

## Findings

### Section E. Federal, State, and Regional Regulations

#### Revisions (Replace Existing Finding 14, with that below):

14. The Regional Board on September 19, 2001, adopted amendments to the Basin Plan, to incorporate TMDLs for trash in the Los Angeles River (Resolution No. R01-013) and Ballona Creek (Resolution No. R01-014). The amendments were subsequently approved by the State Board, the Office of Administrative Law, and the United States Environmental Protection Agency. Twenty-two cities<sup>1</sup> (“Cities”) sued the Regional Board and State Board to set aside the Los Angeles River Trash TMDL. The trial court entered an order deciding some claims in favor of the Water Boards and some in favor of the Cities. Both sides appealed, and on January 26, 2006, the Court of Appeal decided every one of the Cities’ claims in favor of the Water Boards, except with respect to California Environmental Quality Act (CEQA) compliance (*City of Arcadia et al. v. Los Angeles Regional Water Quality Control Board et al.* (2006) 135 Cal.App.4th 1392). The Court therefore declared the Los Angeles River Trash TMDL void, and issued a writ of mandate that ordered the Water Boards to set aside and not implement the TMDL, until it had been brought into compliance with CEQA. As a result of the appellate court’s decision, in 2006, the Regional Board set aside its 2001 action incorporating the TMDL into the Basin Plan (Resolution R06-013) (*City of Arcadia et al. v. Los Angeles Regional Water Quality Control Board et al.* (2006) 135 Cal.App.4th 1392). After conducting the required CEQA analysis, the Regional Board readopted the Los Angeles River Watershed Trash TMDL on August 9, 2007 (Resolution No. R07-012). This TMDL was subsequently approved by the State Board (Resolution No. 2008-0024), the Office of Administrative Law (File No. 2008-0519-02 S), and the United States Environmental Protection Agency, and became effective on September 23, 2008. The Water Boards filed their final return to the writ of mandate on August 6, 2008, and on August 26, 2008, the superior court entered an order discharging the writ, and dismissing the case, thus concluding the legal challenges to the Trash TMDL.

#### Additions:

#### **Findings Related to the Incorporation of the Los Angeles River Watershed Trash TMDL**

40. The Regional Board adopted the Los Angeles River Trash Total Maximum Daily Load (TMDL) on August 9, 2007 as an amendment to the region’s Water Quality Control Plan (Basin Plan) to address water quality impairments due to trash in the Los Angeles River Watershed that were identified in 1998 on the State’s Clean Water Act Section 303(d) List. This TMDL was subsequently approved by the State Board, the Office of Administrative Law (OAL), and the USEPA, and it became effective on September 23, 2008.
41. By its adoption of the Trash TMDL, the Regional Board determined that trash discharged to the Los Angeles River and its tributaries discourages recreational activity, degrades aquatic habitat, threatens wildlife through ingestion and entanglement, and also poses risks to human health. Existing beneficial uses impaired by trash in the Los Angeles River are contact

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<sup>1</sup> The cities include Arcadia, Baldwin Park, Bellflower, Cerritos, Commerce, Diamond Bar, Downey, Irwindale, Lawndale, Monrovia, Montebello, Monterey Park, Pico Rivera, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Vernon, West Covina, and Whittier.

recreation (REC-1) and non-contact recreation (REC-2); warm fresh water habitat (WARM); wildlife habitat (WILD); estuarine habitat (EST) and marine habitat (MAR); rare, threatened or endangered species (RARE); migration of aquatic organisms (MIGR) and spawning, reproduction and early development of fish (SPWN); commercial and sport fishing (COMM); wetland habitat (WET); and cold freshwater habitat (COLD).

42. The Los Angeles River Trash TMDL identifies discharges from the municipal separate storm sewer system as the principal source of trash to the Los Angeles River and its tributaries. As such, WLAs were assigned to MS4 Permittees that discharge to the MS4 system in the watershed. The WLAs are expressed as progressively decreasing allowable amounts of trash discharges from jurisdictional areas within the watershed. The Trash TMDL requires MS4 Permittees to make annual reductions of their discharges of trash to the Los Angeles River Watershed over a 9-year period, until the numeric target of zero trash discharged from the MS4 is achieved for the 2013-2014 storm year. The Basin Plan assigns MS4 Permittees within the Los Angeles River Watershed baseline Waste Load Allocations from which annual reductions are to be made. (See Basin Plan, Table 7-2.2.) The Basin Plan also specifies interim and final Waste Load Allocations as decreasing percentages of the Table 7-2.2 baseline WLAs, and specifies the corresponding “Compliance Points”. (See Basin Plan, Table 7-2.3.)
43. The Los Angeles River Trash TMDL specifies that the WLAs shall be implemented through MS4 permits. Federal regulations require that NPDES permits be consistent with the assumptions and requirements of any available waste load allocation. (40 CFR 122.44(d)(1)(vii)(B).) State law requires both that the Regional Board implement its Basin Plan when adopting waste discharge requirements (WDRs) and that NPDES permits apply “any more stringent effluent standards or limitations necessary to implement water quality control plans...” (Wat. Code §§ 13263, 13377).
44. The Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Browner* ruled that the Clean Water Act grants the permitting agency discretion either to require “strict compliance” with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time (*Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159). In a precedential decision, the State Board acknowledged that the holding in *Browner* allows the issuance of MS4 permits that limit their provisions to BMPs that control pollutants to the MEP, and which do not require compliance with water quality standards. However, the Water Boards have declined to adopt that approach in light of the impacts of discharges from MS4s on waters throughout the State and Los Angeles region (see Order WQ 2001-15 and Part 2 of the LA County MS4 Permit). The State Board concluded and the Regional Board agrees that “where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances” (Order WQ 2001-15, p. 8).
45. In a recent decision, the State Board also concluded that incorporation of the provisions of TMDLs into MS4 permits requires extra consideration. Specifically, the State Board held: “TMDLs, which take significant resources to develop and finalize, are devised with specific implementation plans and compliance dates designed to bring impaired waters into compliance with water quality standards. It is our intent that federally mandated TMDLs be given substantive effect. Doing so can improve the efficacy of California’s NPDES storm water permits.” The State Board stated that TMDLs should not be an “academic exercise”, and indicated that in some instances when implementing TMDLs, numeric effluent

limitations may be an appropriate means of controlling pollutants in storm water, provided the Regional Board's determination is adequately supported in the permit findings (Order WQ 2009-0008). The following paragraphs support the Regional Board's determination to implement the Trash TMDL with numeric effluent limitations.

46. The Trash TMDL specified a specific formula for calculating and allocating annual reductions in trash discharges from each jurisdiction. The formula results in specified annual amounts of trash that may be discharged from each jurisdiction into the receiving waters. Translation of the compliance points described in the TMDL into jurisdiction-specific load reductions from the baseline levels, as specified in the TMDL, logically results in the articulation of an annual limit on the amount of a pollutant that may be discharged. The specification of allowable annual trash discharge amounts meets the definition of an "effluent limitation", as that term is defined in subdivision (c) of section 13385.1 of the California Water Code. Specifically, the trash discharge limitations constitute a "numeric restriction ... on the quantity [or] discharge rate ... of a pollutant or pollutants that may be discharged from an authorized location." While there may be other ways to incorporate the compliance points from the TMDL into permit conditions, the Regional Board is not aware of any other mechanisms that would result in actual compliance with the requirements of the TMDL as it was intended.
47. The process to establish the Trash TMDL was exceedingly lengthy, heavily litigated and scrutinized, and contained extensive analysis. The essence of this TMDL has been twice approved by the Regional Board, the State Board, OAL, the USEPA, and has been subject to considerable judicial review. Therefore, the assumptions underlying this TMDL have been thoroughly vetted by staff, stakeholders, other agencies, and the courts over a significant period of time.
48. In its resolution establishing the Trash TMDL, the Regional Board already determined that the implementation schedule was reasonable and feasible, and noted that the MS4 Permittees had notice of the trash impairment since at least 1998 (with its listing on the 1998 303(d) list) and had been required to attain water quality standards for trash in the receiving waters since this order was first adopted in December of 2001. (See e.g., Resolution R07-012, finding 14.) The Court of Appeal affirmed the Regional Board's determination that the final waste load allocations were attainable and not inordinately expensive. (*Cities of Arcadia*, 135 Cal.App.4<sup>th</sup> at 1413 and 1427-1430.) Full capture systems, partial capture devices, and institutional controls are presently available to feasibly and practicably attain the interim and final effluent limitations, and it is anticipated that this order will precipitate additional innovations in control strategies and technologies, just as the adoption of the Trash TMDL resulted in the proffering and certification of seven full capture systems.
49. The Trash TMDL and this order include provisions that allow Permittees to be deemed in compliance with their effluent limitations through the installation of certain best management practices (certified full capture systems). Any Permittee that is deemed in compliance through the use of certified full capture systems would not be in violation of the effluent limitations even if some trash is discharged in excess of the annual limitations.
50. The Trash TMDL includes provisions requiring its reconsideration after a trash reduction of 50% has been achieved and sustained in the watershed, which provides an opportunity to reexamine some of the assumptions of the TMDL after tangible and meaningful progress has been made in the watershed. (See Basin Plan, Table 7-2.3, fn. 2.)

51. Depending upon the compliance strategy selected by each Permittee, compliance with the effluent limitations set forth in Appendix 7-1 may require a demonstration that the Permittee is in strict compliance with water quality standards. It remains the Permittee's choice, however, to comply via full capture systems (which do not require a demonstration of strict compliance with water quality standards), or partial capture devices and/or institutional controls.
52. Section 402(p)(3)(B)(iii) of the Clean Water Act, requires MS4 Permittees to reduce the pollutants in their storm water discharges to the "maximum extent practicable" (MEP). As set forth herein, "practicable" options presently exist to achieve compliance with the effluent limitations. Since the effluent limitations can be practicably achieved, their imposition is within the federally mandated MEP standard, and no analysis contemplated by *City of Burbank v. SWRCB* (2005) 35 Cal.4th 613 pursuant to Water Code section 13241 is necessary to support these effluent limitations.
53. In its discretion, the Regional Board may administratively impose civil liability of up to \$10,000 for "each day in which the violation [of waste discharge requirements] occurs." (Wat. C. § 13385, subd (c).) The Los Angeles River Trash TMDL adopted by the Regional Board states that improperly deposited trash is mobilized during storm events of greater than 0.25 inches of precipitation. Violations of the effluent limitations, therefore, are limited to the days of a storm event of greater than 0.25 inches. Once a Permittee has violated the annual effluent limitation, any subsequent discharges of trash during any day of a storm event of greater than 0.25 inches during the same storm year constitutes an additional "day in which the violation [of the effluent limitation] occurs".
54. Unlike subdivision (c) of Water Code section 13385 where violations of effluent limitations are assessed on a per day basis, the mandatory minimum penalties subdivisions (Wat. Code § 13385, subd. (h) and (i)) require the Regional Board to assess mandatory minimum penalties for "each violation" of an effluent limitation. The effluent limitations in Appendix 7-1 are expressed as annual limitations. Therefore, there can be no more than one violation of each interim or final effluent limitation per year. Trash is considered a Group I pollutant, as specified in Appendix A to section 123.45 of Title 40 of the Code of Federal Regulations. Therefore, each annual violation of an effluent limitation in Appendix 7-1 by forty percent or more would be considered a "serious violation" under subdivision (h). With respect to the final effluent limitation of zero trash, any detectable discharge of trash necessarily is a serious violation, in accordance with the State Board's Enforcement Policy. Violations of the effluent limitations in Appendix 7-1 would not constitute "chronic" violations that would give rise to mandatory liability under subdivision (i) because four or more violations of the effluent limitations subject to a mandatory penalty cannot occur in a period of six consecutive months.
55. Therefore, the modifications to the Order include effluent limitations in a manner consistent with the assumptions and requirements of the WLAs from which they are derived as well as an allowance to comply with these effluent limitations [*i.e.* WLAs] through proper installation and maintenance of full capture systems.
56. Modifications consistent with the assumptions and requirements of the TMDL are therefore included in Parts 4 (Special Provisions) and 5 (Definitions) of this Order. Part 7 (Total Maximum Daily Load Provisions) is added to this Order and incorporates provisions to assure that Los Angeles County MS4 Permittees achieve the Waste Load Allocations (WLAs) and comply with other requirements of Total Maximum Daily Loads (TMDLs) covering impaired waters impacted by the Permittees' discharges. These modifications are

made pursuant to 40 CFR sections 122.41(f), 122.44.(d)(1)(vii)(B), and 122.62, and Part 6.I.1 of this Order. Tables 7-2.1, 7-2.2, and 7-2.3 of the Basin Plan set forth the pertinent provisions of the Los Angeles River Watershed Trash TMDL. The interim and final effluent limitations consistent with the assumptions and requirements of the waste load allocations, and related provisions required of Permittees within the watershed are provided in Part 7 of this Order.

57. Permittees identified as responsible agencies in the Trash TMDL may achieve compliance with interim and final effluent limitations through progressive installation of BMPs meeting the definition of “full capture” throughout their jurisdictions’ drainage areas. Alternatively, Permittees may install “partial capture” devices and/or implement institutional controls to meet their respective interim and final effluent limitations. In the latter case, compliance shall be determined based on direct measurement of trash discharges or site-specific performance data.
58. The Executive Officer will develop a standard reporting form, consistent with these provisions, which shall be used by Permittees to report compliance with the effluent limitations on an annual basis.
60. Pursuant to federal regulations at 40 CFR sections 124.8 and 125.56, a Fact Sheet was prepared to provide the basis for incorporating the Los Angeles River Watershed Trash TMDL into this Order. This Fact Sheet is hereby incorporated by reference into these findings.