

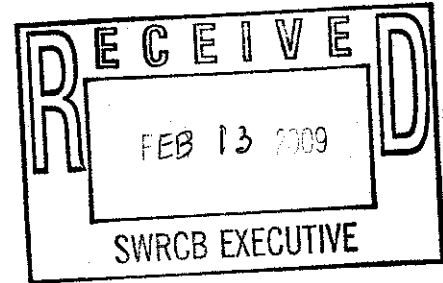


## City of Hidden Hills

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February 13, 2009

Ms. Jeanine Townsend, Clerk to the Board  
California State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814



**Re: Comment Letter – Malibu Creek Watershed Trash TMDL  
City of Hidden Hills, California**

Dear Ms. Townsend:

The City of Hidden Hills (“City”) appreciates this opportunity to comment on the Draft “Trash Total Maximum Daily Load for the Malibu Creek Watershed” (“Draft TMDL”). The City understands that many of the other stakeholders located in the watershed may also be submitting comments under separate cover. As discussed below, the City has serious concerns regarding the legality and viability of carrying out this TMDL.

Specifically, the City has the following technical concerns regarding this TMDL:

### **A. Speed of Notice, Hearing and Adoption**

The first technical issue is the speed and time to respond to the significant requirements of this TMDL. As shown below, this was an expedited procedural process:

- Notice of CEQA Scoping Meeting for establishing a TMDL for Trash in the Malibu Creek watershed – Posted on November 7, 2007
- CEQA meeting – December 13, 2007
- Notice of Filing and Hearing – February 14, 2008
- Posting of Documents – February 14, 2008
- Comment on Draft BPA, Order, and Supporting Staff Report – April 1, 2008
- Board Hearing and Adoption – May 1, 2008

There were less than six (6) 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 of resources, the Regional Board should have

prolonged adoption in order to more adequately involve the public, stakeholders, and Non-Governmental Organizations (NGOs).

## B. Designation as a Point and Non-Point Source

The designation of Municipal Separate Storm Sewer Systems (MS4s) as both Point Source dischargers and Non-Point Sources (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 NPDES programs.

Generally, a TMDL must categorize the sources of impairment between Point Sources, which receives Waste Load Allocations, and Non-Point Sources, which receive Load Allocations.<sup>1</sup> Point Sources are defined as, "...discrete conveyances, such as a discharge pipe." (Total Maximum Daily Loads (TMDLs) Questions and Answers, SWRCB) Nonpoint sources "release pollutants from landscape scale features and include such features as parking lot runoff, agricultural field runoff, and dust and air pollution from human activities. TMDLs must allocate loads for both point and nonpoint sources." *Id.* (*emphasis added*).

In this TMDL, the Regional Board staff provided no clear or legal justification for identifying MS4 permittees as both Point Sources, with specified requirements, and as Non-Point Sources (NPS), with additional requirements. The only statement provided was that, for some areas, MS4 permittees are in the vicinity or are adjacent to an impaired waterbody, which may have the potential to release trash via wind action.<sup>2</sup> No clear definition or extent was provided on the meaning of "adjacent" or "vicinity," or how a MS4, as a Point Source discharger, could also be a NPS. As even stated by the Regional Board Staff, "WLAs will be implemented through permit requirements." For Non-Point sources, the Staff states,

"the strategy for attaining water quality standards focuses on assigning Load Allocations (LAs) to land owners, **municipalities and agencies having jurisdictions over the waterbodies of concern and the vicinity of the listed watersheds.** ...The

<sup>1</sup> 40 CFR 130.2 (g) "Load allocation (LA). The portion of a receiving water's loading capacity that is *attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources*. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished." (*emphasis added*).

<sup>2</sup> The Staff Report states that, "[r]esponsible jurisdictions shall monitor the trash quantity deposited in the vicinities of the waterbodies of concern as well as that on the waterbody to comply with Baseline Load Allocation." Staff Report, Section VI, B, page 23. Further, the report states, that, "[t]he area adjacent to the waterbody, [is] defined as nonpoint source...." Staff Report, Section VI, B, page 23

LAs will be implemented through **regulatory mechanisms that implement the State Board's 2004 Nonpoint Source Policy such as conditional waivers, waste discharge requirements, or prohibitions.**<sup>3</sup> (*emphasis added*)

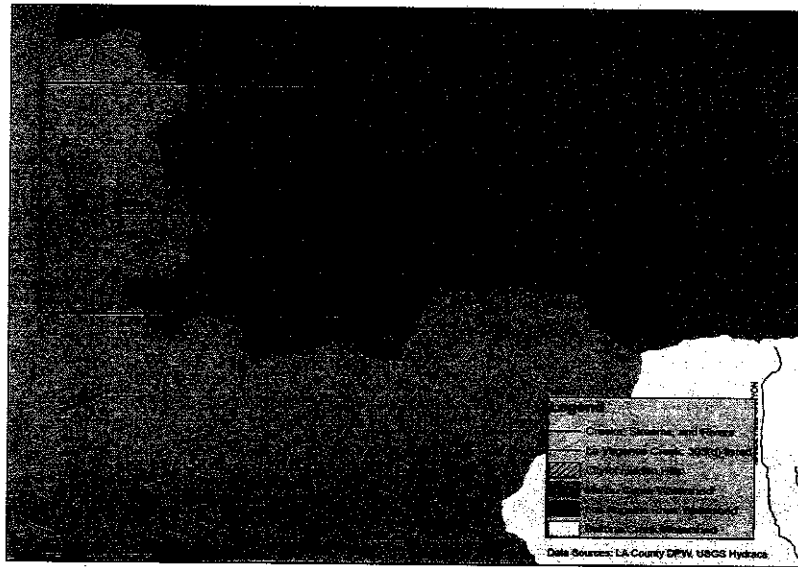
It is clear that an MS4 permittee clearly falls within the point source category. According to the draft TMDL, as a point source discharger, the City can either implement full-capture or partial capture programs. Because the City is primarily located in the Los Angeles River Watershed, it is currently complying with that watershed's Trash TMDL. The City has already implemented partial capture and enhanced non-structural Best Management Practices. The City has also started the necessary planning and funding of installation of full-capture systems on portions of its systems to further reduce its level of trash discharge.<sup>4</sup>

It is less than clear how the City can, at the same time as being an identified point source, also be an NPS. The City's concern is that, as an NPS, it will become responsible for activities, enforcement, and actions outside its legally established jurisdictional boundaries. For example, as a NPS, the City would be required to establish a Trash Monitoring and Reporting Program (TMRP) with a Minimum Frequency of Assessment and Collection (MFAC) program not only within its borders but also at monitoring locations far outside of its jurisdiction, i.e., to monitor trash in the closest impaired waterbody. For the City of Hidden Hills, the closest listed and "impaired waterbody" is Las Virgenes Creek, which is approximately 1.3 miles away. As shown on the GIS map below, there is considerable distance between the border of the City and the listed/impaired waterbody.

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<sup>3</sup> Staff Report, Section VI, page 19-20.

<sup>4</sup> The City will work with the Los Angeles County DPW in installing the devices, with the County to perform all future cleaning and maintenance. The City is currently waiting for County clarification on the next processes necessary to achieve this goal.



*Distance from City of Hidden Hills to Las Virgenes Creek*

Based on the proposed Basin Plan Amendment, Implementation section for Nonpoint Sources, the City through a MFAC/BMP program would be required to either provide staff or hire contractors to travel outside of the City's borders to conduct rapid trash assessments or collection events at specified intervals along waterbodies including Malibu Lagoon, Malibu Creek, Malibu lake, Medea Creek, Lindero Creek, Lake Lindero and Las Virgenes Creek. Specifically, the Basin Plan Amendment, Implementation, Non-Point Sources, requires that, "[r]esponsible jurisdictions that are responsible for both point and non-point sources will be deemed in compliance with both the WLAs and Las if an MFAC/BMP program, approved by the Executive Office is implemented."

Further, the BPA currently requires Point Sources to also, "include collection and disposal of all trash found in the water and on the shoreline. Responsible jurisdictions shall implement an initial suite of BMPs based on current trash management practices in land areas that are found to be sources of trash to Malibu Creek Watershed." For the City of Hidden Hills, located in the upper Las Virgenes Creek sub-watershed, it, as an NPS, will be required to develop and implement a TMRP and MFAC program to address the following areas:

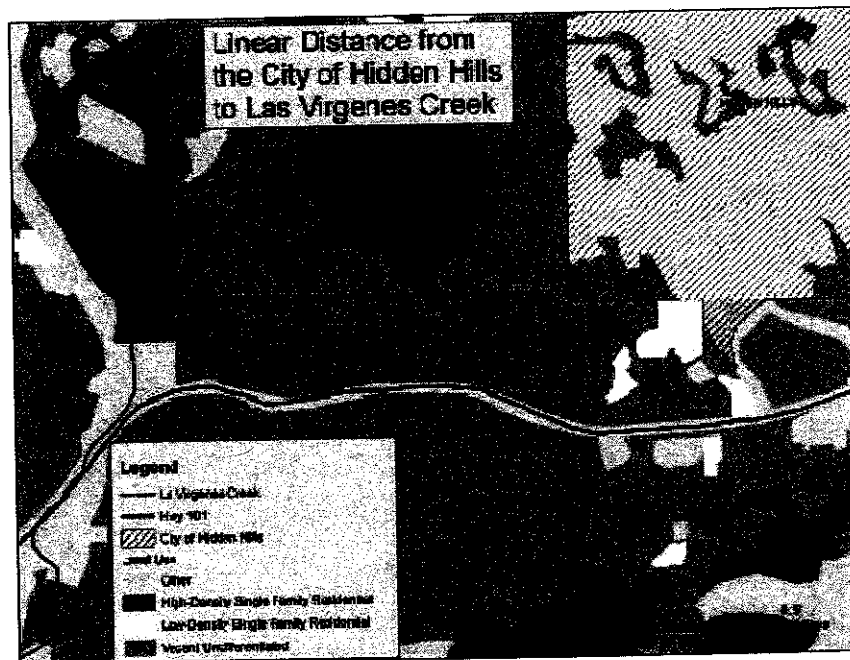
"Las Virgenes Creek

- 1. Within the State Parks northerly to the intersection with Mulholland Highway:** once per month, and within 72 hours after critical conditions.

2. Once per week for the waterbody, shorelines and the adjacent areas between Mulholland Highway and Juan Bautista De Anza Park at Los Hills Road in the City of Calabasas, and within 72 hours after critical conditions.
3. Twice per week for the waterbody, shorelines and the adjacent areas for the rest of City of Calabasas.
4. Once per month for section in Los Angeles County along Ventura Freeway and within 72 hours after critical conditions.
5. Within Ventura County, once every two months for the waterbody, shorelines and the adjacent areas, and within 72 hours after critical conditions.”

*From Basin Plan Amendment, Implementation, Nonpoint Source, 1) Conditional Waiver. (emphasis added).*

If the City of Hidden Hills is held to these extra-border activities, it is likely that the MFAC collections will include other non-point sources originating outside the City. See the map below. The City would therefore be engaging in activity and potentially attempting to enforce trash controls outside of its jurisdictional boundaries – a prohibited act under local, state and, federal laws.



*Land use activity between City of Hidden Hills and Las Virgenes Creek*

In sum, the City, 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, not identified Point Source discharges.

Essentially the Board here has done away with any distinction of Point and Non-Point distinctions, at least as related to trash. With this change, it is highly likely that the City will be forced to operate outside of its borders to reach and maintain compliance with the TMDL. Although the City is responsible for Point Source responsibilities, it should not be extended to a NPS category. Further, there, the City would be responsible for actions, activities, and land areas where it is unable to prevent or minimize the discharge of trash. It is only within the City's borders that it can do this.

In addition, the City has the following legal concerns regarding the adoption of this TMDL:

**C. The Draft TMDL is Based on a Court Invalidated Analysis and is Not in Accordance with State Reasonableness Requirements**

The City does not believe the Draft TMDL complies with state reasonableness requirements. Pursuant to section 13000 of the California Porter-Cologne Water Quality Control Act, State and Regional Board regulations must be "reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Water Code § 13000.

Any regulations relating to discharges must be based on water quality objectives that are "reasonably required for that purpose." Water Code § 13263. Moreover, all water quality objectives adopted by the State and Regional Boards must be reasonably achievable and take into account a variety of factors including, but not limited to, those factors enumerated in Water Code section 13241. The Draft TMDL, as well as the Regional Board's findings in support thereof, do not meet these requirements.

The Draft TMDL is entirely based on the presumptions and findings contained in the recently invalidated Basin Plan. In *Cities of Arcadia et al. v. State Water Resources Control Board*, Orange County Superior Court Case No. 06CC02974, the court held that the Los Angeles Regional Water Quality Control Board ("Regional Board") failed to conduct a proper analysis when adopting and reviewing its standards and objectives for the Basin Plan. As an example, the court ruled that the Regional Board's designation of "potential" rather than "probable" beneficial uses was improper under Water Code section 13241. Pursuant to the court's ruling, the Regional Board is currently revising its

Basin Plan to properly consider all factors set forth in Water Code sections 13000 and 13241.<sup>5</sup>

The Draft TMDL was prepared prior to this ruling and has not been modified to address the deficiencies pointed out by the court's order. To the contrary, the Draft TMDL incorporates and relies on the Basin Plan's invalidated beneficial uses as a justification for its numeric target of zero. (*See* Regional Board Staff Report, p. 17 ["Regional Board staff has not found information to justify any value other than zero that would fully support the designated beneficial uses."].) This is improper.

The ongoing Basin Plan review may result in significant modifications to those beneficial uses. The State Board should therefore not rule on this TMDL until the Regional Board has had sufficient time to conduct its review and modify the Draft TMDL accordingly. To do otherwise would force the regulated agencies to expend precious public resources in order to meet erroneous conclusions.

In addition to the Basin Plan deficiencies outlined above, the City believes that the Draft TMDL's reliance on numeric limits violates the reasonableness requirements set forth in Water Code section 13000. As the U.S. EPA notes, because of the high variability present in the frequency and duration of storm events, numeric limits for municipal storm water discharges should be employed "only in rare cases." *See* EPA Memorandum, Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs (November 22, 2002). The Regional Board's decision to adopt a numeric limit of zero trash does not seem defensible in light of the extremely large geographic area and population encompassed by this proposed regulation. The City believes that a more reasonable and appropriate approach is one that instead utilizes an iterative, BMPs technique intended to produce concentrations in the receiving water to the Maximum Extent Practicable ("MEP").

#### **D. The Scientific Methodology Employed is Vague and Incomplete**

All TMDLs must be based on sound science and must be established in accordance with state and federal regulations, which provide for informed decision making and opportunities for meaningful public input. 40 C.F.R. 130.7(c). Numeric water quality targets for a TMDL, if deemed necessary, must be identified, and an adequate basis for those targets as an interpretation of water quality standards must be specifically documented in the submittal. 40 C.F.R. 130.7(c)(1).

<sup>5</sup> *See* Notice of Triennial Review. Regional Water Quality Control Board, Los Angeles Region, available at [http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/basin\\_plan/announcements/Triennial%20letter.pdf](http://www.waterboards.ca.gov/losangeles/water_issues/programs/basin_plan/announcements/Triennial%20letter.pdf) (last visited January 22, 2009.)

The data supporting the Draft TMDL is built upon a shaky scientific foundation. When rushing to adopt this TMDL, the Regional Board failed to properly support key assumptions regarding the characteristics of the watershed. For example, the Draft TMDL report characterizes Medea Creek Reach 2 and Las Virgenes Creek as having REC-1 uses, even though the report acknowledges that access to such waterways is prohibited. Moreover, most of the TMDL and baseline trash load estimates are based on estimates taken from watershed studies that exhibit significantly different flow patterns and population density. The Regional Board's reasoning for adopting these studies in the Malibu Creek Watershed is based on the hope that future studies conducted by the permittees will support those extrapolations. This is not a proper way to establish scientifically justified effluent limitations.

In addition to these deficiencies, the conclusions and data contained in the Draft TMDL were not properly subjected to peer review. By not subjecting the Draft TMDL to scientific peer review, the State and Regional Board fail to comply with Health and Safety Code section 57004.

Health and Safety Code section 57004(d) states, in pertinent part:

"No board, department, or office within the agency shall take any action to adopt the final version of a rule unless all of the following conditions are met:

- (1) The board, department, or office submits the scientific portions of the proposed rule, along with a statement of the scientific findings, conclusions, and assumptions on which the scientific portions of the proposed rule are based and the supporting scientific data, studies, and other appropriate materials, to the external scientific peer review entity for its evaluation.
- (2) The external scientific peer review entity, within the timeframe agreed upon by the board, department, or office and the external scientific peer review entity, prepares a written report that contains an evaluation of the scientific basis of the proposed rule. If the external scientific peer review entity finds that the board, department, or office has failed to demonstrate that the scientific portion of the proposed rule is based upon sound scientific knowledge, methods, and practices, the report shall state that finding, and the reasons explaining the finding, within the agreed-upon timeframe. The board, department, or office may accept the finding of the external scientific peer review entity, in whole, or in part, and may revise the scientific portions of the proposed rule accordingly. If the board, department, or office disagrees with any aspect of the finding of the external scientific peer review entity, it shall explain, and include as part of the rulemaking



record, its basis for arriving at such a determination in the adoption of the final rule, including the reasons why it has determined that the scientific portions of the proposed rule are based on sound scientific knowledge, methods, and practices. . . .”

The term “rule” is defined in Health and Safety Code section 57004(a)(1) as either:

“(A) A regulation, as defined in Section 11342.600 of the Government Code.

(B) A policy adopted by the State Water Resources Control Board pursuant to the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code) that has the effect of a regulation and that is adopted in order to implement or make effective a statute.”

Health and Safety Code section 57004(2) defines the terms “scientific basis” and “scientific portions” as:

“[T]hose foundations of a rule that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions establishing a regulatory level, standard, or other requirement for the protection of public health or the environment.”

There is nothing in the Draft TMDL, or related documents, which indicates that the Regional Board complied with Health and Safety Code section 57004 in drafting or adopting the Draft TMDL. There is similarly nothing to indicate that the Regional Board conducted any scientific peer review of the Draft TMDL.<sup>6</sup> The State Board should initiate a peer review process prior to final adoption of the TMDL.

#### **E. Compliance Within the Proposed Time Frame Would be Unrealistic**

The Draft TMDL imposes stringent time limits for the coordination, funding, submission, and realization of a TMDL Implementation Plan. According to the Draft TMDL, monitoring plans must be in place within six months and the parties have eight years to achieve 100% reduction of trash from the Baseline WLA. Given the size of the project, the number of agencies involved, the current fiscal realities of the agencies affected, and the lack of solid data to support the reasonableness of the TMDL goals, such a timeframe is highly unrealistic.

<sup>6</sup> The requirement for scientific peer review of TMDLs is not limited to state law. *See also* 40 C.F.R. 130.7(c)(1)(ii); U.S. Environmental Protection Agency Region IX (2000) Guidance for Developing TMDLs in California, p. 15.

Furthermore, according to the Draft TMDL, the permittees are expected to undertake massive infrastructure projects to meet the a 60% reduction of trash from the Baseline WLA, but the entire plan itself is subject to revision at year five. Ramping up for this deadline will require the permittees to invest significant portions of their budgets over the next five years towards TMDL compliance. This is a tremendous investment; especially considering that the entire Draft TMDL is subject to modification in year five. Such prodigious investments will come at the expense of other vital programs and services such as police, fire protection, and education.

Furthermore, the permittees have no assurances from the Regional Board that these sacrifices will result in real world progress towards reducing trash runoff. If the State and Regional Boards truly wants effective results, they must provide extended time frames that recognize the data gaps and require investments reasonable to and in accordance with the information at hand. The final target date should be extended from eight years to at least twelve years.

#### **F. The Draft TMDL Amounts to an Unfunded Mandate**

By imposing this new regulatory requirement, in particular the zero numeric limit, the State and Regional Boards are attempting to impose new programs and/or require a higher level of service of existing programs than are specifically mandated under the Clean Water Act or any federal regulations thereunder. The imposition of unfunded programs and mandates in the Draft TMDL is inconsistent with the provisions of the California Constitution, specifically Article XIII B, Section 6, which requires a state agency which mandates a new program or a higher level of service to provide a "subvention" of funds to reimburse local governments for the costs of the program or increased level of service.

The Draft TMDL does not fully consider the fiscal impact on the City, especially considering the fiscal difficulties imposed on the City by the current economic climate. The Draft TMDL will require a substantial capital investment that individual agencies will have to fund despite the fact that the state will provide no funding mechanism, nor any assistance, financial or otherwise, to the City. According to the Regional Board's estimates, the Draft TMDL will cost the City and other regulated entities upwards of \$35,280,000 to install and maintain over the eight-year implementation period. (See Report, p. 56, Table 15.)<sup>7</sup> Because of the limitations imposed by Proposition 218, the City and other regulated agencies must largely rely on their dwindling general funds to pay for these projects. See *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal. App. 4th 1351.

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<sup>7</sup> This estimate does not include maintenance and capital costs beyond the eight-year period.

Article XIII B, Section 6 of the Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service . . ." State agencies are not free to shift state costs to local agencies without providing funding, even if those costs were imposed upon the state by the federal government. If the state chooses to impose costs upon a local agency as a means of implementing a federal program, then those costs should be reimbursed by the state agency. *See Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-1594. If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. *See Lucia Mar Unified School District v. Honig* (1988) 44 Cal. 3d 830, 833-834.

The Draft TMDL contains new programs and mandates that go beyond the specific requirements of either the Clean Water Act or the EPA's regulations implementing the Clean Water Act. This includes, but is not limited to, the development of massive public works projects such as full capture devices that will alter the normal flow patterns of the Malibu Creek Watershed. It also mandates rigorous collection and testing protocols and regulations of unimpaired tributary waters. If the state wishes to impose this program, it needs to provide a means to pay for its implementation.

Furthermore, the Draft TMDL contains numerous data collection requirements. These activities go beyond the requirements of EPA's regulations implementing the Clean Water Act. Any information collection demands mandated by federal regulations must be submitted for approval to the Office of Management and Budget under the provisions of the Paperwork Reduction Act. 44 U.S.C. §§3501 *et seq.*

Implementing the programs outlined in the Draft TMDL would require the permittees to collectively hire dozens of additional employees to implement these mandates. The City does not believe that these additional burdens were contemplated by EPA, nor are they consistent with the requirements of the federal Paperwork Reduction Act. *See* 44 U.S.C. §3507.<sup>8</sup> Accordingly, these requirements are invalid for failure to comply with the Paperwork Reduction Act.

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<sup>8</sup> Section 3507 of title 44 of the United States Code mandates that a federal "agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information. . . (1) the agency has. . . (D) published a notice in the Federal Register . . . (ii) setting forth. . . (V) an estimate of the burden that shall result from the collection of information." (Emphasis added.) Section 3502(2) of title 44 of the United States Code defines the term "burden" to include the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency. . ." (Emphasis added.) If, as the Regional Board has maintained, these specific TMDL requirements are mandated by the EPA, then the State and Regional Board must conduct a thorough analysis of the burden on the specific Permittees. To date, there has been no such analysis.

\* \* \*

In conclusion, the Draft TMDL still needs substantial revision and modification. The Draft TMDL does not adequately consider the unique characteristics and challenges present in requiring the permittees to undertake this regulation. The burdens that the Regional Board seeks to impose will have a profound impact on the permittees and their residents. This burden is disproportionate to the permittees' alleged discharges into the Malibu Creek Watershed.

Despite the concerns, the City is happy to continue to engage in a constructive dialogue with State and Regional Board staff to develop a TMDL that will make genuine progress toward our common objective of controlling pollutants in the Malibu Creek Watershed to the maximum extent practicable. The City believes that an appropriate next step would be for the State Board to remand this Draft TMDL to the Regional Board for revisions consistent with these comments.

In the interim, the City asks that the State Board, or those members of the Regional Board that are so willing, to conduct a hearing on this matter to obtain more information regarding the permittees' recommendations for achieving compliance with the TMDLs' proposed effluent limitations. *See* Water Code section 13228.14.

The City hereby incorporates and adopts technical comment letter from other stakeholders. The City furthermore reserves its right to make objections to this TMDL and request additional information and documents from State Board staff at the hearing.

As public agencies, all parties involved in the TMDL process have the obligation to carry out their duties in a responsible, realistic, and reasoned manner. Requirements that tether public agencies to impractical positions are counterproductive and violative of our sacred charge as representatives of the people. The City is dedicated to working with the State and Regional Boards in order to achieve full compliance with state and federal law so long as these precepts remain as a cornerstone of all regulatory action.

We look forward to your response to these comments as well as other comments submitted by the other cities and agencies.

Respectfully submitted,

**City of Hidden Hills**

A handwritten signature in black ink, appearing to read "Kevin J. Powers". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

**Kevin J. Powers**  
**Environmental Compliance Coordinator**

**cc: Ms. Cherie Paglia, City Manager**  
**Mr. Dirk Lovett, City Engineer**