



Reply to:

1215 K Street Suite 940
Sacramento, CA 95814
blarson@casaweb.org

Via Electronic Mail

January 25, 2013

Cindy Linn, Ph.D.
U.S. Environmental Protection Agency, Region 9
600 Wilshire Blvd., Suite 1460
Los Angeles, CA 90017
E-mail: lin.cindy@epa.gov

Subject: CASA and Tri-TAC Comments on Draft USEPA TMDL for Pumping and Water Diversion Related Water Quality Impairments for Ventura River Reaches 3 and 4

Dear Dr. Lin:

The California Association of Sanitation Agencies (CASA) and Tri-TAC appreciate the opportunity to comment on the Draft USEPA TMDL for Pumping and Water Diversion Related Water Quality Impairments for Ventura River Reaches 3 and 4 (hereafter “Draft Flow TMDL”). CASA and Tri-TAC are statewide organizations comprised of members representing local public agencies and other professionals responsible for wastewater treatment. Tri-TAC is sponsored jointly by CASA, the California Water Environment Association, and the League of California Cities. The constituency base for CASA and Tri-TAC collects, treats and reclaims more than two billion gallons of wastewater each day and serves most of the sewered population of California. CASA and Tri-TAC do not routinely comment on individual TMDLs. An exception to this practice arises when a draft TMDL would establish a precedent or conflict with efforts to ensure consistent statewide approaches to important regulatory and technical issues.

On December 10, 2012, USEPA released the Draft Flow TMDL in an attempt to address Clean Water Act Section 303(d) listings for “pumping” and “water diversion” for Reaches 3 and 4 of the Ventura River. CASA and Tri-TAC are very concerned with the legal basis for the Draft Flow TMDL and the potential impact of this unprecedented action on future TMDLs in California. We appreciate the opportunity to express our concerns with the Draft Flow TMDL for Ventura River Reaches 3 and 4.

1. USEPA Lacks Jurisdiction Under the Clean Water Act to Adopt the Draft Flow TMDL

First and foremost, CASA believes that the USEPA has exceeded its statutory jurisdiction in attempting to enact a TMDL for pumping and water diversions. TMDLs are designed to address “pollutants,” as that term is defined in the Clean Water Act (CWA). Under the CWA, each TMDL is to establish the maximum amount of a *pollutant* that may be added to the water body from all sources. (33 U.S.C., § 1313(d)(1)(A).) The term “pollutant” is defined in the CWA as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” (33 U.S.C., § 1362(6).) Nowhere in the CWA are water diversions or pumping defined as pollutants. As such, the USEPA clearly lacks jurisdiction to enact a TMDL to regulate pumping and water diversions. The CWA both expressly identifies the limits of USEPA’s jurisdiction to regulate water quality, and as pertinent to the Draft Flow TMDL, the CWA expressly defines the term “pollutant” and does not provide the USEPA with the authority to adopt TMDLs for non-pollutants.

Moreover, courts have demonstrated a propensity to strictly interpret Clean Water Act TMDL requirements, as evidenced by the court’s decision in *Friends of the Earth, Inc. v. Env. Protection Agency*, 446 F.3d 140 (D.C. Cir 2006). In that decision, the court held that all TMDLs must be expressed as daily “loads” of “pollutants.” From both a legal and common sense perspective, “flows” are fundamentally different than “loads”, as can be seen in the common units to express each parameter. Flows are characterized in terms of volume per unit time, e.g. million gallons per day or cubic feet per second. Loads are characterized differently as a mass per unit time, e.g. pounds per day. Thus, the courts too have held that the approach utilized in the Draft Flow TMDL is outside the scope of USEPA’s jurisdiction.

In sum, the Clean Water Act and subsequent interpretations by courts limit USEPA’s jurisdiction to develop TMDLs only for pollutants. Pumping and water diversions are not “pollutants” that can be regulated by a TMDL, and as such, the Draft Flow TMDL should be rescinded.

2. USEPA Improperly Uses the Draft Flow TMDL to Impose Inappropriate Restrictions on Nutrients in the Ventura River

It is apparent from review of the Draft Flow TMDL that USEPA is attempting to use pumping and water diversions as a surrogate to regulate nutrients in the Ventura River. However, as described above, the use of non-pollutant surrogates is simply not authorized under the CWA, and is beyond USEPA’s jurisdiction. A recent federal court decision from the Eastern District of Virginia confirmed this by specifically invalidating USEPA’s attempt to use storm water flow rates as a surrogate for sediment pollution. (See *Virginia Department of Transportation, et al. v. United States Environmental Protection Agency*, Federal District Court for the Eastern District of Virginia, Case No. 1:12-CV-775 (Opinion and Order Filed January 3, 2013). USEPA lacks the jurisdiction to promulgate a TMDL that regulates pumping and water diversions through the use of surrogate nutrient parameters.

Moreover, a TMDL for nutrients already exists for the region in question, and it is inappropriate to adopt a new “nutrient” TMDL under the guise of the Draft Flow TMDL. Specifically, on December 6, 2012, the Los Angeles Regional Water Quality Control Board (LARWQCB) adopted the Total Maximum Daily Load for Algae, Eutrophic Conditions, and Nutrients in the Ventura River and its Tributaries (Algae TMDL) to address several listings on the 2010 CWA Section 303(d) List. The use of the Draft Flow TMDL to impose new nutrient restrictions on parties in the Ventura River watershed that exceed the requirements established in the Algae TMDL for the Ventura River is fundamentally inappropriate and unnecessary.

3. The Draft TMDL Effectively Regulates Water Rights, Which Also Exceeds USEPA’s Jurisdiction

The Draft Flow TMDL also appears to directly regulate water rights in California, despite the fact that regulation of water rights has been confirmed by the United States Supreme Court as being within the purview of the states absent clear Congressional direction otherwise. (See *California v. United States* 438 U.S. 645, 653-663 (1978).) In this regard, there is a general rule “against finding pre-emption of state law in areas traditionally regulated by the States” and also an “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (*California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), quoting *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947).)

Additionally, the CWA clearly precludes federal regulation of water rights. (See 33 U.S.C., § 1251(g).) The CWA explicitly sets forth Congress’s intent to maintain the authority in each state to allocate the rights to its waters. (33 U.S.C., § 1251(g).)

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Contrary to the express language of the CWA, and lacking any other legal authority, USEPA seeks through the Draft Flow TMDL to use pumping and water diversions as surrogates for nutrients. Doing so directly violates the CWA, and the Draft Flow TMDL should be withdrawn.

4. The Draft Flow TMDL for the Ventura River is Unnecessary

Aside from the legal and jurisdictional barriers that make the Draft TMDL inappropriate, the Draft Flow TMDL is also unnecessary because the impairments that serve as the basis for the listing have been addressed through other means. As a result, not only should the Draft Flow TMDL be rescinded, the Ventura River should be delisted or categorized as being addressed by other regulatory actions.

Specifically, “water diversion and pumping” was listed as a basis for impairment of Reaches 3 and 4 of the Ventura River on the 303(d) list in 1996. Since that time, a number of actions have been undertaken in the watershed to address the identified impairment. For example, the Steelhead Restoration and Management Plan for California (CFG Plan), prepared by California Department of Fish and Game in 1996 served as the basis for the pumping/diversion listing in Reach 4. In the CFG Plan, specific recommendations were made for actions that would address aquatic life beneficial use impairments for steelhead in the Ventura River. All of the recommendations in the CFG Plan have been addressed by completed actions, by ongoing actions required by regulators, or through programs being undertaken by mature, multi-agency stakeholder processes. The Draft Flow TMDL includes no analysis of these actions, nor does it look at the current state of the impairments that were the original basis of the listing. The USEPA simply has not examined whether adoption of the Draft Flow TMDL is necessary, even though it appears that the basis for the original listing has been addressed.

5. USEPA Should Consider Re-categorizing the Current Pumping and Diversion Listing for the Ventura River

Given that flow is not a pollutant, the pumping and diversion listing in Reaches 3 and 4 of the Ventura River should never have been placed in Category 5 (a category for which TMDLs are required). Under its Integrated Reporting Option for listing impaired waters, USEPA encourages states to use a five-category system for classifying all water bodies regarding their status in meeting water quality standards. The system includes Category 4C, which is to be used where non-attainment of any applicable water quality standard is the result of “pollution” and is not caused by a “pollutant”. TMDLs are not required (or appropriate) for Category 4c listings. Instead the subject listing should be considered to be included in Category 4C and a TMDL should not be required.

Summary

The Draft Flow TMDL is in excess of the USEPA’s jurisdiction to regulate “pollutants” in TMDLs, and incorrectly presumes CWA authority for addressing a 303(d) listing for anthropogenic reductions in river flow and/or fish passage barriers by regulating nutrients. The Draft Flow TMDL also improperly attempts to regulate water rights and fails to analyze whether the impairment (or indeed, the listing status for these waterbodies) is appropriate in the first instance. For these reasons, CASA requests that USEPA rescind the Draft Flow TMDL and consider other actions, including de-listing or re-categorization of the listed impairment.

CASA appreciates the opportunity to provide comment on the Draft Flow TMDL. If you have any additional questions or comments related to this matter, please contact Roberta Larson at (916) 446-0388.

Sincerely,



Roberta L. Larson, Executive Director
CASA



Terrie L. Mitchell, Chair
Tri-TAC