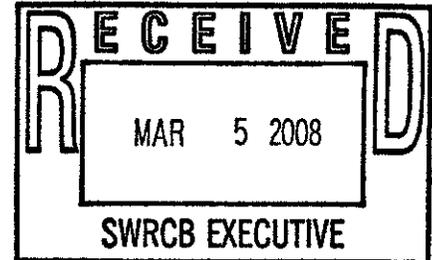


March 4, 2008

VIA OVERNITE EXPRESS

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Re: Comment Letter - Los Angeles River Trash TMDL

Dear Ms. Townsend:

On behalf of the Cities of Downey, Signal Hill, and the ad hoc group of Cities known as the Coalition for Practical Regulation¹ (hereafter collectively "Cities"), enclosed please find a set of comments ("City's May 2007 Comments") which were submitted to the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") on May 4, 2007, in connection with its consideration of the Trash TMDL for the Los Angeles River. Also included herewith are five volumes of Exhibits (Exhibit Nos. "1" - "40") which were previously included with the May 2007 Comments to the Regional Board.² Unfortunately, despite the extensive comments submitted to the Regional Board, said Board failed to properly correct any of the deficiencies identified in the Cities' Comments prior to the Regional Board's re-adoption of the Trash TMDL, and as such, all of the same deficiencies that existed and which were commented on with the May 2007 Comments, and the other comments of the Cities, remain unresolved.

The primary concerns raised in the May 2007 Comments and Exhibits and on other comment letters submitted on behalf of the Cities are summarized below. The first Comment below reflects the fact that the Regional Board has continued to act in a manner that is contrary to the California Environmental Quality Act ("CEQA"), as it failed to conduct an environmental

¹ The Coalition for Practical Regulation also known as "CPR" is an ad hoc group of municipalities in Los Angeles County committed to obtaining clean water through cost-effective and reasonable storm water regulations, and consists of the following Cities: Arcadia, Artesia, Baldwin Park, Bell, Bellflower, Bell Gardens, Bradbury, Carson, Cerritos, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Canada-Flintridge, La Mirada, Lakewood, Lawndale, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pico Rivera, Pomona, Rancho Palos Verdes, Rosemead, Santa Fe Springs, San Gabriel, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Temple City, Vernon, Walnut, West Covina, and Whittier.

² Although the Cities believe it is legally unnecessary to have to re-submit to the State Board, Comments and exhibits previously submitted to the Regional Board during its consideration of this same TMDL, they do so as a precaution in light of contentions made by the State and Regional Board's attorneys in prior court hearings that such a re-submittal is necessary.

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analysis of the impacts of the actual TMDL Project it adopted. The Substitute Environmental Document ("SED") prepared to purportedly evaluate the environmental impacts from the TMDL Project, in fact, contained no discussion of the impacts of the actual TMDL adopted by the Regional Board. In addition, the SED did not contain a legally adequate discussion of feasible alternatives to the TMDL, in spite of a proposed TMDL project alternative submitted by the Cities known as the Catch Basin Prioritization and Protection Plan.

Concerns with some of the discrepancies between the CEQA Analysis conducted in the SED, versus the actual Regional Board adopted TMDL, are also discussed in two letters dated August 6, and August 8, 2007, which were previously submitted to the Regional Board and which are attached hereto and collectively marked as Exhibit "A." Also, the Transcript of the August 9, 2007 hearing before the Regional Board is included herewith and marked as Exhibit "B".

1. The requirements of CEQA have not been met.

The Regional Board failed to comply with CEQA in adopting the TMDL. As the State Board is no doubt aware, the original Trash TMDL adopted by the Regional Board in 2001 and approved by the State Board in 2002, was invalidated by the trial court and the Court of Appeal on the ground that the Boards failed to comply with CEQA. Specifically, the Court found that the Boards had failed to prepare an Environmental Impact Report ("EIR"), or its functional equivalent, in connection with the adoption of the 2001 TMDL. Despite this history, the SED prepared by the Regional Board in connection with the new Trash TMDL, in lieu of an EIR, again fails to satisfy CEQA's requirements.

First, the SED fails to contain an accurate and consistent description of the project, as reflected by the fact that the implementation schedule for the proposed TMDL Project selected in the SED, is inconsistent with the schedule for the adopted TMDL Project set forth in the resolution adopting the TMDL. As pointed out in the comments contained in Exhibit "A" hereto, unfortunately the original March 2007 SED analyzed a TMDL Project that provided for a 30% reduction in trash by September 30, 2008, with the proposed ultimate waste load allocation of zero to be achieved over a 10-year period. This varies from the TMDL actually adopted by the Regional Board, which provided for a 40% reduction by September 30, 2008, and required an implementation period of only 9 years.

The differences between the original SED and the adopted TMDL, were belatedly and incorrectly attempted to be addressed by Regional Board staff, simply by attempting to change the references from 30% in the original SED, to 40% in the revised SED issued on July 30, 2007 (just 10 days before the hearing of August 9, 2007). Yet, not only did the Regional Board fail to revise the SED to include a discussion of the environmental impacts of a 40% TMDL Project during the first year, rather than a 30% TMDL Project during the first year, it did not even bother to correct and discuss the impacts of changing the ten (10) year implementation period in the

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SED, to a nine (9) years implementation period, and included no analysis of the additional environmental impacts from the changed Project or the expedited implementation period. The project description in the SED remains deficient and ambiguous.

Second, the original March 20, 2007 SED characterized the proposed project of 30% reductions in trash in year one as both "reasonable and as short as practicable." This SED also provided that the "environmental impacts" from a project alternative with a shorter compliance schedule:

. . . may be of greater severity as the intensity of the implementation actions will be greater to comply with the shorter time frame. The longer schedule of alternative 1 [the 30% TMDL Project] allows for prioritization and planning, more thoroughly mitigated impacts, more appropriately designed, sited and sized structural devices and, therefore, less environmental impact, in general. In addition, prioritization and planning will likely result in more efficient use of funds and lower overall costs. (March 2007 SED, p. 43.)

Thus, the March 2007 SED provided that a 30% reduction in trash by September 30, 2008 (and achieving the ultimate zero waste load allocation over a 10-year period) was "reasonable and as short as practicable" and that this TMDL alternative would allow for prioritization of planning and result in "less environmental impact, in general" as well as a more "efficient use of funds and lower overall costs" than a more expedited schedule in an alternative TMDL, e.g., such as the adopted TMDL which contained a 40% reduction requirement in year 1, and a shorter 9 year implementation schedule. As such, the decision to approve the 40% Trash TMDL Project with a 9-year implementation plan, is not supported by substantial evidence in the record.

Third, to attempt to rectify the lack of environmental analysis of the adopted TMDL, on July 30, 2007, i.e., 10 days before the date of the hearing on the TMDL, the Regional Board circulated a new SED that simply proposed changing the initial compliance requirement of 30% by September 30, 2008, to 40% by September 30, 2008. The 10-year implementation time in the SED, however, was *not* modified to 9 years, albeit, the 9-year period was the ultimate period adopted by the Regional Board on August 9, 2007.

This change to the SED, only ten days before the hearing, was thus improper and contrary to law, as no substantive environmental analysis was ever conducted of the 40% project alternative, rather than 30% reduction alternative in the SED, even though the SED previously recognized that a 30% TMDL Project over a 10-year period was "as short as practicable" and even though the SED previously recognized that the 30% TMDL Project would have less environmental impacts and would result in a more efficient use of funds.

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Fourth, the last minute change to the SED was clearly substantive and a fundamental change to the SED. Accordingly, the change required that the SED be re-circulated for public review and comment, and that further consultation with local agencies be conducted. (See Public Resources Code § 21092.1; 14 CCR 15088.05.) Thus, under Public Resources Code § 21091 and California Government Code § 11346.4(a), the SED was required to be re-circulated with an additional 45-day notice period for a further hearing and public comment.

When the need for recirculation was brought to the attention of the Regional Board, the Regional Board's position was that the 30% figure in the SED was a typographical error and that it really intended to analyze a 40% TMDL Project and a 9-year implementation period. The problem with this position is that the 30% reference shows up in two different locations in the March 2007 SED, and more importantly, the March 2007 implementation period of 10 years was not changed. The other problem with this contention is that there was never any substantive analysis included of a 40% Year 1 TMDL to be implemented over a 9-year period, anywhere in the SED. Thus, it is unlikely the error was truly a typographical error, and moreover it was not properly or timely corrected.

Finally, the 40% TMDL Project violated CEQA for the various other reasons discussed in the May 4, 2007 Comments. Of these other CEQA violations, a key concern is the failure of the Regional Board to consider a reasonable range of alternatives to the proposed 40% TMDL Project before adopting the TMDL. The SED is defective in that it fails to analyze even one reasonably foreseeable alternative to the adopted 40% TMDL Project. Please see the discussion on pages 29-40 of the attached May 2007 Comments on the March 20, 2007 Draft of the TMDL.

The failure of the Regional Board to consider a reasonable range of alternatives is particularly troubling in light of comments made by the State and Regional Boards' attorneys in connection with the prior litigation over the TMDL, where, as reflected in Exhibit "5" to the May 2007 Comments, the Boards' attorney indicated: "There are an infinite variety of ways that the Regional Board could issue a Trash TMDL for the Los Angeles River. . . ." and further that "there are so many conceivable ways that the Regional Board could go about complying with the mandates of 303(d) of the Clean Water Act . . ." (Exhibit "5," *Cities of Arcadia v. State Water Resources Control Board*, Case No. GIC 803631, Reporter's Transcript, pp. 5-6, September 1, 2006.) (Also see the discussion on the Cities' suggested feasible alternatives discussed on pages 35 through 40 of the May 2007 Comments.)

One particular project alternative that was proposed to the Regional Board by the Cities was the "Catch Basin Prioritization and Protection Plan" ("Plan"). This project alternative was prepared by the Cities and submitted with the May 2007 Comments to the Regional Board. Although meetings occurred between Regional Board staff and the Cities' representatives between May 2007 and the August 9, 2007 hearing, and although some discussion of the Plan occurred during the August 9, 2007 hearing, there was no effort on the part of the Regional Board to analyze the Plan as a project alternative and one which would accomplish the goals of

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the Project. Nor was there any analysis of the environmental benefits of the Plan Alternative as compared to the adopted TMDL.

Other violations of CEQA exist as described in the May 2007 Comments, including the fact that the SED improperly segments the Project, instead of analyzing "the whole of" the Project, as required by CEQA; that the SED fails to identify and evaluate the cumulative affects of adopting the 40% TMDL Project; that the findings made by the Regional Board in adopting the 40% TMDL Project are deficient; and finally, that the SED fails to evaluate the Project's impacts on greenhouse gases.

The requirements of CEQA have not been met.

2. The TMDL was not developed in accordance with the Porter-Cologne Act.

The TMDL was not developed in accordance with the requirements of Water Code sections 13000, 13240, and 13241, which require the Regional Board to give full and complete consideration of various standards when imposing TMDLs, including "the water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." In particular, the TMDL's initial waste load allocation ("WLA"), which requires that trash be reduced by 40% by September 30, 2008 is unreasonable, as it would be virtually impossible to achieve such reductions in such a limited amount of time. Likewise, the other interim WLAs, and the ultimate WLA of "zero" trash are not reasonably achievable. This issue is discussed in considerable detail at pages 14-26 of the May 2007 Comments.

3. The Requirements of the Administrative Procedures Act have not been met.

The TMDL adopted by the Regional Board violates the Administrative Procedures Act's ("APA") requirement of "clarity" in California regulations. (Govt. Code § 11349.1.) The TMDL is ambiguous with regard to who is responsible for achieving the WLAs set forth in the TMDL. The TMDL is also ambiguous with regard to whether "Catch Basin Inserts are considered to be "full-capture" devices. Likewise, the TMDL's definitions of "loading capacity" and "Full-Capture System" are confusing and lack clarity. Also, the TMDL is unclear with regard to when a "reopener" hearing will be triggered. This issue is discussed at pages 49-51 of the May Comments. In addition, the TMDL is ambiguous as to whether the implementation period is to be 9 years or 10 years, in light of the last minute changes to the SED, and the inconsistency between the SED and the language of the proposed Basin Plan Amendment. Further, by failing to recirculate the revised SED with a new 45 day notice period, the notice requirements of the APA were violated.

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4. The requisite "economic" analysis was not conducted.

The Regional Board failed to conduct the "economic" analysis required by Water Code section 13241 and Public Resources Code § 21159(c). The requirements set forth in the TMDL will impose a significant financial hardship upon the Cities, which has not been properly analyzed. The cost assumptions set forth in the TMDL with respect to the cost of catch basin protection devices, full-capture Vortex Separation Systems and "end of pipe nets" are all seriously flawed. Furthermore, the Regional Board failed to consider other costs discussed in studies submitted by the Cities. This issue is more fully discussed at pages 51-65 of the May Comments.

5. The TMDL imposes unfunded mandates, in violation of the California Constitution.

The Trash TMDL will result in unfunded mandates, in violation of the California Constitution. 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. The TMDL will impose enormous compliance costs upon the Cities, without any funding mechanism to cover such costs, in violation of such provision. This issue is discussed at pages 66-67 of the May Comments.

6. The TMDL is contrary to law as a result of the Regional Board's failure to include an implementation plan and a load allocation for nonpoint sources.

The TMDL fails to contain a "load allocation" or an implementation plan for nonpoint sources of trash, in violation of Federal regulations. Pursuant to 40 CFR 130.2(i), a TMDL is the sum of the "waste load allocations" for point sources and the "load allocations" for nonpoint sources. Since the Trash TMDL contains no "load allocation," it was not developed in accordance with law. Moreover, the TMDL fails to include an implementation plan to reduce trash from nonpoint sources. This issue is further discussed at pages 67-72 of the May Comments.

7. The TMDL is defective as it does not include a "translator" as required by law.

The Regional Board failed to utilize a "translator" in establishing the TMDL, as required by Federal Regulations. The water quality objectives relied on by the Board in developing the Trash TMDL are "floating materials" and "solid, suspended, or settleable materials." (TMDL Report, p. 15.) The TMDL fails to explain why these "objectives" are to include "trash," and fails to include a defined "translator" necessary to allow for the conversion of the narrative water quality standards into a pollutant specific numeric effluent limitation. (See 40 C.F.R. § 122.44(d)(1)(vi) [requiring translator for toxic pollutants].) This issue is fully discussed at pages 72-74 of the May Comments.

8. The Trash TMDL is not "suitable for calculation."

The Trash TMDL is not "suitable for calculation," as it was not developed under proper technical conditions, and does not provide a "daily" load which the Cities can comply with. This issue is discussed at pages 75-78 of the May Comments.

9. No cost/benefit analysis was conducted as required by law.

The Regional Board failed to comply with Water Code sections 13267, 13225(c), and 13165, which mandate a cost benefit analysis whenever the State or Regional Boards require a local agency to investigate and report on technical factors involved in water quality control, or require that a local agency obtain and submit analyses of water, including technical or water monitoring programming reports. The TMDL contains significant monitoring requirements, but there is no evidence that any cost/benefit analysis of such requirements was performed by the Regional Board. This issue is discussed at pages 78-80 of the May Comments.

10. The Water Quality Standards upon which the Trash TMDL was based, were not developed in accordance with law.

The Water Quality Standards upon which the Trash TMDL is based were not adopted in accordance with the requirements of law, as they are being applied to storm water/urban runoff. The Boards are required to consider various factors when adopting "water quality objectives" including, among other things, the "past, present and probably future beneficial uses" of the subject water, the "environmental characteristics of the hydrographic unit under consideration," the "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area," "economic considerations," and "the need for developing housing within the region." (Water Code § 13241(a)-(e); see also Water Code § 13000.) Moreover, the Board's are required to periodically review the Water Quality Standards (See Water Code § 13240 and 13143; and 33 U.S.C. § 1313(c)(1).) Nonetheless, there is no evidence that the Regional or State Boards have ever considered the requisite factors under Water Code sections 13241 or 13000, with respect to the application of the Water Quality Standards in the Basin Plan to storm water/urban runoff. This issue is further discussed at pages 80-84 of the May 2007 Comments.

11. No "loading capacity" for the LA River has been developed.

The Board failed to determine the "loading capacity" of the Los Angeles River before developing the TMDL, as required by Federal Regulations. Under such regulations, TMDLs must be based upon "the greatest amount of loading that a water can receive without violating water quality standards." (40 C.F.R. § 130.2(f).) Yet, here, the Regional Board failed to gather and analyze data regarding the quantity of trash that the River could receive without violating water quality standards. This issue is discussed at pages 84-88 of the May 2007 Comments.

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12. The Regional Board failed to consult and/or coordinate with local agencies in developing the TMDL, as required by State and Federal law.

Pursuant to Water Code section 13240, "the Regional Boards shall consult with and consider the recommendations of affected state and local agencies" in the developing or amending a basin plan. (Water Code § 13240; see also Water Code § 13144; 33 USC § 1329(a)(1)(C).) Nonetheless, there is no evidence that the Regional Board meaningfully consulted with local agencies in developing the TMDL. Nor is there any evidence that the board coordinated with the Southern California Association of Governments ("SCAG"), the designated Areawide Waste Treatment Management Planning Agency in developing the TMDL. (See 33 USC § 1288(a)(2).) This issue is discussed in pages 88-90 of the May 2007 Comments.

In light of the numerous deficiencies in the Trash TMDL listed above, and discussed in detail in the enclosed comments, are supported by the attached Exhibits, the Trash TMDL should not be approved by the State Board.

13. The Regional Board's Hearing on the Trash TMDL was conducted in a manner that was contrary to law and the Cities were denied a "Fair" hearing.

The final concern the Cities wish to bring to the attention of the State Board involves the "hearing" process conducted by the Regional Board during the August 9, 2007 hearing on the Trash TMDL. A review of the Transcript (Exhibit "B") starting on page 42 through page 54, and then again starting on page 70 through 81, shows that the Regional Board itself, along with its counsel, wrongly turned the "hearing" (where it was to receive comments on its proposed regulatory action), into an "inquisition" of the various representatives of the Cities. The Regional Board's actions in this regard were entirely inappropriate, and the Cities were denied a fair hearing before the Regional Board. As such, the Regional Board should be admonished and the Trash TMDL should be sent back down to the Regional Board, with direction to follow appropriate hearing procedures for this and all future TMDLs.

The interrogation/inquisition of the City representatives was preceded by a legally inappropriate comment by the Regional Board's counsel, which may shed some light on the bizarre inquisition process followed by the Regional Board. The Regional Board's counsel, just prior to the Cities' presentation, stated that "the City does not have due process rights." (Transcript, Exhibit "B," p. 42:20-21). What then followed was an aggressive interrogation by Board members, and by Board counsel, of several City representatives, some of whom were there only to observe the hearing. At one point, the Chair of the Board went so far as to require people in the audience, again some of whom had no intention of providing comments to the Board, to come forward and take the oath solely for the purpose of having these individuals being interrogated by the Regional Board's counsel. For example, during the so-called "hearing," the following colloquy occurred:

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MR. MINDLIN: Well, will all the members of the CPR please come forward?

CHAIR DIAMOND: Did all of you take the oath, the three people that are coming up?

UNIDENTIFIED SPEAKER: No. Because we have not been asked or authorized to speak.

CHAIR DIAMOND: But since we may ask you questions, just to be sure, I would like to administer the Oath to you.

UNIDENTIFIED SPEAKER: I will take it, but like I said, I haven't been asked today to speak.

CHAIR DIAMOND: You don't have to speak. Then please raise your right hand if you haven't been sworn in. And repeat after me.

I swear to tell the truth, the whole true, and nothing but the truth under penalty of perjury.

Michael continue.

MR. LEVY: The question is you have each of your city's specifically authorized the presentations in the commentor letter set forth by Mr. Montevideo?

(Transcript, Exhibit "B," p. 74-75.)

* * *

CHAIR DIAMOND: Mr. Levy is questioning people. And he will ask you directly by name. And when he calls on you with a question, you can come forward.

UNIDENTIFIED SPEAKER: I beg to differ.

CHAIR DIAMOND: Well, fine. Go ahead, I'm in charge.

(Transcript, Exhibit "B," p. 80.)

The questioning went on for a total of approximately 20 pages of the 115-page Transcript (see pages 42-54 and 70-81) (the Transcript begins on page 6 and ends on page 21). Moreover,

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the colloquy apparently arose in part because of the Board counsel's mistaken assertion that he wanted the information because he wanted to "know if there was a lawsuit, if, they [have] standing to file a lawsuit against us." (Transcript, Exhibit "B," p. 71.)

Aside from the fact that the Board's counsel was unlawfully turning a public "hearing" before the Regional Board, where it was to accept comments from the public, into an "inquisition," he also appeared to be doing so knowing full well (as he commented to such on the record) that the Cities' lawyer was not even present to advise the witnesses of their rights before being interrogated. In addition, the Board counsel's understanding of the law on the issue of exhaustion was entirely incorrect.³

It is also somewhat alarming that the Board's Counsel proceeded to interrogate City representatives, without their counsel being present, concerning in part what appeared from the record to be attorney-client communications the witnesses did or did not have with their lawyer, as well as with respect to communications they did or did not have internally. For example, the Regional Board and its counsel went so far as to ask of the details of the communications between the City representatives and their counsel involving the May 2007 Comments, and the details of the communications between the City representatives and their consultant. (See Transcript, Exhibit "B," pp. 42-54; and p. 71.)

The actions of the Board representatives themselves as well as its counsel during the August 9, 2007 hearing, were reprehensible, and the TMDL should be sent back down to the Board for a proper and "fair hearing," with an admonishment to the Los Angeles Regional Board on the propriety of turning a "hearing" into an "inquisition" of unrepresented persons. Clearly, the colloquy showed the Board's disdain for the Cities' positions, and the Board's unwillingness to fully and properly consider the Cities' Comments.

³ Of course, any person may challenge a decision of the Regional and/or State Boards, regardless of whether or not they have specifically submitted Comments to said Board. The issue in any subsequent court proceeding is whether the challenged decision can be supported by "substantial evidence" in the record, and whether it was consistent with the law. It makes no difference that "City A" submitted comments, but "City B" decides to bring suit. City B has every right to bring suit if the decision of the Boards is not based on substantial evidence or is contrary to law.

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Thank you for your consideration of these comments, and please do not hesitate to contact the undersigned should you have any questions or need any additional information regarding the above or the enclosed.

Sincerely,

RUTAN & TUCKER, LLP



Richard Montevideo

Enclosures:

- (1) Exhibits "A" – August 6 and 8, 2007 letters to the Regional Board.
- (2) Exhibit "B" – August 9, 2007 Transcript of the Regional Board Hearing
- (3) May 2007 Comments on the March 20, 2007 Draft of the Total Maximum Daily Loads for Trash for the Los Angeles River
- (4) List of Exhibits in Support of May 2007 Comments
- (5) Exhibits Nos. 1 – 40 in Support of May 2007 Comments

cc: Mr. Kenneth Farfsing (without enclosures)