



23-Jan-2013

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board

(5) Malibu Creek and Lagoon; and to amend Chapter 3 to modify the Implementation Provisions for Water Contact Recreation Bacteria Objectives.”

Dear Jeanine,

In 2002, in response to a lawsuit by Santa Monica Baykeeper and the Natural Resources Defense Council and consent decree that set timelines for adopting Total Maximum Daily Load regulations, the LA Regional Water Quality Control Board adopted recreation bacteria standards for Santa Monica Bay in a rush. They were scheduled for reconsideration in July 2007 because the rush to come to a quick decision did not allow a stringent review of the science at the time. Also, the water sampling used to set the standards was pulled together by Heal the Bay and Santa Monica Baykeeper using methods that are no longer applicable. The Regional Board completely ignored the July 2002 obligation to review that actual 5-year water quality monitoring results and the best available science that emerged over time. Instead, they let the natural source allocations sit at rock bottom and exposed the City of Malibu and the County to the extraordinarily wasteful litigation that was recently settled by the City but not the County.

In 2004, the LA Regional Board adopted the Malibu Creek Bacteria standards and the Board was also obligated to reconsider the evidence when they reconsidered the Santa Monica Bay Bacteria TMDL.

The major failings of these 2002 and 2004 regulations:

1) They do not accurately account for natural sources of bacteria so the cities are chasing after programs and projects that cannot meet the standards because they are not controllable by the city. The fact that NGOs suggest that Malibu must sterilize its streams and scrape natural kelp and sea grasses off the beaches is in direct conflict with the Clean Water Act. Heal the Bay defines natural bacteria as pollution but the US EPA does not. The consequences of meeting the standards without protecting beach and stream ecology are long-term damage to Malibu's natural coastline. If you damage the beach ecology it interrupts resources that are needed to protect healthy offshore marine protected areas.

Whether or not there is a public health risk from natural bacteria is of potential concern for public health noticing **but it is not supposed to be used as a marker for municipal compliance for TMDL standards.** The NGOs convinced the previous Regional Board that the two regulatory tracks are one and the same because they are “more protective” but the US EPA clearly states that municipalities are not responsible for natural bacteria.

The current bacteria TMDL regulations imagine that the urban watersheds in the highly developed portions of LA County are the same as the open space and natural watersheds of the North Santa Monica Bay which almost every scientist will tell you, they are not the same when it comes to baseline sources of any constituent but especially bacteria. Even natural watersheds are not exactly comparable so the use of Arroyo Sequit watershed and Leo Carrillo Beach to set the baseline standards is not working because there are many factors that affect the abundance of natural bacteria: watershed size, whether or not the beach sampling site is prone to kelp mounding or accumulation of sea grasses, and whether the sampling site is influenced by a poorly functioning lagoon with elevated bacteria. Every one of the sites in Malibu on the HtB Beach Bummer list is very influenced by environmental conditions contributing to persistent bacteria exceedances that are not in the City of Malibu control if they are to be preserved in a natural condition.

2) This basic problem is compounded by the fact that the LA Regional Board has refused to hold every public agency (mainly all park agencies) in a watershed equally accountable to the Clean Water Act regulations. They have the power to do so but the park agencies have asked for and been granted waivers to their own NPDES MS4 Phase 2 permits and all of the agencies are not listed as responsible jurisdictions in the adopted TMDLs.

This is triple compounded when a park agency is listed and specific tasks are required in the regulations, the Regional Board does not send Notices of Violation to the park agency and so municipalities and citizens cannot even take action to correct this very, very significant omission. For the past 10 years, the cities in this region have worked together to reduce or eliminate pollutants but cannot implement a true watershed protection plan because the park agencies refuse to participate because there are no consequences for not participating. The standards are not applied fairly to every agency that could contribute or cause exceedance of the bacteria standards. This contradicts the Clean Water Act regulations.

3) In 2002 (Santa Monica Bay) and 2004 (Malibu Creek) with each of the two respective regulations adopted, that Regional Board included a list of regulations that they imagined would need to be reconsidered when the bacteria TMDLs were reopened. Almost every single one of the major issues that has had unintended consequences and now has scientific proof how wrong the standards are and explain why the municipal compliance rate is little or no better than when they were adopted 10 years ago, will not be heard on June 7. Even though municipal staff in pre-meetings with Regional Board staff pointed out this serious deficiency, the municipalities were ignored and the Regional Board staff only included a limited list of items that would be reconsidered on June 7. Unless the Regional Board instructs the staff to re-notice the meeting and delays voting to allow all relevant issues and the best available science to be part of the Board's deliberation before new standards are adopted, the entire process is a failure.

4) In the Santa Monica Mountains watersheds park agencies do not follow stormwater or TMDL regulations but are not held accountable, State Parks does not follow the regulations in Malibu Lagoon, State Parks allows commercial tenants to plant turf, install lights and fencing at the very edge of Topanga Creek, State Parks and the Santa Monica Mountains Conservancy pave over their parking lots right up to the edge of Topanga Creek, Solstice Creek and Corral Creek without any set back or vegetated swales to reduce pollutant contributions. The Santa Monica Mountains Conservancy installs permanent kiosks right on creek banks when there is plenty of room nearby. The Coastal Commission and the Regional Board are not doing their job. All these park amenities are development projects that remove riparian habitat and all are sites that directly contribute bacteria from dog walking in parking lots, oils, gas and greases from cars, and excessive trash and marine debris that is not managed because park agencies are not held accountable.

5) The Regional Board is being asked to adopt new standards without a clear understanding of the problems that exist with the current regulations and the opportunities for solutions so that cost-effective solutions can be applied and water quality objectives can be met. This severely cripples the public process and the obligation of the Board to implement regulations that will truly improve water quality for human and aquatic life.

The worst part, is that Malibu is the City that adopts progressive regulations, has met water conservation objectives, set high energy efficiency standards, has exemplary clean water programs and projects but is the City that gets notices of violations, is set up for citizen lawsuits, and is the City that gets needlessly sued.

Until park agencies are required to participate in regular water quality compliance monitoring and all the other NPDES MS4 permit requirements, it will be impossible for municipalities to meet the water quality standards.