

**City of Claremont
Agenda Report**

TO: JEFFREY C. PARKER, CITY MANAGER

FROM: BRIAN DESATNIK, DIRECTOR OF COMMUNITY DEVELOPMENT

DATE: FEBRUARY 22, 2011

**SUBJECT: LEAGUE OF CALIFORNIA CITIES RESOLUTION THAT CALLS FOR
"REASONABLE, PRACTICAL, AND ECONOMICALLY ACHIEVABLE NPDES
AND TMDL REQUIREMENTS"**

SUMMARY

The City, along with 87 municipalities in Los Angeles County, has been required since the early 1990's to comply with municipal National Pollutant Discharge Elimination System stormwater permit (NPDES permit) requirements. The Los Angeles Regional Water Quality Control Board (Regional Board) is responsible for assuring municipal compliance with NPDES permit requirements. NPDES permits are primarily authorized under the federal Clean Water Act, and, to some extent, under the Porter-Cologne Act, the State's water code.

There have been concerns raised regarding the implementation of total maximum daily loads (TMDLs) requirements. The TMDL's pose a potential serious cost challenge to all agencies and if implemented using numeric limits at the receiving water, may open cities up to third party lawsuits. With these concerns in mind, the League of California Cities, Los Angeles Division, is recommending cities adopt the attached resolution that calls for "reasonable, practicable, and economically achievable NPDES and TMDL requirements."

Staff Recommendation

Staff recommends that the City Council adopt the attached resolution, which supports a resolution of the League of California Cities, Los Angeles Division (League), that calls for "reasonable, practicable, and economically achievable NPDES and TMDL requirements."

ANALYSIS

Basic Permit Requirements

For the most part, compliance costs, though not light, have been manageable. The NPDES permit allows municipalities to discharge stormwater runoff from within their jurisdictions to waters of the United States (typically oceans, lakes, and rivers), also referred to as "receiving waters." The permit also allows the discharge of certain categories of non-stormwater, such as potable water, irrigation water, and residential car wash water. In exchange, the NPDES permit mandate compliance with several program requirements that require the implementation of best management practices (BMPs) to reduce runoff pollution from construction sites, completed development and redevelopment projects, and municipal operations and activities (e.g., vehicle, equipment maintenance, storm drain, sewer, and street maintenance). BMPs generally prevent stormwater contact with pollutants or treat them if contact prevention is not possible.

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TMDLs

On the other hand, TMDLs or “total maximum daily loads” pose a serious “cost” challenge. A TMDL is a limit on the amount of a pollutant (e.g., bacteria, metals, nutrients, trash, and dozens of others) that may enter a receiving water in order to protect its beneficial use (typically recreation). The cost of complying with TMDLs is potentially staggering; in the several millions of dollars annually, depending on the municipality and its watershed location (Los Angeles River, San Gabriel River, Dominguez Channel, Machado Lake, Legg Lake, etc).

To date, several TMDLs have been adopted. In order for them to be binding on municipal permittees they have to be placed into the NPDES permit. Once this happens, subject cities must comply with the TMDL’s numeric limitation known as a “waste load allocation” (WLA). The problem is that the Regional Board, in the several TMDLs that it has adopted thus far, plans on requiring cities to comply strictly with the WLA in the receiving water through the implementation of BMPs beyond what federal regulations call for. However, if the WLA is not met, the non-compliant city will be subject to administrative enforcement from the Regional Board, and, more seriously, third party lawsuits from non-governmental environmental organizations. A successful third party lawsuit against a city could result not only in costly fines and legal fees, but is also likely to result in a settlement agreement requiring it to agree to use general funds to pay for costly regional treatment facilities.

League Resolution

The League has adopted a resolution declaring a policy on the NPDES permit and TMDL compliance which would not require strict compliance with numeric limitations. Instead, it calls for a TMDL regulatory approach that is in keeping with federal stormwater regulations. That approach allows compliance to be achieved through BMP implementation, but without having to actually meet the TMDL’s numeric WLA. As long as the BMPs are being implemented, compliance will be achieved, even if the WLA metric is not met. The mechanism for accomplishing this is known as a water quality based effluent limitation (WQBEL). Actually, federal regulations require WQBELs to be used when TMDLs are effectuated through NPDES permits. The Regional Board has ignored this requirement for reasons that are not clear. The Regional Board does not have to follow federal regulations here; it can rely on State law. However, if it does, it will be creating an unfunded mandate.

City’s Resolution

The proposed resolution also empowers the mayor and city manager to take actions necessary to promote reasonable compliance approaches to TMDL and NPDES permit requirements. This includes lobbying state and federal elected, and, if necessary, taking administrative and legal action, including but not limited to filing unfunded mandate claims against the State. A copy of the resolution will be forwarded to the City’s county, federal, and state elected officials.

FINANCIAL REVIEW

No immediate fiscal impact is associated with the adoption of the resolution. However, if the Regional Board incorporates TMDLs into the next municipal NPDES permit, the potential fiscal impact on the City is expected to be unmanageable. Should that become a reality, the City would have no choice but to challenge that requirement on unfunded mandate and other legal grounds.

CEQA

The Director of Community Development has determined that this matter is covered by the general rule that the California Environmental Quality Act applies only to projects that have the potential for causing a significant effect on the environment in accordance with Section 15061 (b) (3) of the Guidelines. The request for reasonable, practicable, and economically achievable NPDES and TMDL requirements will not have a significant effect on the environment because the action will not result in or lead to a physical change in Claremont. Therefore no additional environmental review is needed at this time.

PUBLIC NOTICE PROCESS

This item has been noticed through the regular agenda notification process. Copies are available at the City Hall public counter, the Youth Activity Center, the Alexander Hughes Community Center, the Claremont Public Library, and the City website.

ALTERNATIVES TO STAFF RECOMMENDATION

In addition to the staff recommendation, there are the following alternatives:

1. Do not approve the attached resolution at this time.
2. Request additional information.

Submitted by:



Brian Desatnik
Director of Community Development

Prepared by:



Craig Bradshaw
City Engineer

Attachment A: Resolution

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CLAREMONT, CALIFORNIA, SUPPORTING A RESOLUTION ADOPTED BY THE LEAGUE OF CALIFORNIA CITIES, LOS ANGELES DIVISION, CALLING FOR REASONABLE, PRACTICABLE, AND ECONOMICALLY ACHIEVABLE TMDL AND MUNICIPAL NPDES PERMIT REQUIREMENTS.

WHEREAS, the league of California Cities, Los Angeles Division (hereinafter League) supports a resolution calling for a reasonable, practicable, and economically achievable total maximum daily load (TMDL and municipal NPDES permit requirements (Exhibit A attached) ;

WHEREAS, the League's resolution encourages the use of water quality based effluent limitations (WQBELs) in executing total maximum daily loads (TMDLs) in NPDES permits stormwater regulations;

WHEREAS, the use of WQBELs would prevent requiring the City, as a municipal NPDES permittee, to strictly comply with numeric limitations associated with TMDLs by allowing compliance to be achieved through the implementation of best management practices;

WHEREAS, if the Regional Board does not allow the use of WQBELs to comply with TMDLs placed into NPDES permits, and relies instead on State law to compel compliance, it will create an unfunded mandate, which could impose onerous compliance costs on the State resulting from successful unfunded mandate claims raised by affected municipalities;

WHEREAS, the City, along with many municipalities in Los Angeles County, fully supports the League's resolution;

WHEREAS, the resolution proposed herein also authorizes the City to take actions necessary to promote the use of WQBELs and/or other regulatory mechanisms to assure that compliance with TMDLs or municipal NPDES permit requirements is achieved through the implementation of best management practices without having to meet a numeric limitation on the pollutant for which a TMDL was created to address;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF CLAREMONT DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. That the Mayor and his/her designee take the following actions:

1. Forward the League's resolution and this resolution to county, state, and federal elected officials and to appropriate state and federal regulatory agencies, and provide an explanation of their intent and purpose;
2. Communicate in writing and meet as often as necessary with elected officials and regulatory agencies on this matter; and

3. Challenge, through administrative claims or petitions, or litigation of any regulatory requirement that would impose upon the City strict compliance with numeric limitations in TMDLs, municipal NPDES permit, or other regulatory mechanisms.

SECTION 2. The City Clerk shall certify to the passage and adoption hereof.

PASSED, APPROVED AND ADOPTED this ____ day of February, 2011.

Mayor of the City of Claremont

ATTEST:

City Clerk, City of Claremont

APPROVED AS TO FORM:

Shirley R. Cornwall
City Attorney, City of Claremont

Exhibit "A"

**A RESOLUTION OF THE LEAGUE OF CITIES, LOS ANGELES
COUNTY DIVISION, SUPPORTING REASONABLE, PRACTICABLE
AND ECONOMICALLY ACHIEVEABLE STORMWATER NPDES PERMIT AND
TMDL REQUIREMENTS, THROUGH THE USE OF PROGRESSIVE
AND ADAPTIVE BEST MANAGEMENT PRACTICES**

Whereas, municipalities in Los Angeles County are proud of their environmental programs and invest significant resources in improving water quality by implementing both federal, state and local environmental programs, including the National Pollution Discharge Elimination System (NPDES) permits and the Total Daily Maximum Load (TMDL) program; and

Whereas, the United States Environmental Protection Agency (USEPA) is governed under a consent decree issued by a federal district court in 1999 which requires USEPA to adopt 96 TMDLs for water bodies in the Los Angeles region, under an accelerated time schedule; and

Whereas, the State of California, through the State Board and Regional Board, has been designated by the USEPA to enforce federal stormwater regulations, including the municipal NPDES permits and TMDLs, under the Clean Water Act; and

Whereas, TMDLs are the means by which water quality standards are applied to the municipalities and TMDLs are specifically designed to achieve beneficial uses of water bodies by limiting the amount of pollutants in runoff conveyed to them; and

Whereas, TMDLs are typically implemented and enforced against local governments through the Municipal NPDES permits and that the Clean Water Act allows for third-party litigation/citizen suits against local governments if they fail to comply with their NPDES permit requirements; and

Whereas, the USEPA and the Regional Board have adopted dozens of TMDLs since 2001 and additional TMDLs are pending adoption under the consent decree; and

Whereas, the Regional Board has already incorporated into the current NPDES permit a trash TMDL for the Los Angeles River and a bacteria TMDL for the Santa Monica Bay, and plans to include in the permit dozens of other TMDLs affecting Ballona Creek, Calleguas Creek, the Dominquez Channel, the Los Angeles River and the San Gabriel River, and Santa Clara River watersheds; and

Whereas, a study commissioned by the United States Environmental Protection Agency (USEPA) concluded that the stormwater management program (including TMDLs) in the United States is dysfunctional and in need of radical change;

Whereas the USEPA study concluded that the cost of complying with TMDLs would impose upon subject local governments tremendous costs that may not result in a significant improvement in water quality;

Exhibit "A"

Whereas, a Government Accounting Office report commissioned by Congress found that compliance with existing TMDL regulations has been problematic and that limitations in USEPA's economic analysis of the NPDES and TMDL programs raises questions about their reasonableness (GAO/T-RCED-00-233); and

Whereas, the GAO also found that states have had difficulty in developing accurate water quality standards for the TMDL program due to a lack of financial resources and that, as a consequence, local governments risk directing limited resources to water bodies that have been incorrectly targeted for clean-up (GAO -03-88IT); and

Whereas, the State's non-partisan Little Hoover Commission found in its January of 2009 report that local governments, representing small, poor communities, as well as larger, richer urban areas, are struggling to pay for upgrades needed to protect the state's waters and that urban stormwater is a vexing problem with costly solutions, yet the State has not developed an adequate system for assessing and prioritizing the problems; and

Whereas, the State Water Board commissioned a panel of experts to report on the feasibility of relying on numeric limits in municipal NPDES permits and the panel reported on June 19, 2006 that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges"; and

Whereas, the League of California Cities adopted statewide water policy guidelines in March of 2010 supporting the development of reasonably achievable, environmentally sound and cost-effective TMDLs based on monitoring and sound science, and opposes legislation that requires the use of numeric limits in NPDES permits, because of the difficulties in meeting numeric limits, problems with exceeding numeric limits and the costs and potential enforcement impacts of numeric limits; and

Whereas, federal regulations allow for flexibility and provide discretion to the states when imposing NPDES permit requirements and developing TMDL programs, and USEPA has adopted *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, which allows municipalities to employ best management practices (BMPs) as a reasonable, practicable and economically achievable method to improve water quality in lieu of incorporating numeric limits into NPDES permits; and

Whereas a recent USEPA memorandum reaffirmed the use of BMPs in addressing water quality based effluent limits (WQBELs) as a means of complying with TMDLs in NPDES stormwater permits;

Now therefore, the League of California Cities, Los Angeles Division does hereby resolve:

Exhibit "A"

Section 1. That the President is authorized to communicate with USEPA, the State Board and the Regional Board:

1. That the Division supports the California League of Cities statewide policy that TMDLs be reasonably achievable, environmentally sound, cost-effective and based on monitoring and sound science.
2. That the Division supports the League of Cities statewide policy that generally opposes strict compliance with numeric limits in municipal NPDES Permits because of the difficulties in meeting them, problems with exceeding them, and the costs and potential enforcement impacts.
3. That the Division recommends that the Regional Board allow the municipalities to comply with TMDLs through reasonable, practical and economically achievable BMPs, in a progressive and adaptable manner.
4. That the Division recommends that this BMP compliance approach be included in the upcoming municipal NPDES permits in Los Angeles County, in lieu of absolute compliance with numeric limits by whatever means necessary to achieve such compliance.

Section 2. That the President is directed to send letters to all member cities encouraging them to adopt similar resolutions and communicate their position in support of best management practices, rather than strict compliance with numeric limits, as a means of implementing TMDLs in the Municipal NPDES permits to the USEPA, the State Board and the Regional Board.