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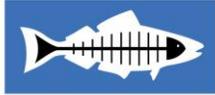
July 1, 2011

Mr. Sam Unger  
Executive Officer  
Los Angeles Regional Water Quality Control Board  
320 West Fourth Street, Suite 200  
Los Angeles, CA 90013  
Via email: ewu@waterboards.ca.gov; sunger@waterboards.ca.gov

**Re: TENTATIVE MEMORANDUM OF UNDERSTANDING WITH CITY OF MALIBU ON THE MALIBU CIVIC CENTER AREA PROHIBITION**

Dear Mr. Unger:

Heal the Bay has a long history of working on water quality issues in the Malibu Creek watershed, Malibu Lagoon and Surfrider Beach. Over the last 20 years, the organization has graded water quality at Malibu beaches as part of its Beach Report Card. Staff members have served on numerous Malibu water quality committees including the Malibu Environmental Review Board for a decade and the Malibu Creek Watershed Committee. Also, Heal the Bay staff served on the Legacy Park and Civic Center Wastewater Treatment Advisory Committees. Our Stream Team monitoring program has collected water quality, habitat and biological data throughout the watershed for over a decade. Three staff members (two are former) completed research at Surfrider Beach and in Malibu Creek that was integral to receiving their doctorates in environmental science and engineering from UCLA. In addition, two staff members were co-authors of the Santa Monica Bay epidemiology study in 1995 which included Surfrider Beach, and a staff member will be an author of the most recent Surfrider Beach epidemiology study. In the late nineties, Heal the Bay and others successfully advocated to the Regional Water Board for the cessation of dry weather Tapia wastewater discharges to Malibu Creek from April to October in order to improve water quality in the watershed and to decrease the frequency of Malibu Lagoon breaching at Surfrider Beach. Also, Heal the Bay helped author the California Clean Beach Initiative, AB411 and AB538, and sits on the Clean Beach Task Force that reviews all beach water quality bond grant applications. A substantial amount of funding for Malibu civic center's dry weather runoff treatment facility came from the CBI. And finally, as a long time vice-chair of the Santa Monica Bay Restoration Commission, Heal the Bay has been instrumental in helping Malibu get funds for water quality projects including Legacy Park and the dry weather runoff treatment facility. Clearly, Heal the Bay has a strong interest in the ecological health of Malibu Creek and Lagoon, and the public health of the over 1.2 million people that enjoy Surfrider Beach every year.



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Given Heal the Bay's demonstrated strong interest in the Malibu Creek watershed and our active involvement in the adoption of Resolution R4-2009-007 to prohibit on-site wastewater disposal systems (OWDSs) in the Malibu Civic Center Area, we are extremely disappointed that our participation in discussions on the Tentative Memorandum of Understanding with the City of Malibu on the Malibu Civic Center Area Prohibition ("MOU") never involved MOU language review. If the Regional Water Board and Malibu truly wanted environmental group involvement in MOU negotiations, then we would have been allowed to review and negotiate draft MOU language. In addition, State Water Board technical staff was excluded from the discussions and also excluded from language review, which is of great concern. These frustrations are further exacerbated by the fact that stakeholders were only provided *eight* business days to review and comment on the MOU. Arguably one of the most critical and complex water quality issues that our Region has faced this decade is being rushed through the process in a completely non-transparent manner. This is unacceptable.

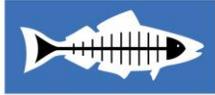
Negotiations between the City of Malibu and the Regional Water Board have been proceeding for over 8 months, yet the proposed MOU has many holes and lacks clarity. Specifically we are concerned that under the MOU, the City of Malibu is not sufficiently held accountable for water quality improvements in the Civic Center area by the Regional Board if Phase 1, 2 and 3 assessment districts are not established. In addition, the geographic scope of the phases must be further refined and substantiated. These concerns and others are discussed in greater detail below.

### **The Regional Board must give the City of Malibu greater accountability in the MOU**

The MOU relies on the formation of assessment districts in order to fund the construction of the central Wastewater Treatment Facility and connections. However, the MOU does not adequately describe what happens if the voters reject the formation of one or more assessment districts, which is entirely plausible. For example, will the Regional Board issue individual waste discharge requirements for every single property in Serra Retreat and the Colony? Given the Regional Board's limited resources, this seems implausible. Or will the Regional Board immediately enforce the Basin Plan Amendment if this occurs? Will the City of Malibu issue individual operating permits for each site? The MOU should include additional clarity for each possible outcome and give the City of Malibu a greater level of accountability in the event that no assessment district is formed.

The MOU should include three additional requirements to ensure Malibu's accountability:

- The MOU sets the deadlines of September 30, 2013 and September 30, 2017 for the formation of these districts during Phase I and Phase II, respectively. This schedule is problematic in the event that voters reject the formation of assessment districts. Under



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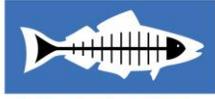
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the proposed scenario, the City would only have two years to issue operating permits and ensure that individual property owners had made necessary upgrades to their OWDSs. This timeframe is far too tight. Instead at a minimum, the Regional Board should move these dates up by a year (September 30, 2012 and September 30, 2016) to ensure that there is time to comply with the MOU. The MOU should also specify that operating permits with the specified advanced treatment, inspection and monitoring requirements, must be in place within 90 days of the end of the election in the event that the assessment district vote fails.

- The operating permit modifications and new requirements for Phase 1 and Phase 2 shall be added as amendments to the current Malibu OWDS operating permit ordinance by December 31<sup>st</sup>, 2012. The modifications can read as follows, “In the event that voters decide not to approve an assessment district, then the following amendment to Malibu’s OWDS operating permit ordinance shall become effective 90 days after the pertinent election for that Phase. All facilities that do not hook up to Malibu’s sewer system shall upgrade their OWDS to advanced treatment (Title 22 requirements for fecal indicator bacteria and/or total nitrogen of 10 mg/l or less as appropriate for the potential impact of the OWDS to cause or contribute to receiving waters impairments and/or water quality standards exceedances) by no later than November, 2019 for Phase 2 properties and November, 2025 for Phase 3 properties that contribute to water quality standards exceedances.”
- Malibu foregoes their right to sue the Los Angeles Regional Water Quality Control Board or the State Water Resources Control Board over any terms stated within the MOU or over any pertinent, current Basin Plan Amendments including TMDLS, and Clean Water Act and Porter Cologne Act requirements until the city fully complies with the terms of the MOU.

Heal the Bay believes that these three MOU amendments would go a long way towards creating MOU compliance accountability for the city of Malibu. Although we would prefer language that would hold Malibu directly accountable for the failure of Phase 1, 2 and potentially polluting Phase 3 facilities to meet the MOU’s compliance deadlines, and we would prefer for Malibu to pass an ordinance within a year that requires OWDS to either hook up to a sewer or go to advanced treatment with specified operating permit terms by the MOU deadline, the aforementioned language goes a long way towards eliminating our concerns.



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## **The properties included in Phases II and III should be modified and substantiated**

Exhibit A shows the boundaries of all three phases contained in the MOU. The Phase III area appears to be the largest. Heal the Bay has repeatedly asked Regional Board staff for the GIS layers to fully understand which properties are currently included within Phase 3 but we have not received this information to date. That information is essential for us to determine whether or not a property was placed in the correct phase. For example, a number of facilities in Winter Canyon have had a history of WDR discharge violations, yet it is unclear whether or not a facility is in Phase 3 or Phase 2.

### ***Malibu Road***

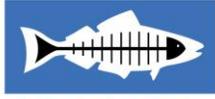
The MOU includes the Malibu Road homes in Phase 3, yet no scientific justification is provided for this major change. The MOU requires the City to complete a water quality study in the ocean adjacent to Malibu Road homes for a period of two years beginning no later than July 1, 2014 to evaluate whether upgraded OWDS requirements are necessary. Instead, we urge the Regional Board to create a Phase II subset for these homes. Specifically, the Regional Board should require that the homes either install disinfection on existing OWDS or hook-up to the central Wastewater Treatment Facility by November 5, 2019. We have seen no evidence to indicate that these OWDSs are *not* causing or contributing to impairment of water quality at a beach required to comply with dry weather beach bacteria TMDL requirements years ago. Thus, they should be included in the MOU. Also, the required study should be completed immediately (begin no later than September 1, 2011) in order to understand the water quality impacts sooner in the compliance timeline.

### ***Winter Canyon***

Several sites within the proposed Phase III boundary in Winter Canyon have known water quality problems and a history of violations. Yet under the terms of the MOU, it is unclear which Winter Canyon parcels are within which phase, and it is uncertain if any of the Winter Canyon parcels will ever be required to hook up to the new sewer or move forward to advanced treatment. It isn't even clear if all sites in and adjacent to Winter Canyon are included in Phase 2 or Phase 3. In general, the Regional Board must provide additional substantiation for the inclusion of properties in Phase 2 and Phase 3.

### ***Pacific Coast Highway***

The MOU's geographic scope should include commercial properties (especially hotels and restaurants) south from the Civic Center on Pacific Coast Highway to at least 21237 Pacific Coast Highway, Malibu. At a minimum, within Phase II, commercial property OWDSs south of



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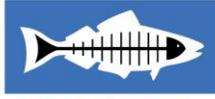
the proposed boundary on PCH should be required to disinfect their wastewater prior to leach field disposal to ensure no bacteria contribution to groundwater and surface water by 2019. This is a more cost effective approach to meeting Santa Monica Bay beach bacteria TMDL requirements. Also, the land adjacent to PCH just southeast of Malibu Lagoon is currently in Phase 3 despite the fact that the beach from Surfrider to Malibu Pier is one of the most polluted beaches along Santa Monica Bay. All of those properties must be moved from Phase 3 to Phase 2, or at least required to implement wastewater disinfection by 2019.

### **The Water Quality Sampling Program should be strengthened**

Under the MOU, Phase III implementation hinges on a water quality sampling program in Malibu Lagoon. Specifically, the City is required to determine bacteria and nitrogen reductions from baseline values in order to evaluate whether Phase I and Phase II “solved” the pollution problems. This concept is scientifically flawed for several reasons. First, a reduction in bacteria and nitrogen in the Lagoon may result from upstream improvements or civic center improvements, or a combination of both. How would the Regional Board discern why the reductions were occurring, especially in such a short time frame? Also improvements in water quality resulting from the implementation of Phase I and Phase II would be seen first in the groundwater; transport of the groundwater in the Civic Center area to the Lagoon could take decades. Thus, it is critical that the MOU include groundwater monitoring. Finally, the majority of the Phase III area is not in the Malibu Creek Watershed. Thus, tying Phase III implementation solely to the Lagoon monitoring is nonsensical. The sampling program should link to *all* receiving waters. This is especially critical given that the beaches are impaired for bacteria and there is a bacteria TMDL in effect. As the law requires, there must be a demonstration that the OWDS do not to cause or contribute to WQS exceedances in all receiving waters.

### **The MOU should specify levels of treatment at the central Wastewater Treatment Facility**

The MOU states that the central Wastewater Treatment Facility effluent must be treated to meet or exceed the requirements of applicable laws, regulations and policy, including Title 22 requirements. However, there is no stated water quality or treatment requirement for the Facility. Title 22 requirements do not include nitrogen standards. Thus, the Regional Board should modify the MOU to include a Total Nitrogen standard of 5 mg/l. Based on the current state of the art in water recycling plants, a 5 mg/l requirement is feasible, and in fact is far above the 3 mg/l requirement for the Malibu Lumber WDR that the Regional Board approved a few years ago.



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### **The MOU should prioritize water recycling**

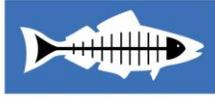
The MOU states that the City may consider the use of deep well or groundwater injection without reverse osmosis as a method of dispersal of effluent from the central Wastewater Treatment Facility. However, the MOU does nothing to require water recycling as the highest and best use of the treated wastewater. Under the California Constitution – Article 10 Water:

SEC. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that **the waste or unreasonable use or unreasonable method of use of water be prevented**, and the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

The Reasonable Use Doctrine, as well as the State Water Board's recently adopted water recycling policy make it clear that highly treated water should not be wasted by discharging it into receiving waters while providing no beneficial use. As such, the MOU must require Malibu to maximize water recycling in the civic center and adjacent areas through recycled water infrastructure including storage. As you know, water recycling is key to an integrated water resources approach. The MOU should specify that designs for the central Wastewater Treatment Facility include significant storage of similar volume (10-15 million gallons) to Pepperdine University's nearby runoff and wastewater storage ponds.

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The scientific and regulatory facts are clear: dischargers of wastewater in the Civic Center area often fail to meet water quality objectives and they have the reasonable potential to cause or contribute to impairments of existing or potential beneficial uses. There is great urgency in solving the water quality issues in the Malibu Civic Center area. World-class Surfrider Beach continues to get Ds and Fs on Heal the Bay's Beach Report Card, as wastewater from commercial and residential septic systems in the area leaches into local groundwater, Malibu Creek and Lagoon and then flows into the ocean, and its poor water quality places public health at risk. Malibu Creek and Lagoon are listed on the State's 2006 303(d) List as impaired by numerous pollutants, and TMDLs were adopted eight years ago for bacteria and nutrients. Surfrider Beach and Malibu Lagoon's legacy of polluted water has continued unabated for decades. For years, we've participated and commented on the development and implementation of plans and studies, from the 1992 Warshall Malibu Wastewater Study to the present. Clearly, Malibu's voluntary efforts to clean up Malibu Lagoon and Surfrider Beach have been largely unsuccessful. The bottom line is that Malibu Lagoon and Surfrider Beach are still two of the



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most polluted receiving waters in the region, if not the state. The public and aquatic life should not have to wait any longer for the promise of clean water.

The Regional Board's adoption of Resolution R4-2009-007 to prohibit on-site wastewater disposal systems (OWDSs) in the Malibu Civic Center Area provided a path forward in fulfilling the promise of clean water in Malibu. However the proposed MOU greatly weakens the requirements and gives little accountability to the City of Malibu for ensuring that the water quality improves. Any change to the Regional Board approved and State Water Board upheld resolution is of tremendous economic benefit to civic center landowners and to Malibu. The fact the Regional Board was willing to voluntarily negotiate a less costly approach to water quality standards compliance was unprecedented and of great benefit to Malibu. However, a strong MOU is necessary to finally clean up Malibu Lagoon and Surfrider Beach to protect human health and aquatic life. Thus, we urge the Regional Board to strengthen the MOU as outlined above.

Thank you for your consideration of these comments. If you have any questions, please contact us at 310-451-1500.

Sincerely,

Mark Gold, D. Env.  
President

Kirsten James  
Water Quality Director