

Response to Comments – April 19, 2011

Lake Tahoe TMDL for Sediment and Nutrients

(Comment deadline 12 noon March 18, 2011)

8. League to Save Lake Tahoe and Tahoe Area Sierra Club

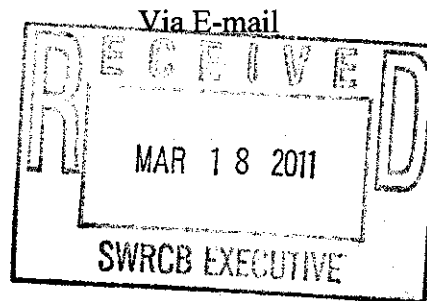
Note: These Responses commonly reference previous Response to Comments from the Lahontan Water Board, which can be found at http://www.waterboards.ca.gov/lahontan/water_issues/programs/tmdl/lake_tahoe/respnse_comments091310.shtm

(If printing Response to Comments, please print double-sided for best viewing)



March 18, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000
commentletters@waterboards.ca.gov



Re: Comment Letter – Lake Tahoe TMDL.

Dear Ms. Townsend and Members of the State Water Resources Control Board,

These comments are submitted on behalf of the League to Save Lake Tahoe (“League”) and the Tahoe Area Sierra Club Group (“TASC”). On September 13, 2010, the League and TASC previously submitted extensive comments on the Regional Board’s proposed TMDL and Basin Plan amendment. On November 10, 2010, the League and TASC filed additional comments replying to staff’s responses to the League’s earlier comments and explaining why many of those responses were inadequate. Although the League and TASC sent a copy of the reply to the State Board, a true and correct copy is attached and incorporated by reference. In addition, the following comments provide further explanation as to why the Regional Board’s staff’s responses to the League’s and TASC’s original comments are inadequate. A true and correct copy of the League’s and TASC September 13, 2010 comment letters without the accompanying attachments also is attached for the State Board’s convenience.

In general, the Regional Board’s responses and refusal to amend the TMDL proposal do not adequately address almost all of the League’s and TASC’s concerns regarding the deep water transparency standard TMDL and its implementation. The groups’ concerns are numerous:

- The proposed clarity TMDL does not factor in discharges from all of the point sources and nonpoint sources affecting the Lake, including pollution from future development, pollution from increases in vehicle miles traveled in the Tahoe Basin, and pollution resulting from the consequences of global warming. The TMDL and its allocations do not adequately factor in future growth within the Lake Tahoe Basin, instead rely on calculations that underestimate parcel sizes and the degree of development allowable under TRPA’s current regulations. The waste load allocations for Caltrans and the municipalities are inadequate because they fail to account for increases in vehicle miles traveled. Despite an acknowledged increase in the rate of fuel reduction projects in the Tahoe Basin since the Angora Fire, the TMDL fails to account for increased road construction associated with aggressive fuel reduction activities currently underway and planned for the Basin. The TMDL must factor in now the

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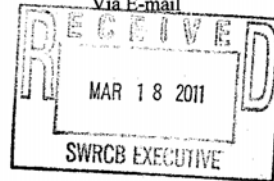
Public Comment
Lake Tahoe TMDL
Deadline: 3/18/11 by 12 noon



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LTSLT(StBd)-1: These comments repeat comments made in the League’s November 10, 2010 letter, which reiterated the same points the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board’s November 16, 2010 hearing that these comments have been responded to in detail. There is no evidence to support the League’s assertion that number of vehicle miles traveled will increase in the future, nor is there evidence to suggest that change in traffic patterns would substantively change pollutant loading rates (see previous responses LTSLT-4 and LTSLT-16).

The League has not provided the Lahontan Water Board any information to support the assertion that the average parcel size used in the analysis was inappropriate, nor has the League documented how the future growth analysis misapplied existing development regulations. The future growth potential analysis conducted by the United States Geological Survey (Halsing 2006) provides an environmentally conservative over-estimate of how pollutant loading may change with future growth in the Lake Tahoe Basin. The results of that analysis were considered in developing the pollutant load allocations and margin of safety.

The TMDL acknowledges the intensive vegetation management efforts planned for the Lake Tahoe basin, and the Basin Plan Amendment includes language to prohibit the increase of pollutant loads at a sub-watershed scale from those activities.

The TMDL includes a detailed discussion of potential changes in temperature and precipitation associated with global climate change, and environmentally conservative assumptions based on that analysis were included in the implicit margin of safety.

uncertainty created by global warming either as part of the propose load allocations or the margin of safety. The Boards have no authority to reduce the margin of safety or avoid allocations now based on future “adaptive management.”

- The Regional Board has no authority under the CWA to establish a schedule of compliance deferring achievement of water quality standards for 65 years. The implementation plan and Basin Plan amendment’s proposed 65-year schedule amounts to a change to the underlying water quality standards that must be submitted to, reviewed, and approved or disapproved by EPA under Section 303(c) of the CWA. The agencies’ proposal to continue violations of the deep water transparency standard for the next 65 years also is in violation of the federal antidegradation policy.
- Relatedly, the Regional Board’s proposal that NPDES Permit dischargers be allowed to meet permit limits consistent only with interim targets for up to 65 years rather than the final TMDL and standards is inconsistent with the CWA 303(d)(4).
- The Regional Board’s proposal to establish total annual loads, without any mechanism to apply those loads on a daily basis, is contrary to the CWA.
- The Regional Board’s proposed lake clarity crediting program must be refined to assure it reflects actual pollution reductions and complies with the antidegradation policy. Load Reduction Estimates and Catchment Credit Schedules must be reviewed and approved by the Regional Board and included in the NPDES discharger’s permits. Load Reduction Estimates and Catchment Credit Schedules must be subject to public review and comment. The validation of conditions and awarding of credits must include storm water effluent monitoring. The apparent absence of direct monitoring of stormwater from various management measures and dischargers’ storm drains precludes the Boards from determining the effectiveness of those measures, whether or not the measures qualify as best practicable treatment controls under the State of California’s high quality waters policy or whether the actual discharges from various contributors comply with the state and federal antidegradation policies, especially as they apply to Outstanding National Resource Waters.
- The League and TASC are very concerned that the TMDL and its accompanying functionally equivalent document under CEQA did not include worsening water quality conditions in the Lake’s near shore. By shifting the pollution control emphasis to addressing fine sediments and the Lake’s deep water transparency problem, the TMDL will focus management measures and treatment options on that pollutant type and less on the nutrients. However, it is nutrient discharges that are causing nuisance levels of algae and invasive species along the Lake’s shorelines. The League and TASC are concerned that the TMDL will be used as a rationale for only focusing proposed measures on complying with the measures addressing fine sediments and not adequately address the nutrients contributing to the mounting shorezone degradation. The League and TASC are very concerned that the TMDL is relying upon the Tahoe Regional Planning Agency to only accomplish a 1% reduction in nitrogen and 2% in 65

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Response

LTSLT(StBd)-2: All potentially foreseeable actions that might influence future pollutant loading rates have been evaluated and the findings of those analyses were included into the TMDL pollutant load allocations and into the TMDL margin of safety.

LTSLT(StBd)-3: The Lahontan Water Board has responded in detail to the League’s belief that the TMDL implementation schedule is beyond the authority of the Water Board and inconsistent with the Clean Water Act and federal antidegradation policy (see previous responses LTSLT-28, LTSLT-29, LTSLT-31, and LTSLT-35) . As noted in those previous responses, the implementation schedule is based on what is reasonable, given the extraordinary resource and technological challenges associated with achieving needed pollutant load reductions.

The Lahontan Water Board has also responded to the League’s comments regarding the legality of including interim targets upcoming NPDES permit updates. See previous response LTSLT-36. As noted in those responses, a compliance schedule to achieve the final load allocations may be included in the permit.

LTSLT(StBd)-4: The Lake Tahoe TMDL Report and associated Basin Plan Amendment include analyses to meet United States Environmental Protection Agency requirements for daily pollutant load estimates. Specifically, following guidelines described in the *Options for Expressing Daily Loads in TMDLs* (US EPA 2007), the Water Board developed daily load estimates for the Lake Tahoe TMDL as a function of total hydraulic inflow (see LTSLT-38).

LTSLT(StBd)-5: The details associated with the referenced Lake Clarity Crediting Program are not specifically proposed as part of the Lake Tahoe TMDL. (See LTSLT-39). These concerns are specific to TMDL implementation through updated NPDES permits and will be addressed with the updated permit is proposed in late 2011.

LTSLT(StBd)-6: These comments are not new and they were raised in the League’s September 13, 2010 comment letter and during oral public comment at the Board’s November 16, 2010 hearing. Lahontan Water Board staff responded in detail to the comments in previous responses LTSLT-49, LTSLT-55, and LTSLT-56 and at the Lahontan Board hearing. (See previous responses LTSLT-55 and LTSLT-56).

years to protect deep water clarity. This is far less than needed to restore historic near shore conditions.

- Lastly, the Regional Board's functionally equivalent document does not comply with CEQA for several other reasons. The FED fails to acknowledge the significant environmental impact of allowing impairing discharges for upwards of 65 years. The FED fails to acknowledge the significant growth-inducing impacts it may have by its express reliance on leveraging new development to implement many of its anticipated management measures. And, the range of alternatives included in the FED is insufficient, basically reviewing the same 65-year long implementation three times and not considering any faster implementation scenarios.

In addition to the League's and TASC's letter of November 10, 2010 responding in detail to many of the Regional Board staff's responses and the above general concerns about the inadequacy of the Regional Board's response, the League and TASC also offer the following summary of the inadequacy of the Regional Board's responses to the groups' concerns:

LTSLT-4: *See* League's November 10, 2010 reply to Regional Board responses.

LTSLT-5: *See* League's November 10, 2010 reply to Regional Board responses.

LTSLT-6: As explained in the League's comment letter, the referenced study does not apply a worst case scenario. The study and TMDL instead underestimate the average size of parcels in the Tahoe Basin; do not account for TRPA's Land Capability Challenge procedure which will allow additional development beyond the amount allowed by the Bailey's map and; do not account for increased development based on the updated NRCS soil maps.

LTSLT-7: New development should be subject to a specific allocation in the TMDL that institutes staff's perceived zero allocation or, as staff's response suggests, a negative allocation. Only by establishing an enforceable allocation will the Boards and EPA assure that new loadings from new development be addressed prior to construction and those project's contribute to reducing overall loads to meet the TMDL. Leaving it to a municipalities catchment-wide estimate will obscure whether or not such new development was in fact more than fully mitigated and contributed to the catchments overall reduction in fine sediment consistent with the TMDL. EPA's recent TMDL guidance, issued a few days prior to the Regional Board's meeting, emphasizes the importance of specifying as narrowly as possible specific categories of dischargers contributing pollutants addressed by a TMDL. "[S]ince 2002, EPA has noted the difficulty of establishing clear, effective, and enforceable NPDES permit limitations for sources covered by WLAs that are expressed as single categorical or aggregated wasteload allocations." Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," p. 4 (Nov. 12, 2010) ("TMDL Guidance"). *See also id.*, p. 5 ("disaggregated WLAs should be defined as narrowly as available information allows"). Given the obvious importance of limiting coverage and restricting development in the Lake Tahoe

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LTSLT(StBd)-7: These comments are not new and the League's November 10, 2010 letter reiterated these same points that the League first raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board's November 16, 2010 hearing that these were not new concerns and the September 13, 2010 comments had already been responded to in detail. See previous responses LTSLT-50 through LTSLT-61.

LTSLT(StBd)-8: These comments are not new and the League's November 10, 2010 letter reiterated these same points that the League first raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board's November 16, 2010 hearing that these were not new concerns and the comments had already been responded to previously in detail.

LTSLT(StBd)-9: The League has not provided any analysis to support its assertion that the Haling 2006 study "does not apply a worst case scenario". The Haling 2006 analysis did not use an "average parcel size." The analysis estimated changes based on the actual size of undeveloped parcels. There is no information to suggest that the analysis underestimated parcel size. The analysis did not assess development potential based on Bailey land use maps as suggested, but rather used the Individual Parcel Evaluation System consistent with Tahoe Lahontan Planning Agency regulations. Water Board staff could find no information to support the assertion that the updated soil maps have increased the development potential in the Lake Tahoe Basin. The Land Capability Challenge procedure does not affect the development rights of a parcel but only addresses the amount of potential allowable land coverage on a parcel. Successful Land Capability Challenges may conclude that certain parcels can be allowed to have additional land coverage, but the additional land coverage is expected to be small and the Haling (2006) study applied the highest land coverage amounts possible to all developable parcels in its analysis. As appropriate for assessing a TMDL margin of safety, the future growth potential analysis (Haling 2006) provides an environmentally conservative over-estimate of how pollutant loading may change with future growth in the Lake Tahoe Basin.

future activities that the agency knows are occurring or will occur. “Any model uncertainty and future conditions should be built into a margin of safety for the TMDL. A final TMDL should not be assigned until all of these factors are considered carefully.” EPA Technical Guidance Manual for Developing Total Maximum Daily Loads, Book II: Streams and Rivers, Part 1: Biochemical Oxygen Demand/Dissolved Oxygen and Nutrients/Eutrophication (EPA 823-B-95-007) (Sept. 1995), p. B-30.

Indeed, the Board’s entire modeling effort is predicting future loadings. In effect, the entire TMDL is about the future and staff’s notion that future events are only addressed by adaptive management is not a meaningful distinction. Because new development, additional vehicle miles travelled, additional fire management and global warming are expected or guaranteed to occur within the Lake Tahoe Basin, and because the Regional Board lacks knowledge about the potential increases in loading that may result from these events, a reasonable, conservative estimate of their possible increase in pollution loadings must be factored into the proposed margin of safety now.

Staff’s general reliance on conservative assumptions in the modeling effort cannot cure the omission of the above uncertainties from the margin of safety because none of the above categories were included in the modeling effort. According to Region 9’s TMDL development guidance, “Where an implicit margin of safety is provided, the submittal should include a specific discussion of sources of uncertainty in the analysis and how individual analytical assumptions or other provisions adequately account for these specific sources of uncertainty.” Guidance for Developing TMDLs in California, EPA Region 9, p. 7 (Jan. 7, 2000) (<http://www.epa.gov/region9/water/tmdl/303d-pdf/caguidefinal.pdf>). The above sources of uncertainty are not specifically addressed anywhere in the proposed TMDL, including the assumptions included in the modeling effort.

2. THE CWA DOES NOT AUTHORIZE A 65 YEAR COMPLIANCE SCHEDULE TO ACHIEVE EXISTING STANDARDS.

Staff’s response claims that “[n]othing in the Clean Water Act prohibits a 65-year implementation plan. There is nothing in the Clean Water Act that states how quickly a TMDL must be implemented. . .” LTSLT-28. Staff simply ignores Section 303(d)(4), discussed in the League’s earlier comment, which requires NPDES permits to include effluent limitations based on the TMDL and its waste load allocation. The interim reductions and clarity challenge proposed by staff are not the TMDL or an applicable waste load allocation. Section 303(d)(4) precludes the Regional Board from issuing NPDES permits as it proposes to do in the implementation plan by allowing them to discharge at levels well above the applicable TMDL and waste load allocations, at least for many decades. That alone precludes any notion that a 65-year compliance schedule is authorized.

Likewise, Section 301(a) of the Clean Water Act provides the deadlines for complying with water quality standards. As EPA has made clear, any schedules of compliance purporting

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LTSLT(StBd)-10: These comments are not new and the League’s November 10, 2010 letter reiterated these same points that the League first raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board’s November 16, 2010 hearing that these were not new concerns and the comments had already been responded to in detail.

As noted in the League’s comment, the November 12, 2010 guidance memo from the U.S. EPA states that allocations should be defined “as narrowly as available information allows”. Neither the League nor the Tahoe Area Sierra Club has provided the Lahontan Water Board with additional information to support more narrowly defined waste load allocations, nor has the League or Sierra Club provided any analysis to that supports the need to define a specific waste load allocation for new development.

basin to the protection of water quality in the Lake, the TMDL should address new development with specific WLAs.

LTSLT-9: According to the TMDL Report, the referenced Basin-wide parcel information was a claimed average parcel size which in the League's experience does not reflect the actual sizes of parcels throughout the Basin, especially those along the Lake or larger parcels where development is more likely to occur than a residential parcel. *See* LTSLT-6 above.

TASC-17: Staff's response to TASC's comments regarding the inaccuracy of the estimated parcel sizes also demonstrates how the Regional Board underestimated the development projection. Staff states "that there will be an additional 200,000 square feet of commercial development" when in fact the TRPA has allocated an additional 400,000 sq ft.

LTSLT-12: *See* League's November 10, 2010 reply to Regional Board responses.

LTSLT-13: Staff concedes that the estimate of future growth potential did not factor in likely Land Capability Challenges. Staff responds that "[t]he future growth analysis used the land capability maps that were in effect as of the 2004 baseline evaluation and did not speculate as to how those land capability maps may or may not change in the future." The TMDL's margin of safety is precisely the mechanism staff is required to use to address uncertainty about the future. Staff's discussion of the effect of Land Capability Challenges is confused. Although the formulas do remain the same, a successful land capability challenge will allow increased coverage, *i.e.* new development, on a parcel. Staff acknowledges that the Bailey's maps are not accurate on a parcel level. Land capability challenges thus almost always change the allowed coverage on a parcel. Because staff's estimate of future development assumed that the Bailey's map accurately predicts the scope of future development in the Basin without factoring in likely increases based on land capability challenges, the future development estimates are inaccurate. In addition, the future development scenario does not factor in automatic coverage overrides in the TRPA codes for new roads and paved trails, new public facilities and recreation development. TRPA Code, Chapter 20.

LTSLT-14: The League is not referring to future TRPA Ordinances but to the existing ordinances, including the Land Capability Challenge process which must be taken into account in order to accurately estimate future development.

LTSLT-16 and -17: *See* League's November 10, 2010 reply to Regional Board responses. Staff does not respond to most of the studies referenced by the League in its comments relating to vehicular traffic and fine sediments. Staff's response does not address Kuhn's plain reference to urban roads with "high traffic volumes" as emitting the largest volume of fine sediments. In addition, a more recent road dust report has been released that further corroborates the significant contribution by vehicle traffic on pollutants to Lake Tahoe. *See* Kuhns, Hampden, et al., Draft Final Report, "Examination of Dust and Air-Borne Sediment Control Demonstration Projects" (Sept. 15, 2010) (attached as Exhibit C).

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LTSLT-16 and -17: See League's November 10, 2010 reply to Regional Board responses. Staff does not respond to most of the studies referenced by the League in its comments relating to vehicular traffic and fine sediments. Staff's response does not address Kuhn's plain reference to urban roads with "high traffic volumes" as emitting the largest volume of fine sediments. In addition, a more recent road dust report has been released that further corroborates the significant contribution by vehicle traffic on pollutants to Lake Tahoe. See Kuhns, Hampden, et al., Draft Final Report, "Examination of Dust and Air-Borne Sediment Control Demonstration Projects" (Sept. 15, 2010) (attached as Exhibit C).

Response

LTSLT(StBd)-11: See response LTSLT(StBd)-9 above. The League's "experience" is not documented nor has there be any information submitted to support the assertion that parcel size was underestimated in the future growth potential analysis.

LTSLT(StBd)-12: The League has not provided any evidence to show that the Lahontan Board underestimated the development projection. Lahontan Water Board staff could find no information to support the League's assertion that "TRPA has allocated an additional 400,000 sq ft." Lahontan Water Board staff contacted the TRPA and confirmed that the existing Regional Plan allows for approximately 187,000 square feet of additional commercial floor area. This confirms that the future development analysis consistently used environmentally protective assumptions to ensure a true "worst-case" development scenario based existing development rules.

LTSLT(StBd)-13: These comments are not new and the League's November 10, 2010 letter reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board's November 16, 2010 hearing that comments regarding the legality of the TMDL margin of safety have been addressed in previous detailed responses (see LTSLT-8 and LTSLT-12.)

LTSLT(StBd)-14: The Bailey land use maps were not used in the future growth potential analysis. Coverage area for the worst-case development scenario was established according to rules described in Haling (2006) and in Chapter 20 of the TRPA Code of Ordinances. The maximum allowable impervious cover varies by community plan areas. For single-family and multi-family residential developments, the analysis used the sum of the plan area-specific coverage limits. For commercial developments in a community plan area, the analysis assumed 70% impervious coverage on a parcel. For developments not included in a community plan area, the analysis assumed 25% base allowable coverage. For tourist accommodation units, public services, and recreational developments, the analysis used 50% coverage if the development area was in a community plan area and the base allowable coverage if not in a community plan area.

Lahontan Water Board staff reviewed the Land Capability Challenge process with TRPA staff and concluded that, due to the small number of challenges and the minor adjustments in land capability determinations, the process does not substantively change the land coverage in the Lake Tahoe basin.

to extend those firm deadlines established by Congress are not authorized. In the case of water quality-based effluent limitations, the clear deadline was July 1, 1977. 33 U.S.C. § 1311(b)(1)(C). *See* EPA Memo, Feb. 3, 1975, Revision of Water Quality Standards and Implementation Plans (http://water.epa.gov/scitech/swguidance/waterquality/standards/upload/1999_11_03_standards_revisions.pdf) (“Under § 303 of the Federal Water Pollution Control Act, the reason §303(c) did away with the requirement for implementation plans is that they are not needed under the 1972 Amendments. Section 301 establishes the compliance dates for water quality standards”). The deep water transparency standard was adopted in the mid-1970s. Any notion the Regional Board has of authorizing through the implementation plan the issuance of NPDES permits that include schedules of compliance extending out as long as 65-years plainly violates the express deadline established by Congress. *See id.* (“there shall be achieved— (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard established pursuant to this chapter”); *See also In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990).

Staff lists various TMDLs for which it suggests EPA has approved similar schedules. First, it is worth noting that Lake Tahoe – one of the two Outstanding Natural Resource Waters for the State of California – is proposed to demolish the previous record of delayed implementation of a TMDL by 25 years! More importantly, it is the League’s and TASC’s understanding that EPA limited its review of the listed TMDLs to the TMDL and Waste Load Allocations, and did not review or approve the implementation schedules. Likewise, EPA’s approval of the State Board’s 2008 compliance schedule policy regarding NPDES permitting compliance schedules did not specifically address the issue raised here – whether there is any authority at all to defer compliance with an existing standard through a TMDL. In any event, Congress’ deadline controls as well as the plain language of Section 303(d)(4) which precludes the Board from adopting a plan that calls for issuing an effluent limitation implementing anything less than the final waste load allocation.

Likewise, EPA’s regulations prohibit the 65-year long implementation scheme proposed by the Regional Board. 40 C.F.R. § 122.44(d)(1) states unequivocally that:

each NPDES permit shall include conditions meeting the following requirements when applicable . . .

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

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basin to the protection of water quality in the Lake, the TMDL should address new development with specific WLAs.

LTSLT-9: According to the TMDL Report, the referenced Basin-wide parcel information was a claimed average parcel size which in the League's experience does not reflect the actual sizes of parcels throughout the Basin, especially those along the Lake or larger parcels where development is more likely to occur than a residential parcel. *See* LTSLT-6 above.

TASC-17: Staff's response to to TASC's comments regarding the inaccuracy of the estimated parcel sizes also demonstrates how the Regional Board underestimated the development projection. Staff states "that there will be an additional 200,000 square feet of commercial development" when in fact the TRPA has allocated an additional 400,000 sq ft.

LTSLT-12: *See* League's November 10, 2010 reply to Regional Board responses.

LTSLT-13: Staff concedes that the estimate of future growth potential did not factor in likely Land Capability Challenges. Staff responds that "[t]he future growth analysis used the land capability maps that were in effect as of the 2004 baseline evaluation and did not speculate as to how those land capability maps may or may not change in the future." The TMDL's margin of safety is precisely the mechanism staff is required to use to address uncertainty about the future. Staff's discussion of the effect of Land Capability Challenges is confused. Although the formulas do remain the same, a successful land capability challenge will allow increased coverage, *i.e.* new development, on a parcel. Staff acknowledges that the Bailey's maps are not accurate on a parcel level. Land capability challenges thus almost always change the allowed coverage on a parcel. Because staff's estimate of future development assumed that the Bailey's map accurately predicts the scope of future development in the Basin without factoring in likely increases based on land capability challenges, the future development estimates are inaccurate. In addition, the future development scenario does not factor in automatic coverage overrides in the TRPA codes for new roads and paved trails, new public facilities and recreation development. TRPA Code, Chapter 20.

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Response

LTSLT(StBd)-15: See response LTSLT(StBd)-14. The League's comments specifically refer to future TRPA Ordinances, "*The presumption is demonstrably false because it fails to account for the scale of development as proposed in TRPA's new draft Lahontan Plan.*" This comment by the League refers to possible changes to TRPA Ordinances which are being developed but such changes have not been drafted into complete proposals. As stated in response *LTSLT(StBd)-14*, the Land Capability Challenge process does not substantively change the land coverage and development potential in the Lake Tahoe basin.

LTSLT(StBd)-16: (see previous response LTSLT-16) The Lake Tahoe TMDL identifies fugitive dust from paved and unpaved roadways as a significant source of the fine sediment particles discharged to Lake Tahoe via atmospheric deposition. The cited literature is consistent with TMDL findings. The Kunns, Hampden, et al. draft final report referenced in the LTSLT's comment letter directly references Lake Tahoe TMDL research as the basis for their study. TMDL research is also consistent with the statement that roads with higher traffic volumes are a larger source of atmospheric fine sediment particles than roads with lesser traffic volumes. There is not, however, any documented evidence that vehicular traffic is increasing in the Lake Tahoe basin. In fact, there are a multitude of policies and implementation efforts underway to effectively reduce the number of vehicle miles traveled in the area including enhanced traffic engineering, traffic systems management, traffic signal design, multi-modal transportation planning, transit planning and operations, parking facility design, traffic impact studies, access planning and design, and improved bicycle/pedestrian circulation efforts.

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LTSLT-21: Similar to new development, road emission should be subject to a specific allocation that mandates specific percentage reductions of fines for all roads consistent with the TMDL.

LTSLT-22: Staff's response that additional, new forest roads meet existing BMP-type requirements does not acknowledge that such BMPs will not eliminate all fine sediment discharges from these new roads nor reduce fine sediments in any catchment consistent with the TMDL.

LTSLT-23: See League's November 10, 2010 reply to Regional Board responses. Potential fine sediment discharges from new forest roads need to be factored into the TMDL's allocations and margin of safety now. Once EPA completes its ongoing study, the TMDL can be adjusted to reflect that new information.

LTSLT-24 through -27: See League's November 10, 2010 reply to Regional Board responses.

LTSLT-28 through -32: See League's November 10, 2010 reply to Regional Board responses.

LTSLT-34: The lengthy compliance schedule adopted by the Regional Board is a change to the underlying deep water transparency standard that must be reviewed by EPA pursuant to Section 303(c) of the Clean Water Act. The Regional Board failed to distinguish the cases cited by the League in its comments. Whether or not some interim progress is made does not change the fact that the Regional Board's adoption of the TMDL effectively suspends the deep water transparency standard for 65-years. And BMPs and interim targets for some farms were required by the State of Florida in the *Miccosukee* case. *Miccosukee Tribe of Indians v. United States*, 1998 U.S. Dist. LEXIS 15838*44, 45 n. 8 (S.D. Fla. Sept. 11, 1998).

LTSLT-35: See League's November 10, 2010 reply to Regional Board responses.

LTSLT-36: See League's November 10, 2010 reply to Regional Board responses.

LTSLT-38: Staff does not say a rolling annual average would not work but simply admits that such loading framework would be more readily enforceable. The League believes that allowing the Regional Board to respond by enforcing daily violations where a municipality or other entity has not achieved TMDL loading reductions is required by the Act. Given the high stakes to the Lake at issue and the ineffectiveness of the Regional Board's efforts historically to address degradation to the Lake's transparency, a more enforceable TMDL that implements the Act's *daily* load requirement should be adopted.

A rolling annual average also would be consistent with EPA's recent TMDL Guidance. As EPA now emphasizes, "[n]umeric WQBELs in stormwater permits can clarify permit requirements and improve accountability and enforceability." TMDL Guidance, p. 2. "EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential) to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges

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Response

LTSLT(StBd)-17: The Lake Tahoe TMDL includes specific pollutant allocations for the major pollutant sources, including atmospheric deposition. A detailed atmospheric pollutant source inventory has not been conducted, thus the Lahontan Water Board does not have the ability to allocate needed load reductions from various sources within the atmospheric deposition pollutant source category.

LTSLT(StBd)-18: These comments are not new and the League's November 10, 2010 letter reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board's November 16, 2010 hearing that these comments had already been responded to in detail. Furthermore, the Basin Plan amendment explicitly prohibits any pollutant load increases associated with forest management activities, including the development of temporary forest roads.

LTSLT(StBd)-19: These comments are not new and the League's November 10, 2010 letter reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board's November 16, 2010 hearing that these concerns and the September 13, 2010 comments had already been responded to in detail (see previous responses LTSLT-22, 23, 24, 28, 29, 31, 34). Lahontan Water Board staff distinguished the one unpublished case cited by the League to support its argument that the compliance schedule results in a change to the deep water clarity objective in previous response LTSLT-34. The fact that some farms were required to meet an interim objective was not persuasive to the court because unlike the Tahoe TMDL, where the interim requirements will continue to improve water quality, the interim objectives required by the farmers in that case were not sufficient to stop the decline in the health of the Everglades. (1998 U.S. Dist LEXIS 15838* 44,45, f.n. 8 (S.D. Fla. Sept. 11, 1998). The objectives required in the Tahoe TMDL are designed to reverse the decline in deep water clarity within the first fifteen years of implementation.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

40 C.F.R. § 122.44(d)(1). And those mandated limitations must be consistent with any applicable TMDL: “the permitting authority shall ensure that . . . : (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.” 40 C.F.R. § 122.44(d)(1)(vii)(A). Hence, the permits have to be consistent with the waste load allocations – not some interim step which is not a waste load allocation and is not reviewed and approved by EPA pursuant to 40 C.F.R. § 130.7. The implementation plan calls for the Regional Board to issue NPDES permits that by definition will violate 40 C.F.R. § 122.44(d)(1) because they will not achieve water quality standards and will not control all pollutants causing or contributing to excursions above the deep water transparency standard.

Staff also claims that the regulation’s mandate that any effluent limitations in the relevant NPDES permits be consistent with a TMDL and waste load allocation is not the same as implementing the TMDL. The League and TASC do not discern any meaningful distinction in staff’s assertion. Both state and federal courts have had no difficulty in underscoring the clear mandate that any NPDES permit issued to point sources subject to a TMDL and its waste load allocations must be consistent with the terms of the TMDL and waste load allocation – barring any claim of authority to issue NPDES permits that only implement half a TMDL or only interim load reductions. “When a TMDL and specific wasteload allocations for point sources have been established, any NPDES permits issued to a point source must be consistent with the terms of the TMDL and WLA. *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (citing 40 C.F.R. § 130.2) (emphasis added). *See also City of Arcadia v. United States EPA*, 265 F. Supp. 2d 1142, 1145 (N.D. Cal. 2003); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1349 (N.D. Cal. 2000); *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095–1096 (“[o]nce a TMDL is developed, effluent limitations in NPDES permits must be consistent with the [waste load allocations] in the TMDL”); *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1404. As EPA’s Water Quality Standard Handbook states:

Waste load allocations establish the level of effluent quality necessary to protect water quality in the receiving water and to ensure attainment of water quality standards. Once allowable loadings have been developed through WLAs for specific pollution sources, limits are incorporated into NPDES permits. . . . The WLA and permit limit should be calculated to prevent water quality standards impairment at all times.

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A rolling annual average also would be consistent with EPA's recent TMDL Guidance. As EPA now emphasizes, "[n]umeric QBELs in stormwater permits can clarify permit requirements and improve accountability and enforceability." TMDL Guidance, p. 2. "EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential) to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges

Response

LTSLT(StBd)-20: A "rolling annual average" as described the League would not provide an accurate or consistent assessment of pollutant loading conditions. Such an approach would be subject to seasonal precipitation and inter-annual climatic variability and would not provide for meaningful progress assessments.

Although the daily load estimates for each pollutant are required by EPA, the average annual load remains the basis for developing storm water permits and determining compliance for the Lake Tahoe basin. The deep water transparency standard is based on average annual conditions and the most meaningful measure of Lake Tahoe's transparency is generated by averaging the Secchi depth data collected during a given year. The modeling tools used to predict load reduction opportunity effectiveness as well as the lake's response are all driven by annual average conditions. An emphasis on average annual fine sediment particle and nutrient loads also addresses the hydrologic variability driven by inter-annual variability in precipitation amounts and types. Average annual estimates also provide a more consistent regulatory metric to assess whether urban implementation partners are meeting established load reduction goals. Finally, by emphasizing annual average conditions rather than instantaneous concentrations, implementers will have the incentive to focus action on the areas of greatest pollutant loads to cost effectively achieve required annual reduction requirements.

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should contain numeric effluent limitations where feasible to do so.” *Id.*, p. 3. “EPA recommends that NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges.” *Id.* The Lake Tahoe implementation plan should incorporate a rolling annual average in order to achieve EPA’s prescribed goal of creating objective and accountable means for controlling storm water discharges, or as staff would paraphrase that goal, “magnif[y] possible enforcement penalties.” LTSLT-38.

And even where WQBELs are expressed as BMPs, EPA provides that “the permit should contain objective and measurable elements (*e.g.*, schedule for BMP installation or level of BMP performance). “The objective and measurable elements should be included in permits as enforceable provisions. Permitting authorities should consider including numeric benchmarks for BMPs and associated monitoring protocols or specific protocols for estimating BMP effectiveness in stormwater permits.” TMDL Guidance, p. 3. Likewise, “[w]here WQBELs are expressed as BMPs, the permit must require adequate monitoring to determine if the BMPs are performing as necessary. When developing monitoring requirements, the NPDES authority should consider the variable nature of stormwater as well the availability of reliable and applicable field data describing the treatment efficiencies of the BMPs required and supporting modeling analysis.” *Id.*, p. 4. The implementation plan should include specific provisions describing how the dischargers will directly monitor BMPs to verify their effectiveness at reducing fine sediments and other pollutants.

LTSLT-43 through -46: To date, the Regional Board has failed to require monitoring of the Basin Plan’s existing numeric storm water effluent limitations by any municipality or Caltrans. The Regional Board now extends this *de facto* exemption to the near shore standards to its implementation of the TMDL for the deep water transparency standard, providing for no site specific BMP monitoring to determine if the pollution credits the Board intends to hand out reflect any fine sediment and other pollution reductions actually being achieved by installed BMPs. Likewise, baseline calculations by municipalities without corroborating monitoring would appear to be an exercise in guessing, not calculating.

LTSLT-53: Staff failed to address the League’s comment that “the FED fails to address the significant environmental impact to the Lake’s water quality of institutionalizing violations of the deep water transparency standard for a period of 65-years” By allowing sediment and other pollution discharges for the next 65 years that will fail to comply with Lake Tahoe’s deep water transparency standard, the proposed TMDL and implementation plan authorize numerous pollution sources around the Lake to discharge pollutants that cause or contribute to that violation. Where a local or regional policy of general applicability, such as an ordinance or in this case a water quality objective, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy in itself indicates a potentially significant impact on the environment. *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903. Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR or FED. 14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans). A Project’s inconsistencies with local plans and policies constitute

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LTSLT(StBd)-21: These comments are not new and the League’s November 10, 2010 letter reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board’s November 16, 2010 hearing that these concerns and the September 13, 2010 comments had already been responded to in detail (see previous response LTSLT-43). Furthermore, the Lake Tahoe TMDL Report and Basin Plan Amendment describe proposed monitoring plans for each pollutant source, including urban runoff. The upcoming Municipal NPDES Permit will include specific monitoring requirements for permitted jurisdictions.

LTSLT(StBd)-22: These comments are not new and the League’s November 10, 2010 letter reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board’s November 16, 2010 hearing that these concerns and the September 13, 2010 comments had already been responded to in detail in previous responses LTSLT-39, LTSLT-44, LTSLT-49, LTSLT-54, and LTSLT-55.

The Lahontan Water Board has not established a “*de facto* exemption” for water quality monitoring. Lahontan Water Board staff plan to include detailed monitoring requirements in upcoming NPDES Permit updates to verify pollutant load reductions associated with the Lake Clarity Crediting Program and calibrate and validate load estimation tools.

LTSLT(StBd)-23: These comments are not new and the League’s November 10, 2010 letter reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board’s November 16, 2010 hearing that these concerns and the September 13, 2010 comments had already been responded to in detail (also see previous response LTSLT-50). The fact that the Lake is not meeting the deep water transparency standard is the reason that the TMDL is being developed. The baseline for the purposes of CEQA is the current existing conditions in the Lake, not the applicable water quality objective. To consider non-compliance with the transparency standard over the period of the TMDL implementation, during which time the deep water transparency is set to improve, to be a significant impact is inconsistent with CEQA. Impacts are measured from a comparison between existing, on-the-ground conditions and the impacts of the action.

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significant impacts under CEQA. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177.

LTSLT-58 through -60: By limiting its review to three alternatives, all of which suspend compliance with a final TMDL and the deep water transparency standard for 65 years, the Board did not consider a reasonable range of alternatives consistent with CEQA. Staff does not respond to the League's comments that any schedules to comply should be addressed at the permitting stage for each discharger. Different dischargers will have different capabilities and different levels of activity in the past that must be factored in to determining whether a schedule for them to comply with the TMDL should be allowed and for how long. Thus, for example, it may be that Caltrans could implement all of its necessary measures (many of which should already have been installed) in a much shorter period, perhaps 10 years or less. Each municipality's circumstances also would differ. The TMDL should not prejudice that every discharger, regardless of their past recalcitrance or access to adequate resources, should plan on 65 years to fully implement actions necessary to comply with the deep water standard. And it is the Board's responsibility, not the League's, to analyze a reasonable range of alternatives rather than the essentially one alternative presented by the FED.

LTSLT-61: Staff does not address the League's comments about the growth-inducing impact of a TMDL that depends in part upon future growth to leverage additional water quality controls. TMDL Report, p. 11-2. Staff's response discusses how they claim the TMDL program addresses future development but it does not refute that the TMDL would act as an inducement by TRPA and other local agencies to approve new development to fund pollution control measures.

Lastly, staff does not comment on the League's reference to the recent Ninth Circuit decision in *Northwest Environmental Defense Center v. Brown*, __ F.3d __, 2010 U.S. App. LEXIS 17129 (9th Cir., Aug. 17, 2010). See League Comment, p. 12 n. 5. EPA's TMDL Guidance compliments that citation by encouraging state's to designate pollution sources contributing to violations of water quality standards addressed by a TMDL. "Since 2002, EPA has become concerned that NPDES authorities have generally not adequately considered exercising these authorities to designate for NPDES permitting stormwater discharges that are currently not required to obtain permit coverage but that are significant enough to be identified in the load allocation component of a TMDL. Accordingly, EPA encourages permitting authorities to consider designation of stormwater sources in situations where coverage under NPDES permits would afford a more effective mechanism to reduce pollutants in stormwater discharges than available nonpoint source control methods." TMDL Guidance, p. 6. Consistent with that Guidance, the State Board should designate discharges from all forest roads in the Tahoe Basin for regulation under the NPDES program and assign WLAs to those sources.

Thank you for this opportunity to provide further comments on the proposed Lake Tahoe TMDL. The League and TASC respectfully request that the State Board not let what should be

Comment

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LTSLT-58 through -60: By limiting its review to three alternatives, all of which suspend compliance with a final TMDL and the deep water transparency standard for 65 years, the Board did not consider a reasonable range of alternatives consistent with CEQA. Staff does not respond to the League's comments that any schedules to comply should be addressed at the permitting stage for each discharger. Different dischargers will have different capabilities and different levels of activity in the past that must be factored in to determining whether a schedule for them to comply with the TMDL should be allowed and for how long. Thus, for example, it may be that Caltrans could implement all of its necessary measures (many of which should already have been installed) in a much shorter period, perhaps 10 years or less. Each municipality's circumstances also would differ. The TMDL should not prejudge that every discharger, regardless of their past recalcitrance or access to adequate resources, should plan on 65 years to fully implement actions necessary to comply with the deep water standard. And it is the Board's responsibility, not the League's, to analyze a reasonable range of alternatives rather than the essentially one alternative presented by the FED.

LTSLT-61: Staff does not address the League's comments about the growth-inducing impact of a TMDL that depends in part upon future growth to leverage additional water quality controls. TMDL Report, p. 11-2. Staff's response discusses how they claim the TMDL program addresses future development but it does not refute that the TMDL would act as an inducement by TRPA and other local agencies to approve new development to fund pollution control measures.

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Thank you for this opportunity to provide further comments on the proposed Lake Tahoe TMDL. The League and TASC respectfully request that the State Board not let what should be

Response

LTSLT(StBd)-24: These comments are not new and the League's November 10, 2010 reply reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Lahontan Board's November 16, 2010 hearing that these were not new concerns and the September 13, 2010 comments had already been responded to in detail, specifically in previous response LTSLT-59. As stated in response LTSLT-59, no information exists, nor was submitted by the League, to develop an implementation plan that achieves the load reductions on a timeframe faster than the chosen Alternative. The League did not submit any information to support the League's assertion that different dischargers may have differing capabilities. Consequently, establishing different implementation periods for different dischargers could be considered arbitrary and capricious. The TMDL process does not prejudge each discharger's ability to comply, thus the implementation schedule is based on what has been determined to be technically feasible. In addition, because the State Water Board's Compliance Schedule Policy requires that compliance schedules in permits cannot exceed the maximum length for implementation set forth in TMDL implementation plans, it would not be permissible to require immediate implementation in the TMDL and then set forth a more realistic compliance schedule in the permit. If, however, it can be shown that compliance could be achieved in less time than the implementation plan suggests, the Lahontan Water Board could establish permits with a shorter compliance schedule.

LTSLT(StBd)-25: The Lake Tahoe TMDL implementation plan does not "*depend in part upon future growth to leverage additional water quality controls*". The referenced page in the TMDL Report (page 11-2) does not have any text that would support the League's assertion that the TMDL implementation plan relies on future development in any way. The League's statement that TRPA will use the TMDL "*as an inducement...to approve new development*" is unsubstantiated.

LTSLT(StBd)-26: These comments are not new and the League's November 10, 2010 reply reiterated these same points that the League raised in its September 13, 2010 comment letter. Lahontan Water Board staff responded at the Board's November 16, 2010 hearing that these concerns and the September 13, 2010 comments had already been responded to in detail. Furthermore, the Basin Plan Amendment includes language acknowledging the Ninth Circuit Court of Appeals August 17, 2010 decision. The TMDL assigned pollutant load allocations to the basin-wide Forest source category, which includes all forest roads and the Water Board's current regulatory authority is sufficient to ensure the loads are reduced according to the TMDL load allocation schedule. If, in conformance with the referenced Ninth Circuit Court decision, the Water Board reclassifies a portion of the forest load allocation as a waste load allocation, such a regulatory shift would not change the Implementation approach.

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an opportunity to cure Lake Tahoe's pollution problems become an excuse to prolong that long-standing violation for several generations.

Sincerely,

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Janet Hashimoto, EPA Region 9
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Comment

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Response