

From the Desk of Joan C. Lavine

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January 24, 2013

U.S. Environmental Protection Agency
Southern District Field Office
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Attention: Ms. Cindy Lin, (WTR-2)

Re: Comment, dated January 25, 2013, by Attorney Joan C. Lavine on Draft Total Maximum Daily Loads (TMDLs) for Malibu Creek and Malibu Lagoon

TO WHOM IT MAY CONCERN:

I hereby respectfully submit my comments and review of regarding proposed Total Maximum Daily Loads (TMDLs) for Malibu Creek and Malibu Lagoon in a Draft, dated on or about December 12, 2012.

1. I urge and request that a moratorium on setting TMDLs be instituted for at least one year, and that, during that time period, a thorough, intensive re-evaluation be conducted by drawing and testing specimens as frequently as daily, with back-up specimens stored for corroboration, to identify the existence of pollutants and sources and that they be taken at all potential point sources, for proposed permittees and for naturally occurring phenomena such as contaminants and pollutants that may come from non-human sources such as birds, fish, and plants.

The most recently generated information about the Malibu Lagoon, in a published study of the USGS, is negative for contaminants that are human-sourced.

The California State Water Resources Control Board during 2012 published on its website interactive mapping show areas area the Malibu Creek and Malibu Lagoon in the Malibu area to be negative for human-sourced contaminants. I attach copies of those interactive maps for over 100 residences in the Serra Retreat in the vicinity of the Malibu Creek and Malibu Lagoon in Exhibit "B" attached hereto. Note that California State Water Resources Control Board's findings printed on all of those interactive maps as follows: **"No nitrogen-compound impaired waters within 2000 ft. of this point. No pathogen-impaired waters within 2000 ft. of this point."**

I urge that, in setting the Total Maximum Daily Loads (TMDLs) for Malibu Creek and Malibu Lagoon, only that data which is current and reliable, and which is based on the most current, relevant testing techniques, be used. I object to the use by the US EPA, for a decree or modification of it, of any purported data that is more than five years old, as too remote, as irrelevant and as too outmoded in testing techniques. I object that data more than five years old is irrelevant due to changed circumstances, due to recent changes in the law due to a decision this month, January, 2013, and due to its being speculative. Old, outdated data is not a legal factual basis for restricting property rights, business operations or governmental functions and services, or for imposing substantial expense or prohibiting activities.

2. During the past five years, several major events, changes in conditions, and studies have taken place within the Malibu Civic Center, where the flows from Malibu Lagoon and the southerly mouth of the Malibu Creek enter the Santa Monica Bay.

a. The only large-scale scientific study of its kind was conducted by accomplished and unbiased scientists, the U.S. Geological Survey of the Malibu Lagoon in or about 2010-2011. It was negative for contaminants tested for from human sources. DNA testing identified tested-for bacteria as being that of animals and plants. See Exhibit "A" attached hereto, the first page of that study. See: **"Sources Of Fecal Indicator Bacteria To Groundwater, Malibu Lagoon And The Nearshore Ocean, Malibu, California, USA"**, Izbicki et al., Annals of Environmental Science / 2012, Vol 6, Pages 35-86. Its first page as published on the internet is attached hereto in Exhibit "A". It may be found in full text on the Internet at: <http://iris.lib.neu.edu/aes/vol6/iss1/4/>

b. Over the last two to three years, the City of Malibu has conducted testing at numerous wells throughout the Malibu Civic Center. This data is reported to be negative for finding contaminants. The City of Malibu officials have custody of that data. I refer you to them to obtain it. I request that the US EPA officials and the U.S. District Court supervising the consent decree involved consider that testing.

c. The City of Malibu has constructed and is operating a special water filtration system called “Legacy Park” which is filtrating water.

d. The California State Parks, funded with State of California bond resources, and the California State Resources Control Board, providing funding from the same bond measure, have razed the Malibu Lagoon. They appear to have taken out ALL life form from a substantial part of the Malibu Lagoon, starting in or about last June, 2012.

3. At a workshop conducted by the US EPA at its office on January 14, 2013, at 600 Wilshire Blvd., Suite 1560, Los Angeles, Ca. 90017, I asked the moderator Ms. Cindy Lin if any pollution/contamination testing has been conducted of the Malibu Creek/Malibu Lagoon area within the past year. She responded to my inquiry that there have been three testings done, and that they were done by the US EPA. Since that meeting I have tried to find out from her where and when the tests occurred, what they tested for and what the results are. I have not received that information yet. See copies of some of the e-mails I have sent Ms. Lin this month, January, 2013.

However, I observe that three testings in an entire year of such vast areas falls woefully short of the current relevant data necessary to make such important decisions as those under consideration here.

4. Is it true that numerous citations issued to Malibu Civic Center commercial interests and governmental entities for allegedly exceeding NDES permit TMDL limits, issued by the California Regional Water Quality Control Board, Los Angeles Region (Region 4) shortly before the proceedings to adopt a septic ban resolution were dismissed without prosecution for lack of probable cause?

5. All property owners, commercial, governmental and residential, within the vicinity of the Malibu Civic Center, the Malibu Creek and Malibu Lagoon should be offered the opportunity to be issued TMDL levels and an NPDES permit.

6. The recent U.S. Supreme Court opinion, Los Angeles Co. Flood Control District v. NRDC, U.S. Supreme Court Docket 11-460, 568 US ____ (January 8, 2013), prohibits placing responsibility on a single suspected discharger for discharges known to have multiple other sources.

The U.S. Supreme Court has held that without proof of responsibility for pollution or contamination, an accused cannot be held responsible. Imposition of TMDLs are likely not to be compliant with that decision.

7. Where the perceived pollutants are naturally occurring, having been sourced in fauna and flora, and are thus Acts of God, Heal The Bay's and Baykeepers laying blame on human sources lacks a factual basis for setting TMDLs and requiring that property owners be permitted by NPDES permits.

8. I urge that a moratorium on setting TMDLs and/or requiring NPDES permits be put into effect and that the US EPA conduct a thorough investigation with currently collected data and testing techniques, such as doing DNA testing, to determine accurately the facts and the state of affairs. To put it a bit more formally, I recommend that a current forensic water quality study be conducted of the Malibu Creek and Malibu Lagoon.

9. The drafts under consideration largely lack consideration of the impact on visitors and beachgoers to the Malibu Civic Center area, on residents and residential property owners, and/or business interests and operations and governmental functions and services.

10. These draft TMDL proposals lack provisions for those affected by TMDLs and permit requirements to be able to apply for exemption and/or variances to the consent decree, its amendments, and/or requirements and restrictions. They do not grandfather in permits currently issued to those affected in order to prevent harm from retroactive application. I recommend to the attorneys involved that the appropriate provisions be added to ameliorate the potential problems and harm from not providing for same.

11. "Notice" published on the internet is not constitutionally adequate notice of these proceedings. It fails to comport with fundamental constitutional Fifth Amendment, U.S. Constitution due process requirements of Mullane v. Central Hanover Bank & Trust Co., 339 US 306, at 318-319 (1950). Given the substantial personal and economic impacts on those affected by the setting of TMDLs, written notice by mail to those property and business owners, and government entities so affected should be given of these TMDL-settings proceedings. These notices should be delivered to the affected property addresses and to the mailing addresses listed with the respective county tax assessors for the affected properties.

12. I have been unable to obtain the original consent decree, dated March 23, 1999, in Heal The Bay v. Browner/Jackson, U.S.D.C. (N.D.Cal.) CV-98-4825-SBA. It is not obtainable on PACER. It is not posted on the US EPA or the California State Water Resources Control Board websites, as far as I can determine.

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I do not find referenced attachments to the 2010 amendment to the March 23, 1999, Heal the Bay v. Browner/Jackson, i.e. the consent decree, actually attached to the 2010 decree amendment.

When, on December 19, 2012, I attempted to access the documents relevant to this comment regarding the modification of TMDLs for the Malibu Creek and Malibu Lagoon, the December 12, 2012, notice of these TMDL setting hearings contained a link to the US EPA's website and proposals which did not connect to the US EPA draft proposals. I found a webpage, which linked me to a 44-page draft, not a 196-page one, and which did not include an appendix with proposed TMDLs. This caused me difficulty in locating the documents relevant to these comments.

Very truly yours,

Joan Lavine
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Attachments:

Exhibit "A" – First page of "**Sources Of Fecal Indicator Bacteria To Groundwater, Malibu Lagoon And The Nearshore Ocean, Malibu, California, USA**", Izbicki et al., *Annals of Environmental Science* / 2012, Vol 6, Pages 35-86.

Exhibit "B" – California State Water Resources Control Board 2012, Interactive map for over 100 residential properties in the Malibu Civic Center's Serra Retreat residential area near and contiguous with the Malibu Creek and Malibu Lagoon.

Exhibit "C" – A sampling of e-mails Joan Lavine has sent to US EPA Assistant Administrator regarding the setting of TMDLs during January, 2013.

Delivered via E-mail to: Lin.Cindy@epa.gov and to the US EPA by hand-delivery