



# City of Malibu

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Sent via Email to [ewadhvani@waterboards.ca.gov](mailto:ewadhvani@waterboards.ca.gov)

Emel G. Wadhvani, Esq.  
State Water Resources Control Board  
Senior Staff Counsel  
PO Box 100  
Sacramento, CA 95812-0100

RE: SWRCB/OCC File A-2236 (a) Through (kk)

Dear Mr. Wadhvani:

The City of Malibu (hereafter, “City” or “Malibu”) hereby provides its comments to the two questions posed by the State Water Resources Control Board (State Water Board) in its July 8, 2013 announcement with respect to the petitions received on Order No. R4-2012-0175 (Los Angeles MS4 Permit). In particular, the State Water Board requested comments addressing the following questions:

- 1. Is the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 permits?*
- 2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 permits?*

In its July 29, 2013 announcement, the State Water Board further clarified that in addition to the questions above, it is *generally seeking all information that would assist it in determining whether these approaches constitute appropriate revisions or additions to the existing receiving water limitations language in MS4 Permits.*

## ***Summary***

The City has been concerned and continues to be concerned with the Receiving Water Limitations (RWL) language (i.e., the language that determines when a permittee is in violation) in municipal stormwater permits. In particular, language in the permits must contain better protections against unfounded and costly citizen suits and must better explain when a permittee is affirmatively in violation of the permit. As described in this letter, the City’s basis for concerns is based on firsthand knowledge of the counterproductive impacts of such citizen suits and the Ninth Circuit’s recent opinion in the *NRDC v. County of Los Angeles* case. This letter proposes language found in other

permits and also supports sample language proposed by the California Stormwater Quality Association (CASQA) Comment Letter.

### ***Basis of the City's Concerns with Current RWL Permit Language***

In February 2008, the Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper (now called Los Angeles Waterkeeper) filed a citizen suit against the City, alleging exceedances of various pollutants from monitoring completed between the years of 2002-2007.<sup>1</sup> The lawsuit alleged exceedances from the following monitoring programs: Santa Monica Bay Beaches Bacteria TMDL Coordinated Shoreline Monitoring, Los Angeles MS4 Permit Annual Storm Water Monitoring, and Tapia Wastewater Treatment Plant Monitoring.

Towards the end of the lawsuit, Santa Monica Baykeeper compiled additional fecal indicator bacteria data from sampling conducted along the coast of Malibu. After extensive review and based on the City's expert understanding of that data, the City determined that this data did not demonstrate that the City's MS4 caused or contributed to a condition of nuisance or violation of any applicable water quality standards.

The lawsuit was ultimately settled by the parties, but at great expense to the City. Moreover, the City's Clean Water Program (to which the City has devoted over \$60 million in the past 10 years) has not changed in any meaningful way as a result of this expensive litigation.

The money devoted to defending the litigation could have been used for projects that result in improved water quality, such as the City's award-winning Legacy Park Project.<sup>2</sup> To avoid future counterproductive situations in other municipalities, the City urges the State Water Board to revise the permit language to state that if a city is complying in good faith with the permit obligations, implementing Best Management Practices, and identifying and implementing additional measures to resolve extremely complicated issues, then the city is in **full compliance** with the permit.

Indeed, the need for such language is heightened by the recent U.S. Ninth Circuit Court opinion in *NRDC v. County of Los Angeles*.<sup>3</sup> In that opinion, the Ninth Circuit interpreted the language in the previous NPDES permit, which is similar to the language in the current permit, to impose liability on the County of Los Angeles for violations of the permit.<sup>4</sup> The Ninth Circuit distinguished the language in the permit that a permittee's responsibility to "discharge[s] for which it is the operator" "applies to the appropriate *remedy* for Permit violations, not to *liability* for those violations."<sup>5</sup> The Court issued its opinion despite the fact that the RWL language requires municipalities to follow an

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<sup>1</sup> *Santa Monica Baykeeper, et al. v. City of Malibu*, Case No. CV 08-01465 (AHM) (C.D. Cal. Mar. 3, 2008).

<sup>2</sup> In 2010, the City completed its \$35 million Legacy Park project, which transformed 15 acres in the heart of Malibu into a central park that is one of the most ambitious and innovative stormwater and urban runoff projects in California. The project captures an estimated 2.6 million gallons per day of stormwater and urban runoff for treatment and disinfection, and then reuses the water for irrigation of the park. Among other prestigious awards, the Legacy Park project received the 2012 Water Quality Improvement Award from the Water Environment Federation.

<sup>3</sup> *Natural Resources Defense Council, Inc. et al. v. County of Los Angeles et al.*, Case No. CV 10-56017 (opinion filed August 8, 2013).

<sup>4</sup> *Id.* at 24-25.

<sup>5</sup> *Id.* at 25 (emphasis in original).

iterative process to implement additional measures based on the results of water quality monitoring to increase as necessary the effectiveness of the stormwater quality program. The court, however, found that a municipality will still be found in violation of the permit notwithstanding the measures being taken to meet those water quality standards.

The Ninth Circuit's ruling, which interpreted the prior permit's language, places municipalities in an untenable and vulnerable position. Indeed, to unnecessarily subject cities to unfounded and costly citizen suits is counterproductive in that it will likely result in cities diverting all resources away from water quality projects and programs to defend itself in such lawsuits.

### ***Specific Concerns with Current RWL Permit Language***

The RWL language in the permit must explain which entities are responsible for a discharge. Although the City appreciates the citation to 40 CFR 122.26(a)(3)(vi) in the current language, which provides that a permittee is only responsible for discharges of stormwater and non-stormwater from the MS4 for which it is an operator, the City requests that the word "operator" be clarified. Note that the word "owner" is not used in 40 CFR 122.26(a)(3)(vi) or 40 CFR 122.26(b)(1). For example, Malibu has faced allegations that it was responsible for discharges from an MS4 that it did not own or operate, but where the City may have provided maintenance service or may have stenciled the inlet with a clean water message. Of course, a permittee can only be responsible for a discharge if it has some modicum of control over what goes in and what comes out of the drain. Therefore, it is imperative that "operate" be defined. As we have learned, the more specific the permit language, the less likely it is to be unnecessarily broadened.

In addition, the RWL language in the permit must contain better protections against unfounded and costly citizen suits and must better explain when a permittee is affirmatively in violation of the permit.

The RWL language must include an iterative process that provides some limited protection against unfounded citizen suits if the permittee is acting in good faith to resolve any discharge-related issues. This suggested process is appropriate because an MS4 permittee should not automatically be in violation of the permit if there is an exceedance of a water quality standard in the receiving water; the exceedance may not have been caused from an MS4 discharge. The permit must acknowledge that MS4 discharges are not the only source of pollutants in the water and regulate accordingly. If monitoring demonstrates that a particular compliance strategy is not working, through no fault of the discharger, then the discharger must have time to identify and implement a new strategy before being held liable for water quality alterations that may be beyond its control, such as for natural sources.

For example, the following language from the Port of Stockton's permit (Order No. R5-2011-0005) sets forth when a permittee is in violation and authorizes the Regional Board to initiate an investigation before a permittee is found to be in violation. The State Water Board and the federal Environmental Protection Agency (EPA) have approved use of this permit language. The City suggests that the State Water Board consider including the following language from the Port of Stockton permit as an appropriate example of where the final compliance date is used and allows for implementation and final date modification in the permit:

### *C. Receiving Water Limitations*

*1. Receiving water limitations are site-specific interpretations of water quality standards from applicable water quality control plans. As such, they are required to be addressed as part of the permit. However, a receiving water condition not in conformance with the limitation is not necessarily a violation of this Order. The Central Valley Water Board may require an investigation to determine cause and culpability prior to asserting a violation has occurred.*

*Discharges from MS4s shall not cause the following in receiving waters:*

*... (List of Receiving Water requirements, including TMDL WLAs omitted, with the exception of Mercury TMDL Example RWL)*

*o. Violation of the methylmercury waste load allocation for the Permittee, by Delta subregion, upon approval of the Delta Mercury Control Program by US EPA and after 2030\*. The wasteload allocation is:*

*Central Delta 0.39 grams/year; and*

*San Joaquin River 0.0036 grams/year.*

*\* The final compliance date for the WLAs is 2030. Compliance with the methylmercury waste load allocation shall be met as soon as possible, but no later than 2030, unless the Central Valley Water Board modifies the Delta Mercury Control Program implementation schedule and final compliance date.<sup>6</sup>*

The City also suggests that the State Water Board consider including the following language from the same Port of Stockton permit, as it also explains what is an appropriate iterative approach for explaining what is not considered a violation:

*4. If the Permittee is found to have discharges notwithstanding the prohibitions in Provision A, or discharges causing or contributing to an exceedance of an applicable benchmark value, water quality objective, waste/wasteload allocation, or receiving water limitation in Provision B, the Port will not be determined to be in violation of this Order unless it fails to comply with the requirement to report such discharge (Provision C.3.a.), and revise its BMPs to include additional and more effective BMPs, and to implement the same (Provision C.3.b-d). Further, the Port may demonstrate in its SWMP that the use of particular benchmark values are not appropriate (e.g., aluminum, electrical conductivity) due to local ambient conditions or other environmental studies (e.g., Water Effect Ratios).*

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<sup>6</sup> Order R5-2011-0005 (NPDES No. CAS0084077) Waste Discharge Requirements for Stockton Port District.

#### *D. Provisions*

##### *1. Compliance with Discharge Prohibitions and Receiving Water Limitations*

*As reflected in the findings, the effect of the Port's storm water discharges on receiving water quality is highly variable. For this reason, this Order requires that, within its geographic jurisdiction, the Permittee shall design its storm water program to achieve compliance with water quality standards over time through compliance with the following, which reflects an iterative approach...<sup>7</sup>*

The City suggests that such language presents a viable alternative to the watershed management program (WMP)/enhanced watershed management program (EWMP) alternative of the Los Angeles MS4 Permit for receiving water limitations.

#### ***The City Supports the CASQA Comment Letter and Proposed RWL Language***

The City supports the CASQA comment letter submitted August 14, 2013 in response to this same solicitation for comments and proposed RWL language which seeks to address the problem of RWL language in MS4 Permits on a statewide basis. The EWMP approach in the 2012 Los Angeles MS4 permit provides a means to better define what is expected of the iterative process (e.g., through the "reasonable assurance analysis"). This approach is also consistent with, and serves as an example of, the Strategic Compliance Program approach recommended by CASQA in its comment letter and proposed language.

The 2012 Los Angeles MS4 Permit EWMP approach incorporates "design storms" (e.g., the 85<sup>th</sup> percentile 24-hour event and the 1-year/1-hour storm for trash control) and allows for a compliance schedule. Those permit provisions provide greater certainty and a clear objective for municipalities seeking to define the scope of their technical and fiscal responsibilities under the MS4 Permit. The EWMP approach contained in the Los Angeles MS4 Permit is an appropriate means for permittees to comply with receiving water limitations for MS4 discharges.

Lastly, the City suggests that the RWL language be amended to provide for the situation where it may be infeasible for a municipality to achieve the water quality standards, despite its good faith efforts to do so. Such language would advance both the State Water Board's and the municipalities' collective interest in achieving water quality standards because it would help avoid future disputes and foster collaboration among all parties.

#### ***Conclusion***

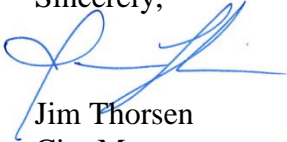
The City appreciates the opportunity to comment on this very important issue and hopes that the State Water Board will take the City's comments into consideration when it develops revised RWL language. The City reiterates its desire to work with the State and Regional Board staff to protect and restore the quality of our valuable water resources in a manner that is most effective and allows us to prioritize water quality objectives for deployment of our limited municipal resources in a way that addresses the most pressing water quality priorities for the benefit of the public taxpayer.

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<sup>7</sup> Id.

If you have any questions regarding this letter, please contact Jennifer Brown, Senior Environmental Programs Coordinator, at (310) 456-2489 extension 275 or [jbrown@malibucity.org](mailto:jbrown@malibucity.org).

Sincerely,



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City Manager

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