



September 15th, 2011

Lahontan Regional Water Quality Control Board
2501 Lake Tahoe Blvd
South Lake Tahoe, CA 96150

Re: Tentative Updated Waste Discharge Requirements/NPDES Permit and Monitoring and Reporting Program for the City of South Lake Tahoe, El Dorado County and Placer County Storm Water/Urban Runoff Discharge, El Dorado and Placer Counties.

Dear Mr. Larsen,

The League to Save Lake Tahoe appreciates the opportunity to comment on the tentative updated NPDES Permit for City of South Lake Tahoe, El Dorado County, and Placer County. Major concerns described in detail below involve backsliding on pollutant limits, the process for storm water plan approval, and monitoring deficiencies.

The Tentative Permit's Proposed Deletion of Numerous Water Quality-based Effluent Limitations Violates the Clean Water Act's Anti-Backsliding Prohibition.

The proposal in the Tentative Permit to eliminate the existing permit's numeric effluent limitations unlawfully backslides from the requirements of the 2005 permit. Section 402(o) of the federal Clean Water Act prohibits a renewed or modified NPDES permit from containing less stringent water quality-based effluent limitations that were enacted in the previous permit. "In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USC § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USC § 1313(d)(4)]." 33 USC § 1342(o)(1). Section 303(d)(4) allows for the revision of effluent limitations for waters identified on the Section 303(d)(1)(A) list of impaired waters. Section 303(d)(4)(A) only applies to the listed waters and where the "*applicable water quality standard*" has not yet been attained and is limited to revisions of an "effluent limitation based on a total maximum daily load or other waste load allocation established under this section [1313(d)]. . . ." 33 U.S.C. § 1313(d)(4)(A). Section 303(d)(4)(B) also only applies to the portion of a waterbody listed as impaired and where the quality of such water "equals or exceeds levels necessary to protect" its designated uses "or otherwise required by applicable water quality standards." In

addition to Section 303(d)(4), additional limited exceptions to the Clean Water Act's backsliding prohibition are set forth at 33 U.S.C. § 1342(o)(2).

The tentative permit is plainly inconsistent with the Act's backsliding prohibition. The 2005 permit included numeric effluent limitations for storm water discharges for Total Nitrogen, Total Phosphorous, Turbidity, Oil and Grease, and Total Iron. Order R6T-2005-0026, p. 7. The 2005 Permit also includes a long list of receiving water limitations. *Id.*, pp. 8-10. The new permit now proposes to eliminate those limits and replace them with the TMDL mass-based limitations adopted to address the Lake's ongoing violation of the deep water transparency standard. Tentative Permit, pp. 7-35 – 7-36. The Fact Sheet only discusses the deep-water transparency standard as relevant to the inclusion of the TMDL-based mass limits and the deletion of the permit's previous water quality-based and Basin Plan driven effluent limitations.

Id. at 7-36. No other standards that apply to Lake Tahoe are mentioned or considered:

The mass-based limitations on storm water discharges are protective of the Lake Tahoe transparency standard and are supported by extensive scientific analysis performed for the development of the TMDL. Rather than imposing concentration-based limitations at discrete discharge points, the Water Board has adopted mass-based limitations on a watershed basis that are expected to reduce pollutant loads to levels needed to achieve the transparency standard.

Id. The Fact Sheet also indicates that staff has only considered EPA's regulation at 40 C.F.R. 122.44(l) in proposing its antibacksliding conclusion. *Id.*

The Fact Sheet's discussion fails to provide adequate information as to how the Regional Board is applying the Act's anti-backsliding provisions and how the proposed deletion of numerous water quality-based effluent limitations in the tentative permit is consistent with those requirements.

To begin, 40 C.F.R. § 122.44(l) does not apply to the water quality-based effluent limitations proposed for deletion in the Tentative Permit. EPA's antibacksliding regulation prohibits any backsliding whatsoever with some limited exceptions for effluent limitations that were established based on best professional judgment. The effluent limitations in the 2005 permit are water quality-based effluent limitations. Nothing in the 2005 Fact Sheet indicates that the limitations were based on best professional judgment. As a result, Section 122.44(l) does not apply at all to the effluent limitations proposed for deletion.

Presumably, the Regional Board is relying on Section 303(d)(4) as the purported basis for deleting the Permit's existing water quality-based effluent limitations. If so, that reliance also is unlawful. First, the listing of Lake Tahoe only applies to the deep water transparency standard. That is not the only standard applicable to Lake Tahoe.

The Basin Plan establishes a long list of standards that apply to Lake Tahoe and which are distinct from the deep water transparency standard. *See* Basin Plan, p. 5.1-6 (the following objectives (listed alphabetically) apply to all surface waters of the Lahontan Region, including the Lake Tahoe HU"); pp. 5.1-6 – 5.1-9; p. 3-2 – 3-6 ("Listed alphabetically below, these

narrative and numerical water quality objectives apply to **all** surface waters (including wetlands) within the Lahontan Region: Ammonia, Bacteria, Coliform, Biostimulatory Substances, Chemical Constituents, Chlorine, Total Residual, Color, Dissolved Oxygen, Floating Materials, Oil and Grease, Non-degradation of Aquatic Communities and Populations, Pesticides, pH, Radioactivity, Sediment, Settleable Materials, Suspended Materials, Taste and Odor, Temperature, Toxicity [and] Turbidity”). The Basin Plan also establishes standards for Lake Tahoe that applicable “at any point in the Lake”, not just the deep water areas, including algal growth potential, clarity, conductivity, pH and plankton counts. As for clarity, the Basin Plan specifically sets a standard for shallow waters:

When water is too shallow to determine a reliable extinction coefficient, the turbidity shall not exceed 3 Nephelometric Turbidity Units (NTU). In addition, turbidity shall not exceed 1 NTU in shallow waters not directly influenced by stream discharges.

Basin Plan, pp. 5.1-9, 3-8. The Basin Plan establishes numeric water quality objectives for Lake Tahoe for TDS, Cl, SO₄, B, N, P, and Fe. Basin Plan, 5.1-20. In addition, the Basin Plan establishes numeric water quality objectives for most of the creeks into which the permittees also discharge storm water. *Id.*, pp. 5.1-20 – 5-21.

The Basin Plan also establishes effluent limitations for storm water discharges. Basin Plan, p. 5.6-4. These are the limitations included in the existing permit. The Basin Plan plainly requires that “These limits shall apply in addition to any more stringent effluent limitations for the constituents below, or to limitations for additional constituents, which are necessary to achieve all applicable water quality objectives for specific receiving waters.” *Id.*

None of these standards are addressed by the TMDL mass-loading limits established to achieve the deep water transparency standard. The only standard applicable to the Lake’s listing as an impaired water is the deep water transparency standard. Indeed, in the response to comments on the TMDL, the Regional Board admits that the deep water transparency standard TMDL does not address compliance with standards on the Lake’s near-shore zone:

The draft Lake Tahoe TMDL was developed to meet federal requirements under section 303(d) of the federal Clean Water Act, by addressing Lake Tahoe’s deep water transparency. Because the Lake is not meeting the deep water transparency standard, it was listed as impaired on the federal 303(d) list. The TMDL was developed to specifically address that impairment. Because Lake Tahoe’s nearshore environment is not yet listed as impaired on the State Water Board’s 303(d) list, the draft Lake Tahoe TMDL does not specifically address issues in the nearshore. However, actions taken to reduce pollutant loads from the four source categories are expected to result in improved conditions in the nearshore because of the reductions in amount of pollutants entering the lake through stormwater in the nearshore.

Response to League Comments on TMDL, p. 26

(http://www.waterboards.ca.gov/lahontan/water_issues/programs/tmdl/lake_tahoe/docs/comments/responses/letter_6.pdf) Of course, even assuming the expected “reductions” to near shore

pollutants occur says nothing about whether the applicable water quality standards will be achieved.

Because Lake Tahoe's 303(d) listing is limited to the deep water transparency standard, Section 303(d)(4)'s antibacksliding exception also is limited to modifying effluent limitations implementing that applicable water quality standard. Because none of the effluent limitations included in the Basin Plan are implemented by the deep water transparency TMDL, the Regional Board may not modify the effluent limitations implementing those standards pursuant to Section 303(d)(4).

Second, Section 303(d)(4)(A) cannot be used to change any effluent limitations that themselves were not based on a TMDL or waste load allocation. The existing numeric and narrative effluent limitations in the municipal storm water permit are not based on any TMDL or accompanying waste load allocation. They simply implement the Basin Plan requirements. Accordingly, the Regional Board cannot rely on Section 303(d)(4)(A) as a basis for deleting those limitations.

Third, the Regional Board cannot show that the standards implemented by the existing permit's limitations are all being attained. Nothing in the Fact Sheet claims this is the case. In fact, numerous studies available to the Regional Board show that standards besides the deep water transparency standard are being violated in the Lake, especially in the near-shore area. As the Regional Board and Tahoe Regional Planning Agency already have recognized for several years, the near-shore zone of Lake Tahoe is currently not protecting beneficial uses. *See, e.g.* Taylor, K., *Investigation of Near Shore Turbidity At Lake Tahoe* (March 2002) (http://www.swrcb.ca.gov/water_issues/programs/swamp/docs/laketahoe_turbidity_mar2002.pdf); SNPLMA Proposal for Theme 2c (Near-Shore Water Quality) (2007) (<http://www.fs.fed.us/psw/partnerships/tahoescience/documents/SchladowNearShoreProposal.pdf>); McConnell, Joe; Kendrick Taylor, *Spatial Variability of Near Shore Turbidity at Lake Tahoe* (2001) (synopsis) (http://www.agu.org/meetings/fm01/fm01-pdf/fm01_H42G.pdf). *See also* Basin Plan, pp. 5.7-8 Human activities in and near the littoral zone can physically alter fish habitat and contribute nutrients leading to eutrophication and the alteration of food webs . . . ; erosion and sedimentation can degrade habitat quality"); *Id.* ("Increased growth of attached algae and rooted plants in the shorezone is the most visible sign of eutrophication to human recreational users of lakes"). Readily available evidence indicates that "[t]here is a strong correlation between elevated turbidity near the shore and development on the shore." Taylor 2002. *See also* McConnell & Taylor (2004) ("Perimeter surveys (Taylor et al., 2004) quantified turbidity on a basin-wide scale, finding a distinct association between elevated near-shore turbidity and several developed areas"). "The near shore zone is the portion of the lake first impacted by disturbances on shore because the material causing the adverse impact will have the greatest concentration near the source on shore." *Id.* As Geoffrey Schladow of the Tahoe Environmental Research Center explains:

Conditions in the near-shore zone have degraded over time. Elements of this degradation include elevated turbidity (Taylor et al. 2004)...and increasing concentrations of periphyton (attached algae) on rocks, piers and other hard substrate (Hackley et al. 2004, 2005, 2006).

<http://www.fs.fed.us/psw/partnerships/tahoescience/documents/SchladowNearShoreProposal.pdf>. Dr. Schladow also emphasizes that, even assuming any benefits accrue from pollution control measures attempting to address clarity issues in the deep waters of the Lake, those measures cannot be assumed to benefit the near-shore:

Recent optical modeling (Swift et al. 2006) suggests that mid-lake clarity is predominantly controlled by the concentration and size distribution of fine, inorganic particles (< 20 microns). The near-shore zone, by contrast, is more biologically productive suggesting that nutrient fluxes and other factors may play a much larger role in that zone. It therefore cannot be assumed that the same management strategies will work for both the near-shore and mid-lake.

Id. Kendrick Taylor, in her 2002 study, linked degradation of the near-shore from turbidity to development:

The highest turbidity values were in the lake adjacent to Tahoe Keys and exceeded the TRPA littoral zone turbidity threshold. Areas with persistently high turbidity occurred off South Lake Tahoe and Tahoe City. Areas with occasional high turbidity occurred off Incline Village and Kings Beach.

http://www.swrcb.ca.gov/water_issues/programs/swamp/docs/laketahoe_turbidity_mar2002.pdf. See also http://www.agu.org/meetings/fm01/fm01-pdf/fm01_H42G.pdf. Because the Regional Board has no evidence that the Lake is achieving all of the other applicable standards, the Regional Board cannot rely on Section 303(d)(4)(B) to backslide by deleting the effluent limitations adopted to implement those standards.

Lastly, the Fact Sheet does not indicate that the Regional Board is relying on any exception to the backsliding prohibition listed at Section 402(o)(2). Any such effort would also be an abuse of discretion and unlawful. Most of the exceptions are not relevant on their face, including subparagraphs (A), (C), (D) and (E). As for subparagraph (B), because the TMDL only applied to the deep water transparency standard, no information justifying less stringent effluent limitations for other standards became available or evidenced any mistakes on those effluent limitations implementing long-standing water quality standards for Lake Tahoe.

The Tentative Permit's Proposed Process for Approving Storm Water Management Plans is Inconsistent with the Clean Water Act.

The existing permit required the dischargers to submit a storm water management plan for Regional Board approval. Order R6T-2005-0026, p. 12 (“submit a revised SWMP no later than July 15, 2006 for Regional Board approval”). The tentative permit changes that requirement to provide for Executive Officer approval. Tentative Permit, p. 15. That proposed procedure to delegate approval of amended SWMPs to the Executive Officer is inconsistent with the Clean Water Act because the Executive Officer is not the permitting authority and no public procedures attach to review and approval by the Executive Officer. Federal law is clear that management plans prepared by dischargers pursuant to storm water permits under the Clean Water Act, amount to effluent limitations that, prior to adoption, must be reviewed and approved

by the permitting authority. *See Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 855-57 (9th Cir. 2003); *Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486, 500 (2d Cir. 2005). In California, Porter-Cologne limits permitting authority to the Regional Board and expressly precludes the Regional Board from delegating such authority to the Executive Officer. Water Code § 13223 (no delegation of issuance or modification of waste discharge requirements); 13377 (NPDES permits issued as WDRs). Relatedly, each storm water management plan must be included as part of the NPDES permit. *See Waterkeeper Alliance*, 399 F.3d at 502-503.

In addition to the required review and approval by the permit issuing authority, the Clean Water Act also mandates that the public be provided notice and an opportunity to comment on a storm water management plan. *Waterkeeper Alliance*, 399 F.3d at 503-504. The tentative permit must be consistent with allowing the public the notice and comment period required by EPA's regulations for the revised storm water management plans. 40 C.F.R. § 124.10.

The League believes that these requirements mean that the tentative permit should include the current storm water management plans in place for each of the jurisdictions. Those plans should be included as part of the permit and open to public comment during this renewal process. Once the plans are amended as required by the final permit, those revised plans would also have to be treated as permit amendments, released for public review and comment and ultimately reviewed and adopted by the Regional Board. Only in this way will the public have an opportunity to meaningful comment on the real management practices being applied in the three jurisdictions.

Monitoring Deficiencies

Catchment Scale Monitoring

Each jurisdiction should be required to monitor each of its catchments over the life of the permit, not just two. No rationale is discussed in the Fact Sheet justifying the limited scope of the proposed catchment scale monitoring.

The BMP Effectiveness Monitoring is Inadequate

The tentative permit proposes that each of the three entities pick a single BMP and monitor just one BMP for three years. This limited monitoring requirement does not come close to assessing the effectiveness of the range of BMPs that will be employed by the jurisdictions and the different contexts where they may be placed. A more robust BMP effectiveness monitoring requirement should be proposed that includes a statistically significant number of monitoring locations covering the range of BMPs that may be used within the three jurisdictions. No justification is provided in the Fact Sheet justifying the limited scope of the BMP effectiveness monitoring.

Additional Monitoring to Ensure Compliance with the Existing Numeric Effluent Limitations and Standards Must Be Included

As noted above, the permit must maintain the existing numeric storm water effluent limitations as well as the existing effluent limitations implementing the Lake's applicable water quality standards. In addition, the monitoring program should be expanded to assure that representative data from a statistically significant number of stormwater discharge locations is collected that can be compared to the Basin Plan's stormwater limitations and other applicable standards. Currently, the tentative permit does not propose any monitoring to determine what impacts may be resulting from the municipalities' discharges of storm water to near shore areas of the Lake containing pollutants that threaten or cause violations of the Basin Plan's effluent limitation and water quality standards.

Baseline estimates

Subsection IV. A states that each permittee has submitted baseline pollutant load estimates. How were these estimates validated by Lahontan?

If you have any questions, please contact the undersigned at 530-541-5388.

Sincerely,

Carl Young,
Program Director
League to Save Lake Tahoe