

State of California
California Regional Water Quality Control Board, Los Angeles Region

RESOLUTION NO. R4-2008-007

May 1, 2008

**Amendment to the *Water Quality Control Plan for the Los Angeles Region* to
Incorporate a Trash Total Maximum Daily Load for the Malibu Creek Watershed**

**WHEREAS, the California Regional Water Quality Control Board, Los Angeles Region,
finds that:**

1. The Federal Clean Water Act (CWA) requires the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) to establish water quality standards for each water body within its region. Water quality standards include beneficial uses, water quality objectives that are established at levels sufficient to protect those beneficial uses, and an antidegradation policy to prevent degrading waters. Water bodies that do not meet water quality standards are considered impaired.
2. CWA section 303(d)(1) requires each state to identify the waters within its boundaries that do not meet water quality standards. Those waters are placed on the state's "303(d) List" or "Impaired Waters List". For each listed water, the state is required to establish the Total Maximum Daily Load (TMDL) of each pollutant impairing the water quality standards in that waterbody. Both the identification of impaired waters and TMDLs established for those water must be submitted to U.S. EPA for approval pursuant to CWA section 303(d)(2). For all waters that are not identified as impaired, the states are nevertheless required to create TMDLs pursuant to CWA section 303(d)(3).
3. A consent decree between (U.S. EPA), Heal the Bay, Inc. and BayKeeper, Inc. was approved on March 22, 1999, which resolved litigation between those parties relating to the pace of TMDL development. The court order directs the U.S. EPA to ensure that TMDLs for all 1998-listed impaired waters be established within 13 years of the consent decree. The consent decree combined water body pollutant combinations in the Los Angeles Region into 92 TMDL analytical units. In accordance with the consent decree, the Malibu Creek Trash TMDL addresses the waterbody with Trash listings in analytical unit 63. Based on the consent decree schedule, TMDLs must be approved or established by United States Environmental Protection Agency (USEPA) by March 2012.
4. The elements of a TMDL are described in 40 CFR 130.2 and 130.7 and section 303(d)(1)(C) and (D) of the CWA, as well as in U.S. EPA guidance documents (Report No. EPA/440/4-91/001). A TMDL is defined as the sum of the individual waste load allocations for point sources, load allocations for nonpoint sources and natural background (40 CFR 130.2). TMDLs must be set at levels necessary to attain and maintain the applicable narrative and numeric water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality (40 CFR 130.7(c)(1)). 40 CFR 130.7 also dictates that TMDLs shall take into account critical conditions for stream flow, loading and water quality parameters. TMDLs typically include one or more numeric "targets", i.e., numerical translations of the existing water quality standards, which represent attainment of those standards, contemplating the

TMDL elements described above. Since a TMDL must represent the "total" load, TMDLs must account for all sources of the relevant pollutants, irrespective of whether the pollutant is discharged to impaired or unimpaired upstream reaches.

5. Neither TMDLs nor their targets or other components are water quality objectives, and thus their establishment does not implicate Water Code section 13241. Rather, under California Law, TMDLs are programs to implement existing standards (including objectives), and are thus established pursuant to Water Code section 13242. Moreover, they do not create new bases for direct enforcement against dischargers apart from the existing water quality standards they translate. The targets merely establish the bases through which load allocations (LAs) and waste load allocations (WLAs) are calculated. LAs and WLAs are only enforced for a discharger's own discharges, and then only in the context of the discharger's National Pollutant Discharge Elimination System (NPDES) permit (or other permit, waiver, or prohibition), which must contain effluent limits consistent with the assumptions and requirements of the WLAs (40 C.F.R. 122.44(d)(vii)(B)). The Regional Board will develop permit requirements through subsequent permit actions that will allow all interested persons, including but not limited to municipal storm water dischargers, to provide comments on how the WLAs should be translated into permit requirements. LAs will be implemented either through a conditional waiver included in this basin plan amendment or in a subsequent permit or order.
6. As envisioned by Water Code section 13242, the TMDL contains a "description of surveillance to be undertaken to determine compliance with objectives." The Compliance Monitoring elements of the TMDL recognize that monitoring will be necessary to assess the on-going condition of listed waterbodies in the Malibu Creek Watershed and to assess the on-going effectiveness of efforts by dischargers to reduce trash loading to Malibu Lagoon, Malibu Creek, and its tributaries and lakes. Additional studies may also be appropriate to provide further information about new data, new or alternative sources, and revised scientific assumptions. The TMDL does not establish the requirements for these monitoring programs or reports, although it does recognize the type of information that will be necessary to secure. The Regional Board's Executive Officer will issue orders to appropriate entities to develop and to submit monitoring and reporting plans and technical reports. The Executive Officer will determine the scope of these plans and reports, taking into account any legal requirements, and issue the orders to the appropriate entities.
7. Upon establishment of TMDLs by the State or U.S. EPA, the State is required to incorporate the TMDLs into the State Water Quality Management Plan (40 CFR 130.6(c)(1), 130.7). This Water Quality Control Plan for the Los Angeles Region (Basin Plan) and applicable statewide plans serve as the State Water Quality Management Plans governing the watersheds under the jurisdiction of the Regional Board. Attachment A to this resolution contains the Basin Planning language for this TMDL.
8. The Malibu Creek Watershed is located within both Ventura County and Los Angeles County, and covers approximately 69,900 acres with a drainage area of 109 square miles. It is the most ecologically significant watershed in Los Angeles County. Tributaries of Malibu Creek start in the Santa Monica Mountains and include the following tributaries, lakes, and Malibu Lagoon: Lindero Canyon Creek, Lake Lindero, Medea Creek, Palo Comado Canyon Creek, Cheeseboro Canyon Creek, Las Virgenes Creek, Hidden Valley Creek, Lake Sherwood, Potrero Valley Creek, Westlake Lake, Triunfo Creek, Lake

Enchanto, Malibou Lake, Malibu Creek, Las Virgenes Creek and Cold Creek. The dominant land use in the Malibu Creek Watershed is open space, accounting for approximately 82.7%. Other land uses include agriculture, recreation, and urbanized land uses of high and low density residential, and commercial industrial which accounts for 15.4% of the area. Malibu Creek is a receiving body of urban and stormwater runoff from a network of storm drains and various types of open space throughout the watershed. Among all tributaries and lakes, Malibu Creek from Malibou Lake to Malibu Lagoon, Medea Creek, Lindero Creek, Lake Lindero, and Las Virgenes Creek are identified on the 1998, 2002, and 2006 Clean Water Act 303(d) list of impaired water bodies as impaired due to trash. The proposed TMDL addresses impairments of water quality caused by trash and the Implementation Plan is developed to achieve water quality objectives for trash in waterbodies of the Malibu Creek Watershed.

9. Trash in waterways causes significant water quality problems. Small and large floatable materials can inhibit the growth of aquatic vegetation, decreasing spawning areas and habitats for fish and other living organisms. Wildlife living in creeks, lakes and in riparian areas can be harmed by ingesting or becoming entangled in floating trash. Settleable material can be a problem for bottom feeders and can contribute to sediment contamination. Some debris (e.g. diapers, medical and household waste, and chemicals) are sources of bacteria and toxic substances.
10. Numeric targets for the TMDL are based on the specific narrative water quality objectives provided in the Water Quality Control Plan for the Los Angeles Region (Basin Plan) that are applicable to trash. These water quality objectives include floating material:

"Waters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses."

and solid, suspended, or settleable materials:

"Waters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses."

11. The Regional Board's goal in establishing the TMDL for trash in the waterbodies in the Malibu Creek Watershed is to protect the Municipal and domestic supply (MUN), groundwater recharge (GWR), water contact recreation (REC-1), non-contact water recreation (REC-2), warm freshwater habitat (WARM), cold freshwater habitat (COLD), wildlife habitat (WILD), rare, threatened or endangered species (RARE), migrating of aquatic organisms (MIGR), spawning, reproduction, and/or early development (SPWN), and wetland habitat (WET) beneficial uses of waterbodies in the Malibu Creek Watershed and to achieve the narrative water quality objectives set to protect those uses.
12. Regional Board Staff have prepared a detailed technical document that analyzes and describes the specific necessity and rationale for the development of this TMDL. The technical document entitled "Trash Total Maximum Daily Load for the Malibu Creek Watershed" is an integral part of this Regional Board action and was reviewed, considered, and accepted by the Regional Board before acting. Further, the technical document provides the detailed factual basis and analysis supporting the problem statement, numeric targets (interpretation of the narrative and numeric water quality objectives used to calculate the waste load and load allocations), source analysis, linkage

analysis, waste load allocations (for point sources), load allocations (for nonpoint sources), margin of safety, and seasonal variations and critical conditions of this TMDL.

13. On May 1, 2008, prior to the Board's action on this resolution, a public hearing was conducted on the Trash TMDL for the Malibu Creek Watershed. Notice of the hearing for the Trash TMDL for the Malibu Creek Watershed was published in accordance with the requirements of Water Code Section 13244. This notice was published in the Los Angeles Times and Ventura County Star on February 14, 2008.
14. The public has had a reasonable opportunity to participate in the review of the amendment to the Basin Plan. Public Stakeholder meetings were held on September 27, 2007, November 13, 2007, December 13, 2007, January 24, 2008 and February 12, 2008. A draft of the TMDL was released for public comment on February 14, 2008; a Notice of Hearing and Notice of Filing were published and circulated 45 days preceding Board action; Regional Board staff responded to oral and written comments received from the public; and the Regional Board held a public hearing on May 1, 2008 to consider adoption of the TMDL.
15. In amending the Basin Plan to establish this TMDL, the Regional Board considered the requirements set forth in Sections 13240 and 13242 of the California Water Code.
16. Because the TMDL implements existing narrative and numeric water quality objectives (i.e., numeric water quality objectives in the Basin Plan), the Regional Board and the State Water Resources Control Board have determined that adopting a TMDL does not require the Regional Board to consider the factors of Water Code section 13241. The consideration of the Water Code section 13241 factors, by section 13241's express terms, only applies "in establishing water quality objectives." Here the Regional Board is not establishing water quality objectives, but as required by section 303(d)(1)(C) of the Clean Water Act is adopting a TMDL that will implement the previously established objectives that have not been achieved. In making this determination, the Regional Board has considered and relied upon a legal memorandum from the Office of Chief Counsel to the State Water Board's basin planning staff detailing why TMDLs cannot be considered water quality objectives. (See Memorandum from the Staff Counsel Michael J. Levy, Office of Chief Counsel, to Ken Harris and Paul Lillebo, Division of Water Quality: *The Distinction Between A TMDL's Numeric Targets and Water Quality Standards*, dated June 12, 2002.)
17. While the Regional Board is not required to consider the factors of Water Code section 13241, it nonetheless has developed and received significant information pertaining to the Water Code section 13241 factors and has considered that information in developing and adopting this TMDL. The past, present, and probable future beneficial uses of waterbodies in the Malibu Creek Watershed have been considered in that they are designated for a multitude of beneficial uses in the Basin Plan. The beneficial uses for the waterbodies in the Malibu Creek Watershed include aquatic life habitat uses, water contact and non-contact water recreation, and water supply. The environmental characteristics of the Malibu Creek Watershed are spelled out at length in the Basin Plan and in the technical documents supporting this Basin Plan amendment, and have been considered in developing this TMDL. Water quality conditions that reasonably could be achieved through the coordinated control of all factors which affect water quality in the area have been considered. This TMDL provides several compliance options, including structural and/or non-structural best management practices (BMPs) such as full capture

devices for point sources and a program of minimum frequency of assessment and collection in conjunction with BMPs (MFAC/BMP program) for nonpoint sources that could be implemented directly at the watershed to reduce trash loading to the creeks and lakes. These options provide flexibility for responsible jurisdictions to reduce trash loading to the waterbodies in the Malibu Creek Watershed. Establishing a plan that will ensure the waterbodies in the Malibu Creek Watershed attain and continue to attain water quality standards is a reasonable water quality condition. However, to the extent that there would be any conflict between the consideration of the factor in Water Code section 13241 subdivision (c), if the consideration were required, and the Clean Water Act, the Clean Water Act would prevail. Economic considerations were considered throughout the development of the TMDL. Some of these economic considerations arise in the context of Public Resources Code section 21159 and are equally applicable here. The implementation program for this TMDL recognizes the economic limitations on achieving immediate compliance and allows a flexible implementation schedule of 8 years for point source dischargers and 5 years for nonpoint source dischargers. The need for housing within the region has been considered, but this TMDL is unlikely to affect housing needs. Whatever housing impacts could materialize are ameliorated by the flexible nature of this TMDL and the implementation schedules.

18. The amendment is consistent with the State Antidegradation Policy (State Board Resolution No. 68-16), in that the changes to water quality objectives (i) consider maximum benefits to the people of the state, (ii) will not unreasonably affect present and anticipated beneficial use of waters, and (iii) will not result in water quality less than that prescribed in policies. Likewise, the amendment is consistent with the federal Antidegradation Policy (40 CFR 131.12).
19. Pursuant to Public Resources Code section 21080.5, the Resources Agency has approved the Regional Water Boards' basin planning process as a "certified regulatory program" that adequately satisfies the California Environmental Quality Act (CEQA) (Public Resources Code, Section 21000 et seq.) requirements for preparing environmental documents (14 Cal. Code Regs. § 15251(g); 23 Cal. Code Regs. § 3782.) The Regional Water Board staff has prepared "substitute environmental documents" for this project that contain the required environmental documentation under the State Water Board's CEQA regulations. (23 Cal. Code Regs. § 3777.) The substitute environmental documents include the TMDL staff report entitled "Trash Total Maximum Daily Load for the Malibu Creek Watershed", the environmental checklist, the comments and responses to comments, the basin plan amendment language, and this resolution. The project itself is the establishment of a TMDL for trash in Malibu Creek from Malibu Lake to Malibu Lagoon, Medea Creek, Lindero Creek, Lake Lindero, and Las Virgenes Creek in the Malibu Creek Watershed. While the Regional Board has no discretion to not establish a TMDL (the TMDL is required by federal law), the Board does exercise discretion in assigning waste load allocations and load allocations, determining the program of implementation, and setting various milestones in achieving the water quality standards. The CEQA checklist and other portions of the substitute environmental documents contain significant analysis and numerous findings related to impacts and mitigation measures.
20. A CEQA Scoping hearing was conducted on December 13, 2007 at the Council Chamber of City of Calabasas – 26135 Mureau Road, Calabasas, California. A notice of the CEQA Scoping hearing was sent to interested parties including cities and/or counties with jurisdiction in or bordering the watershed. The notice of CEQA Scoping hearing

was also published in the Los Angeles Times on November 9, 2007 and Ventura County Star on November 13, 2007.

21. In preparing the substitute environmental documents, the Regional Board has considered the requirements of Public Resources Code section 21159 and California Code of Regulations, title 14, section 15187, and intends those documents to serve as a tier 1 environmental review. This analysis is not intended to be an exhaustive analysis of every conceivable impact, but an analysis of the reasonably foreseeable consequences of the adoption of this regulation, from a programmatic perspective. Many compliance obligations will be undertaken directly by public agencies that will have their own obligations under CEQA. In addition, public agencies including but not limited to National Park Service, California Department of Parks and Recreation, California Department of Transportation, County of Los Angeles, County of Ventura, Ventura County Watershed Protection District, Santa Monica Mountains Conservancy, Cities of Agoura Hills, Calabasas, Hidden Hills, Malibu, Westlake Village and Thousand Oaks are foreseeably expected to facilitate compliance obligations. The "Lead" agencies for such tier 2 projects will assure compliance with project-level CEQA analysis of this programmatic project. Project level impacts will need to be considered in any subsequent environmental analysis performed by other public agencies, pursuant to Public Resources Code section 21159.2.
22. The foreseeable methods of compliance of this TMDL entail structural stormwater management systems such as full capture or partial capture devices, or non-structural Best Management Practices (BMPs) for point source discharge. Foreseeable methods of compliance with nonpoint source discharge include a program of Minimum Frequency of Assessment and Collection in conjunction with BMPs (MFAC/BMP program)..
23. Consistent with the Regional Board's substantive obligations under CEQA, the substitute environmental documents do not engage in speculation or conjecture, and only consider the reasonably foreseeable environmental impacts, including those relating to the methods of compliance, reasonably foreseeable feasible mitigation measures to reduce those impacts, and the reasonably foreseeable alternative means of compliance, which would avoid or reduce the identified impacts.
24. The proposed TMDL could have a potentially significant adverse effect on the environment. However, there are feasible alternatives, feasible mitigation measures, or both, that, if employed, would substantially lessen the potentially significant adverse impacts identified in the substitute environmental documents; however such alternatives or mitigation measures are within the responsibility and jurisdiction of other public agencies, and not the Regional Board. Water Code section 13360 precludes the Regional Board from dictating the manner in which responsible agencies comply with any of the Regional Board's regulations or orders. When the agencies responsible for implementing this TMDL determine how they will proceed, the agencies responsible for those parts of the project can and should incorporate such alternatives and mitigation into any subsequent projects or project approvals. These feasible alternatives and mitigation measures are described in more detail in the substitute environmental documents. (14 Cal. Code Regs. § 15091(a)(2).)
25. From a program-level perspective, incorporation of the alternatives and mitigation measures outlined in the substitute environmental documents may not reduce impacts to less than significant levels.

26. The substitute documents for this TMDL, and in particular the Environmental Checklist and staff's responses to comments, identify broad mitigation approaches that should be considered at the project level.
27. To the extent significant adverse environmental effects could occur, the Regional Board has balanced the economic, legal, social, technological, and other benefits of the TMDL against the unavoidable environmental risks and finds that specific economic, legal, social, technological, and other benefits of the TMDL outweigh the unavoidable adverse environmental effects, such that those effects are considered acceptable. The basis for this finding is more fully set forth in the substitute environmental documents. (14 Cal. Code Regs. § 15093.)
28. Health and Safety Code section 57004 requires external scientific peer review for certain water quality control policies. The proposed Trash TMDL and Basin Plan Amendments are based on policy and management considerations, not scientific findings or conclusions drawn from empirical data. It is not necessary for the Regional Board to seek external peer review for these amendments per the provisions of Health and Safety Code section 57004.
29. The regulatory action meets the "Necessity" standard of the Administrative Procedures Act, Government Code, Section 11353, Subdivision (b). As specified above, Federal law and regulations require that TMDLs be incorporated into the water quality management plan. The Regional Board's Basin Plan is the Regional Board's component of the water quality management plan, and the Basin Plan is how the Regional Board takes quasi-legislative, planning actions. Moreover, the TMDL is a program of implementation for existing water quality objectives, and is, therefore, appropriately a component of the Basin Plan under Water Code section 13242. The necessity of developing a TMDL is established in the TMDL staff report, the section 303(d) list, and the data contained in the administrative record documenting the trash impairments of Malibu Creek from Malibou Lake to Malibu Lagoon, Medea Creek, Lindero Creek, Lake Lindero and Las Virgenes Creek.
30. The Basin Plan amendment incorporating a Trash TMDL for the Malibu Creek Watershed must be submitted for review and approval by the State Water Resources Control Board (State Board), the State Office of Administrative Law (OAL), and the U.S. EPA. The Basin Plan amendment will become effective upon approval by OAL and U.S. EPA. A Notice of Decision will be filed with the Resources Agency.
31. If during the State Board's approval process, Regional Board staff, the SWRCB or State Board staff, or OAL determines that minor, non-substantive modifications to the language of the amendment are needed for clarity or consistency, the Executive Officer should make such changes consistent with the Regional Board's intent in adopting this TMDL, and should inform the Board of any such changes.
32. Considering the record as a whole, this Basin Plan amendment will result in no adverse effects, either individually or cumulatively, on wildlife resources.

THEREFORE, be it resolved that pursuant to sections 13240 and 13242 of the Water Code, the Regional Board hereby amends the Basin Plan as follows:

1. The Regional Board hereby approves and adopts the CEQA substitute environmental documentation, which was prepared in accordance with Public Resources Code section 21159 and California Code of Regulations, title 14, section 15187, and directs the Executive Officer to sign the environmental checklist.
2. Pursuant to Sections 13240 and 13242 of the California Water Code, the Regional Board, after considering the entire record, including oral testimony at the hearing, hereby adopts the amendments to Chapter 7 of the Water Quality Control Plan for the Los Angeles Region, as set forth in Attachment A hereto, to incorporate the elements of the Trash TMDL for the Malibu Creek Watershed.
3. The Executive Officer is directed to forward copies of the Basin Plan amendment to the State Board in accordance with the requirements of section 13245 of the California Water Code.
4. The Regional Board requests that the State Board approve the Basin Plan amendment in accordance with the requirements of sections 13245 and 13246 of the California Water Code and forward it to OAL and the U.S. EPA.
5. If during the State Board's approval process, Regional Board staff, the State Board or OAL determines that minor, non-substantive modifications to the language of the amendment are needed for clarity or consistency, the Executive Officer may make such changes, and shall inform the Board of any such changes.
6. The Executive Officer is authorized to request a "No Effect Determination" from the Department of Fish and Game, or transmit payment of the applicable fee as may be required to the Department of Fish and Game.

I, Tracy J. Egoscue, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Los Angeles Region, on May 1, 2008.



Tracy J. Egoscue
Executive Officer

5/15/08

Date