



July 1, 2011

Dr. Eric Wu
Chief of Groundwater Permitting Unit
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

RE: Tentative Resolution Authorizing the Executive Officer to Sign a Memorandum of Understanding with the City of Malibu and the State Water Resources Control Board Regarding the Malibu Civic Center Area Prohibition (“Tentative Resolution”); Tentative Memorandum of Understanding Regarding the Phased Implementation of Basin Plan Amendment Prohibiting On-Site Wastewater Disposal Systems in the Malibu Civic Center Area (“Tentative MOU”)

Dear Mr. Wu,

On behalf of Santa Monica Baykeeper and our hundreds of members living and recreating in the Malibu Creek, Malibu Lagoon and Malibu beaches, please accept our comments on the Tentative Resolution and the Tentative MOU. As discussed in detail below, the Tentative MOU is an attempt to amend the Water Quality Control Plan for the Coastal Watersheds of Ventura and Los Angeles Counties (“Basin Plan”) in violation of the California Water Code (“Water Code”). The Tentative Resolution, which purports to authorize the Executive Officer to amend the Basin Plan similarly violates the Water Code. Legal arguments aside, the Tentative MOU is unnecessary as an implementation framework. Consequently, we urge the Los Angeles Regional Water Quality Control Board (“Regional Board”) to reject both the Tentative MOU and the Tentative Resolution.

The Tentative MOU asserts to simply provide the framework for implementation of the prohibitions established in the November 5, 2009 Amendment to the Water Quality Control Plan for the Coastal Watersheds of Ventura and Los Angeles Counties to Prohibit On-site Wastewater Disposal Systems in the Malibu Civic Center Area (“Malibu Septic Prohibition” or “Basin Plan Amendment”). A close review of the MOU, however, reveals that it sets to accomplish far more than simply implement the Malibu Septic Prohibition. In fact, the Tentative MOU deviates substantively from the directives of the Malibu Septic Prohibition and as such is an improper and illegal attempt to amend the Basin Plan in violation of the Water Code’s clear requirements. *See* Cal. Wat. Code § 13245 (specifying the procedure for Basin Plan amendments). To the extent that it authorizes the Regional Board’s Executive Officer to amend the Basin Plan via the Tentative MOU, the Tentative Resolution separately violates the Water Code as well. *See id.* § 13223 (Regional Board may not delegate its authority to amend the Basin Plan to its Executive Officer).

Furthermore, the Tentative MOU is unnecessary and unjustified as an implementation tool because the Malibu Septic Prohibition and Regional Board Resolution No. R4-2009-007 together provide a clear and comprehensive implementation plan for the accomplishment of the goal of the Basin Plan Amendment.

For these reasons alone, the Los Angeles Regional Water Quality Control Board (“Regional Board”) must reject both the Tentative MOU and the Tentative Resolution. Instead of trying to revise the unambiguous language of the Basin Plan and wasting precious time and resources, Regional Board staff and City of Malibu should fully engage in the difficult but extremely urgent task of terminating all septic system discharges in the Civic Center Area, cleaning up Malibu Creek, Malibu Lagoon and Malibu beaches, and protecting public health just as the Malibu Septic Prohibition outlines.

I. The Malibu Septic Prohibition Was Adopted to Protect the Water Quality in Malibu Creek, Malibu Lagoon and Malibu Beaches and Must Not Be Revised

The Malibu Septic Prohibition was adopted to protect the Malibu Creek, Malibu Lagoon and Malibu beaches after decades of impairment, violations and broken promises.

In recognition of the serious degradation of these iconic waterbodies, the Regional Board and the United States EPA have developed a number of TMDLs, including the Malibu Creek and Malibu Lagoon Nutrient TMDL, the Santa Monica Bay Beaches Bacteria TMDL and the Malibu Creek and Malibu Lagoon Bacteria TMDL. These TMDLs have been violated by the discharge of wastewater from on-site wastewater disposal systems (“OWDS”) which reaches the Malibu Creek, Malibu Lagoon and adjacent beaches through shallow groundwater. *See Final Technical Memorandum #3: Pathogens in Wastewater that are in Hydraulic Connection with Beaches Represent a Source of Impairment for Water Contact Recreation* (“Technical Memorandum #3”); *Final Technical Memorandum #4: Nitrogen Loads from Wastewater Flowing to Malibu Lagoon are a Significant Source of Impairment to Aquatic Life* (“Technical Memorandum #4).

Similarly, despite the Waste Discharge Requirements (“WDRs”) issued by the Regional Board to Malibu Civic Center area dischargers, discharges in the Malibu Septic Prohibition area have continued to violate effluent limits and effluent flows and the Regional Board has issued numerous Notice of Violations as recently as 2009. *See Final Technical Memorandum #1: Dischargers Have Poor Records of Compliance with Regional Board* (“Technical Memorandum #1). Even the most recently permitted discharger in the area, the Malibu Lumber Yard, violated its WDRs immediately upon commencing discharge by exceeding its effluent limits for nitrogen, phosphorus and coliform. Regional Board Notice of Violation to Malibu Lumber Yard (June 15, 2009), at 1-2. Furthermore, the section 13269 waiver for smaller OWDS which was administered by the City of Malibu under the 2004 Memorandum of Understanding (“MOU”) with the Regional Board has also failed to adequately regulate subsurface wastewater discharges.¹

In light of the prolonged history of water quality degradation and non-compliance with TMDLs, water quality standards, WDRs and the 2004 MOU with the City of Malibu, and after carefully considering and analyzing all available monitoring data and the science and subjecting it to

¹ The City of Malibu in fact failed to comply with the majority of its obligations under the 2004 MOU, including the requirement to adopt ordinances requiring upgrades of OWDS contributing to bacterial and nitrogen impairment in Malibu Creek, Malibu Lagoon and Malibu beaches.

exhaustive peer review, the Regional Board took the only right regulatory action - it amended the Basin Plan to prohibit any new OWDS in the Malibu Civic Center area and require all existing OWDS to cease discharge by 2015 for commercial properties and 2019 for residential properties.

While it does not, and cannot, provide any new information or science showing that the Malibu Septic Prohibition and its implementation schedule was in any way unjustified and should be revoked or revised, the Tentative MOU completely modifies the Basin Plan amendment, negating the extensive scientific and technical analysis and public review which went into its development. In the meantime, violations of TMDLs and water quality standards in Malibu Creek, Malibu Lagoon and Surfrider Beach have not abated and the Malibu Septic Prohibition continues to be necessary just as it was when the Regional Board adopted it in November 2009. The Tentative MOU lacks any scientific and regulatory justification and should be rejected.

II. The MOU Is An Attempt to Illegally Amend the Basin Plan

The tentative MOU goes beyond merely providing a different implementation framework for compliance with the Malibu Septic Prohibition. If approved by the Regional Board, the MOU will effectively revise the substantive requirements of the Basin Plan in contravention of the clear directives of the California Water Code (“Water Code”). This attempt to amend the Basin Plan is illegal and must be rejected.

1. The MOU Directly Contradicts the Requirements of the Malibu Septic Prohibition

The Tentative MOU contradicts and revises the substantive provisions of the Malibu Septic Prohibition and the Basin Plan. The discrepancies between the two documents are so significant that the Tentative MOU effectively replaces the Malibu Septic Prohibition.²

The Basin Plan, as amended by the Malibu Septic Prohibition, requires that “all wastewater discharges in commercial areas from existing on-site wastewater disposal systems are prohibited on November 5, 2015, as specified in figure 4-yy.” Regional Board Resolution No. R4-2009-007 at 12. “All wastewater discharges in residential areas from existing on-site wastewater disposal systems are prohibited on November 5, 2019, as specified in figure 4-yy.” *Id.*

In direct contradiction with the Basin Plan’s language, the Tentative MOU adds an entirely new third phase for compliance with the Malibu Septic Prohibition under which certain residential and commercial properties in the prohibition area *may* have to connect to a centralized wastewater treatment plant (“CWTP”) and thus discontinue their on-site discharge, by November 5, 2025. *See* Tentative MOU at 6. Thus, the MOU effectively amends the requirements of the Malibu Septic Prohibition with respect to the following residential and commercial properties:

- Instead of discontinuing septic system discharges by November 5, 2015 as the Basin Plan currently requires, the Hughes Research Laboratory, the Malibu Bluff Park, the Webster

²The map attached to the Tentative MOU is an essential part of the document as it delineates the properties to which the MOU’s three-phased implementation will apply. Yet this map is of very poor quality and does not clearly identify the different areas covered by the Tentative MOU. This makes it very difficult to compare the MOU to the November 5, 2009 Basin Plan amendment and thus hinders the public’s right to review and provide meaningful comments on the Tentative MOU. Our comments are therefore necessarily not as detailed as they would have been if the map attached to the Tentative MOU were of better quality.

Elementary School, and coastal properties to the southeast of the Malibu Pier, among others, will be allowed to discharge at least until November 5, 2025 and may be indefinitely;

- Instead of discontinuing septic discharges by November 5, 2019 as the Basin Plan currently requires, the Malibu Knolls area properties, Malibu Road area properties, properties to the east of Sweetwater Mesa Road, among others, will also be allowed to continue discharging at least by November 5, 2025 and may be indefinitely.

The Tentative MOU also improperly attempts to amend the Basin Plan by extending the November 5, 2015 deadline to November 5, 2019 with respect to the following areas: coastal properties immediately to the southeast of the Malibu Lagoon and properties to the northwest of the Legacy Park. *See* Tentative MOU at 6.

Thus, although presented as an agreement to streamline the implementation of the Malibu Septic Prohibition, the MOU is an improper and illegal attempt to amend the Basin Plan and should be rejected outright by the Regional Board. *See* Cal. Water Code § 13245 (outlining the procedure for amending the water quality control plans). Further, Regional Board staff have failed to provide justification for these substantive and significant changes.

2. As A Basin Plan Provision, the Malibu Septic Prohibition Cannot Be Amended Via an MOU and Can Only Be Revised by the Regional Board in Compliance with the Water Code

The Malibu Septic Prohibition was adopted by the Regional Board on November 5, 2009 after a lengthy public process during which the Regional Board considered thousands of pages of comments from all stakeholders, including extensive comments by the City of Malibu. In compliance with the requirements of the Water Code, Regional Board staff prepared several peer-reviewed technical memoranda which unequivocally established that the Malibu Septic Prohibition is necessary and supported by science. Following this comprehensive process, the Malibu Septic Prohibition was again reviewed and subjected to public scrutiny at the State Water Resources Control Board (“State Board”) which approved it on September 21, 2010. The Malibu Septic Prohibition became effective as a Basin Plan amendment on December 23, 2010.

Thus, the Malibu Septic Prohibition is now a part of the Basin Plan and can only be modified in conformance with the Water Code requirements. *See* Cal. Wat. Code § 13245 (Basin Plan revisions must be adopted by the Regional Board and are not effective until approved by the State Water Resources Control Board). Revising the Basin Plan via an MOU or a resolution authorizing the Regional Board’s Executive Officer to sign an MOU is clearly not an amendment mechanism sanctioned by the Water Code.

In fact, the California Court of Appeal has held that a water board cannot amend a water quality control plan by approving an implementation agreement that alters the provision of the plan precisely because such an amendment does not comply with the Water Code’s requirements. *See State Water Quality Control Board Cases* (2006) 136 Cal.App.4th 674, 729 (the State Board could not properly adopt an agreement proposing a different implementation of a water quality control plan because the implementation “fundamentally altered” the water quality control plan and “such an alteration could be accomplished only through a properly noticed and conducted regulatory proceeding”). Just like in *State*

Water Quality Control Board Cases, the Tentative Resolution will approve an implementation agreement that will de facto amend the Basin Plan. And just like in *State Water Quality Control Board Cases*, both the Tentative Resolution and the Tentative MOU will violate the Water Code and therefore must be rejected by the Regional Board.

Furthermore, the Malibu Septic Prohibition, as any Basin Plan provision, may not be amended by the Regional Board's Executive Officer. Section 13223 of the Water Code specifically prohibits the delegation to the Executive Officer of the Regional Board's prerogative to revise the Basin Plan. Cal. Wat. Code § 13223 (a). The tentative resolution which purports to authorize the Executive Officer to do just that via an MOU with the City of Malibu is thus illegal. *See Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 483-485 (a Regional Board's executive officer has not capacity to make an agreement with dischargers to amend the Basin Plan because the Regional Board "could not [] delegate its power and duty to issue, modify, or revoke any water control plan").

Clearly, the Tentative MOU and the Tentative Resolution amount to a Basin Plan amendment undertaken in direct contravention of the Water Code provisions and case law. The Regional Board must therefore reject them.

III. The MOU Is Unnecessary as an Implementation Tool because the Basin Plan Amendment and the Regional Board Resolution Provide an Implementation Schedule for the Malibu Septic Prohibition

Apart from attempting to amend the Basin Plan in violation of the Water Code requirements, the Tentative MOU is also unnecessary and unjustified as an implementation framework for the Malibu Septic Prohibition.

The Basin Plan and Regional Board Resolution No. R4-2009-007 together contain a detailed implementation schedule for achieving compliance with the Malibu Septic Prohibition. Thus, the Basin Plan clearly prohibits any new on-site wastewater disposal systems, with certain exceptions. Regional Board Resolution No. R4-2009-007 at 12. It further mandates all on-site wastewater disposal systems in commercial and residential areas, as specified in figure 4-yy, to cease discharging by November 5, 2015 and November 5, 2019 respectively. *Id.*

Moreover, the Regional Board outlined specific steps and deadlines which must be followed by Malibu on the road toward achieving compliance with the Malibu Septic Prohibition. Regional Board Resolution No. R4-2009-007 at 7. These implementation measures include the submission of quarterly written reports by the City of Malibu to the Regional Board's Executive Officer "summarizing the strategy and progress toward meeting the 2015 prohibition deadline." *Id.* The Regional Board also required the City to "document progress, to the satisfaction of the Executive Officer" toward the achievement of several interim and final prohibition deadlines, including deadlines for the completion of a master facilities plan for possible projects to comply with the prohibition, preliminary engineering and feasibility study, and selection of a project to comply with the prohibition, among others. *Id.*

In light of this detailed implementation framework for compliance with the Malibu Septic Prohibition, there is no justification or necessity for the Tentative MOU. Indeed, neither the Tentative

MOU nor the Tentative Resolution provide any reasons for revising the existing implementation schedule other than the threat of litigation from City of Malibu.³

While as an environmental organization enforcing water quality regulations Santa Monica Baykeeper appreciates the seriousness of litigation, we are concerned about the dangerous precedent that could be set if the Regional Board approves the Tentative MOU solely to appease potential litigants even before it has utilized any of the enforcement mechanisms available to it to ensure compliance with its Basin Plan provisions. Undoubtedly, such an action will provide an incentive to the next individual, municipality or company that is unhappy with a Regional Board Basin Plan amendment or a waste discharge permit to threaten litigation in order to obtain a more lenient treatment. This prospect is not just undesirable, it is also in direct contradiction with the Regional Board's mandate to protect water quality.

IV. Conclusion

The Tentative MOU and the Tentative Resolution violate the Water Code and are unnecessary and unjustified as implementation tools for the Malibu Septic Prohibition. The Regional Board is bound by the Water Code and common sense to reject them. The City of Malibu must comply with the Malibu Septic Prohibition as written.

Sincerely,

Tatiana K. Gaur

Tatiana Gaur
Staff Attorney
Santa Monica Baykeeper



Liz Crosson
Executive Officer
Santa Monica Baykeeper

³ Given Malibu's thorough failure to comply with its 2004 MOU with the Regional Board regarding on-site wastewater treatment systems and the Board's expressed desire to terminate that MOU (*see* September 19, 2008 Notice of Intent to Terminate the MOU and November 13, 2008 Regional Board hearing), it is incomprehensible that the Regional Board will now entertain entering into another agreement with Malibu over the same subject matter and area.