

Nevada Division of Environmental Protection
Responses to Nevada Public Comments
November 2, 2010

3. United States Environmental Protection Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

September 9, 2010

Doug Smith, Chief
TMDL/Basin Planning Unit
Lahontan Regional Water Quality Control Board
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

Jason Kuchnicki
Lake Tahoe Watershed Program Manager
Nevada Division of Environmental Protection
901 S. Stewart St., Ste 4001
Carson City NV 89701

Dear Mr. Smith and Mr. Kuchnicki,

Thank you for the opportunity to provide comments on the public notice draft of the Lake Tahoe Total Maximum Daily Load (TMDL) and the associated proposed amendments to the Water Quality Control Plan for the Lahontan Region. EPA has strongly supported this TMDL and appreciates the tremendous effort and substantial dedication of resources that has gone into its development. We have the following comments but wish to emphasize EPA's great interest in expeditious TMDL adoption and implementation.

General

The draft final Lake Tahoe Total Maximum Daily Load Technical Report ("Report") synthesizes a vast amount of information obtained during almost a decade of research and development. EPA applauds the authors for presenting the results of this enormous undertaking in a clear and accessible form.

Specific

1. There is a disparity between Tables 8-3, 9-1, and 10-3 of the Report concerning the percent total phosphorus load reduction required to meet the Clarity Challenge (14% in Table 8-3 and 17% in the other two tables).
2. There is a discrepancy in the text of the Report and of the Proposed Water Quality Control Plan Amendments ("Basin Plan Amendments," July 2010) concerning load

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allocations (LAs) and wasteload allocations (WLAs). Tables 10-1 through 10-3 refer to “Load Allocations” but include urban upland allocations (some of which are WLAs), as well as allocations for the other primary source categories (forest upland, atmosphere, and stream channel, which are properly considered LAs). Section 10.3 refers to wasteload allocations applying to urban stormwater dischargers in the first paragraph, but uses the term “load allocations” in the second paragraph. Similarly, Section 11.3.1 refers to “load allocation milestones” being used to establish load reduction requirements for both California and Nevada permittees, and page 9 of the Basin Plan Amendments (paragraphs three and four) refers to “load allocations” for the urban upland source. Given the disparity between how municipal stormwater dischargers are regulated in California and in Nevada (see also comment 4 below), EPA considers it important that the terminology be precisely defined and consistently applied throughout Chapters 10 and 11 of the Report and the Basin Plan Amendments. The TMDL should also specify that if urban stormwater discharges that are currently considered nonpoint sources become point sources in the future, the load allocations they are currently subject to will become wasteload allocations, without the TMDL itself needing to be re-opened.

3. EPA recognizes that average annual pollutant loads are a more useful expression of this TMDL than daily loads, as discussed in Section 10.4 of the Report. However, as explained further in national Office of Water guidance available at: http://www.epa.gov/owow/tmdl/draft_daily_loads_tech.pdf, California and Nevada should also include daily loads in the Lake Tahoe TMDL. The EPA guidance says, "If it is deemed appropriate to express a TMDL on a non-daily time frame, that non-daily TMDL should also include a daily expression" (p. 4). We note that the Integrated Water Quality Management Strategy Project Report (http://www.swrcb.ca.gov/rwqcb6/water_issues/programs/tmdl/lake_tahoe/docs/iwqms_poj_report.pdf, pp. 89-94) includes the analysis needed to develop daily loads. EPA’s guidance further states that adoption of daily loads in the TMDL does not require that WLAs based upon them must be incorporated into subsequent NPDES permit effluent limits (p. viii).

4. As described in Chapter 11, the states of California and Nevada have disparate approaches to regulating municipal stormwater discharges in Lake Tahoe Basin. In California, municipal separate storm sewer system (MS4) NPDES permits have been issued, while Nevada does not have regulatory controls in place for their MS4s. Although both states have issued statewide NPDES permits to their respective Departments of Transportation, the Water Board intends to incorporate load reductions and associated planning requirements into future permit revisions or orders (pp. 11-4 and 11-7), whereas NDEP intends to incorporate wasteload allocations into a Memorandum of Agreement (MOA) with Nevada Department of Transportation (NDOT) rather than via a permit revision or order (p. 11-5).

EPA wishes to discuss with NDEP available regulatory and non-regulatory mechanisms that will provide a reasonable assurance that the TMDL will be fully implemented in Nevada. These include:

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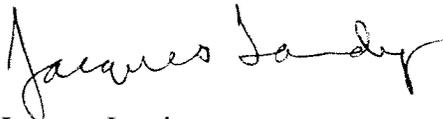
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- issuance of Memoranda of Implementation or Agreement (MOAs) as recommended in the TMDL Report. Questions associated with this approach include: who will be parties to the MOAs, and how will responsibilities be assigned and differentiated? Are these agreements purely voluntary, or do they include legally binding requirements? Will the MOAs be subject to public review and comment prior to adoption? How will MOA compliance be monitored, and what are the consequences of non-compliance? Would a pre-defined number, and/or a particular type of violation of the MOA, trigger termination of the agreement, or a pre-defined response/consequence?
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EPA understands that there are advantages and disadvantages to either regulatory or non-regulatory approaches, and that there may be others (or combinations of both) that are preferable. Furthermore, we wish to emphasize that we will continue to support, as well as to closely monitor, TMDL implementation in order to provide a reasonable assurance of success on an on-going basis.

We urge both states to promptly approve the Lake Tahoe TMDL, and look forward to our continued collaboration on TMDL implementation and improvement of Lake Tahoe water quality. If you have any questions about these comments, please contact me at (775) 589-5248.

Sincerely,



Jacques Landy
Lake Tahoe Basin Coordinator
U.S. EPA Region 9

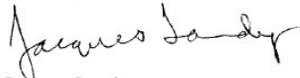
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Response

USEPA-1: NDEP acknowledges that the complexities of the agreement approach are such that many of the details regarding the proposed Memorandum of Agreement (MOA) are yet to be determined. NDEP is consulting with the Nevada Attorney General to determine appropriate language and intends to meet with EPA throughout the MOA development process to ensure EPA approval of the TMDL.

No decision has been made on the number of MOAs to be entered or the signatory parties. It is clear that the counties are essential signatories as we expect they will take the lead role for operations and maintenance of stormwater programs in their jurisdictions. Rationale has been added to the TMDL document expressing why this makes sense; the primary reason being the counties' greater capacity and technical expertise to operate and manage stormwater programs. While GIDs may have roles and responsibilities to implement the TMDL, it is less clear if the GIDs are necessary parties to the MOA(s). It may be sufficient to generally describe GID roles and responsibilities in the MOA and provide more specific details within Catchment Implementation Plans which are required for the Crediting Program.

The Nevada Attorney General has determined that MOAs are not legally binding. Therefore, the MOA(s) will not set forth requirements as are contained in permits. Rather, the MOA(s) will lay out commitments to which the implementing entities agree. Similarly, "monitoring of compliance" with the MOA is inappropriate terminology. NDEP contends that "measuring and assessing progress" toward load reduction milestones contained in the MOA(s) is a more appropriate statement. Progress will be measured and assessed the same way compliance with NPDES permit requirements is measured: by using the protocols described in the Crediting Program Handbook.

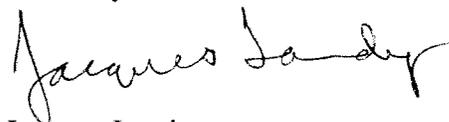
The MOA(s) will contain contingency provisions that describe the consequences of poor performance including issuance of a stormwater permit. Each entity's progress toward meeting its annual and 5-year milestones will be assessed to determine if the commitments set forth in the MOA are being met. Factors that will be considered for determining progress and/or the necessity to act on a contingency include but are not limited to: annual versus 5-year milestone; the degree to which a milestone is not met; the level of effort implemented by the entity; economic or other impediments; and past performance.

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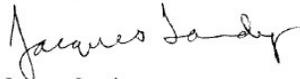
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USEPA-2: NDEP would be happy to discuss residual designation with EPA. It must be emphasized however that NDEP does not initially intend to issue an NPDES permit unless the 2010 census indicates the Lake Tahoe basin or any portion thereof meets the population-density requirements for designation as a small MS4. If there is no such designation at the time of EPA approval of the TMDL, NDEP will implement the agreement approach for TMDL implementation. NDEP and local governments agree that an agreement approach is preferable due to the following benefits:

Collaborative – addressing the problem is seen as a team effort between the regulatory agency and the regulated community;

Efficient – a customized program to address the distinct problem of clarity loss may be significantly more efficient than administering an NPDES Program; minimizing operational costs is particularly important in this economic downturn as budgets continue to decline; and this streamlined process will lead to more actions being implemented more quickly on the ground.

More flexible –does not disqualify projects for funding through 319(h) or other grants that may not be used to fund activities required by a permit; this approach also diminishes risk to jurisdictions over lawsuits should economics or other relevant factors affect their ability to meet load reduction milestones.

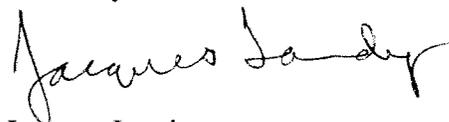
The cooperative agreement approach between NDEP and other government agencies and private companies has been used very successfully in southern Nevada for the largest non-Super Fund cleanup of an unregulated contaminant (perchlorate) in the nation. Based on past experience of the working relationship between NDEP, Nevada Tahoe local governments and NDOT there is no reason to believe that this type of approach will not be just as successful for implementing the Tahoe TMDL. Furthermore, Nevada Tahoe local governments and NDOT have a demonstrated record of cooperating and implementing projects, actions and strategies with TRPAs Environmental Improvement Program. This non-regulatory program which has no penalties for not taking action is further evidence that the MOA approach will work. If the agreements are faltering, NDEP will open discussions concerning permit coverage under the Small MS4 General Permit with the applicable jurisdictions.

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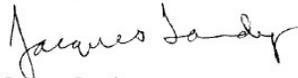
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Response

USEPA-3: The Lake Tahoe TMDL Report has been revised to clarify the language for the Performance, Compliance Assessment, and Reporting (Section 11.3.1) and to reflect that NDOT's wasteload will be incorporated into the permit. Other components such as load reduction milestone schedules, stormwater load reduction plan development and implementation, Crediting Program participation, and monitoring commitments may also be incorporated into the permit or the permit may reference any MOA to which NDOT becomes a signatory party and require compliance to terms and conditions specified within it.