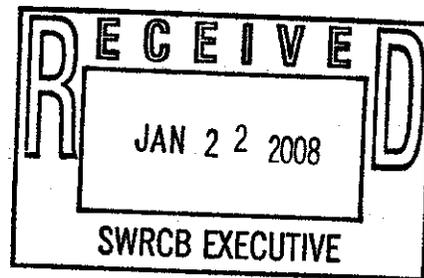


January 22, 2008

**VIA ELECTRONIC MAIL**  
**AND FACSIMILE AND**  
**FIRST CLASS MAIL**



Jeanine Townsend  
Acting Clerk  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: Comment Letter - Coachella Valley Storm Water Channel Bacterial Indicators TMDL

Dear Ms. Townsend:

The City of La Quinta appreciates the opportunity to comment on the State Board's consideration of the TMDL for bacterial indicators for the Coachella Valley Storm Water Channel ("CVSWC") and the supporting staff materials (collectively, the "TMDL").

**The TMDL Should Specify All Dischargers Subject to the TMDL**

The TMDL should explicitly specify all wet weather and dry weather dischargers to the subject water quality segment. Because the TMDL imposes monitoring and reporting obligations now, and it will result in the subsequent setting of "waste load allocations" for point source dischargers and "load allocations" for nonpoint sources and natural background in the future, the TMDL should clearly specify the point source dischargers to the CVSWC, which are the parties that will be required to comply with the TMDL's terms. The draft TMDL lists dry weather dischargers and indicates that further analysis will be conducted for wet weather allocations. We suggest that this provision include additional language confirming all dischargers that will be required to meet its terms.

**The TMDL Should Expand the Required CEQA Analysis**

The proposed resolution under consideration for approval provides that "The CEQA analysis determined that the proposed Basin Plan Amendment would not have a significant adverse effect on the environment." Thus, the State Board appears ready to ratify the Regional Board's apparent adoption of the "functional equivalent" of a negative declaration. Despite this statement, however, we believe the CEQA documentation prepared for this TMDL should be

Jeanine Townsend  
January 22, 2008  
Page 2

expanded to meaningfully consider the impacts on local government agencies and their constituents from reasonably foreseeable compliance measures that will be necessary to comply with the TMDLs numeric limitations.

A CEQA analysis in compliance with the applicable certified regulatory program must be conducted and circulated for public review and comment before the basin plan amendment can be approved. (See, e.g., *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 [invalidating regulation for failure to comply with certified regulatory program]; *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1421 [confirming CEQA's application to TMDLs].) We believe the proposed TMDL CEQA's analysis does not adequately analyze (1) reasonably foreseeable environmental impacts of the methods of compliance, (2) reasonably foreseeable feasible mitigation measures, or (3) a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites where compliance measures will be carried out. (See Cal. Pub. Resources Code § 21159(a)(1)-(3), (c).)

In addition, in light of the regulation's two-part implementation structure, the TMDL should include a provision confirming that additional CEQA analysis will be conducted and circulated to the public at the time the Regional Board considers adopting the contemplated waste load allocations and load allocations in the future. This is particularly important given CEQA's requirements that the Board analyze potential adverse environmental impacts from reasonably foreseeable compliance and implementation measures. (*City of Arcadia*, 135 Cal.App.4th at 1424-1426.)

### **The TMDL Should Clarify that Compliance with Waste Load Allocations Can Be Achieved Through Best Management Practices Governed by the Maximum Extent Practicable Standard**

The United States EPA has recognized that storm water discharges should be treated differently from other types of discharges when applying numeric limits such as TMDLs. In a November 22, 2002 EPA Guidance Memorandum on Establishing TMDLs ("EPA Guidance Memo"), EPA explained that for NPDES-regulated municipal storm water discharges, any water quality based effluent limit for such discharges should be "in the form of BMPs, and that numeric limits will be used only in rare instances." (EPA Guidance Memo, p. 2.) EPA recommended that "for NPDES-regulated municipal . . . discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits." (*Id.* at 4.) According to the EPA Guidance Memo: "If it is determined that a BMP approach (including an iterative BMP approach) is appropriate to meet the storm water component of the TMDL, *EPA recommends that the TMDL reflect this.*" (*Id.* at 5.)

Jeanine Townsend  
January 22, 2008  
Page 3

Based on the Clean Water Act's provisions applicable to municipal dischargers and EPA's guidance directives, the Regional Board should be encouraged to revise the TMDL to reflect that future compliance and implementation measures to be imposed will be expressed as BMPs, to be governed by the "maximum extent practicable" standard.

### **The TMDL Should Confirm That An Assimilative Capacity Has Been Conducted.**

Under the Clean Water Act, "[e]ach State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." (33 U.S.C. § 1313(d)(1)(C), emphasis added.) TMDLs are to be established "*at a level necessary to implement the applicable water quality standards.*" (*Id.*, emphasis added.)

As further set forth in the Clean Water Act and in federal regulations and policy directives, to establish the maximum pollutant loading level (i.e., the TMDLs), states must analyze the amount of a pollutant that the entire water body can accommodate without preventing the attainment of the water body's designated uses. That is, to establish TMDLs, it is necessary to analyze the water body's "*loading capacity.*"

EPA defines water bodies' "loading capacity" as "*the greatest amount of loading that a water can receive without violating water quality standards.*" (40 C.F.R. § 130.2(f), emphasis added.) EPA has characterized this requisite analysis of the "greatest amount of loading the water body can receive" as the "assimilative capacity" of the water body.

In its Guidance for California TMDLs, EPA indicated it was necessary to initially understand how much of a pollutant a water body can handle before it is found to be impaired. EPA stated as follows:

#### **Source Analysis**

**Point, nonpoint, and background sources of pollutants of concern must be described, including the magnitude and location of sources. The TMDL document demonstrates all sources have been considered [40 C.F.R. § 130.2(i) and 40 C.F.R. § 130.7(c)(1)].**

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

Jeanine Townsend  
January 22, 2008  
Page 4

key basis for determining the levels of pollutant reductions needed to meet water quality standards, and **the allowable assimilative capacity**, TMDL, waste load allocations, and load allocations, quantified source analyses are required. . . .

**5. Link Between Numeric Targets) and Pollutant(s) of Concern.**

**The TMDL document must describe the relationship between numeric target(s) and identified pollutant sources, and estimate total assimilative capacity (loading capacity) of the waterbody for the pollutant of concern [40 C.F.R. § 130.7(d) and 40 C.F.R. § 130.2(i) and (f)].**

\* \* \*

The need for understanding the pollutant loading sources, including both point sources and nonpoint sources, and the importance of documenting the causes of the problem and estimating the "total assimilative capacity" of the water body, are thus all "vital" to determine the "loading capacity," i.e., the "greatest amount of loading that a water can receive without violating water quality standards." (40 C.F.R. § 130.2(f).) (EPA Guidance Memo at p. 4.)

Thus, an "assimilative capacity study" should be conducted to determine how much bacteria is "too much" because it cannot be assimilated into the water body without unreasonably impairing designated uses. (Compare *City of Arcadia*, 135 Cal.App.4th at 1412 [assimilative capacity study was not required before adoption of Trash TMDL, "because the nature of trash, . . . in contrast to [that of] chemical pollutants" would make such a study "difficult to conduct and of little value"].) The draft TMDL should be revised to confirm that such a study is or will be conducted before the TMDL is adopted.

**The Lack of Sufficient Data Renders the TMDL Not Yet "Suitable For Calculation"**

A TMDL can be established only when the pollutant at issue is "suitable for such calculation[.]" and [s]uch load allocations shall 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 regulation, a TMDL is "suitable for calculation" only under "proper technical conditions." (43 Fed. Reg. 60665; RA 17, emphasis added.) "Proper technical

Jeanine Townsend  
January 22, 2008  
Page 5

conditions” require “the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL.” (43 Fed. Reg. 60662.)

The critical importance of adequate scientific data, and the negative impact on the development of TMDLs without such data, is underscored by the extensive problems identified in EPA’s proposed TMDL program. In its 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 calculation, that 303(d) lists are not based on scientifically defensible data, or that the listing criteria is too inflexible.” (66 Fed. Reg. 41817, 41819; RA 23, 26, 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; RA 23, 26), and then abandoning altogether, the Proposed TMDL Rule because the controversial regulations could not serve as an “efficient and effective TMDLs program without significant revisions.” (68 Fed. Reg. 13608; RA 35.)

If a total maximum daily load of a particular pollutant for a particular water body is not “suitable for calculation,” it is not proper for EPA to adopt a TMDL for such pollutant and water body. (*Friends of the Earth, Inc. v. Environmental Protection Agency* (D.C. Cir. 2006) 446 F.3d 140, 143, 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”.)

Here, the TMDL documents essentially concede that additional research and analysis is needed to calculate the TMDL’s waste load and load allocations. Further research is needed to develop analytical methods, particularized modeling techniques, and an appropriate database to for a technically defensible TMDL.

To adhere to the Clean Water Act, the Regional and State Boards should first determine how, and to what degree, the beneficial uses of the River are actually impaired as a result of the existence of bacteria, so it can establish proper analytical parameters to determine what level of pollutants would not unreasonably impair the beneficial uses.

Without scientifically defensible data, an assimilative capacity study, and a baseline established by adequate monitoring, “proper technical conditions” for the TMDL do not exist. Because the TMDL is not “suitable for calculation,” its adoption should be delayed until after the monitoring referenced in the TMDL has been conducted. At that point, the results of the monitoring should be reviewed, and a determination made on whether enough data exists to properly develop the TMDL, that is, a decision whether the TMDL is then “suitable for calculation.”

Jeanine Townsend  
January 22, 2008  
Page 6

### **The TMDL Does Not Set "Daily Loads" for the Pollutant**

As recently reaffirmed by the U.S. Court of Appeals for the District of Columbia, a TMDL must actually be a "daily" load. (*Friends of the Earth, Inc. v. Environmental Protection Agency* (D.C. Cir. 2006) 446 F.3d 140, ["The law says 'daily.' We see nothing ambiguous about this command. 'Daily' connotes 'every day.'"]).

As a result of the *Friends of the Earth* decision, EPA issued a policy directive in which it "recommends that all TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments." (See "Establishing TMDL 'Daily' Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No. 05-5015 (April 25, 2006) and Implications, for NPDES Permits" (Nov. 15, 2006) at pp 1-2.)

Although EPA recognizes that "TMDL submissions may include alternative, non-daily pollutant load expressions," EPA recommends that TMDLs currently in development "be revised, if feasible, to be consistent with [its] memorandum prior to their adoption or establishment." (*Id.* at p. 3.) EPA's policy directive also confirms that if a state does not express a TMDL with a "daily" load increment, EPA may develop its own daily loads calculations, and in such case "EPA would make it clear that its approval of the State's TMDL is contingent on the assumption that such TMDL contains the daily load calculations developed by EPA." (*Id.* at 3.)

Here, the proposed "Total Maximum Daily Loads" are not set as maximum "daily" pollutant loads at all, but rather as single or mean sample maximums. The TMDL numeric target should be revised to confirm the "daily" load. (See *Friends of the Earth*, supra, 446 F.3d 140, 142.)

Again, the City of La Quinta appreciates the opportunity to provide the foregoing comments. The City also looks forward to the Board's consideration of these comments in conjunction with its review of the proposed Basin Plan amendment and TMDL.

Very truly yours,

RUTAN & TUCKER, LLP



Terence J. Gallagher

TJG:clc