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July 9, 2010

Via Federal Express & Email
Chair Charles R. Hoppin and the Members
of the State Water Resources Control Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Reference: **Comments regarding Proposed Approval of An Amendment
to the Water Quality Control Plan for Los Angeles Region to
Prohibit OWDSs in the Malibu Civic Center Area**

Dear Chair Hoppin and Board Members:

I write on behalf of the City of Malibu to request that the proposed Basin Plan amendment prohibiting on-site wastewater disposal systems (OWDS)¹ in the Malibu Civic Center area (OWDS Ban) be remanded back to the Regional Board for further consideration.

Foremost, as discussed in detail below, **no potential source of drinking water exists within the Malibu civic center.** The OWDS Ban does *not* protect a potential source of drinking water and, for that reason alone, should be reconsidered.

¹ The term OWDS refers to the category of systems subject to the ban; the City only allows onsite wastewater treatment systems (OWTS) which have a treatment component and meet the highest standards.

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To the extent that the Board may find benefits other than protection of potential sources of drinking water that may warrant the imposition of a prohibition on OWDS, the City proposes a Civic Center Wastewater Treatment Proposal that employs both a plan to construct a state-of-the-art centralized wastewater treatment facility in the Malibu civic center area and a comprehensive regulatory program with respect to onsite wastewater *treatment* systems that has proven successful.

Malibu's Civic Center Wastewater Treatment Proposal warrants your serious consideration; it is discussed more fully in this letter and the accompanying documents. Essentially, Malibu's alternative focuses on creating a central wastewater treatment system within an area drawn to include the area that would benefit from it and the City has actively reached out to the stakeholders in the area to increase the likelihood that the system would be built. The Civic Center Wastewater Treatment Proposal also continues to employ the stringent standards for onsite wastewater treatment systems that have proven highly effective in other areas of the City. The City's Civic Center Wastewater Treatment Proposal also is much more likely to protect the Malibu Valley groundwater than the Regional Board's plan, as it coincides with historical groundwater use. The proposed OWDS Ban inappropriately mandates a strategy and method of compliance; but, beyond that, the approach it mandates misses the mark. The Civic Center Wastewater Treatment Proposal is more likely than the proposed OWDS Ban to succeed as an effective wastewater management solution for the Malibu civic center because it is based on hydrology and increasingly supported by the stakeholders. Moreover, experience has proven that disinfection and tertiary treatment are essential to an effective wastewater management strategy in Malibu. The Regional Board did not adequately address this issue.

Ultimately, the success of a comprehensive wastewater management strategy will depend on the City's ability to garner public support and obtain funding for this massive endeavor. In order to be successful in developing a centralized wastewater treatment system, the local property owners must approve an assessment district. Without public support, this endeavor will result in stagnation, similar to what has mired Los Osos for over 20 years. Water quality goes unprotected under that scenario.

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The City has worked closely with the residents and businesses to develop a targeted and science-based wastewater treatment solution that has wide-spread community support as an alternative to the Regional Board's OWDS Ban. Property owners of over 80% of the land area in the City's Phase 1 zone support *the City's proposal* for centralized wastewater management.²

The City requests that the proposed Basin Plan amendment be remanded to the Regional Board with instructions that the Regional Board conduct further hearings to consider Malibu's Civic Center Wastewater Treatment Proposal.

The City's Civic Center Wastewater Treatment Alternative

The City's proposal regulates the same geographic area as the RWQCB's plan; however, each solution is based on hydrogeologic and water chemistry studies to verify the appropriate treatment technology is being used to treat wastewater to regulatory standards. The proposal targets users with the highest potential impact to groundwater by focusing on the homes and businesses closest to Malibu Creek, which is the only area where viable drinking water has ever historically been extracted.³ The City's wastewater management plan will allow for the construction of a smaller treatment plant, for which there is adequate percolation area. The City's targeted and science-based plan would also require a disinfection treatment for nearly 115 homes and restaurants along the beach.

The City's Community-based Wastewater Treatment Solution⁴ is as follows:

Phase 1: Installation of a centralized wastewater treatment plant for the commercial properties in the Civic Center area, covering properties on the westside of the Malibu Creek and Lagoon contribution area. The system will treat up to 190,000 gallons per day and be completed by 2015.

² Support Letter Map attached as Exhibit E.

³ See Responses to RWQCB, comment No. 42, Exhibit N.

⁴ See Map Attached as Exhibit A

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Phase 2: Expansion of the centralized wastewater treatment plant for Serra Retreat, covering the residential properties closest to Malibu Creek and on the eastside of the Creek and Lagoon contribution area. This system will treat up to 50,000 gallons per day and be completed by 2019.

Phase 3: The City will adopt a “Disinfection Ordinance,” requiring all Malibu Colony homes and beachfront restaurants to upgrade to individual disinfection systems by 2019.

Phase 4: Malibu’s existing regulations already require that upon sale of property, remodel or replacement of system, the City inspects existing systems, issues operating permits, and where needed, requires upgrading to advanced treatment/disinfection systems. This ordinance applies city-wide.

Scientific Analysis Supporting the City’s Civic Center Wastewater Treatment Alternative

The City’s plan utilizes the latest scientific studies⁵ and research efforts which identify the Malibu Creek impact areas.

First, the scientific community is just beginning to fully understand the groundwater hydrology in the Civic Center area. For example, we are learning that the groundwater flow through the Civic Center area is not dictated by topography as assumed in the Regional Board’s Ban, but by the tidal activity and the condition in Malibu Lagoon.⁶ (A.R. 1-447:86 – 1-448:89). During a rainstorm, water levels increase in the monitoring wells, as expected. However, as soon as the Lagoon breaches, the groundwater levels in the area drop as the Creek and Lagoon act like a siphon and drain groundwater towards the ocean. In other words, groundwater levels and groundwater

⁵ See Exhibit O for additional scientific studies.

⁶ Dr. Laton (California State University at Fullerton), with Stone Environmental Consultants, is completing a Malibu Civic Center Groundwater Hydrology Study to determine the influence of wastewater dispersal on groundwater and other OWTS systems within the Civic Center Area. This study was required by the RWQCB at a cost to the City of \$350k. The study is underway and the final report is expected by September.

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flow paths change depending upon the Lagoon berm and tidal activity and groundwater depths do not have any discernible trend.

The Regional Board staff's understanding of the local hydrology is far different and some of it is based on 20-30 year old records from hydrogeologic analysis submitted from individual waste dischargers pursuant to their WDRs.

The Regional Board staff insisted that the City conduct this \$350,000 groundwater hydrology study and modeling program to understand the complicated groundwater system. This advanced hydrology study is the first time anyone has studied the comprehensive area, and looked at the effect of individual OWDS. In addition to studying the groundwater flow, the study will evaluate the cumulative impact on subsurface wastewater dispersal on ground water levels in the Civic Center area, refine existing numerical groundwater flow models with new data and use the numerical model to evaluate hydrologic effects of wastewater dispersal in the area. The City has spent considerable money and time on this study. Although this study is now nearing completion, the Regional Board moved forward with the Ban without the benefit of the results from the study that its staff required. A Civic Center wastewater management solution should have the benefit of these new scientific findings. The City's Civic Center Wastewater Treatment Proposal will utilize this data to properly design and site the proposed systems.

Next, the United States Geologic Survey is evaluating the occurrence, distribution and sources of Fecal Indicator Bacteria (FIB) and nutrients in shallow groundwater, Malibu Lagoon and near-shore ocean waters. The FIB can indicate if unclean wastewater is seeping into the groundwater, and eventually to the ocean. At the November 5th hearing, USGS reported that 10 of the 11 groundwater wells sampled had FIB concentrations less than the detection limit. This means that there was no FIB in the groundwater sampled in Civic Center area. Similarly, the groundwater was discharging to the Lagoon during the sampling period at a very slow rate.

This study showed that FIB was coming from surface deposits along the berm and nearby sand, as well as from the bottom of the Lagoon as it was disturbed during tidal

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activity. In other words, FIB within the Creek and Lagoon was unrelated to OWDS. In sum, the large amounts of bacteria found in the Creek and Lagoon were unrelated to OWDS in the area and not entering the ocean through the groundwater. Of the three beach sites sampled near Surfrider Beach, FIB concentrations were lowest in the near-shore area adjacent to unsewered residential development in the Malibu Colony.⁷ .

Consistent with the hydrology study, the USGS is learning that bacteria in the near shore ocean were associated with tidal fluxes, with highest bacteria concentrations occurring during high tide. This is consistent with wave run-up on the beach washing FIB from the rack line and beach sands. Water movement through the berm at the mouth of the Lagoon was a source of FIB to the near shore ocean during low tide, and groundwater bacteria concentrations were low at low tide. (A.R. 1-451). Given the general absence of FIB in groundwater found in the USGS study, measured rates of groundwater discharge to the lagoon, and other hydrologic conditions at the time of sample collection, **groundwater discharge was not a likely source of FIB to the lagoon.**

Next, an independent UCLA study⁸ is looking for human bacteria sources in Malibu Creek and Lagoon. Again, the UCLA Study shows that the existence of bacteria in the Lagoon is dictated by the condition of the Lagoon and rainfall. During wet weather, the scientists found the highest concentrations of FIB, and FIB concentrations were generally low during dry weather when the Lagoon was open. (A.R. 1-452). More importantly, 93% of the samples did not detect any human bacteria sources even though significant amounts of bacteria were present. (A.R. 1-454-). Human markers were not found in any of the forty-four samples taken during dry weather when the Lagoon was open and only three of the twenty-two samples tested positive for human markers during dry weather when the Lagoon was closed. Only two of the fourteen samples taken during wet weather with an open Lagoon showed human markers. Samples were positive for human markers only when level of FIB were high; however, high FIB was observed in the absence of human markers. The locations that showed human bacteria were adjacent to

⁷ USGS Letter for Task 1 Results dated June 28, 2010 and corresponding Study description, attached as Exhibit F and letter dated January 11, 2010 at Exhibit L.

⁸ UCLA 2009 Investigation of Spatial and Temporal Distribution of Human-specific Bacteroides marker in Malibu Creek, Lagoon and Surfrider Beach, attached as Exhibit G.

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areas within the State Park where there are campers and hikers. Further, data reports for other dates show virtually no human specific bacteria markers exist during dry weather, indicating that OWTs may have little to no effect on the cause of the bacteria levels in the lagoon. Human specific bacteria markers were found in a few wet weather samples, indicating stormwater⁹ is a potential significant source of human bacteria. Finally, the UCLA study concluded that there is no correlation between Fecal Indicator Bacteria and Human Bacteria Markers.

In other words, high FIB concentrations at the Lagoon and at Surfrider Beach are not associated with *human* waste.¹⁰ The source, or combination of sources, of fecal material to the lagoon and near-shore ocean water is not precisely known but may also include: (1) natural sources either directly deposited by birds and other wildlife, or indirectly mobilized as tides and wave wash beach sands and material accumulated at the high-tide line (rack line) along the beach; and (2) surface flow into the Malibu Lagoon. The Regional Board's failure to appreciate other potential sources represents a major flaw in the Ban's supporting documentation, and specifically Technical Memo #3.

Natural Lagoon conditions are a breeding ground for bacteria; however, there is an unsupported assumption that when the berm in the Lagoon is closed, bacteria must be coming from the septic systems in the Malibu Colony area. To the contrary, the USGS study (tested both inside and out of the Lagoon) shows that bacteria passes through the sand berm. Bacteria counts were higher at night when there is less of chance for solar disinfection and much lower in the afternoon after the sun's heat penetrated the water to kill the bacteria. Bacteria was also at its highest during high tide. Tidal and temporal influences impact the existence of bacteria. Moreover, the studies prove that FIB are not a reliable indicators that bacteria in Lagoon comes from the wastewater treatment systems.

⁹ Importantly, the City has constructed a stormwater treatment facility in the Civic Center area that has been online since February 2, 2007, and is well along in construction of its stormwater treatment facility in Legacy Park, which will substantially help to address the pathogens in stormwater.

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Resolution No. R4-2009-007 was presented to the Board based on studies and data that have been superseded by more recent and more specific scientific data and analysis.¹¹

The environmental background from which the studies were based has changed over the past fifteen years and as a result, those historical studies and data, dating as far back as 1970 and 1985,¹² have been superseded by the more complete and specific studies of the local hydrology. Copies or preliminary summaries of the studies were submitted to the Regional Board and are attached to this comment letter. Each of these studies supports the conclusion that Civic Center OWDSs are not a significant source of groundwater contamination or degradation of water quality in the ocean or the Creek.

Geographic Analysis Supporting the City's Civic Center Wastewater Treatment Alternative

The City's Civic Center Wastewater Treatment Proposal will require centralized wastewater treatment plant for the specific geographic area that Regional Board staff cited as contributing nitrogen to the Lagoon, i.e. the land areas "nears the creek in the surrounding hills" and employs the stringent standards for onsite wastewater treatment systems that have proven highly effective in other areas of the City (A.R. 1-512:243).

¹¹ FIB is also not a reliable measurement of human sources of bacteria. The RWQCB relies heavily, if not solely, on the existence of FIB as an indicator of a human sources of pollution and a potential health risk from the waste. Health professionals and water quality experts have not resolved linked human illness and non-human sources of bacteria. Avian fecal matter is being implicated in waters where people report illness and there is no evidence of a human fecal source. Equally common are the natural bacteria found in lagoon soils, sand, algae and decaying plants. Kelp washed up on the shore is a reservoir that contributes to the background levels collecting fecal matter. Fecal concentrations vary depending on time of day, temperature, tidal flows when samples are collected and tool(s) chosen to analyzed the samples. The US EPA has used the same growth-based measurements of fecal indicator bacteria (FIB) for over 40 years for recreational water quality criteria; however, great advances in science now allow measurement of more specific sources of human fecal pollution, such as human specific microbes (i.e. Bacteriodes). Multiple studies have demonstrated that human markers have not been found in Malibu Creek, Malibu Lagoon or Surfrider Beach samples even in the presence of elevated enterococcus. (Ambrose 2000, Ambrose 2009, USGS, SCCWRP 2005, US EPA 2010). The Regional Board's technical memos did not acknowledge these other potential sources and the City continues to challenge the conclusions in the Technical Memos.

¹² See e.g. Table 7, Technical Memo No. 3 -Pathogens in Wastewater that are in Hydraulic Connection with Beaches Represent a Source of Impairment for Water Contact Recreation (November 5, 2009); RWQCB Staff Presentation, Proposed Prohibition On-site Wastewater Disposal Systems (Septics) Malibu Civic Center Area, slide 21 (November 5, 2009).

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The OWDS Ban is based on the faulty premise that it is necessary to protect the "Malibu Valley Groundwater Basin" (MVGB) as a potential source of drinking water.

First, in 1960, the underlying groundwater was considered unsuitable as drinking water due to the presence of extremely high and increasing concentrations of total dissolved solids (TDS). These elevated TDS levels resulted from salt water intrusion, which was caused by groundwater withdrawal. In 1975, seawater was recorded to have advanced .5 miles inland. Chloride concentrations exceeded 100mg/L in the coastal areas of the basin.¹³ For this reason, the ground water is unusable along the coast. A recent water quality measurement made during sampling of the deep aquifer located in the area designated for the OWDS Ban revealed a TDS concentration exceeding the drinking water maximum contaminant level (MCL).

Regional Board Staff's Technical Memo No. 2 also does not address the State Water Resources Control Board's "Sources of Drinking Water Policy" (Resolution 88-63), even though this policy specifically questions whether the TDS and electrical conductivity water quality criteria are satisfied, a question central to whether Malibu Valley groundwater is suitable for municipal use. Therefore, it is appropriate to employ onsite wastewater treatment systems in these coastal areas subject to salt water intrusion.

Moreover, Regional Board staff has set an arbitrary boundary for the Malibu Valley Groundwater Basin.

The OWDS Ban boundary is based on an obscure boundary for MVBG mapped in the Basin Plan over 30 years ago. The MVGB boundaries identified in the Basin Plan are not to scale and have not been properly reproduced. The Board's boundaries for the MVGB could be ½ mile or more in error, based on the loose scale in the Basin Plan.

The Ban boundaries have no relationship to potential groundwater drinking water because Winter Canyon and Malibu Creek have two separate groundwater basins.¹⁴ It appears that the Ban is based upon surface topography that includes, Malibu Creek Basin,

¹³ See Exhibit R.

¹⁴ See Exhibit Q.

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Winter Canyon Basin, and also a portion of Marie Canyon Basin. The Ban can not protect drinking water when the boundaries are unrelated to the actual groundwater basin.

Although they are adjacent, Winter Canyon and Malibu Creek have intervening ridges that divide surface waters such that each watershed drains independently to the ocean. The ridge is composed of siltstone bedrock of the Monterey Formation. Both Winter Canyon and the Malibu Creek contain sediment deposits capable of storing and transmitting groundwater, though the potential yield of Winter Canyon is very limited. Winter Canyon can therefore be classified as a separate groundwater basin distinct from the Malibu Creek. The Winter Canyon boundaries are well defined by the surrounding bedrock hills, including the bedrock ridge the separates this basin from the Malibu Creek area. The lack of hydraulic connections between the two and the significantly different water levels and flow gradients were demonstrated in the Stone Environmental Risk Assessment Report. Additionally, Winter Canyon is not affected by water levels in the Malibu Lagoon. The Malibu Beach Quadrangle Map depicts the Winter Canyon area as a separate alleviated valley bordered by bedrock. The Seismic Hazard Zone Map also depicts this as separate water unit from the Malibu Creek area due to the liquefaction potential in this region.¹⁵

The entire Winter Canyon area has no hydraulic connection to MVGB or the Malibu Creek and Lagoon. It is a separate groundwater unit that does not contribute ground water or surface water to the MVGB and cannot be considered part of the MVGB nor a component of the Prohibition. The Regional Board staff admitted at the hearing that this area does not flow towards the Lagoon through groundwater flow. (A.R. 1-511:241- 1-512:242). Winter Canyon is an extension of the upper Winter Canyon bedrock area that was removed from the Prohibition. The Department of Water Resources has more recently defined the MVGB as only that limited portion of the valley that drains by Malibu Creek to the Ocean.¹⁶ Water quality regulation aimed at protecting the Malibu Valley or Civic Center area must be tailored to this geographic region only and exclude the upper and lower portions of Winter Canyon.

¹⁵ See Exhibits S and T.

¹⁶ See Exhibit Q.

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The Regional Board's proposed MVGB boundaries do not match the OWDS Boundaries. Attached as Exhibit R is the Department of Water Resources report on the Malibu Valley, showing several key factors the Regional Board failed to consider. The northern boundary of the MVGB is described as "non water-bearing tertiary age rocks on the sides." This area consists of only approximately 42 residential parcels of which 5 are vacant lots; there is no evidence that these few parcels with a relatively small number of OWTS are contributing to any degradation of the groundwater in the MVGB. As a non water bearing area, all of the Winter Canyon area and all areas north of the MVGB boundary must not be included in the boundaries for an OWDS Ban. The City's Wastewater Treatment Proposal relies on these preferred boundaries.

The Winter Canyon Upland Area, see Exhibit P, which the Regional Board removed from the OWDS Ban boundaries during the hearing, consists of bedrock and does not contribute hydrogeologically to the Winter Canyon groundwater basin. The areas between the Regional Board's obscure MVGB boundaries and the OWDS Ban boundaries, commonly referred to as the Malibu Knolls area, consists of the same non-water bearing bedrock and yet is included in the OWDS Ban boundaries. The City's proposal does not include this area and there is no evidence to support its inclusion in the OWDS Ban.

Further, there is no viable source of drinking water in the area. All historical sources of drinking water were adjacent to Malibu Creek, and the last known usable water well was abandoned over 65 years ago. The groundwater beneath the Malibu Colony area, in the Civic Center Ocean Contributing Area in Exhibit P, is not viable for drinking water because of inter-tidal saltwater influences. The same phenomenon is experienced in most of the Malibu Creek Contributing Area, the Ocean Contributing Area and West Shore areas, as designated in Exhibit P. Historically, wells placed along the creek were rapidly impaired by salinity from saltwater intrusion and considered not viable for human consumption. In the 1950s, the County of Los Angeles Health Department recommended the water be used for salt tolerant plants only. These areas subject to inter-tidal saltwater intrusion are not viable drinking water sources and as proposed in the City's Civic Center Wastewater Treatment Proposal, wastewater treatment is appropriate here.

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While the case may be on appeal, we cannot ignore that a trial court in *City of Arcadia v. State Water Resources Control Board* found that it is improper to base standards on consideration of potential beneficial water uses, and that Water Code Section 13241 requires the Regional Board to consider analysis of only probable future beneficial uses of water in the basin planning process. See Case No. 06CC02974, Orange County Superior Court Judgment dated March 13, 2008. Staff's analysis of groundwater as a potential drinking water source is not supported by the evidence and does not appear to meet the requirements of Section 13241.

RWQCB staff also did not provide any evidence of impairment at Amarillo Beach and the USGS studies support this finding. The City has completed additional testing near the Winter Canyon and there is extensive County testing at Marie Canyon (Amarillo) showing that bacteria is surface water related and only upstream of the OWTS at the beach. In other words, disinfection in the OWTSs works and should be treated as a realistic option for protecting water quality in these areas.

Legal Analysis Supporting Remanding the Basin Plan Amendment to Regional Board

Next, we direct your attention to a number of legal flaws in the Regional Board's adoption of the OWDS Ban Basin Plan amendment, flaws that could be cured by remanding the amendment back to Regional Board.

1. *Adoption of the OWDS Ban was an adjudicative proceeding that was legally flawed and not fairly conducted.*

While a Basin Plan amendment is usually considered a regulatory, or rule-making, proceeding, the OWDS Ban functions as an adjudicative decision because its effect and purpose was to regulate only specific property within a limited geographic region based on site-specific evidence; the Ban does not apply to all properties generally. Under the Water

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Code, the Board is also required to consider evidence and make findings based on that evidence (A.R. 1-1 – 1-8), a further indicator of adjudicative determinations.¹⁷

Due Process

The constitutional principle of procedural due process requires reasonable notice and opportunity to be heard before government deprivation of a significant property interest, e.g. prohibiting the use of existing onsite wastewater treatment systems.

As Boardmember Glickfeld pointed out at the hearing, the systems that can no longer operate under the Ban “cost a fortune,” citing two examples of new commercial systems costing between \$3-5 million each. (A.R. page 1-513: Section 245). Individual residential treatment systems in the OWDS Ban area can cost anywhere from \$60,000 to \$160,000 each. A preliminary review of the City’s records shows that in the prohibition area, more than fifty OWDSs have been installed since 2000, and another approximately 200 parcels in the area are on package treatment systems. Each of these property owners will be stripped of that investment if these treatment systems are prohibited. Conversely, the cost of compliance with the OWDS Ban is estimated at \$52 million, with another \$1.6 million required for maintenance annually, at a cost to each property owner of approximately \$500-\$1000/month for the centralized system. Given the incredible costs to individual property owners within a defined area at stake here, due process requires reasonable notice be given to the affected property owners and that they be afforded a meaningful opportunity to be heard. These legal protections were missing from the Regional Board’s November 5, 2009 hearing.

¹⁷ Adjudicative proceedings are evidentiary hearings of determination of facts pursuant to which a Regional Board formulates and issues a decision. See 23 CCR 648. In this case, the Board must make findings as to the impact of the OWDS on water quality and must consider all relevant evidence related to the discharge, including evidence of contamination, existing and planned land uses, Water Code Section 1341 factors and other issues. These findings require an adjudicative hearing under the Administrative Procedures Act and Title 23 of the California Code of Regulations.

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Inadequate Notice

The notice and hearing provided for the OWDS Ban, while purportedly in compliance with the requirements for a Basin Plan amendment, do not meet due process standards, or the legal requirements set forth in the Administrative Procedures Act (APA) and the Regional Board's procedural regulations for adjudicatory hearings (Title 23 Cal. Code Regs).

First, notice was not provided to individual property owners, as would be expected and required, prior to a decision impacting specific, identified parcels. In fact, the County of Los Angeles was not noticed even though approximately 30% of the original prohibition ban area was within its jurisdiction. It is not clear if notice was properly published in the newspaper or if any other required notice was provided.

Second, the Regional Board staff removed a significant exemption for zero-discharge systems *after* the close of the written comment period on October 8, 2009 (A.R. 1-505: 227), precluding the public from commenting on this significant change. Procedures to adopt regulations must meet the requirements of the Administrative Procedures Act. 23 CCR. 649.1. The APA prohibits the Regional Board from substantively changing a proposed regulation after it has been made available to the public for comment. Cal. Govt. Code section 11346.8(c). If a change is made, staff must re-circulate the changes to the public for at least 15 days, the Board must accept written comments on the changes and staff should respond to those comments prior to a hearing on the proposed regulation.

Further, then Executive Officer Tracey Egoscue offered another substantial revision to the plan (that was ultimately adopted by Board) at the November 5th hearing *after the oral public comment period had closed* ("Post Public Comment Proposal")¹⁸. Egoscue's Post Public Comment Proposal changed the boundaries of the prohibition area, exempted certain residential systems that had already received entitlements (provided

¹⁸ Ms. Egoscue's Post Public Comment Proposal had been created and printed on November 2, 2009, three days before the hearing, indicating an intentional delay in introducing this alternative until after public comment (see initials JFL 11/2/09 bottom right corner of alternative map- attached as Exhibit B).

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they be removed by the 2019 deadline), and extended the residential compliance date to 2019. After waiting to introduce the proposal until after public comment, the Executive Officer insisted that the Board had to make a decision that evening and would not give the Board or the public an opportunity to process and comment on these changes.

Board staff refuses to accept any additional written materials from the public after October 8, 2009 because staff needs time to review, verify and respond to written materials; yet, the Executive Officer introduced a new proposal after the close of public testimony and allowed the public *no* time to review and *no* opportunity to comment on the new proposal.

The Regional Boards discourages introduction of surprise testimony and exhibits (23 CCR 648.4(a)), as the City pointed out during the hearing. The Regional Board staff should be required to adhere to its own admonitions. More importantly, this Board should not accept a recommendation from the Regional Board that has not been subject to the required public review or has been adopted in contravention of basic due process protections.

Inadequate Opportunity for Public Participation

The Regional Board and its staff were so determined to make a final decision on November 5th, that public comment was reduced to a formality and did not provide a meaningful opportunity for public participation. The Regional Board reduced the amount of time afforded to the public throughout the course of the hearing from five minutes per speaker at the beginning, to three minutes per speaker, to one minute per speaker. The hearing involved complicated scientific analysis and even those most knowledgeable on wastewater management cannot reasonably convey his or her concerns on a 2000 page record in sixty seconds.

The Regional Board also refused to let anyone comment who had not filled out a speaker card at the beginning of the day *before* the staff's presentation; however, the point of public participation is to allow the public to comment on staff's presentation and the comments made by other members of the public during the course of the hearing.

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Disallowing speakers who choose to respond based on what is said at the hearing defeats the purpose of public participation, which is to inform the Board of facts and opinions other than those presented by staff.

Additionally, Regional Board staff admitted that the public written comments had uncovered many errors and inaccuracies in all five tech memos; however, the public was not given the opportunity to review and comment on the revised data to verify accuracy. (See e.g. 1-429:42; 1-430:44; 1-431:47- 48).

Improper Separation of Duties

The Board also failed to separate staff's advocacy function from its adjudicative function when Regional Board Counsel acted as both advocate in support of the amendment and as legal advisor to the Regional Board. This dual role constituted a violation of the APA and due process and unduly influenced the outcome of the hearing.¹⁹ See *Nightlife Partners Ltd. V. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-93; Government Code Section 11425.10.

There must be a clear delineation between the Regional Board Staff and the decision maker. In *Nightlife Partners*, the Court of Appeal held that procedural due process requires a clear division between the prosecutorial and adjudicative functions.

Jeff Ogata, counsel for the Regional Board, presented staff's environmental assessment under CEQA as part of the prosecutorial staff team, and in doing so expressly advocated for the Board's adoption of staff's recommendation. Mr. Ogata presented that, "we are not recommending the no project alternative," "we considered public comments that we received and revised the Environmental Staff Report and checklist accordingly," and finally, that "the prohibition should be adopted in spite of potential significant effects." (A.R. 1-432- 434).

¹⁹ The Los Angeles Superior Court ruled earlier this month that a Regional Board hearing on a TMDL, another Basin Plan Amendment, was not fairly conducted because Regional Board counsel acted as both the Board's advocate while simultaneously functioning as the Board's legal advisor. See Case No. BS122724, Order granting petition for writ dated June 2, 2010.

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After advocating for adoption of the OWDS Ban, Mr. Ogata advised the Board on, among other things, the admissibility of evidence at the hearing (A.R. 1-503:222- 1-504:223), structuring a proper motion (A.R. 1-538:307- 1-539:309) and compliance with Water Code provisions. The Regional Board had two lawyers present at the November 5th hearing, each of whom functioned improperly in both advocate and advisor roles.

Even if the separation of duties rule did not apply to this type of proceeding, counsel's advocacy for the adoption of the Ban gives the appearance of impropriety and diminishes the public confidence that an impartial Board was advised by impartial counsel. For example, the same lawyer that advocated for adoption of the Ban improperly advised the Board that the City's *oral* testimony at the hearing and scientific studies submitted in writing in advance of the hearing that contradicted staff's evidence that OWDS are a source of bacteria be "stricken from the record." (1-503:222 – 1:504 223). The evidence the City submitted was improperly excluded from the record on the advice of the Regional Board's counsel. Advising that testimony and evidence contrary to staff's recommendation be removed from the record during a purported "rulemaking" hearing reflects bias and suggests a lack of impartial legal advice.²⁰

Violation of state open meeting laws

By introducing the Post Public Comment Alternative, the Executive Officer violated the Bagley-Keene open meeting laws, set forth in Government Code sections 11120-11132. (See A.R. 1-533: 294, lines 5-7). Bagley- Keene requires that the details of what the Board will consider be posted before the meeting and that the public be afforded an opportunity to comment before or during the consideration of an agenda item. Introducing a Post Public Comment Alternative denied the public the right to comment on the same proposal that the Board considered, and ultimately adopted.²¹

²⁰ Attached as Exhibit C is the City's request for reconsideration. The request was denied by the Chair of the Board without providing the City an opportunity to present its request to the Board. (Exhibit C-24). The City requested further information on the denial of the request (Exhibit C-25) and the City is awaiting a response.

²¹ The impropriety of the proceedings was not lost on the Board members. Board member Blois was "really, really troubled that Staff removed the [zero discharge] option after the deadline for public comments, and that [the Board] only allowed one minute worth of comments from the public." (1-534: 296).

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Miscellaneous Concerns

The hearing was also full of miscellaneous procedural errors and created much confusion that was not resolved before the final vote. The decision was rushed and three commissioners were confused about the motion being put to a vote and whether disinfection and treatment and zero-net discharge systems were included. When the motion was made, Board Member Glickfeld was under the impression that the City could use existing, advanced treatment systems as a way of pre-treating the wastewater and then moving the treated water to a community system for reclamation and recycling (1-533: 295), Board Member Richardson thought that the motion permitted zero-discharge and disinfection systems (1-533: 295). In fact, both were mistaken.

Board Member Glickfeld requested a friendly amendment to allow property owners to use existing systems as pretreatment and Board Counsel, Michael Levy, interjected that it was not possible because the prohibition was not written that way. (1-536: 303). In other words, the legal counsel instructed the decision maker that she could not change the OWDS Ban as staff wrote it, although the Executive Director's changes to the recommendation were permitted.

Rulemaking is not contingent on how staff drafts a proposal; the regulation *must* be drafted to reflect the will of the decision-makers. Further, the self imposed deadline to make a decision that day was allowed to circumvent the decision-making process. The Board Members' comments reflect confusion on scope of the motion and the procedures to make a substitute motion or amend the motion. As the transcript reveals, those concerns were not alleviated before the final vote. The Board was needlessly rushed to act that evening and the Regional Board's OWDS Ban reflects a hectic, confusing and legally flawed hearing.

Any of these actions by the Regional Board and its staff would be grounds to find that the hearing was not fair. Taken together, they establish that the public was not accorded a full and fair hearing and that the Regional Board's adoption of Resolution No.

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R4-2009-007 was unlawful. For these reasons, the City respectfully requests that the matter be remanded to the Regional Board for further consideration.

2. *The OWDS Ban was adopted in violation of CEQA*

The environmental review for the original proposal for the OWDS Ban lacked sufficient analysis, failed to adequately analyze potential environmental impacts, identify mitigation measures, and analyze a reasonable range of project alternatives. (See City of Malibu Comment Letter dated October 8, 2009, A.R. 2-125 – 192). In other words, the environmental review lacked any meaningful analysis of the reasonably foreseeable environmental impacts of the Ban and the consequences of the “compliance projects.” Deferral of meaningful analysis in spite of the fact that environmental impacts are reasonably foreseeable at this stage frustrates CEQA’s fundamental purpose and forecloses the opportunity for the Board to make an informed, independent and reasoned judgment on the merits of the proposed project. Under CEQA, the Regional Board has a duty to disclose to the public and the decision-makers the potential impacts and feasible mitigation measures associated with the proposed project *prior* to any action. The Regional Board may not defer the requisite environmental analysis until some later action. In its responses to comments, the Regional Board staff failed to adequately address or remedy the lack of analysis.²²

These legal flaws were compounded by the removal of the zero discharge exemption after the close of written comment period²³ and the amendments to the proposed OWDS Ban that were adopted at the hearing but never subjected to environmental analysis.

As a result, we know nothing about the potential environmental effects of the revised OWDS Ban where a “public-owned, community based solution” is allowed,

²² See Exhibit N.

²³ The City, in an October 8, 2009 letter to Regional Board staff, requested that the environmental documents be recirculated for public review and comment before the Regional Board hearing. The request was denied and the flawed environmental documents were presented to the Regional Board on November 5, 2009. See October 8, 2009 letter attached as Exhibit D.

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Winter Canyon and Pepperdine are excluded from the boundaries, compliance is not required until 2019, and 40 residential properties are exempted. This changed project was not considered until after the public comment portion of the public hearing and was never subjected to any analysis before being adopted by the Regional Board.

3. ***OWDS Ban Mandates the Method of Compliance in Violation of Water Code §13360***

Water Code section 13360 prohibits the State and Regional Boards from specifying the method of compliance with regulation. The OWDS Ban unlawfully mandates the method of compliance. As two Board Members pointed out, there is more than one method of compliance and removal of the exemption for zero discharge systems and prohibiting disinfection systems effectively mandates the City to build a centralized wastewater facility. (A.R. 1-507:232). The OWDS is drafted with the purpose of eliminating all options other than a centralized system.

The OWDS Ban is inconsistent. The OWDS Ban prohibits property owners from using existing treatment systems in which they have invested large amounts of money to pre-treat water before sending to a centralized facility for reuse or dispersal. This prohibition on disinfection systems is not rationally related to the goals of the regulation, which is to eliminate additional ground water. Instead, it bans pretreatment. However, inexplicably, 40 residential systems were exempted at the last minute and allowed to be installed until 2019. This inconsistency make the regulation appear arbitrary.

In fact, when questioned as to whether adopting a prohibition was in essence mandating a centralized system, the Executive Officer admitted that the difference really was just “semantics” and that result of this endeavor would be a “centralized system, centralized plant.” (1-506:230- 1-508:233). The Regional Board thus improperly mandated a method of compliance and the OWDS Ban should be reconsidered so the City and the property owners can determine the design, location, type of construction, and *particular manner* of compliance, as required under Water Code section 13360.

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The OWDS Ban also constitutes an unfunded state mandate in violation of Section 6 of Article XIII B of the California Constitution. The City estimates that construction of a centralized wastewater management facility based upon the Regional Board's proposal will cost approximately \$52 million, plus annual maintenance costs of \$1.6 million.

4. *The Administrative Record from the Proceeding is Incomplete*

The Administrative Record from the proceedings is incomplete and fails to include communication between Regional Board staff and the City of Malibu before the hearing. Email correspondence dated October 12, 2009 from Ms. Erickson states that if the City submitted certain scientific studies by October 13, 2009 at noon, those studies would be included in the administrative record; however, Regional Board staff failed to include these submittals (or the communications) in the record.²⁴

In addition to the specific comments set forth this letter, the City reaffirms its comments to the RWQCB on October 8, 2009 by reference.²⁵ The RWQCB staff failed to adequately address the City's comments, as more specifically explained in Exhibit N attached. Further, the City reserves the right to challenge any document supporting or relating to this Basin Plan Amendment that was amended after the written public comment period closed on October 8, 2009.

All other issues raised in the City's October 8, 2009 letter and Request for Reconsideration dated March 25, 2010 are incorporated herein by reference, as further explained in Exhibits C, H, and N. However, the administrative record from the November 5th hearing was not made available to the public for free or provided online. The City had to spend over \$900 making one digital copy of the record. The Regional Board could have easily made the record available on-line. As a matter of fact, the City did just that. By making the record difficult and expensive to access, the Regional Board frustrated the public's ability to address this Board with its concerns.

²⁴ See Exhibits I, J, K and M.

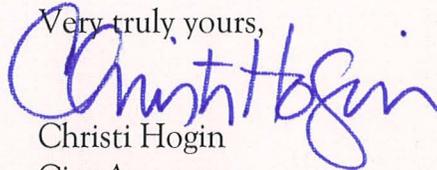
²⁵ Exhibit H.

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For these reasons, the City respectfully requests that the Board reject the OWDS Ban on the ground that it does not protect a potential source of drinking water. Alternatively, the City requests that the Board remand this matter to the Regional Board with instruction that the Regional Board fully consider the current, relevant science and the City's Civic Center Wastewater Treatment Proposal and hold a fair hearing.

Very truly yours,



Christi Hogin
City Attorney
City of Malibu

cc: Dorothy R. Rice, Executive Director

City of Malibu Exhibit List

Exhibit	Description
A	City's Civic Center Wastewater Treatment Proposal Map
B	Egoscue's Post Public Comment Alternative Map
C	C-1 – Request for Reconsideration of Resolution No. R4-2009-007
	C-2 – Malibu Civic Center Area Map
	C-3-- Multi-Tiered Approach Using Quantitative Polymerase chain Reaction for Tracking Sources of Fecal Pollution to Santa Monica Bay, CA (February 28,2005); Rachel T. Noble, et al.
	C-4 – City's Comments regarding Bacteria TMDL for Malibu Creek Watershed
	C-5 -- Impacts of Stormwater Discharges on the Nearshore Environment of Santa Monica Bay; Steve Bay, et al
	C-6 -- Fecal Indicator Bacteria (FIB) Levels During Dry Weather from Southern California Reference Streams (August 14, 2008); Liesl L. Tiefenthlaer, et al.
	C-7 -- Evaluation of Rapid Methods and Novel Indicators for Assessing Microbiological Beach Water Quality; (September 8, 2009); John F. Griffith, et al.
	C-8 -- Enumeration and Speciation of Enterococci Found in Marine and Intertidal Sediments and Coastal Water in Southern California (January 25,2005); D. M. Feguson, et al.
	C-9 -- Assessing Pathogen Risk to Swimmers at Non-Sewage Impacted Recreational Beaches (February 15, 2010); MaryE. Schoen, et al.
	C- 10 -- The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff (I 999); Robert H. Haile, et al.
	C-11 -- Water Quality Indicators and the Risk of Illness at Beaches with Nonpoint Sources of Fecal Contamination (January, 2007); John M. Coldford, Jr., et al.
	C-12 -- Sources of Fecal Indicator Bacteria in Urban Streams and Ocean Beaches, Santa Barbara, CA (September 10, 2009); John A. Izbicki, et al.
	C-13 -- Retrospective Evaluation of Shoreline Water Quality Along Santa Monica Bay Beaches; Kenneth C. Schiff, et al.
	C-14 -- Relationship Between Rainfall and Beach Bacterial Concentrations on Santa Monica Bay Beaches; Drew Ackerman, et al.
	C-15 -- Pathogens and Indicators in Storm Drains within the Santa Monica Bay Watershed (June 1992); Mark Gold, et al.
	C-16 -- Multitiered Approach Using Quantitative PCR to Track Sources of Fecal Pollution Affecting Santa Monica Bay, CA (November 16, 2005); Rachel T. Nobel, et al.
	C-17 -- Coastal Groundwater Dynamics off Santa Barbara, California: Combining geochemical tracers, electromagnetic seep meters, and electrical resistivity (March 15, 2009); Peter W. Swarzenski, et al.
	C-18 – October 29, 2009 Letter from USGS
	C-19 -- Investigation of FIB and human-specific Bacteroidales within Malibu Creek & Lagoon (2009); Dr. Richard Ambrose, et al.
	C-20 --
	C-21 -- Evaluation of Rapid Microbiological Methods for Measuring Recreational Water Quality (May 2006); John F. Griffith, et al.
	C-22 -- Epidemiology Study at Nonpoint Source Contaminated Beaches; Ken Schiff

	C-23 -- Final Report and Abatement Plan for the Redondo Beach Pier Pilot Project (February 24,2010); County Sanitation Districts of Los Angeles County
	C-24 – Letter from RWQCB re: Response to City’s Request for Reconsideration
	C-25- Email from Ms. Erickson re: Response Letter to Chair Lutz
D	October 29, 2009 Letter to RWQCB Requesting Recirculation
E	Map representing Support for City’s Proposal
F	USGS Letter for Task 1 results dated June 28, 2010 and corresponding Study description
G	UCLA 2009 Investigation of Spatial and Temporal Distribution of Human-specific Bacteroides marker in Malibu Creek, Lagoon and Surfrider Beach
H	October 8, 2009 Comment Letter to RWQCB
I	October 13, 2009 Letter to Elizabeth Erickson
J	October 13, 2009 email from Ms. Erickson re: including studies in administrative record
K	Email to Ms. Erickson with Additional Studies attached
L	January 11, 2010 Letter from USGS
M	Email to Ms. Erikson re: City Responses to RWQCB Staff’s Responses to Comments
N	Malibu’s Responses to RWQCB Staff’s Responses to Comments
O	O-1 – June 28, 2010 Letter from USGS
	O-2 – Summary of 2009 UCLA Study in Malibu Lagoon
	O-3 – Civic Center Hydrology Study
	O-4 –UCLA Study re: High Levels of Unhealthy Bacteria Found in Sand at L.A. Beaches
	O-5 – Modeling the dry-weather tidal cycling of fecal indicator bacteria in surface waters of an intertidal wetland (2005); B.F. Sanders, et al.
	O-6 – Frequent Occurrence of the human-specific Bacteroides fecal marker at an open coast marine beach: relationship to waves, tides and traditional indicators
	O-7 – Enterococci Concentrations in Diverse Coastal Environments Exhibit Extreme Variability (2007); Alexandria Boehm
	O-8 – Public Mis-Notification of Coastal Water Quality: A Probabilistic Evaluation of Posting Errors at Huntington Beach, California (2004); S.B. Grant
	O-9 – Final Report: Identification and Control of Non-Point Sources of Microbial Pollution in a Coastal Watershed
	O-10 –Bacterial Contamination at Huntington Beach, CA--- Is it From a Local Offshore Wastewater Outfall?
	O-11 – Generation of Enterococci Bacteria in a Coastal Saltwater Marsh and Its Impact on Surf Zone Water Quality (2001); S.B. Grant, et al.
	O-12 – Lower Malibu Creek and Lagoon Resource Enhancement and Management (2001); Richard Ambrose, et al.
P	Map of Malibu Civic Area
Q	January 20, 2009 Letter to RWQCB re: CEQA Scoping Meeting, Proposal and Comments on Groundwater Basins
R	Department of Water Resources --Malibu Valley Groundwater Basin
S	Map of Malibu Beach Quadrangle
T	Map of Malibu Beach Quadrangle Seismic Hazard Zones