CALIFORNIA COASTKEEPER ALLIANCE

March 31, 2016

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comments on the Draft TMDL Industrial General Permit Requirements

Dear Chair Marcus and Board Members:

In order to legally incorporate TMDL waste load allocations (WLAs) into the Industrial General Permit (IGP or Permit), any BMP-based water quality based effluent limitations (WQBELs) must be sufficient to meet WLAs as demonstrated by discharger monitoring.

California Coastkeeper Alliance (CCKA) is a network of twelve Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems. We appreciate the opportunity to provide comments to the Regional Water Board on the proposed WLAs from various TMDLs for incorporation into the IGP. This letter is intended to outline our major concerns with regional boards' proposed IGP TMDL incorporation. We reserve the right to submit additional comments when the State Board takes up the matter.

The Clean Water Act's TMDL program represents the Act's "safety net."[1] It is the bedrock component of the Clean Water Act, the backstop to ensure that the goals of the Act can be achieved when initial efforts fail. CCKA supports the importation of the numeric WLAs from the TMDL directly into the Permit. However the proposed incorporation of WLAs as Numeric Action Levels (NALs) or TMDL Action Levels (TALs) rather than WQBELs is inconsistent with the requirements of the Clean Water Act, and creates an illegal compliance schedule. Further, because the WLA is incorporated into an adaptive management process rather than as an effluent limitation, the submission fails to meet the data and analysis requirements set out in the Permit.

While the current proposals to develop a trigger for an adaptive management process leading to additional BMPs might ultimately play some useful role in implementing the TMDLs, it cannot be the exclusive approach taken, as is now the case. NALs and TALs are not lawful substitutes for WQBELs. For these reasons, CCKA requests that staff revisit the proposed WLA incorporation, and apply the straightforward process contemplated by the TMDL and the Clean Water Act to submit numeric effluent limitations consistent with the concentration based WLA in the applicable TMDL.

I. TMDLS SHOULD BE INCORPORATED INTO THE PERMIT AS EFFLUENT LIMITATIONS—NUMERIC ACTION LIMITS OR TMDL ACTION LIMITS ARE NOT APPROPRIATE ON THEIR OWN.

The use of NALs or TALs as the exclusive method of WLA incorporation is unlawful. Permitting agencies must ensure that NDPES permits authorizing storm water discharges associated with industrial activities include both 1) technology based protections *and* 2) water quality based effluent protections in the form of WQBELs. As the

[1] Houck, Oliver A., The Clean Water Act TMDL Program 49 (Envtl. Law Inst. 1999).

State Board has recognized, the inclusion of WQBELs consistent with WLAs is non-discretionary.[2]

Regional Boards' current proposals relying on NALs or TALs represent neither a technology based nor a water quality based effluent limitation. TALs have the same permitting status as NALs.[3] The State Water Board has held that NALs are neither technology based nor water quality based effluent limitations.[4] Moreover, a NAL or TAL is used as a trigger for an adaptive management and monitoring program leading to development of BMPs, and only after a minimum of 10 months past incorporation must a discharger demonstrate that the facility's Stormwater Pollution Prevention Plan (SWPPP) is revised to include BMPs to prevent an exceedance of the TAL.

NALs or TALs create an illegal compliance schedule for metals and toxics, and may create schedules conflicting with existing Basin Plans for other pollutants, necessitating Basin Plan Amendments at a minimum. Since the WLAs are incorporated as triggers for an adaptive management process eventually requiring compliance with the numeric limits indirectly, rather than as a simple effluent limitation, the proposed incorporation creates impermissible compliance schedules, and also fails to meet the data and analysis requirements set out in the General Permit.

While the use of NALs or TALs might be an appropriate adaptive management measure, they can never be the sole, or even primary, approach to incorporating WLAs for TMDL constituents into the Permit—WQBELs must be an element of the WLAs. We urge the Regional and State Water Boards to incorporate the proposed WLAs, currently expressed as NALs or TALs, into the Permit as WQBELs—as the Clean Water Act requires. This direct approach should be coupled with the requirement that permittees implement BMPs necessary to achieve the numeric effluent limitations.

II. IF BMP-BASED EFFLUENT LIMITATIONS ARE INCORPORATED INTO THE PERMIT, THE STATE WATER BOARD MUST REQUIRE THE DISCHARGER TO IMPLEMENT BMPS SUFFICIENT TO ACHIEVE THE WASTE LOAD ALLOCATION THROUGH DEMONSTRATED MONITORING.

The Clean Water Act requires the permitting agency to adopt monitoring requirements in NPDES permits that will produce the information necessary to make efficient compliance determinations.[5] As the Permit dictates, the Regional Water Boards will submit to the State Water Board the following information for each of the TMDLs listed in Attachment E:

- Proposed TMDL-specific permit requirements, including any applicable effluent limitations, implementation timelines, additional monitoring requirements, reporting requirements, an explanation of how an exceedance of an effluent limitation or a violation of the TMDL will be determined, and required deliverables consistent with the TMDL(s);
- An explanation of how the proposed TMDL-specific permit requirements, timelines, and deliverables are consistent with the assumptions and requirements of applicable waste load allocation(s) to implement the TMDL(s);
- Where a BMP-based approach is proposed, an explanation of how the proposed BMPs will be sufficient to implement applicable waste load allocations; and
- Where concentration-based monitoring is required, an explanation of how the required monitoring, reporting and calculation methodology for an exceedance of an effluent limitation or a violation of the TMDL(s) will be sufficient to demonstrate compliance with the TMDL(s).[6]

[2] General Permit Fact Sheet, pp. 23-26.
[3] Regional Board Notice, footnote 10, p.8.
[4] CAS000001 at 11.
[5] *Sierra Club*, 813 F.2d at 1491-92; *County of Los Angeles*, 725 F.3d at 1208-1209 (discussing the necessity and purpose of self-monitoring in context of general NPDES permits).
[6] Fact Sheet at p. 25.

Clean Water Act implementing regulations set forth the monitoring requirements that must be in NPDES permits.[7] Among these requirements is the express mandate that NPDES permits include provisions "to assure compliance with permit limitations" through the monitoring of the amount of pollutants discharged, the volume of effluent discharged from each outfall, and "other measurements as appropriate."[8] Thus, the State Water Board must adopt NPDES permits that include requirements to collect the data and information necessary to effectively determine compliance with the terms of the permit—including compliance with a WLA based effluent limitation.[9]

If Regional Boards are to incorporate BMP based WQBELs to represent TMDL WLAs, then the Region and State boards should require the discharger to implement BMPs sufficient to meet WLAs as demonstrated by monitoring.

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The TMDL program is the essential means to achieving the Clean Water Act's goal of restoring waters so that they are safe for swimming, fishing, drinking, and other "beneficial uses" that citizens enjoy, or used to be able to enjoy. We look forward to working with you to ensure clean, abundant water for California.

Sincerely,

Sean Bothwell
Policy Director
California Coastkeeper Alliance

[7] *See* 40 C.F.R. §§ 122.44(i), 122.48.
[8] 40 C.F.R. § 122.44(a)(1)(i)-(iii).
[9] *See County of Los Angeles*, 725 F.3d at 1207.