

CALLEGUAS CREEK



January 25, 2013

Cindy Lin (WTR-2)
U.S. Environmental Protection Agency
Southern California Field Office
600 Wilshire Blvd., Suite 1460
Los Angeles, CA 90017

Subject: Comments on Draft TMDLs for Malibu Creek & Lagoon TMDL for Sedimentation and Nutrients to address Benthic Community Impairments, dated December 2012

Dear Ms. Lin:

The Stakeholders Implementing TMDLs in the Calleguas Creek Watershed (Stakeholders) appreciate the opportunity to provide comments on the Draft TMDL for Sedimentation and Nutrients to address Benthic Community Impairments. The Stakeholders are concerned with several aspects of the TMDL that we feel are precedent setting and ahead of policies and science being developed by the State of California. We feel the TMDL could result in significant expenditure of public resources for dischargers in the Malibu Creek watershed, including some stakeholders in the Calleguas Creek Watershed (City of Thousand Oaks, Caltrans, Ventura County, and Ventura County Watershed Protection District) that are not justified by the information and science presented in the TMDL.

Our first concern is that the TMDL is setting targets and allocations for benthic macroinvertebrates that are inconsistent with the direction the State Water Resources Control Board is going with the development of the Biological Objectives for the State of California. While we recognize that the policy is not yet developed, the State has made some determinations and developed scientific information that are relevant and were not considered as part of the TMDL development. These elements include:

1. The SC-IBI is not appropriate for setting biologically based objectives due to the lack of appropriate reference sites and conditions for many locations in California, including the Malibu Creek watershed.
2. The scientific advisory group for the biological objectives is currently recommending that a multi scoring tool approach be used that does not rely solely on one index (such as the

O/E).

3. The science advisory group is recommending consideration of a “grey area” for setting thresholds for biological objectives within which additional data would be collected before determining whether an impairment exists.

The Malibu Benthic TMDL sets two separate targets based on the SC-IBI and O/E, neither of which are currently being recommended for the biological objectives for California. Additionally, the analysis in the TMDL is based on reference conditions that do not adequately represent the conditions in the Malibu Creek watershed, particularly the presence of the Modelo formation. The Stakeholders feel that it is inappropriate to develop a TMDL that includes targets that are clearly in contradiction with the science being developed by the State of California regarding biological objectives.

Additionally, we feel it is inappropriate to include targets for benthic macroinvertebrates in the TMDL, since they are not pollutants as defined under the Clean Water Act. The US District Court for the Eastern District of Virginia recently ruled that EPA exceeded its authority in establishing a flow-based TMDL¹. This case ruled that EPA cannot use surrogates in place of regulating pollutants. According to the case, EPA is charged with “establishing TMDLs for appropriate pollutants; that does not give them the authority to regulate nonpollutants.” The term “pollutant” is defined in the CWA as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C., § 1362(6). Benthic macroinvertebrates are not defined as pollutants by the Clean Water Act. However, there are benthic macroinvertebrate targets in the TMDL and those targets are additionally assigned as instream allocations that are required to be included in the NPDES permits for dischargers. On page 10-13, the TMDL states “The biological response numeric targets for Malibu Creek and Lagoon are directly linked to the allocations and should be placed into the applicable regulatory mechanism (i.e., NPDES permit) in order to ensure that the benthic community condition achieves the water quality objectives. As result, this TMDL is inappropriately regulating nonpollutants through the inclusion of benthic macroinvertebrate targets and corresponding in-stream allocations.

We feel that the establishment of benthic macroinvertebrate targets at this time could lead to confusion and conflict with the policies being developed by the State of California, the inability to develop a true assessment of problems and impairments in the watershed using science being developed by the State, and could result in significant expenditures of public resources to address a problem that may not exist or may be caused by the natural conditions in the watershed. For these reasons, the Stakeholders would like to request the removal of the SC-IBI, O/E and species richness targets for Malibu Creek and Malibu Lagoon from the TMDL.

In addition, the Stakeholders are concerned with the analysis that was done to justify changes to the nutrient targets and allocations that were established in the 2003 Total Maximum Daily

¹ Virginia DOT v. EPA, E.D. Va., No. 1:12-cv-775, 1/3/13

Loads for Nutrients Malibu Creek Watershed (2003 Malibu Nutrient TMDL).

We are concerned with establishment of new requirements based on analysis associated with the State's Nutrient Policy that is still under development. Additionally, we feel the technical analysis used to support the lowering of nutrient targets and allocations and application of those targets and allocations year round was insufficient. Additionally, we are concerned with the stressor analysis that was conducted to determine that algal biomass was contributing to benthic macroinvertebrate impairments was inadequate and based on analysis methods that are not able to draw definitive linkages between stressors and impacts. We support the technical analysis that is provided in letters by the City of Thousand Oaks and Ventura County that discusses the technical analysis and provides support for this conclusion.

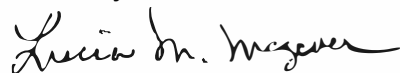
Finally, the proposed nutrient targets and allocations are likely unachievable with available technology for stormwater and wastewater treatment. For wastewater, any attempt to reach these numbers would require reverse osmosis or other similar treatment. The cost and energy usage associated with these types of treatment processes are significant. The TMDL does not provide sufficient technical information to justify that the additional nutrient reductions will result in improvements to the benthic community impairments. On page 9-12, the TMDL acknowledges that "nutrient concentrations were not limiting on algal growth in Malibu Creek" and the discussion above shows that the linkage between algal biomass and benthic community impacts is flawed. As a result, it is an inappropriate use of public funds to require significant expenditures to address nutrient reductions that the TMDL does not demonstrate will result in achievement of the goals of improving benthic community conditions, particularly when another TMDL exists to control nutrient discharges in the watershed.

For these reasons, the Stakeholders do not feel the TMDL provides sufficient justification for lowering nutrient targets and allocations in this TMDL. Given the development of a Statewide Nutrient Policy is in development and a TMDL already exists that has not yet achieved all of the nutrient targets in the watershed, it is premature to require further reductions. As a result, we request that the proposed total nitrogen and total phosphorus targets and allocations be removed from the TMDL or set equal to the 2003 Nutrient TMDL targets and allocations.

Finally, we request that the TMDL clarify that the City of Simi Valley is not a responsible party to this TMDL. Although a portion of the City area drains into the Malibu Creek watershed, the area does not contain any urban area or MS4 drainages that require an allocation in the TMDL.

The Stakeholders appreciate your consideration of these comments, please contact me at lmcgovern@ci.camarillo.ca.us or (805) 388-5334 if you have questions or need additional information.

Sincerely,



Lucia McGovern, Chair

Stakeholders Implementing TMDLs in the Calleguas Creek Watershed