

**Response to Comments – Trash TMDL for the Malibu Creek Watershed  
Comment Due Date: February 13, 2009**

1. Heal the Bay
2. Malibu Surfing Association
3. County of Ventura Public Works Agency
4. County of Los Angeles Department of Public Works (LACDPW)
5. City of Hidden Hills
6. United States Environmental Protection Agency (U.S.EPA)

<b>No.</b>	<b>Author</b>	<b>Comment</b>	<b>Response</b>
1.1	Heal the Bay	We believe the limit of zero trash is the only way to meet the threshold of attaining and maintaining water quality standards as set forth in the Clean Water Act, and thus, strongly support the proposed Total Maximum Daily Load (TMDL).	Comment noted.
2.1	Malibu Surfing Association	We wish to go on record wholeheartedly in support of the amendment and urge the Board to amend the Water Quality Control Plan as set forth in the Draft Resolution.	Comment noted.
3.1	County of Ventura Public Works Agency	The calculation of the Ventura County Unincorporated land area for the Non-point Source Load Allocation (LA) is of concern. On page 29, Table 6 of the Draft Staff Report, the "Ventura County-Responsible Jurisdiction" is listed as having 10.18 square miles of "Nonpoint Source Area (Mile <sup>2</sup> )". We feel this land allocation is incorrect and assume the number includes the Upper Las Virgenes Creek, designated on Page 25, Figure 2, " <i>Areas of the Malibu Creek Watershed</i> " of the Staff report as being all Unincorporated County lands. This is incorrect; the vast majority of Upper Las Virgenes Creek lands (above the City of Calabasas) is owned and operated by the Santa Monica Mountains Conservancy and listed as a region in the Santa Monica Mountains National Recreation Area, Upper Las Virgenes Canyon Open Space (Former Ahmanson Ranch	This comment was received and responded to by the Regional Board under comment 5.1. Please see response to comment 0.1 at the end of the table.

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		Area). The County of Ventura has no authority in these areas and thus has no mechanism to take actions associated with TMDL implementation. Attachment A shows the area described. This "impaired area" should be reallocated to the proper responsible parties.	
3.2	County of Ventura Public Works Agency	<p>In Table 7-31.1 (Elements), page 7 on the revised BPA implementation section, Nonpoint Sources, under Las Virgenes Creek #5, the current language reads, “<i>Within Ventura County, once every two months for the waterbody, shorelines and the adjacent areas and within 72 hours after critical conditions.</i>”</p> <p>The County of Ventura requests the following revised language be modified on this paragraph as follows: “<i>Within Ventura County the Santa Monica Mountains National Recreation Area/upper Las Virgenes Canyon Open Space, once every two months for the waterbody, shorelines and the adjacent areas and within 72 hours after critical conditions.</i>”</p>	<p>Ventura County, as quoted in the second paragraph under Language suggestion, is a general geographical term for the area located within Ventura County. Agencies responsible for any surface areas and are listed as responsible jurisdictions shall follow the same Minimum Frequency of Assessment and Collection (MFAC), at a minimum, as described in the implementation section of Table 7-31.1.</p> <p>The State Board does not have the authority to modify the Basin Plan Amendment (BPA). Any requests to change the BPA should have been made to the Regional Board in a timely manner during the review process.</p>
4.1	LACDPW	<p><u>Table 7-31.1</u>  <u>Requested Action:</u> In the section on Implementation, Nonpoint Sources, it is stated that the "Counties of Los Angeles and Ventura will act as third parties to identify private party dischargers in unincorporated County lands." With respect, the California Regional Water Quality Control Board (Regional Board) has no authority to require the counties to perform this task. Therefore, we, request that this sentence be deleted from the Basin Plan Amendment (BPA).</p>	<p>This appears to have been an administrative oversight on the Regional Board’s part. The language has no substantive value and the amendment language will be corrected accordingly through an Executive Officer correction provided by the Regional Board dated March 4, 2009.</p>
4.2	LACDPW	<p><u>Table 7-31.2</u>  For Task No. 3 in table .7-31.2a, responsible jurisdictions are required to comply with this task one year from receipt of the</p>	<p>This comment was received and responded to by the Regional Board under comment 4.6.</p>

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		<p>letter of approval for the TMRP from the Regional Board Executive Officer. During this one year period, the first six months is the time allowed to implement the TMRP. Responsible jurisdictions have to start trash monitoring activities no later than this 6-month period. This leaves responsible jurisdictions only six months of trash monitoring data to recommend for approval the Trash Baseline Waste Load Allocations. The Trash Baseline Waste Load Allocations should be established based on trash data collected for both dry weather and wet weather. Only providing six months to prepare the allocations obviously will not satisfy this requirement. We note also that on page 20 of the Staff Report, it is stated that the Trash Baseline Waste Load Allocations "may be revised with data collected during the Trash Monitoring and Reporting Plan (TMRP) in the first two years of the implementation period." Therefore,  <u>Requested Action:</u> Change the date for Task No.3 in table 7-31.2a from one year from receipt of letter of approval to two and a half years from receipt of letter of approval.</p>	<p>Please see response to comment 0.1 at the end of the table.</p>
4.3	LACDPW	<p><u>Table 7-31.2</u>            For Task No. 4 in table 7-31.2b, responsible jurisdictions are required to comply with this task one year from receipt of the letter of approval for the TMRP from the Executive Officer. During this one year period, the first six months is the time allowed to implement the Minimum Frequency of Assessment and Collection/Best Management Practices (MFAC/BMP) program. Responsible jurisdictions have to start the MFAC/BMP program no later than this 6-month period. This leaves responsible agencies only six months to actually run the MFAC/BMP program and submit the first annual report, as well as to propose revising the MFAC/BMP program. This one year time period is not sufficient for these tasks. There should</p>	<p>Please see response to comment 4.2, above.</p>

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		<p>be at least one full year's data available to the responsible jurisdictions under the MFAC/BMP program so that the proposal for revision is meaningful and based on actual experience in the watershed. Therefore,  <u>Requested Action:</u> Change the date for Task No.4 in table 7-31.2b from one year from receipt of letter of approval to two years from receipt of letter of approval.</p>	
5.1	City of Hidden Hills	<p>The first technical issue is the speed and time to respond to the significant requirements of the TMDL. There were less than six months from the first notice to the adoption. Considering that this TMDL covers an area of 69,900 acres, drains approximately 109 square miles, and requires a tremendous investment resources, the Regional Board should have prolonged adoption in order to more adequately involve the public, stakeholders, and Non-Governmental Organizations (NGOs).</p>	<p>Staff Disagrees. The Regional Board’s process complied with all noticing requirements in that they provided a 30 day notice prior to their CEQA scoping meeting and provided an additional 45 day comment period prior to the adoption hearing pursuant to the Federal Public Participation Act. Furthermore, the approach used in this TMDL is well established for the Los Angeles region, and is the same approach approved by the State Board for five previous Los Angeles Region TMDLs. Notably, the water body was first listed as impaired on the 1998 303(d) list, the MS4 permittees were required to comply with receiving water limits, including the standards at issue here, since their 2001 MS4 permit, and all responsible jurisdictions already have ordinances banning litter. The TMDL, which essentially requires them to enforce their own litter ordinances, was not adopted with undue haste.</p>
5.2	City of Hidden Hills	<p>The designation of Municipal Separate Storm Sewer Systems (MS4s) as both Point Source dischargers and Non-Point dischargers (NPS) is based entirely on the assumption that MS4 permittees may be in the “vicinity of” or “adjacent” to impaired waterways. This is inconsistent with current regulations and requirements and it unreasonably extends responsibilities to permittees under separate National Pollutant Discharge Elimination Systems (NPDES) programs.</p>	<p>The City of Hidden Hills is considered as the responsible agency for trash that is generated within its jurisdictional boundaries and discharged to the Malibu Creek Watershed through nonpoint source loading mechanisms. Staff considers the City of Hidden Hills as responsible for controlling nonpoint sources of trash because open space and streets are immediately adjacent to the Malibu Creek Watershed. This consideration is supported by geographical information system (GIS) information</p>

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		<p>The City of Hidden Hills and other MS4s, listed as NPSs, unless having jurisdiction over a NPS area should be removed from NPS responsibilities pursuant to the BPA/TMDL. The allocation of the problem and responsibilities thereof, should be assigned to actual NPSs, no identified Point Source discharges.</p>	<p>available to the Regional Board. Trash can be carried to estuary by wind or stormwater from these areas. These findings have been supported in previous trash TMDLs implemented throughout the Los Angeles Region. Contrary to the comment, where a municipality is responsible for both point source discharges (as through an MS4), and direct discharges to the water body not through a point source (non-point source), the discharger must be held responsible for both types of discharges. The fact that a municipality may be a co-permittee under its point source MS4 system, does not absolve the municipality for its responsibility for its non-point source discharges. The point source requirements are directed to preventing discharges from the MS4 system. The nonpoint source requirements are directed to addressing discharges to Malibu Creek outside of the MS4 system.</p>
5.3	City of Hidden Hills	<p>The Draft TMDL is based on a Court Invalidated Analysis and is not in accordance with State Reasonableness Requirements.</p>	<p>The commenter's assertion that the court in <i>Cities of Arcadia et al v. State Water Resources Control Board et al</i> invalidated the basin plan is incorrect. Although, the court ordered an evaluation of standards as applied to storm water, the court expressly ordered that the standards remain effective during the assessment. Furthermore, no evidence presented during that proceeding suggests that the standards at issue in this TMDL are not set at the appropriate level. In any event, the <i>Arcadia</i> case is currently under appeal by all sides. The triennial review referenced by the commenter is not pursuant to the court order, but rather the regularly scheduled periodic assessment required by CWA section 303(c). The commenter has presented no evidence that the standards at issue here are likely to be revised during the triennial</p>

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			<p>review or are, in the commenter’s words, “erroneous”.</p> <p>The commenter’s reference to “numeric limits” is misplaced. The term “numeric limit” is a shorthand reference to “numeric effluent limitations”. Effluent limitations are conditions in permits. They are not components of regulations such as TMDLs. Presumably the comment is directed to future MS4 permit revisions to incorporate the TMDL into the relevant storm water permit. How the TMDL may be incorporated into the relevant permits is not before the board at this time, and will be directed to a future permit proceeding. In any event, USEPA supports the TMDL (so reference to general EPA guidance is not helpful). Moreover the claims raised here with respect to permit implementation were squarely rejected by the court of appeal in Arcadia I (challenging the Trash TMDL for the Los Angeles River).</p>
5.4	City of Hidden Hills	The scientific methodology employed is vague and incomplete. In addition, the Regional Board failed to perform a proper peer review of the draft TMDL pursuant to Health and Safety Code section 57004.	The proposed Trash TMDL and Basin Plan amendments are based on existing policies and policy considerations pertaining to the prohibition of trash and littering at the 303(d) listed waterbodies in the Malibu Creek Watershed, not scientific findings or conclusions drawn from empirical data. As a result, it is not necessary for the Regional Board to seek external peer review for these amendments per the provisions of Health and Safety Code 57004.
5.5	City of Hidden Hills	Compliance within the proposed time frame would be unrealistic.	Staff disagrees. The implementation schedule as proposed is both reasonable and feasible.
5.6	City of Hidden Hills	The draft TMDL amounts to an unfunded mandate.	This claim is not a proper comment to the Regional Board. If the commenter believes the TMDL, when implemented, would constitute an unfunded mandate, the commenter is free to file a test claim before the Commission on State Mandates, which has exclusive jurisdiction over unfunded

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			<p>mandate issues. In any event, the claim is not valid for a variety of reasons, a few of which are set forth below.</p> <p>First, the Malibu Creek Watershed Trash TMDL is compelled by federal law and as such is not an unfunded state mandate, but a federal mandate. The requirement that states develop TMDLs for impaired waters is clearly set forth at 33 U.S.C. 1313(d)-(e).</p> <p>Second, every point source discharger is required to have an NPDES permit, not just municipal permittees. Thus the requirement is not endemic to municipalities, thus precluding a mandates claim. The fact that the federal Clean Water Act established more lenient requirements for municipalities via an MS4 permit, than other NPDES permittees, does not negate the fact that the permit requirement applies to all dischargers, municipal and private alike. The TMDL implements the applicable water quality standard, and makes all stormwater permittees in the watershed responsible for meeting the water quality standard. As a result, the TMDL is generally applicable and not subject to subvention requirements in Article XIII.</p> <p>Third, the affected agencies have sufficient time to conduct planning and implementation activities, and to explore and select any necessary funding options, including loans, grants and revenue increases. The availability of such funding mechanisms precludes a claim for subvention.</p>
5.7	City of Hidden Hills	The TMDL requires the city to undertake activities outside of its jurisdiction to conduct rapid trash assessments or collection events at specified intervals along water bodies not contiguous with the city.	The TMDL does not require any responsible jurisdiction to perform MFAC related activities outside of its borders. The TMDL only requires responsible jurisdictions to abate sources of trash within their jurisdiction or under their

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			control. The commenter is required to submit a Trash Monitoring and Reporting Plan within 6 months of the effective date of the TMDL. Presumably the commenter's TMRP will detail the areas over which it is responsible and be directed to those areas.
6.1	U.S.EPA	<p>The proposed TMDLs are appropriately set the numeric target at zero trash and included phased reduction tasks from defined baseline waste load and load allocations. The critical portion of these TMDLs is the implementation plans, which define the steps for achieving zero trash in a set time frame. In addressing non-point sources, each TMDL practically establishes a program of MFAC and installation of BMPs to address the trash impairment problem.</p> <p>We urge the State Board to adopt the TMDLs to meet California's TMDL commitments and to enable EPA to meet its requirements under the consent decree (<i>Heal the Bay V. Browner, C. 98-48 25 SBA, March 22, 1999</i>).</p>	Comments noted.
0.1	Multiple	Many of the comments received by the State Board in opposition to its approval of this TMDL were submitted either verbatim or in a substantially similar format to comments submitted to Regional Board, without any explanation to the State Board as to why the Regional Board's response was inadequate.	Many of the comments submitted to the State Board on this matter are identical or substantially similar to comments submitted to the Regional Board at the time the draft version of this regulation was under Regional Board consideration. During its consideration, the Regional Board received and provided written responses to all of the many significant comments. The Regional Board's responses either indicated that changes would be made to the regulatory provisions or related documentation in view of the comment (in which case corresponding changes were made), or the Regional Board's written responses indicated that that changes would not be made, and the response indicated why not.

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			<p>Where a commenter merely repeats the comment tendered below on a prior version of this regulation, but fails to disclose what quarrel, if any, the commenter has with the response provided or the action taken by the Regional Board in response to the comment, the State Board is unable to address the comment. Specifically, in those cases where the Regional Board made changes in response to a comment, the commenter has failed to explain how the changes were allegedly inadequate. Likewise, where the Regional Board did not make changes, the commenter has failed to explain how the response or explanation that the Regional Board provided was allegedly inadequate, or even if the commenter even believes that the response was inadequate.</p> <p>Where a commenter has merely repeated the comment submitted below, or merely referred back to comments previously submitted to the Regional Board, the State Water Board cannot divine what the commenter believes has been adequately satisfied and what has not, nor can it determine the reason for any remaining dissatisfaction. Without that information, the State Board does not have a fair opportunity to understand what, if any, remaining concerns exist, and the State Board is therefore unable to use its authority under 13245 to address them. The doctrine of exhaustion of administrative remedies is intended to allow agencies like the State Water Board an opportunity to address the concerns of the commenters. The State Board cannot do so if those concerns have not, as here, been fairly presented.</p> <p>All comments to which this response applies are identified with a reference to this comment 0.1.</p>

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