

# **EPA's Response to Comments on Modification of Amended Consent Decree Addressing Total Maximum Daily Loads (TMDLs) in Los Angeles Region**

**July 23, 2010**

## **INTRODUCTION**

EPA determined a modification to the consent decree was appropriate and in the public interest so we sought to reach agreement with *Heal the Bay, Inc., Santa Monica Baykeeper, Inc., and NRDC* to modify some terms of the decree (*Heal the Bay et al. v. Browner*, No. C98-4825 SBA (N.D. Cal.)). Briefly, Heal the Bay and Santa Monica Baykeeper ("Plaintiffs") and EPA reached an agreement whereby 14 TMDL projects would be removed from the list of TMDLS governed by consent decree's schedule, and 4 TMDLs would be added, resulting in a net decrease of 10 TMDLs that EPA is required to establish or approve under the consent decree. In addition, the deadline for EPA to establish or approve 7 other TMDLs will be extended by one year. This document provides EPA's responses to public comments received on the modification to the decree.

The amended consent decree was entered on March 24, 1999, and sets forth deadlines for the establishment or approval of TMDLs under Section 303(d) of the Clean Water Act, 33 U.S.C. §1313(d), by the US EPA for waters in the region of California administered by the Los Angeles Regional Water Quality Control Board. On April 12, 2010, EPA notified interested parties that such an agreement had been reached and provided to those parties information regarding that agreement. See Attachment A. EPA sent e-mails directly to two groups of individuals whom had shown interest in the consent decree. One group consisted of approximately 20 individuals who had previously requested to receive information pertaining to the consent decree. EPA also discussed the proposed modification of the consent decree at an EPA-sponsored workshop in January 2010 that was attended by 68 individuals.

EPA hosted two teleconference calls to discuss with interested persons the modification to the consent decree. Separate teleconference calls were hosted by EPA Region 9 Water Division staff on April 14 and April 15, 2010. EPA also provided to interested persons contact information for Region 9 staff in order to provide further opportunity to discuss the modification.

EPA received written comments from the following 11 parties:

- City of Los Angeles
- City of Thousand Oaks
- City of Malibu
- Dominguez Channel Watershed Management Committee
- Los Angeles River Watershed Management Committee
- San Gabriel River Watershed Management Area Committee
- Los Angeles County, Dept. of Public Works
- Ventura County Watershed Protection District

- Las Virgenes – Truinfo Joint Powers Authority (Las Virgenes Municipal Water District & Truinfo Sanitation District)
- Flow Science, representing Cities of Signal Hill and Downey
- Rutan Attorneys at Law, on behalf of Cities of Signal Hill and Downey and the Coalition for Practical Regulation (an ad hoc group of the following cities: Arcadia, Artesia, Baldwin Park, Bell, Bell Gardens, Bellflower, Carson, Cerritos, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Canada-Flintridge, La Mirada, Lakewood, Lawndale, 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, Vernon, Walnut, West Covina and Whittier.)

This document summarizes the comments received and EPA’s response to them. Similar comments were received from several commenters; EPA has sought to address such comments collectively.

### **Comments and Responses**

#### **1. Several cities support a re-prioritization of the TMDLs to be established in LA Region.**

Response: EPA welcomes acknowledgement that these modifications result in net reduction of (10) TMDLs to be completed under the consent decree. It also reflects EPA’s decision to focus remaining time and resources on the TMDLs to be established for water quality limited segments. The 1999 consent decree addresses some impairments that, in EPA’s view, now have a lower priority than more recently identified impairments. For example, the impairment of Long Beach City Beach due to bacteria was included on the State’s Section 303(d) list in 2006. EPA’s determination to include that impairment on the list addressed by the decree is based in part on the agency’s view of the high priority of the impairment and the TMDLs to address it.

#### **2. Several cities support the removal of 14 water quality limited segments from the list of impairments subject to the consent decree schedule.**

Response: EPA concurs. As noted above, we have re-prioritized some water quality limited segments that require TMDL development to attain applicable water quality standards, including meeting criteria and restoring beneficial uses.

#### **3. Several commenters support the removal of impairments associated with coliform from the TMDL list subject to the consent decree schedule.**

Response: EPA concurs. Pursuant to the modification, impairments due to coliform removed from the consent decree include Ventura Harbor, Ventura Keys, Dominquez Channel, Los

Cerritos Channel, San Gabriel River reaches 1 and 2, Coyote Creek, and San Jose Creek Reaches 1 and 2.

**4. Several commenters support the deadline extensions (by one year) for numerous TMDLs.**

Response: EPA concurs. EPA believes the deadline extensions allow needed time for:

- (a) more Regional Board participation in TMDL development;
- (b) limited resources to be available over an extended timeframe;
- (c) EPA to develop TMDLs for the numerous pollutants using a watershed approach. This conserves agency resources by focusing relevant scientific information on unique site features and promotes stakeholder implementation efforts more efficiently so each improvement effort addresses multiple pollutants.

Stakeholders have voiced support for watershed TMDLs. EPA believes that developing TMDLs using that approach is particularly appropriate to address impairments within Malibu Creek watershed.

**5. One commenter asked that several impairments of lakes due to metals be removed from the list of impairments subject to the consent decree schedule.**

Response: EPA agrees with the comment and we wish to clarify the status of certain waterbody-pollutant combinations. First, the modification removes several impairments due to metals in creeks from the consent decree. EPA, with Plaintiff's concurrence, has determined that we need not undertake TMDL development for the following WQLS and pollutant pairings, based on EPA's recent findings of non-impairment for such WQLS and pollutant pairings: Echo Park Lake (copper, lead, ammonia, pH), Dominguez Channel above and below Vermont Avenue (ammonia, Wilmington Drain (copper and lead), and Los Cerritos Channel (ammonia). This conclusion of non-impairment is consistent with our public draft TMDL for impairments within several Los Angeles Lakes and it is consistent with provisions outlined in the existing consent decree whereby EPA determines it need not undertake TMDLs for waters that are not impaired. The stipulation has included the status of these certain waterbodies within the whereas clauses.

Also, EPA has agreed to continue monitoring the remaining lake-metal combinations, once those results are available, then EPA will evaluate all available data and then make a determination of whether to undertake TMDLs for metals in these lakes before the consent decree deadline date of March 2012. Continued monitoring pertains to the following waterbody-pollutant combinations: El Dorado (copper, lead, pH), Legg Lake (copper, lead), Lincoln Park Lake (lead), Peck Road Park Lake (lead), Santa Fe Dam Park Lake (copper, lead, pH), Westlake (lead).

However, based upon the currently available data, EPA concludes that no further modification of the decree to remove additional lake-metal combinations from the decree's schedule is warranted at this time.

6. Several commenters indicated that it is inappropriate to add the Malibu Creek benthic macroinvertebrate community impairments to the list of impairments subject to the decree schedule because:
- a) State water quality objectives for biocriteria have yet to be established;
  - b) There is insufficient data and lack of a baseline or Malibu Creek watershed specific reference condition to write a TMDL; the impairment could be due to a diverse range of natural conditions;
  - c) Tiered Aquatic Life Uses should be considered; and
  - d) The invasive New Zealand mudsnail could be the cause of this water quality problem and volunteer monitoring in the watershed could be contributing to mudsnail problem.

Response:

a) Adding the identified impairments of Malibu Creek to the list of impairments subject to the decree is appropriate notwithstanding the pending process to establish State water quality objectives for biocriteria. Malibu Creek is currently included on the State's Section 303(d) list as impaired due to sedimentation/siltation, and the Regional Board has recommended that Malibu Creek be included on the State's Section 303(d) list as impaired because of the benthic-macroinvertebrate bioassessment data record. The Regional Board's Basin Plan includes narrative water quality objectives for protecting the benthic macroinvertebrate community, which states:

"All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in, human, plant or animal, or aquatic life. Compliance with this objective will be determined by use of indicator organisms, analysis of species diversity, population density, growth anomalies, bioassays of appropriate duration or other appropriate methods as specified by the State or Regional Board."

Due to the Regional Board's water quality objectives (WQOs) and the data record evaluation, it is appropriate to complete a TMDL for these impairments. EPA is involved in and supports the State's effort to develop additional WQOs for biocriteria; however, the final statewide WQOs for biocriteria do not have to be completed to develop a TMDL to address these impairments. EPA understands the State is in its initial conceptual stages of developing statewide WQOs for biocriteria, which would likely not be completed until after the end of the schedule for completing the last TMDL addressed by the consent decree. EPA believes that completing such a TMDL is particularly appropriate where, as in the case of Malibu Creek, the existing impairment should be promptly addressed, and the TMDL that will likely be developed will also help ensure that the future WQOs will be implemented. Although a biological indicator TMDL has not been completed in California, several other states have completed biological TMDLs. See, Biological Integrity TMDL in Perry Creek Watershed, North Carolina and Excessive Nutrients due to Invasive Species TMDL in Diamond Lake, Oregon.

b) Under the modification, the TMDL to address Malibu Creek's benthic macroinvertebrate bioassessment impairment need not be established until March 24, 2012, and the TMDL to address Malibu Creek's sedimentation/siltation impairment need not be completed until

March 24, 2013. See, Stipulation, paras. 1 through 3.<sup>1</sup> EPA does not agree that there will be insufficient data to establish the TMDLs by those dates. Before the TMDLs are established, EPA will collect additional samples of benthic community and sediment data to evaluate the range of conditions in Malibu Creek Watershed. EPA is aware of approximately six years of benthic macroinvertebrate data and associated physical habitat parameters in Malibu Creek watershed that supports the assessment and will be available to help develop the subject TMDLs. When developing the TMDLs, EPA will examine available data from Malibu Creek Watershed and other like areas to determine the range of natural conditions for Malibu Creek and Lagoon.

During the development of the TMDL, EPA will comprehensively evaluate the available data, in addition to conducting an assessment and source analysis to assess the impairment listing. At this time, EPA views this as an appropriate part of the TMDL development and would be open to considering the impact, if any, due to “natural conditions” affecting the benthic macroinvertebrate community. In general, EPA plans to use the best available data record and scientific approaches to evaluate this impairment, in addition to conferring with the regional estuarine and benthic macroinvertebrate assessment experts in the field. EPA may also conduct additional monitoring if needed to appropriately complete the TMDLs.

c) EPA takes note of the request to consider the concepts behind the Tiered Aquatic Life Uses designations. EPA recognizes that biological data and definition of regional reference conditions can lead to a stratification of expectations for streams and rivers. As such, EPA will consider this during the development of the TMDL and intends to review all available lines of evidence, including chemical and physical habitat data, in addition to the benthic macroinvertebrate community data.

d) EPA is aware of the invasive New Zealand mudsnail population impacting numerous locations along Malibu Creek. During the development of the TMDL, EPA plans to evaluate the on-going scientific basis of the listing and potential impact of the mudsnail population.

**7. One commenter expressed concern about adding the listing associated with sedimentation/siltation in Malibu Creek to the list of impairments subject to the decree schedule. The commenter indicates that the listing should be addressed with a mechanism other than a TMDL, that there is not sufficient information to demonstrate the sediment/siltation generated in the creek is of unnatural or even controllable sources, and that the sediment loading is primarily due to natural sources from steep and naturally erosive canyons in this relatively undisturbed watershed.**

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<sup>1</sup> As noted above, the Los Angeles Regional Water Quality Control Board has recommended that Malibu Creek be included on the State’s Section 303(d) list as impaired as a result of its benthic-macroinvertebrate bioassessments. The State’s 2008/2010 Section 303(d) list has not yet been adopted by the State Board, nor approved by EPA. Consequently, the modification of the decree includes a provision to address the contingency that the Malibu Creek benthic macroinvertebrate bioassessment listing is not approved. See, Modification, para. 4 (providing that a TMDL to address an indicator bacteria impairment for Avalon Beach, and oil impairment for Los Angeles River Reach 2 & 5 will be substituted).

Response: EPA acknowledges that, under CWA Section 303(d) and EPA's regulations, a waterbody may or may not need a TMDL where "other pollution control requirements required by local, State or Federal authority" are stringent enough to implement the applicable water quality standards. See 40 CFR 130.7(b)(iii). However, the State's identification of Malibu Creek as impaired due to sedimentation/siltation suggests that such "other pollution control requirements" have been insufficient to address these impairments, thus TMDL development is appropriate. EPA acknowledges that, as the TMDL is developed, additional data may become available showing that the conditions triggering the requirement to establish a TMDL for Malibu Creek may not exist. However, the information currently available to EPA does not persuade us that California incorrectly identified Malibu Creek as impaired or that a TMDL to address that impairment is unwarranted.

Malibu Creek is currently included on the States's Section 303(d) list as impaired due to sedimentation/siltation. Furthermore, the Regional Board's Basin Plan includes narrative objectives, which states

"Surface waters carry various amounts of suspended and settleable materials from both natural and human sources. Suspended sediments limit the passage of sunlight into waters, which in turn inhibits the growth of aquatic plants. Excessive deposition of sediments can destroy spawning habitat, blanket benthic (bottom dwelling) organisms, and abrade the gills of larval fish. Waters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect the beneficial uses."

Based on the water quality objectives and the data record, it is appropriate to complete a TMDL for this impairment.

See Response to #6b and c above regarding comprehensive data evaluation, sample collection and extensive source analysis conducted during the development of the TMDL. As indicated above, the TMDL to address Malibu Creek's sedimentation/siltation impairment need not be completed until March 24, 2013. See, Stipulation, paras. 1 through 3. As the TMDL is developed, EPA intends to investigate the source of sediment loads and evaluate whether sediment inputs are anthropogenic or exclusively due to natural conditions. EPA welcomes more detailed information from the commenter or related agencies describing other regulatory programs that exist or may lead to the control of the sediment's fate and transport causing impairment.

**8. One commenter requested the Malibu Lagoon benthic community effects impairment be pursued via some other mechanism than a TMDL; e.g., the Malibu Lagoon Restoration Program.**

Response: See response to comment #7 above about possible "other regulatory programs" besides TMDLs that may address impairments. EPA has considered the Malibu Lagoon Restoration Program and the effects that the program may have on the impaired benthic macroinvertebrate community in Malibu Lagoon. However, EPA is aware the Malibu Lagoon Restoration Program timeline had been delayed previously, and the current Restoration Program timeline may be subject to further delay due to multiple variables, including budget constraints. Consequently, EPA cannot reliably predict the progress of this restoration project, its final

completion date, and whether it will result in improvements sufficient to meet water quality standards applicable to the waterbody. However, during the development of the Malibu Lagoon TMDL, EPA will consider the progress of the Malibu Lagoon Restoration Program and will seek to ensure that the TMDL and the Restoration Program are compatible.

- 9. Two cities indicated that the TMDL addressing the Los Angeles River impairment due to bacteria should be delayed because the LA Regional Board is currently proposing a Basin Plan amendment to remove fecal coliform from the applicable water quality objectives for freshwater bodies. The commenter acknowledges the Basin Plan would retain the *E. coli* objectives, consistent with USEPA's 1986 recommendations.**

Response: EPA has communicated to the LA Regional Board that establishing TMDLs for the Los Angeles River based on *E. coli* is appropriate and that such TMDLs can attain the applicable standards, including recreational use. EPA does not agree that delaying the subject TMDL, and the source reductions for *E. coli* that are expected due to the TMDL, is warranted.

- 10. One commenter encouraged EPA to consider extending the schedule governing the TMDL to address ammonia within the Los Cerritos Channel, and indicated that to do otherwise would be a "considerable waste of finite federal, state and local [government] resources, to no avail."**

Response: EPA has considered various modifications to the list of impairments governed by the decree and various modifications to the schedule by which the needed TMDLs will be established. Based on our review of currently available data, EPA concludes the Los Cerritos Channel is not impaired due to ammonia, thus a TMDL for this waterbody-pollutant combination is unwarranted. EPA believes that further modification of the decree to remove the TMDLs from the list governed by the decree is not required at this time.

- 11. One commenter requested that: EPA remove the Dominguez Channel and Los Angeles/Long Beach Harbor toxics impairments from the list of impairments governed by the decree; and that, at a minimum, the sediment-related WQLS-pollutant combinations should be removed from the decree, and TMDL development for these should be pursued only after the Sediment Quality Objectives policy is followed. Another commenter indicated that the Dominguez Channel, Los Angeles and Long Beach Harbor sediment problem should be addressed using the State's Sediment Quality Objectives procedures adopted on August 25, 2009.**

Response: EPA does not agree that the impairments of Dominguez Channel and Los Angeles/Long Beach Harbor due to toxics should be removed from the list of impairments governed by the decree. The Regional Board is currently developing the subject TMDLs with EPA assistance. EPA expects the Regional Board to distribute draft TMDLs for public review in fall 2010. The impairments addressed by the TMDLs are included in the State's 2008-2010 Section 303(d) list currently under review by the State Board. The information available to EPA

does not indicate the impairments identified by California were incorrectly included on its list, and EPA does not conclude that the conditions that triggered the requirement to establish the TMDLs no longer exist. Under the consent decree schedule, the subject TMDLs are to be completed by March 24, 2012.

EPA and the Regional Board have appropriately applied the Sediment Quality Objectives (Phase 1) to the Dominguez Channel estuary, Los Angeles and Long Beach Harbor waters within these draft TMDLs. Within the draft TMDL Numeric Targets section, we have applied the sediment triad approach consistent with the technical recommendations of the Sediment Quality Objectives, thereby addressing sediment toxicity, benthic community indices and sediment chemistry. Per federal regulations, we have identified numeric criteria for these narrative sediment quality objectives because TMDLs set numeric wasteload and load allocations to pollutant sources to ensure attainment of applicable water quality standards. This approach of translating narrative water quality standards/objectives has been previously used in numerous TMDLs in California and around the nation. See 40 CFR §130.2 (h) and (i). Within the implementation plan of these forthcoming TMDLs, there will also be sediment toxicity and benthic community stressor identification information consistent with the Sediment Quality Objectives.

**12. One commenter expressed concern about the Santa Monica Bay DDT, PCBs, and sediment toxicity TMDLs. Briefly, the commenter is not confident that these listings are appropriate for all stretches of northern coastline in Santa Monica Bay. The commenter further described that recent monitoring results in coastline waters neighboring the commenter's city were not indicative of impairments and that pollutants were not detected in water samples from stormwater discharges. The commenter is willing to provide these results to EPA prior to initiating TMDL development.**

Response: EPA appreciates the offer of additional monitoring results; we invite the commenter to submit these results when EPA initiates TMDL development on these water quality limited segments starting in summer 2010. We wish to note the following related information. First, DDT and PCB impairments in Santa Monica Bay are associated with elevated levels in fish samples. The Office of Environmental Health Hazard Assessment (OEHHA) issued a fish consumption advisory in 1991. OEHHA re-sampled fish in 2006 and revised this advisory in 2009; this revision did not produce any substantive changes in the geographic definition of the area governed by the fish consumption advisory. The fish tissue impairments were due to the bioaccumulative organic pollutants DDT and PCBs. Second, non-detection of these particular organic pollutants in water often does not elucidate presence or absence of these pollutants since ambient concentrations are at such low levels that analytical detection limits are not sufficiently sensitive enough to obtain quantification. Detection limits must be below the applicable water quality criteria (as defined in CTR for human health consumption) to ascertain that local sources, such as stormwater discharges, can be ruled out. Third, EPA diligently reviews available data as the first task in TMDL development. At this time we cannot predict if our re-assessment will result in change of waterbody impairment status. Finally, EPA will carefully review the site-



specific sediment toxicity information from available monitoring results and thereby determine the spatial extent of the sediment toxicity TMDL.

**13. The consent decree must be *further* revised to incorporate a new alternative TMDL schedule to account for the “likelihood” that the water quality standards in the Basin Plan “will” be revised because of the Court’s decision in the *Arcadia v. State Board* case. Specifically, the commenters request that the alternative TMDL schedule be tied to the date the Judgment and Writ of Mandate in *Arcadia v. State Board*, Orange County Superior Court, No. 06CC02974, becomes final and the Basin Plan has thereafter been reviewed and revised consistent with California and federal law. The alternative TMDL schedule requested by the commenter would require the development of TMDLs within a number of years after the State and Regional Boards have corrected what the commenter contends were improperly designated “potential” use designations, and after the State and Regional Boards have completed a review and revision process pursuant to California Water Code sections 13241 and 13000.**

Response: EPA does not agree that the decree “must” be revised to incorporate a new alternative TMDL schedule to account for the “likelihood” that the water quality standards “will” be revised because of the Court’s decision in *Arcadia v. State Board*. EPA is establishing TMDLs for waters as a whole and thus for all pollutant sources, not only stormwater.

The section of the Clean Water Act that requires the establishment of TMDLs to implement water quality standards recognizes that those standards may change. See, Clean Water Act Section 303(d)(1)(C) (requiring establishment of TMDLs “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality), and Section 303(c) (requiring that a State “shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing ... and, as appropriate, modifying and adopting standards”). EPA does not agree that the possible future revisions to the standards in this case warrants moving for a decree modification to include the schedule requested.

TMDLs are required when the conditions identified in Clean Water Act, section 303, and 40 C.F.R. 130.7 are met; and, when required, TMDLs must be established at levels necessary to attain and maintain the applicable narrative and numerical water quality standards. See, 40 C.F.R. 130.7(c)(1). EPA does not understand the *Arcadia* case to provide that TMDLs which are required under Clean Water Act, section 303, are no longer needed. Judgment and writ of mandate have been issued in that case. EPA understands the writ of mandate to, among other things, direct the State Water Resources Control Board and Regional Board to: void the Regional Board resolution concluding the Regional Board’s 2004 triennial review of its Basin Plan; and to review and, if appropriate, revise the water quality standards which apply to storm water and urban runoff. See, Peremptory Writ of Mandate, issued November 10, 2008.<sup>2</sup> However, EPA understands that the existing standards remain in place while the State’s review

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<sup>2</sup> The State Water Resources Control Board and Regional Board have filed an appeal in the action. City of Arcadia, et al., v. State Water Resources Control Board et al., Case No. G041545 (Calif. 4<sup>th</sup> Appellate Dist., Div. 3).

of the applicability of the water quality standards to stormwater is being conducted. See also, 40 C.F.R. 131.21 (addressing the criteria for determining which water quality standards apply for Clean Water Act purposes). The outcome of the pending judicial appeal, the standards revisions (if any) that may be produced after the State's review is complete, and the date by which such revisions would apply for Clean Water Act purposes, are uncertain and speculative, and do not justify further delay in the establishment of the Federally-required TMDLs.

In response to the issue of appropriately designating "potential" use designations, and completing California Water Code sections 13241 and 13000 review/revision process, EPA Region 9 provided extensive comment on this issue in a letter from Alexis Strauss to the State Board dated October 8, 2009. As the letter indicates, Section 303(c) of the CWA, 33 U.S.C. § 1313(c), requires States to adopt water quality standards for waters in their jurisdictions; and Section 303(c)(2)(A) states that water quality standards are to include designated uses for the waters and water quality criteria based on those uses. EPA's implementing regulations state that "water quality standards define the goals of a waterbody" by designating the uses to be made of the water and by setting criteria necessary to protect the uses. 40 C.F.R. 131.2. Moreover, designated uses are defined as "those uses specified in water quality standards ... whether or not they are being attained." 40 C.F.R. 131.3(f). EPA's regulations interpret and implement the requirements and objectives of the CWA by requiring that the fishable/swimmable designated uses be adopted unless those uses have been shown to be unattainable. EPA concluded that we could not approve the removal of use designations unless the State provides a demonstration that the use was not attainable consistent with EPA's regulations. Furthermore, States may not remove a designated use that is an "existing use," 40 C.F.R. 131.10(h)(1), and EPA could not approve any wholesale removal of "potential" uses without adequate justification consistent with applicable CWA and regulatory requirements.

Finally, EPA notes it cannot modify the decree in *Heal the Bay, Inc. v. Browner* without plaintiffs' agreement or the Court's approval. See, Consent Decree, paras. 20 and 21, addressing extensions of dates by agreement, and decree modifications by motion. EPA has not reached an agreement with the plaintiffs to include in the decree the "alternative schedule" requested by the commenter, and EPA concludes that moving to modify the decree to include that alternative schedule is not warranted.

**14. The commenter further states that "the development of TMDLs for Stormwater discharges in the LA Region, at this time, must be delayed until such time, at a minimum, as the appeals in the Arcadia Case have been finally decided, and if the Superior Court's decision is upheld in sum and substance, until such time as the Standards ... have been reviewed and corrected."**

EPA does not agree that "the development of TMDLs for Stormwater discharges in the LA Region ... must be delayed until such time, at a minimum, as the appeals in the Arcadia Case have been finally decided, and if the Superior Court's decision is upheld ..., until such time as the Standards ... have been reviewed and corrected." [Emphasis added.] As noted in response to comment 13, EPA understands the Arcadia case to concern the applicability of water quality standards to stormwater. In addition, EPA is aware of no prohibition on the further development

of any TMDL addressing a water body in the Los Angeles region listed under Clean Water Act Section 303(c). The consent decree in *Heal the Bay, Inc. v. Browner*, however, requires that several of those TMDLs be completed by deadlines identified in the decree. Accordingly, in EPA's view, EPA or the State may continue to develop such TMDLs. Further, EPA does not agree that it would be arbitrary and capricious for it to continue to develop the TMDLs required by the decree in *Heal the Bay, Inc. v. Browner* at this time. In light of that decree's deadlines, the uncertainty regarding the date on which *Arcadia v. State Board* will be resolved and the uncertainty regarding the date on which any subsequent State review process might be completed, EPA concludes that continuing to develop TMDLs is reasonable and necessary, and that completion of the TMDLs required by the CWA should not be further delayed. EPA further notes that both the decree and this modification to it concern numbers of TMDLs and completion dates, but do not affect the contents of those TMDLs.

**15. The LA TMDL Consent decree is dated and must be revised to address the “fact” that the LA Basin Plan was never designed to cover Stormwater, and that the TMDL Program is a “poor fit” to manage stormwater.**

Response: EPA disagrees.

EPA is aware of no provision requiring such revisions. As noted above, EPA cannot modify the decree in *Heal the Bay, Inc. v. Browner* without plaintiffs' agreement or the Court's approval. EPA has reached an agreement with the plaintiffs that EPA believes is in the public interest, and EPA concludes that unilaterally moving for additional relaxation of the decree's requirements is unwarranted at this time.

TMDLs are required under the CWA to address all pollutant sources within a watershed, and identified stormwater discharges must have wasteload allocations to protect the water quality and beneficial uses of an impaired waterbody. EPA has provided detailed guidance and information on how TMDLs must address MS4 stormwater conveyances, as specified under the CWA. Specifically, EPA's 2002 Memorandum, “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLA”, clearly states that NPDES-regulated storm water discharges must be addressed by the wasteload allocation component of a TMDL. See 40 C.F.R. § 130.2(h). Storm water discharges regulated under Phase I or Phase II of the NPDES storm water program are point sources that must be included in the wasteload allocation portion of a TMDL. See 40 C.F.R. § 130.2(h).

EPA disagrees that the TMDL program is a “poor fit” for stormwater, and notes that TMDLs must comprehensively evaluate *all* pollution sources (stormwater discharges are one of many) and calculate a maximum pollutant load acceptable by the waterbody. See, *Pronsolino v. Nastri*, 291 F.3d 1123, 1139 (9th Cir. 2002), and *Dioxin/Organochlorine Center v. Clarke* 57 F.3d 1517, 1520 (9th Cir. 1995). The connection between TMDLs and the implementation via existing NPDES permit programs is clear; NPDES permits must contain effluent limits and conditions consistent with the requirements and assumptions of the wasteload allocations in the TMDL. See 40 CFR §§ 122.44(d)(1)(vii)(B) and 130.2. It would be inappropriate to exclude

stormwater dischargers in general, or small entities in particular, from the TMDLs analysis, as TMDLs need to analyze all the sources of a pollutant and allocate loads to such sources. Additionally, under 40 CFR 122.44(d)(1)(vii)(B), water quality-based effluent limits in NPDES permits must be consistent with the assumptions and requirements of any available wasteload allocation. This requirement is not contingent on the State having adopted an implementation plan for the TMDLs. As to the TMDL's effect on stormwater discharges, or the implementation of a particular TMDL, it is appropriate to provide comments on related stormwater issues during the TMDL's development phase of public comment period.

The National Research Council report to which the comment refers confirmed that stormwater is a principal contributor to water quality impairment of waterbodies nationwide, and "increased water volume and pollutants from stormwater have degraded water quality and habitats in virtually every urban stream system". The Report also found that limited information is available on the effectiveness and longevity of many stormwater facilities, thereby contributing to uncertainty regarding their performance. EPA supports innovative solutions and approaches to address stormwater pollution and control, such as the promotion of the watershed approach, encourages watershed stakeholder groups to work collaboratively with the state to develop appropriate, protective and practical implementation plans, supports examining single and or aggregate sources into the MS4 system that may contribute to the load; allows some flexibility when individual or grouped allocations are defined (e.g; Los Angeles River Metals TMDL, LA Lakes TMDL, and draft LA River Bacteria TMDL), supports the use of stormwater control measures such as rainfall harvesting, bioswales and other means to capture the additional flow, and supports the use of biological endpoints in TMDL implementation plans.

Finally, numerous examples across the nation show that TMDLs can effectively and innovatively address stormwater pollutant loads and that the resultant waste load allocations can be translated into permit conditions. For example, the city of Portland, Oregon, in an effort to comply with the effluent limits based on the TMDL wasteload allocations, conducted a thorough review of its existing MS4 stormwater management program and identified additional activities necessary to fulfill new MS4 permit requirements for stormwater discharges to waters with assigned TMDLs. The city developed performance measures for each BMP and numeric benchmarks for each pollutant as required by the permit (e.g. reduction of 436 lbs/day of phosphorous), as well as modified the existing stormwater monitoring program to evaluate progress towards achieving the benchmarks. See, EPA's stormwater website at <http://www.epa.gov/owow/tmdl/stormwater/> for examples and guidance on how to address stormwater loading via TMDLs.

**16. One commenter stated that a major overhaul of the consent decree is required due to a "significant change in circumstances" (citing *Rufo v. Inmates of Suffolk County Jail*). The commenter also indicated that, since 2002, the State and federal agencies have pushed ahead with a "train wreck" approach to Basin Planning, appearing entirely oblivious to the practical and economic realities of their actions, and having only been slowed by their own resource limitations, but caring nothing of the impossible predicament that they have created for local governments who are being forced to implement the TMDLs.**

Response: EPA does not agree that a “major overhaul” of the decree is required. EPA notes the commenter does not oppose the proposed removal of the impairments from the decree’s schedule or the proposed deadline extensions. Rather, EPA understands the commenter to seek a further relaxation of the decree than the modification proposes. In particular, EPA understands the commenter to request that EPA obtain a further delay in the schedule governing TMDLs for impairments caused in part by stormwater discharges.

EPA has concluded that the proposed modification is appropriate, and moving for additional relaxation of the decree is not warranted at this time. The TMDLs which have not been completed but are governed by the decree’s schedule address a variety of impairments in Los Angeles area waters. EPA has sought to establish an appropriate schedule for those TMDLs, after taking into account the severity of the impairments, and the public health and environmental benefits to follow when those impairments are addressed, as well as the implementation costs to which the comment refers. The remaining TMDLs will address several impairments that are severe<sup>3</sup> in EPA’s view. Storm drains’ and stormwater’s contribution to those impairments is substantial.<sup>4</sup> And EPA expects that substantial public health and environmental benefits will occur when the subject TMDLs are established and those impairments are addressed.<sup>5</sup> Consequently, EPA does not agree that further revision to the decree’s schedule is warranted at this time.

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<sup>3</sup> See, e.g.: Brinks MV, et al, Health risk of bathing in southern California coastal waters, *Arch. Environ & Occup. Hlth* 63(3):123-135 (2008); Stein ED, Ackerman D, Dry weather water quality loadings in arid, urban watersheds of the Los Angeles Basin, California, USA, *J. Amer. Water Res. Assoc.* 43(2):398-413 (2007); Holmes RW, et al, Statewide investigation of the role of pyrethroid pesticides in sediment toxicity in California’s urban waterways, *Environ. Science & Tech.* 42:7003-7009 (2008); Schnetzer A, et al, Blooms of *Pseudo-nitzschia* and domoic acid in the San Pedro Channel and Los Angeles harbor areas of the Southern California Bight, 2003-2004, *Harmful Algae* 6(3):372-387 (2007); Noble RT, et al, Multi-tiered approach using quantitative PCR to track sources of fecal pollution affecting Santa Monica Bay, California, *Appl. & Environ. Micro.* 72(2):1604-1612 (2006); Ferguson DM, et al, Enumeration and speciation of enterococci found in marine and intertidal sediments and coastal water in southern California, *J. Appl. Micro.* 99(3):598-608 (2005); and Stein ED, Tiefenthaler LL, Dry-weather metals and bacteria loading in an arid, urban watershed: Ballona Creek, California, *Water, Air, & Soil Poll.* 164:367-382 (2005).

<sup>4</sup> See, e.g.: Sercu B, et al, Storm drains are sources of human fecal pollution during dry weather in three urban southern California watersheds; *Environ. Sci. & Tech.* 43(2):293-298 (2009); Ahn JH, Coastal water quality impact of stormwater runoff from an urban watershed in southern California, *Environ. Sci. & Tech.* 39(16):5940-5953 (2005); Corcoran AA, et al, Spatiotemporal development of physical, chemical, and biological characteristics of stormwater plumes in Santa Monica Bay, California (USA), *J. Sea Res.* 63(2):129-142 (2010); He LM, He ZL, Water quality prediction of marine recreational beaches receiving watershed baseflow and stormwater runoff in southern California, USA, *Water Res.* 42(10-11):2563-2573 (2008); Kayhanian M, et al, Toxicity of urban highway runoff with respect to storm duration, *Sc. Tot. Environ.* 389(2-3):386-406 (2008); McPherson TN, et al, Trace metal pollutant load in urban runoff from a southern California watershed, *J. Environ. Eng.* 131:1073 (2005); Ha SJ, Stenstrom MK, Predictive modeling of storm-water runoff quantity and quality for a large urban watershed, *J. Environ. Eng.* 134(9):703-711 (2008); and McPherson TN, et al, Dry and wet weather flow nutrient loads from a Los Angeles watershed, *J. Amer. Water Res. Assoc.* 41(4):959-969 (2005).

<sup>5</sup> Lyon GS, Stein ED, How effective has the Clean Water Act been at reducing pollutant mass emission to the Southern California Bight over the past 35 years?, *Environ. Mon. Assess.* 154(1-4):413-426 (2009); Given S, et al, Regional public health cost estimates of contaminated coastal waters: a case study of gastroenteritis at southern California beaches, *Environ. Sci. & Tech.* 40(16):4851-4858 (2006); and Dwight RH, et al, Estimating the economic burden from illnesses associated with recreational coastal water pollution – a case study in Orange County, California, *J. Environ. Mgmt.* 76:95-103 (2005).

The circumstances associated with this Consent decree are clearly different than those in *Rufo* and do not warrant a major overhaul of the decree as sought by the commenter. Most notably, here, unlike in *Rufo*, the parties in the action are in agreement that the proposed modification is in the public interest and should be approved.

EPA has extensively reviewed the original Consent Decree, the priorities of the State and the most problematic water impairments in the Los Angeles region to date. As a result, the proposed modification provides that 14 fewer TMDLs must be completed under the decree's schedule and the deadline for completing other TMDLs have been extended.

Since the filing of the original consent decree, numerous water quality standards and objectives have been updated to reflect improved data records and scientific methodology correlating between pollutant levels and impacts.<sup>6</sup> Over the years, the Regional Board and the stakeholders have had many opportunities to improve TMDL implementation, resulting in better technical information pertaining to best management practices (BMPs), including (Heal The Bay and Los Angeles County) efforts to improve modeling of local watersheds to optimize the BMPs for either individual or groups of pollutants and development of a decision tool to help identify efficient and cost effective BMPs (e.g., the SUSTAIN model<sup>7</sup>).

In 2004, California adopted the Non-Point Source Implementation and Enforcement Policy which provides a regulatory approach to reduce pollutant inputs from many non-point source categories: agriculture, nurseries, feedlots, contaminated sediments, abandoned mines, parkland runoff, boats/marinas, forestry, and hydromodification. The addition of non-point source enforcement tools, along with the existing point source focused NPDES permits, makes it far more likely to achieve reduced pollutant loads defined by TMDLs and more reliable and cost-effective attainment of water quality standards. This results in better chances of improving water quality and restoring the beneficial uses as envisioned and called for in Clean Water Act and Porter-Cologne Act.

#### **17. Several commenters wanted more stakeholder involvement in negotiations concerning modifications to the consent decree.**

Response: EPA believes it has provided non-parties to the decree an appropriate opportunity to participate in the modification of the decree provisions. A summary of the notices and

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<sup>6</sup> EPA promulgated California Toxics Rule in 2000, establishing water quality standards for 126 toxicants in freshwaters, bays and estuaries. State Board adopted Sediment Quality Objectives – Phase 1 in 2009, establishing sediment quality requirements to protect benthic organisms within bays and estuaries. LA Regional Board adopted (additional) bacteria criteria in 2004, establishing numeric enterococci objectives for marine waters. LA Regional Board adopted nutrient TMDLs for Machado Lake by applying the Numeric Nutrients Endpoint model. EPA approved these TMDLs in 2007.

<sup>7</sup> Sim, Y. 2009. Development of Watershed Management Modeling The Los Angeles County Flood Control District's Based Approach for Urban Runoff and Stormwater. *Proceedings of World Environmental and Water Congress* Vol. 342, pp. 1-10.

opportunities to comment is provided in the Introduction, above. EPA has considered the comments received, has responded to them, and concludes that modification of the decree as proposed is in the interest of the public, the parties, and judicial economy.

## **Attachment A – Public notification of CD modification and overview**

### **Notification/Revision to LA TMDL consent decree:**

This notification provides revised information regarding the LA TMDL consent decree (*Heal the Bay et al. v. Browner, C. 98-4825 SBA*, March 23, 1999). Due to some of the considerations mentioned below, EPA sought relief from some of the terms of the consent decree.

Briefly, Heal the Bay and Santa Monica Baykeeper (“Plaintiffs”) and EPA reached **an agreement whereby 14 TMDL projects would be removed from the consent decree, and 4 TMDLs would be added, resulting in a net decrease of 10 TMDLs that EPA is required to establish or approve under the consent decree. In addition, the deadline for EPA to establish or approve 7 other TMDLs will be extended by one year.** The attachment provides specific details for each waterbody-pollutant combination that is removed, added, and/or extended. An overview of the remaining TMDLs to be completed and proposed schedule is included.

EPA and Plaintiffs have reached this agreement in recognition of the following considerations: mandated state worker furloughs, reduced resources for regional, state and federal agencies, changes in water quality conditions, and addressing higher priority impairments. Also, the extension will allow for more Regional Board participation in TMDL development and completion.

Pursuant to the settlement agreement associated with the decree, EPA is providing notice and inviting comments from interested parties for a 21-day period. Written comments must be submitted on or before May 3, 2010. Oral comments will not be considered.

**Contact Information:** Peter Kozelka, TMDL/303(d) Regional Coordinator, Water Division (WTR-2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105, telephone (415) 972-3448, facsimile (415) 947-3537, email [kozelka.peter@epa.gov](mailto:kozelka.peter@epa.gov) or Cindy Lin, TMDL Liaison to Los Angeles RWQCB (213) 244-1803.

### **Background**

CWA Section 303(d) requires states to identify impaired waters where technology-based effluent limitations and other required controls fail to achieve water quality standards. A state must develop a TMDL for each impaired water on its Section 303(d) list. A TMDL represents the maximum amount of pollutant “loading”; i.e., amounts of individual pollutants each WQLS can receive from all combined sources and still meet water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(e).

On March 23, 1999, the District Court for the Northern District of California entered a consent decree resolving a lawsuit against EPA by Heal the Bay, Inc. and Santa Monica Baykeeper, Inc., represented by NRDC. In their complaint Plaintiffs alleged that EPA had a duty to approve or disapprove TMDLs submitted to EPA by California for waters administered by the Los Angeles Regional Water Quality Control Board.

The consent decree resolved the litigation by requiring EPA to ensure that a TMDL would be completed for each pairing of WQLSs and pollutants set forth in Attachment 2 of the consent decree (approximately 740 pairings of WQLSs and pollutants). The decree provides a schedule for EPA to



approve or establish these TMDLs. For each of the impaired water-pollutant pairings, EPA must either: approve a TMDL submitted by the state by a date specified in the decree; or establish a TMDL within one year after the specified date, unless the pairing is removed from the State's 303(d) list or EPA otherwise determines that no TMDL is required.

### Overview

1. Four pairings of WQLSs and pollutants would be added to the decree, as follows:

- TMDLs to be established or approved by March 24, 2012:
  - Long Beach City Beach bacteria;
  - Dominguez Channel and Los Angeles/Long Beach Harbor toxics – extra pollutants added for several waterbodies
- TMDLs to be established or approved by March 24, 2013:
  - Malibu Creek benthic macroinvertebrate bioassessments;
  - Malibu Creek sedimentation/siltation.

2. The following pairings of WQLSs and pollutants are removed from the decree, yet remain on the State's 303(d) list:

- a. Los Angeles River Reach 6 (up/str of Sepulveda Basin) volatile organics;
- b. Ventura Harbor: Ventura Keys coliform;
- c. Elizabeth Lake eutroph., DO, pH; Lake Hughes eutroph., fish kills, algae, odors; Munz Lake eutroph.;
- d. Crystal Lake org. enrichment/low DO;
- e. Marina del Rey Harbor—Back Basins DDT, dieldrin;
- f. Sepulveda Canyon NH<sub>3</sub>;
- g. Topanga Canyon Creek Pb; Santa Monica Canyon Pb;
- h. Lake Lindero chloride;
- i. Triunfo Cyn Creek Reach 1 Pb, Hg; Triunfo Cyn Creek Reach 2 Pb, Hg;
- j. Medea Creek Reach 2 (abv. confl. with Lindero) Se; Medea Creek Reach 1 (lake to confl. with Lindero) Se; Las Virgenes Creek Se; Lindero Creek Reach 2 (above lake) Se; Lindero Creek Reach 1 Se;
- k. Dominguez Channel coliform;
- l. Los Cerritos Channel coliform;
- m. San Gabriel River Reach 2 (Firestone to Whittier Narrows Dam) coliform; San Gabriel River Reach 1 (Estuary to Firestone) coliform; Coyote Creek coliform; San Jose Creek Reach 1 (SG confluence to Temple St.) coliform; San Jose Creek Reach 2 (Temple to I-10 at White Ave.) coliform;
- n. Los Angeles River Reach 2 (Figueroa St. to u/s Carson St.) oil; Los Angeles River Reach 5 (within Sepulveda Basin) oil.

3. The deadline for EPA to establish TMDLs, or approve TMDLs submitted by the State of California, for the following pairings of WQLSs and pollutants currently listed in the decree is extended to March 24, 2013:

- a. Rio de Santa Clara/Oxnard Drain #3 PCBs, ChemA, chlordane, DDT, toxaphene, sediment toxicity;
- b. Peck Rd Lake Pb; Lincoln Park Lake Pb; Echo Park Lake Cu, Pb;
- c. Malibu Lagoon benthic community effects;
- d. Westlake Lake Pb;

- e. Dominguez Channel (above Vermont) NH<sub>3</sub>; Dominguez Channel Estuary (to Vermont) NH<sub>3</sub>;
- f. Ventura River Reach 1 (estuary to Main St.) algae; Ventura River Reach 2 (Main St. to Weldon Canyon) algae; Ventura River Estuary algae;
- g. Ventura River Reach 4 (Coyote Creek to Camino Cielo Rd.) pumping, water diversions; Ventura River Reach 3 (Weldon Canyon to confl. w/ Coyote Cr.) pumping, water diversions.

4. With respect to the Malibu Creek benthic macroinvertebrate bioassessments TMDL (due March 24, 2013), if this listing is not included on the final approved 2008-2010 303(d) List, then Avalon Beach indicator bacteria TMDL (due March 24, 2012) and a LA River Reach 2 & 5 oil TMDL (due March 24, 2013) would be substituted for it.