (*Id.* at 566.) As stated in CEQA's Guidelines: "The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project." (14 Cal. Code Regs. § 15126.6(f) (emph. added).)

The whole purpose of an alternatives analysis is to discuss project alternatives that could meet most of the project's objectives at a lower environmental cost. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 406.) The SED's failure to discuss a reasonable range of potentially feasible alternatives, with potentially substantial environmental advantages over the project, contravenes CEQA's purpose of ensuring that public agencies regulate activities that affect environmental quality so as to give major consideration to preventing environmental damage, and thus violates CEQA. (Pub. Res. Code §§ 21000 (g); 21001 (g); 21002.)

Although the SED states that it examines three alternatives to the project, that statement is misleading. In actuality, the SED fails to analyze even one legitimate project alternative.

**b. The SED Does Not Analyze Three Alternatives As Alleged**

First, the SED misleadingly represents that it analyzes three project alternatives. (SED, 15.) Such statement is false on its face because included within the three purported "alternatives" is the proposed project, itself. (*Id.*) The proposed project cannot be an alternative to itself. (Pub. Res. Code § 21100(b)(4) [EIR must review alternatives "to the proposed project"].)

### c. The "No Project" Alternative Discussed in the SED is Not a Legitimate Alternative, and a true "No Project" Alternative must be discussed in the SED and Considered

Second, of the two purported "alternatives" that were actually included, the "no project" alternative, as described in the SED, cannot be considered within a reasonable range of project alternatives because, as framed in the SED, it would not accomplish the most basic objectives of the project. (14 Cal. Code Regs. § 15126.6(c) [the range of potential alternatives to the proposed project "shall include those that could feasibly accomplish most of the basic objectives of the project. . . ."].) The SED provides that the "no project" alternative "is not a feasible alternative." (SED, 17.) This "no project" alternative, as framed in the SED, appears to have been included not because it offers "substantial environmental advantages" over the project proposed or is "feasible," but only because, under CEQA, an EIR's discussion of alternatives must include a "no project" alternative. (14 Cal. Code Regs. § 15126.6(e)(1).) Because the "no project" alternative, as framed in the SED, does not satisfy either of the criteria of *Goleta II*, its inclusion in the SED does not satisfy the requirement of disclosing a reasonable range of potentially feasible project alternatives.

Still, a legitimate "no project" alternative could have and should have been evaluated in the SED. Specifically, the SED should have evaluated the likelihood that the contaminated sediment in issue, which is the issue driving the need for these TMDLs, would be dredged and/or capped pursuant to the ongoing CERCLA cleanup process that was commenced more than two decades ago in connection with the Montrose Superfund Site. (*See* Cities' Consent Decree, Exhibit "1", p. 1 ["The United States, . . . and the State . . . filed the original complaint in this action on June 18, 1990, under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA") . . .."].) This CERCLA cleanup process may entirely negate the need for this TMDL "project," and a more accurate and

complete description of the "no project" alternative must be included before this project can be lawfully considered under CEQA.

### d. The US EPA TMDL Alternative is Not a Legitimate Alternative

The US EPA TMDL similarly cannot be considered within a reasonable range of project alternatives because it also does not meet *Goleta II*'s requirement that a legitimate alternative offer substantial environmental advantages over the project proposed. Indeed, the SED expressly asserts that the environmental impacts of this alternative "may be of greater severity [than the proposed project] as the intensity of implementation actions will be greater to comply with the shorter time frame." (SED, 17.) Thus, the US EPA TMDL alternative would not satisfy CEQA's requirements because it would not be "capable of avoiding or substantially lessening any significant effects of the proposed project," as legitimate alternatives are required to do. (14 Cal. Code Regs. § 15126.6(b).)

Consequently, it is beyond dispute that the SED fails to analyze even one alternative that meets the requirements of CEQA. At the risk of stating the obvious, zero alternatives is not a reasonable range of alternatives.[2] Thus, the SED's alternatives analysis does not produce information sufficient to permit a reasonable choice and plainly violates the rule of reason. (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1029.) *Goleta II* stands for the proposition that where no alternative meeting the *Goleta II* reasonable range parameters is reviewed in-depth in an SED (*see Arcadia v. State Board, supra,* 135 Cal.App.4th at 1422), the lead agency abuses its discretion in certifying such a document.

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[2] The word "range" refers to "a sequence, series, or scale between limits . . . [*e.g.*] a range of possible solutions. . . ." (Webster's New Internat. Dict. (3d ed. 1971), 1880.)

### e. An Example of an Alternative Project Analysis that Should have been Conducted in the SED

The deficiencies of the SED's alternatives analysis is starkly revealed by comparing it to the analysis undertaken in *In re Bay-Delta, supra,* 43 Cal.4th 1143. There, a program EIS/EIR was prepared for a long-term plan to restore the Bay-Delta's ecological health and to improve water management. A series of public workshops was held for over a year just to define the Bay-Delta's problems and to develop a range of potential alternative solutions. (*Id.*, 1157.)

Four primary objectives were then developed, and six solution principles were adopted to provide a measure of acceptability of alternatives. (*Id.*, 1158.) Initially, fifty categories of potential action, including hundreds of individual actions within these categories, were identified to achieve the project's objectives, and these action categories became the building blocks of the alternatives; *i.e.*, each alternative was a combination of action categories reflecting different approaches to achieving program objectives. The agency then narrowed the alternatives by defining approaches to resolve critical conflicts among the beneficial users of the water. (*Id.*) The process, which took over five years to complete, yielded 32 approaches and 100 alternatives that were later reduced to 10. Then, after several more public meetings, the draft program EIS/EIR was finally released, which evaluated the proposed project and twelve variations of three basic alternatives, as well as a "no action" alternative. (*Id.*, 1158.) Fifteen public workshops were held on the draft PEIS/EIR. The Final PEIS/EIR was not certified until 2½ years later. (*Id.*, 1160.) Even then, the court of appeal invalidated the PEIS/EIR based, in part, on a deficient alternatives analysis. Ultimately, the Supreme Court reversed that ruling based on the thorough analysis which had been undertaken by the agency as described above.

No such thorough alternative project analysis was undertaken for the proposed TMDL. While the program EIS/EIR in *In re Bay-Delta* clearly defined project objectives, which helped

the agency in ultimately selecting three legitimate alternatives with twelve variations of each, plus a "no action" alternative, here the SED does not clearly define project objectives, and only one project "alternative" has been cursorily analyzed, *i.e.,* the US EPA TMDL, which, as discussed above, is one and the same as the "no project" alternative. And, neither of those so-called "alternatives" constitutes a legitimate alternative under CEQA for the reasons set forth above. The deficiencies with the SED's alternatives analysis are clear, and unless corrected, the Regional Board's certification of the SED and approval of the subject TMDL would be an abuse of discretion and action contrary to law.

### 3. The SED Fails to Provide an Adequate Review of the Alternatives it Does Evaluate

CEQA also requires that the alternatives selected for an EIR be reviewed in-depth. (*Goleta II*, 52 Cal.3d at 569; 14 Cal. Code Regs. § 15126.6(f) [legitimate alternatives must be examined "in detail" and "discussed in a manner to foster meaningful public participation and informed decision making"].§ 15126.6(d) ["EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project".)

The SED does not contain the "in depth" alternatives analysis required under CEQA. Thus, the EPA TMDL and "no project" alternatives discussion violates CEQA because the discussion is extremely cursory and unsupported by the record. Indeed, the SED devotes a scant 3 pages to the entire alternatives analysis. (SED, 15-17.) No evaluation is undertaken of the alternatives' impacts in each of the resource areas as compared to the project's alleged impacts in those areas, and the conclusory statements in the SED are unsupported by any quantitative or comparative analysis. At a minimum, a matrix displaying the major characteristics and significant environmental effects of each alternative in each of the resource areas should have been included to summarize the comparison of the project and the alternatives, as recommended

by 14 California Code of Regulations section 15126.6(d). By offering no "factual informational underpinning" (*Laurel Heights Improvement Assn., supra,* 47 Cal.3d at 403) for its boilerplate conclusions or quantitative data for its bald characterizations, the SED offers no useful or reliable bases for comparisons.

The SED's failure to adequately analyze the alternatives it has selected underscores the more basic failure of the SED to select alternatives that meet the *Goleta II* criteria – since the alternatives on their face offer no potentially substantial environmental advantages over the project, the SED apparently assumes there is little point in evaluating them.

### 4. The SED Fails to Explain Why It Selected and Rejected Alternatives and Fails to Identify an Environmentally Superior Alternative

The SED's alternatives analysis also violates CEQA because it:

(i) fails to disclose its reasoning for selecting the alternatives it chose, which it is required to do under 14 California Code of Regulations section 15126.6(a), (c);

(ii) fails to identify the alternatives, other than a "partial" TMDL, that were considered and explain why they were rejected, which it is required to do under 14 California Code of Regulations section 15126.6(c)); and

(iii) fails to identify an environmentally superior alternative, which is required under 14 California Code of Regulations section 15126.6(e)(2)).

### 5. The SED Does Not Comply With 14 Cal. Code Regs. Section 15123

The discussion of alternatives in the SED also fails to meet the requirements of 14 California Code of Regulations section 15123, which requires that the SED's summary identify each significant effect with proposed mitigation measures and alternatives that would reduce or avoid that effect. The SED acknowledges several potentially significant effects, but makes absolutely no effort to identify, on an impact-by-impact basis, how any alternative would better

address environmental impacts. The failure to conduct this analysis reveals a disturbing lack of effort at identifying feasible alternatives. Equally important, the SED simply has not identified how each alternative would reduce each significant effect, if at all. (14 California Code of Regulations § 15123(b)(1).) The SED is thus legally defective and its certification would be an abuse of discretion and action contrary to law.

### 6. Other Feasible Alternatives Are Not Analyzed

Other potentially feasible alternatives that offer substantial environmental advantages over the proposed project do exist. Thus, it is surprising that the SED fails to evaluate even a single alternative that satisfies the requirements of CEQA. Although it is the Board's duty to formulate alternatives for inclusion in the SED, the SED fails to do so even though several alternatives are readily apparent. For example:

(1) Delay Development of TMDLs Until EPA and Cal DTSC complete CERCLA Cleanup Process. As discussed above in connection with the Cities' Consent Decree and the CERCLA process, EPA and the California DTSC have been involved in assessing and evaluating dredging and other cleanup options for the areas impacted by these TMDLs for over two decades. This CERCLA cleanup process must be allowed to be completed ***before*** any legitimate TMDLs can be established and load and wasteload allocations for discharges from the MS4 systems, developed. Only once this CERCLA process has been completed and the cleanup work thereunder conducted, can the need for any TMDLs for these water bodies (i.e., the need for this project) be properly evaluated and the true environmental impacts assessed.

(2) Lengthier Implementation Schedule. The SED should evaluate a TMDL alternative that contains a lengthier implementation schedule, *e.g.,* 35 years, given the Regional Board's Staff admission that a longer schedule will result in less severe environmental impacts.

(3) Phased-In TMDL. The SED should evaluate a TMDL alternative that is based on phased-in TMDLs, with WLAs that are contingent on the conducting of additional studies to determine the effectiveness of specific implementation measures.

(4) Watershed TMDLs. The SED should evaluate a "watershed TMDL alternative;" *i.e.*, it should evaluate the implementation of all of the required watershed TMDLs as a single project. Such an alternative might well avoid some of the problems that will likely result from implementing the TMDLs *seriatim*, such as where the implementation of a set of controls for one TMDL could be altered or negated by the next TMDL in line or could exacerbate conditions for a future TMDL (*e.g.*, installing wetlands to control metals for the Los Angeles and San Gabriel Rivers, only to thereafter require yet different or additional measures for the subject TMDLs). The Board has previously conceded that the various TMDLs will impact each other. (*See* SED for Metals TMDL for the Los Angeles River, 235 [the SED acknowledges that the placement of structural BMPs for the Metals TMDL, such as infiltration trenches or filters, in series with the systems being installed to meet the Trash TMDL, could result in more efficient operations and less maintenance in connection with those filters, which in turn would result in fewer, or less severe, environmental impacts].) Consequently, because such an alternative could substantially lessen the significant environmental impacts of the proposed project, it should be evaluated in the SED. The failure to evaluate the implementation of all of the required TMDLs as a single project also results in an unlawful segmentation, or piecemealing, of the project.

## H. THE SED FAILS TO ANALYZE SPECIFIC SITES

Public Resources Code section 21159(c) and 14 California Code of Regulations section 15187(d) mandate that the SED take into account "specific sites." The SED fails to comply with this obligation because it discusses only implementation alternatives without discussing any

specific sites. It is clearly feasible to perform this analysis in a programmatic document, and it should have been done in the SED as mandated by CEQA.

## I. THE SED DOES NOT INCLUDE REQUIRED INFORMATION

14 California Code of Regulations section 15120(c) mandates that the SED include certain information, such as a separate "summary" section that identifies each significant effect of the project with proposed mitigation measures, areas of controversy known to the Board, including issues raised by agencies and the public, and issues to be resolved, including the choice among alternatives and whether or how to mitigate the significant effects. (14 Cal. Code Regs. § 15123.) Typically, much of this information is provided in the Executive Summary, setting forth in table form (i) the proposed project's potential impacts, (ii) their level of significance, (iii) the mitigation measures proposed to address the impacts, and (iv) the level of significance of each impact after mitigation. This information was not set forth in the SED as required.

CEQA also requires that energy conservations measures, including those in CEQA Guidelines Appendix F, be discussed. (14 Cal. Code Regs. § 15126.4(a)(1)(C).) This has not been done.

Also, the potential Environmental Justice impacts, general population and housing impacts, and S. B. 375 impacts and related issues potentially caused by the project have not been analyzed.

## J. THE SED UNLAWFULLY SEGMENTS THE PROJECT IN VIOLATION OF CEQA

For purposes of CEQA coverage, a "project" is defined as comprising "the whole of an action" that has the potential of resulting in either a direct, or reasonably foreseeable indirect, physical change in the environment. (14 Cal. Code Regs. § 15378 (a).) An agency must describe a project in a manner that will encompass the entire activity's potential impacts, and

may not avoid preparing comprehensive environmental documents by segmenting a project into stages of approval, focusing on isolated parts; *i.e.*, an agency may not chop a large project into little ones, each with a minimal impact on the environment, to avoid full environmental disclosure. (14 Cal. Code Regs. § 15003 (h); *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.) The SED violates CEQA by engaging in just this sort of segmentation of the project.

First, the lack of specificity in the mitigation measures discussed in the SED amounts to an illegal segmentation of the project because, by deferring until the project level stage any review of the problems associated with the acknowledged environmental impacts that will result from the project, the SED illegally truncates the project and treats those various impacts as separate, independent projects. (See *Inyo County v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193 ["A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and the public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR"].)

Second, the SED and TMDL Report indicate the project is necessary because of the Consent Decree. Aside from the fallacy that the Consent Decree imposes any obligation on the Regional or State Board, under the Consent Decree the "project" should be the establishment of a series of TMDLs for the Los Angeles River and other impaired waters in the Basin. However, instead of evaluating the whole series of TMDLs together, or even the series of TMDLs for the Dominguez Channel alone, the Board has separated each TMDL into an individual project, thus focusing on the constituent parts of the real project, minimizing the real project's environmental

impacts, and avoiding full environmental disclosure. Indeed, other SEDs for other TMDLs have conceded that the implementation of the various TMDLs for the watershed impact one another and their effectiveness. (*See, e.g.*, the Trash TMDL SED, 235.) The SED should evaluate the environmental impacts of developing all the TMDLs at the same time.

## K. THE FINDINGS AND EVIDENCE ARE DEFICIENT

The findings of the Tentative Resolution do not support the decision, and the evidence in the record does not support the findings. When an EIR identifies potentially significant environmental impacts from the project, such as here, the agency must make specific findings for each impact as follows: That changes have been required in the project that will avoid or substantially lessen the impacts; that impacts are within the jurisdiction of another agency and the lead agency does not have concurrent jurisdiction to impose the suggested mitigation measures; or that specific economic, social, or other conditions render identified mitigation measures or project alternatives infeasible. (Pub. Res. Code § 21081; 14 Cal. Code Regs. § 15091.) Moreover, the agency must make findings concerning the project alternatives unless it finds that all of the project's significant impacts will be avoided or substantially lessened by mitigation measures. The Resolution is deficient in this respect because it fails to make any of these findings.

Similarly, the draft Statement of Overriding Considerations is deficient. Although the SED concludes that the project may result in significant environmental impacts, it concludes that the project has "overriding considerations" that outweigh the project's significant impacts. Thus, it inappropriately predetermines that the undisclosed, unknown, and perhaps unmitigable adverse impacts are outweighed by the necessity of implementing this particular TMDL. This determination is unsupported and uninformed by substantial evidence, and thus the analytic route of the Board is not disclosed, because the extent of the impacts has not even been evaluated by

the Board (*e.g.*, there is no hint as to why a different schedule would not achieve most of the project's objectives at a fraction of the environmental cost).

A Statement of Overriding Considerations cannot properly be made unless the potentially significant adverse impacts have been fully identified and analyzed and a conclusion has been reached that they are significant and cannot be mitigated. Further, such a conclusion cannot be reached until the significant impacts have been analyzed in comparison to the benefits that will result from the project. (14 Cal. Code Regs. § 15043.) No such analysis is conducted within the SED.

Moreover, the Statement improperly preempts the decisions of local agencies, which as the lead agencies on the implementation decisions, are the appropriate bodies to determine whether the impacts of a particular implementation method are overridden by project benefits.

## L. CONCLUSIONS ON CEQA ANALYSIS

The SED is fatally flawed and must be substantially revised and recirculated before adoption of the TMDLs because it:

- is based on an unclear and inconsistent project description;
- fails to adequately assess the dredging impacts of the project;
- fails to evaluate a reasonable range of alternatives;
- provides an inadequate analysis of the alternatives it does include, while mischaracterizing them;
- fails to explain why it chose or rejected alternatives, and fails to set forth a potentially environmentally superior alternative;
- fails to evaluate the project's impacts on governmental services or greenhouse gases and global warming;

- fails to adequately analyze the cumulative impacts of the project; and
- unlawfully segments the project.

Moreover, the SED and the draft Resolution and statement of overriding considerations are deficient because they fail to include adequate findings, and the findings they do include are erroneous and not supported by substantial evidence.

## XII. CONCLUSION

For the foregoing reasons, the Cities respectfully request that the subject TMDLs not be adopted at this time.

Respectfully submitted,

RUTAN & TUCKER, LLP

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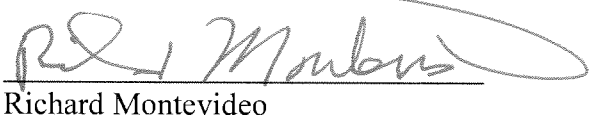

Richard Montevideo