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7 Attorney for Petitioners SANTA MONICA BAYKEEPER
8 and HEAL THE BAY

9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

10 IN RE: MEMORANDUM OF UNDERSTANDING) PETITION TO REVIEW
11 BETWEEN CITY OF MALIBU AND REGIONAL) CALIFORNIA REGIONAL WATER
12 WATER QUALITY CONTROL BOARD, LOS) QUALITY CONTROL BOARD, LOS
13 ANGELES REGION REGARDING PHASED) ANGELES REGION'S APPROVAL
14 IMPLEMENTATION OF BASIN PLAN) OF MEMORANDUM OF
15 AMEDMENT PROHIBITING ON-SITE) UNDERSTANDING BETWEEN
16 WASTEWATER DISPOSAL SYSTEMS IN THE) CITY OF MALIBU AND REGIONAL
17 MALIBU CIVIC CENTER AREA) WATER QUALITY CONTROL
18) BOARD, LOS ANGELES REGION;
19) REQUEST TO HOLD PETITION IN
20) ABEYANCE
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29 I. INTRODUCTION

30 Pursuant to Water Code § 13320 and Section 2050 of Title 23 of the California Code of
31 Regulations, Santa Monica Baykeeper ("Baykeeper") and Heal the Bay (collectively
32 "Petitioners") hereby petition the State Water Resources Control Board ("State Board") to
33 review the action of the California Regional Water Quality Control Board, Los Angeles Region
34 ("Regional Board") in approving the Memorandum of Understanding Between the City of
35 Malibu, the Regional Board and the State Board Regarding Phased Implementation of Basin
36 Plan Amendment Prohibiting On-Site Wastewater Disposal Systems ("OWDSs") in the Malibu
37 Civic Center Area ("Malibu MOU"), and in authorizing the Executive Officer to sign the Malibu
38 MOU on behalf of the Regional Board with the City of Malibu and the State Board through

1 Resolution XX-XX ("Malibu MOU Resolution"). As the Malibu MOU itself states, it is intended
2 to implement the amendment to Chapter IV of the Water Quality Control Plan for the Coastal
3 Watersheds of Los Angeles and Ventura Counties ("Basin Plan") prohibiting OWDSs in the
4 Malibu Civic Center Area, as defined in Resolution R4-2009-007 approved by the Regional
5 Board on November 5, 2009 and subsequently approved by the State Board and the Office of
6 Administrative Law ("Septic Prohibition"). The Malibu MOU and Malibu MOU Resolution
7 were approved by the Regional Board on July 14, 2011.

8 As discussed in detail below, the Regional Board's action in approving the Malibu MOU
9 and authorizing the Executive Officer to sign the Malibu MOU on behalf of the Regional Board
10 was inappropriate and improper and resulted in violations of state law and regulatory
11 requirements including: (1) the Malibu MOU deviates substantively from the directives of the
12 Septic Prohibition and as such the Malibu MOU and the Malibu MOU Resolution constitute an
13 improper and illegal attempt to amend the Basin Plan in violation of Water Code § 13245; (2) the
14 Malibu MOU and the Malibu MOU Resolution, because they are inconsistent with the Septic
15 Prohibition, violate the Regional Board's duty pursuant to Water Code §§ 13263 and 13247 to
16 take actions consistent with the applicable water quality control plans; (3) the Regional Board's
17 authorization to the Regional Board's Executive Officer to amend the Basin Plan via the Malibu
18 MOU separately violates Water Code § 13223; (4) the Regional Board also failed to conduct the
19 mandatory assessment of significant environmental consequences of the Malibu MOU and the
20 Malibu MOU Resolution which is required by section 3777(a) of Title 23 of the California Code
21 of Regulations and section 13283 of the Water Code; (5) the Regional Board failed to provide
22 proper notice and comment period and as a result the July 14 public hearing violated section
23 13244 of the Water Code; and (6) the Regional Board failed to provide the requisite justification
24 for its substantive and significant changes to the Basin Plan Amendment.

25 The Septic Prohibition prohibits all new OWDSs in the Malibu Civic Center Area. It also
26 prohibits the discharge from existing OWDSs based on a phased schedule to cease discharges
27 from Phase One systems by November 5, 2015 and Phase Two systems by November 5, 2019.
28 The Septic Prohibition does not prevent repairs, maintenance, and upgrades to existing OWDSs,

1 provided that they do not expand the capacity of the systems or increase flows of wastewater.
2 See Septic Prohibition at 7. Regional Board staff developed the Septic Prohibition based on
3 technical evidence presented in five technical memoranda demonstrating that discharges of
4 wastewater from OWDSs in the Civic Center Area consistently fail to meet water quality
5 objectives in the Basin Plan, contribute to impairments of present or future beneficial uses of
6 water resources, and cause pollution, nuisance or contamination. See *id.* at 3; Final Technical
7 Staff Report at 6. The scientific portions of the technical reports were peer reviewed pursuant to
8 California Health and Safety Code section 57004. See Septic Prohibition at 4.

9 The Malibu Civic Center Area is defined according to hydrogeologic parameters and
10 drainage patterns and totals 2.2 square miles of which 1.5 square miles and .7 square miles are
11 within the City of Malibu and the unincorporated area of County of Los Angeles respectively.
12 The Basin Plan Amendment boundary was chosen to encompass priority areas that affect
13 groundwater and are hydraulically connected to impaired surface water resources, including
14 Surfrider, Malibu, and Amarello Beaches and Malibu Lagoon. Final Environmental Staff Report
15 at 2. The Regional Board estimates that approximately 270,000 gallons per day (gpd) of
16 wastewater is released via OWDSs to the subsurface in the Civic Center Area. Tech. Staff Report
17 at 2. Surface waters in the Malibu Civic Center Area include Malibu Creek, Malibu Lagoon and
18 several beaches including the world-renowned Surfrider Beach. In the Basin Plan, the Regional
19 Board has designated specific beneficial uses for each of these waterbodies that include, but are
20 not limited to:

- 21 **Malibu Lagoon:** Navigation; Water Contact Recreation; Estuarine Habitat; Marine
22 Habitat; Rare, Threatened, or Endangered Species Habitat; Wetland Habitat
- 23 **Malibu Creek:** Water Contact Recreation; Warm Freshwater Habitat; Wildlife Habitat;
24 Rare, Threatened, or Endangered Species Habitat; Migration of Aquatic Organisms
- 25 **Malibu, Surfrider, Amarillo, Carbon Beaches:** Water Contact Recreation, Commercial
26 and Sport Fishing, Marine Habitat, Wildlife Habitat, Shellfish Harvesting
- 27 **Groundwater:** Municipal and Domestic Supply (Potential), Industrial Process and
28 Service Supply, and Agricultural Supply

1 The Regional Board and the United States Environmental Protection Agency ("EPA")
2 have established total maximum daily loads ("TMDLs") for the following impaired water bodies
3 in the Malibu Civic Center Area: a Nutrient TMDL for Malibu Creek and Malibu Lagoon, a
4 Santa Monica Bay Beaches Bacteria TMDL for Malibu Beaches, and a Malibu Creek and
5 Lagoon Bacteria TMDL. Regional Board Resolution No. 02-004 (Santa Monica Bay Beaches
6 Bacteria TMDL); Regional Board Resolution No. 2004-019R (Malibu Creek and Lagoon
7 Bacteria TMDL); U.S. EPA TMDL for Nutrients in Malibu Creek Watershed.

8 The Malibu Creek, Malibu Lagoon, and Malibu beaches TMDLs are consistently violated
9 by the discharge of wastewater from OWDSs which reaches the waterbodies through shallow
10 groundwater. Final Technical Staff Report, *Technical Memorandum #3: Pathogens in*
11 *Wastewater that are in Hydraulic Connection with Beaches Represent a Source of Impairment*
12 *for Water Contact Recreation*; Final Technical Staff Report, *Technical Memorandum #4:*
13 *Nitrogen Loads from Wastewater Flowing to Malibu Lagoon are a Significant Source of*
14 *Impairment to Aquatic Life*. Further, despite the Waste Discharge Requirements ("WDRs")
15 issued by the Regional Board to Civic Center dischargers, the violations of effluent limits and
16 effluent flows imposed on dischargers to protect the quality of ground and surface waters in the
17 Civic Center area continue. Final Technical Staff Report, Technical Memorandum #1:
18 *Dischargers Have Poor Records of Compliance with Regional Board Orders*.

19 Given the extensive evidence demonstrating OWDSs in the Malibu Civic Center Area are
20 a significant source of pollution to Malibu Creek, Malibu Lagoon and Malibu beaches and
21 groundwater, on November 5, 2009 the Regional Board revised the Basin Plan to prohibit any
22 new OWDSs (with certain exceptions) and require a two-phase discontinuance of all existing
23 OWDSs in the Malibu Civic Center area. Septic Prohibition at 5-12. On September 21, 2010, the
24 State Board unanimously adopted Resolution No. 2010-0045 approving the November 5, 2009
25 amendments to the Basin Plan and on December 23, 2010, the Office of Administrative Law
26 similarly approved the amendments, making the Septic Prohibition an effective part of the Basin
27 Plan.

1 In October 2010, the City of Malibu, the Regional Board, and the State Board entered
2 into a tolling agreement to extend the deadline by which the City has the option to bring an
3 action against the Regional Board and State Board challenging their approvals of the Septic
4 Prohibition. Regional Board staff and the City of Malibu then entered discussions regarding the
5 implementation of the Septic Prohibition, effectively eliminating public input, and reached the
6 agreement memorialized in the Malibu MOU, released to the public on June 21, 2011. The
7 Regional Board hearing was held on July 14, 2011 and comments were due July 1, 2011 – eight
8 business days after notice was provided.

9 The Malibu MOU purports to merely provide the framework for implementation of the
10 prohibitions established in the Septic Prohibition. In reality, it attempts to significantly change
11 the Basin Plan itself. It extends the ultimate compliance deadline and substantively revises the
12 phasing for achieving compliance with the Septic Prohibition. For example, the Malibu MOU
13 extends the compliance date for some facilities for four to ten years despite known water quality
14 problems and a history of violations, and appears to allow expansion of existing OWDSs in
15 direct contravention of the Septic Prohibition. Further, under the Malibu MOU, properties in the
16 new “Phase Three” may never be required to comply with the Septic Prohibition at all.

17 The Malibu MOU also fails to hold the City of Malibu accountable for its non-
18 compliance. The language of the MOU essentially excuses anticipated violations of the Basin
19 Plan’s requirements by the City of Malibu should the city fail to establish assessment districts to
20 fund the proposed sewer connections. Indeed, the MOU fails to adequately describe how the city
21 will comply should the voters reject the assessment district, a result which is highly likely.
22 Removing accountability again contravenes the provisions of the Malibu Septic Prohibition.

23 II. NAME AND CONTACT INFORMATION OF PETITIONERS.

24 Liz Crosson
Executive Director/Baykeeper
25 Santa Monica Baykeeper
120 Broadway, Suite 105
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1 **III. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH**
2 **THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY**
3 **ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS**
4 **REFERRED TO IN THE PETITION.**

5 Petitioners seek review of the Regional Board's approval of the Malibu MOU and Malibu
6 MOU Resolution, both of which are inconsistent with the Basin Plan and the California Water
7 Code. The petition also seeks review of the Regional Board's failure to comply with the
8 substantive and procedural requirements of the Water Code and the California Code of
9 Regulations in its approval of the Malibu MOU. A copy of the executed Malibu MOU and
10 Malibu MOU Resolution was requested from Regional Board staff, but, as of the date of the
11 filing of this petition, the requested documents have not been provided to Petitioners. See Exhibit
12 1 (email communication from Baykeeper to Regional Board staff). Thus, a copy of the Tentative
13 Malibu MOU and Tentative Malibu MOU Resolution, considered at the July 14, 2011 Regional
14 Board Meeting, is attached as Exhibit 2. Additionally, true and correct copies of Petitioners'
15 comments submitted to the Regional Board on July 1, 2011 regarding the Malibu MOU are
16 attached hereto as Exhibits 3 and 4.

17 In public testimony on July 19, 2011 and in written form on July 22, 2011 (attached as
18 Exhibit 5), Petitioners requested the State Board hold a public hearing to consider the
19 deficiencies of the Malibu MOU. Accordingly, Petitioners request that the State Board hold the
20 petition in abeyance to allow further discussion, negotiation, and public proceedings in relation
21 to the Malibu MOU.

22 **IV. THE DATE ON WHICH THE REGIONAL BOARD ACTED.**

23 Pursuant to Water Code § 13320, the Regional Board's action occurred on July 14, 2011.

24 **V. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR**
25 **FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER.**

26 In approving the Malibu MOU and Malibu MOU Resolution, the Regional Board failed
27 to act in accordance with relevant governing law, acted arbitrarily and capriciously, without
28 substantial evidence, and without adequate findings. Specifically, but without limitation, the
Regional Board failed because:

- 1 A. The Malibu MOU is inconsistent with the Septic Prohibition, the regulatory
2 provisions it purports to implement, and is thus an improper and illegal attempt to
3 amend the Basin Plan in violation of the Water Code's clear requirements. *See*
4 Cal. Water Code § 13245 (specifying the procedure for amending the Basin Plan).
- 5 B. By modifying the Septic Prohibition, the Regional Board is violating Water Code
6 § 13263 which mandates that waste discharge requirements "shall implement any
7 relevant water quality control plans that have been adopted. . . ." Similarly, by
8 approving the Malibu MOU, the Regional Board is violating Water Code §
9 13247's mandate that the Regional Board comply with its own Basin Plan,
10 including the Basin Plan Amendment.
- 11 C. To the extent that it authorizes the Regional Board's Executive Officer to amend
12 the Basin Plan via the Malibu MOU, the Malibu MOU Resolution separately
13 violates the Water Code as well. *See id.* § 13223 (Regional Board may not
14 delegate its authority to amend the Basin Plan to its Executive Officer).
- 15 D. The Regional Board failed to assess the significant environmental consequences
16 of its action, and violated the substantive requirements of California Code of
17 Regulations, title 23, section 3777(a) and Water Code § 13283 – both of which
18 provide guidelines and requirements for an agency with a certified regulatory
19 program under the California Environmental Quality Act.
- 20 E. The Regional Board's failure to provide a proper notice and comment period and
21 a properly noticed and conducted regulatory proceeding on the substantive
22 changes to the Basin Plan violated Water Code § 13244,
- 23 F. The Regional Board acted in approving the Malibu MOU without adequate
24 findings and without substantial evidence in the record.

25 **VI. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED.**

26 Petitioner Santa Monica Baykeeper is a non-profit, environmental organization that has a
27 direct interest in protecting the quality of Los Angeles inland and coastal waters. Baykeeper
28 represents approximately 3,000 members and hundreds of volunteers who frequent the beaches

1 and waterways of Santa Monica Bay, including in the City of Malibu. In particular, Baykeeper's
2 members directly benefit from Malibu waters in the form of recreational swimming, surfing,
3 photography, birdwatching, fishing, and boating. Baykeeper meets all standing requirements for
4 prosecuting this petition, is beneficially interested in the subject matter of this petition, and will
5 be adversely affected by the environmental impacts resulting from the Regional Board's action.
6 Baykeeper accomplishes its mission through community activism, legal advocacy, and outreach
7 and education.

8 Petitioner Heal the Bay is a non-profit environmental organization which since 1985 has
9 been working to protect the health of Santa Monica Bay, its marine inhabitants and the public
10 using Santa Monica Bay beaches. Heal the Bay accomplishes its mission through education,
11 science, community action and advocacy. As an organization which has been heavily involved in
12 working on improving the quality of ground and surface waters in the Malibu Civic Center area,
13 Heal the Bay has a direct interest in protecting and restoring Malibu Creek, Malibu Lagoon and
14 Malibu beaches affected by OWDSs discharges regulated by the Septic Prohibition. Heal the Bay
15 has 12,000 members and hundreds of volunteers, many of which live and/or recreate in Malibu
16 Creek, Malibu Lagoon and Malibu beaches. Heal the Bay's members and volunteers swim, surf,
17 fish, boat, birdwatch and hike in and around Malibu waters and are directly affected by unabated
18 OWDSs discharges degrading these waters. As a result, Heal the Bay satisfies all standing
19 requirements for prosecuting this petition, is beneficially interested in the subject matter of this
20 petition, and will be adversely affected by the environmental impacts resulting from the Regional
21 Board's action.

22 The Regional Board's failure to adequately address OWDSs in the Civic Center Area has
23 enormous consequences for the region, its residents, and its visitors. Peer-reviewed technical
24 memoranda demonstrate the severe threat to water quality OWDSs pose and the need to
25 implement the Basin Plan Amendment as approved by the Regional Board in November 2009.
26 Moreover, there is ample evidence showing that discharges from OWDSs in the areas covered by
27 the Septic Prohibition contribute to systematic violations of water quality standards in Malibu
28 Creek, Malibu Lagoon and Malibu beaches and to increased health risks to the public using

1 Malibu beaches including the world-famous Surfrider Beach. (All of these documented facts
2 demonstrate the considerable negative impact on Petitioners' members and the environment that
3 continues today as a result of the Regional Board's weakening of the Basin Plan.

4 **VII. THE SPECIFIC ACTION BY THE STATE BOARD WHICH PETITIONER**
5 **REQUESTS.**

6 Petitioners seek an Order by the State Board that:

7 Overturns the Regional Board's approval of the Malibu MOU and the Malibu
8 MOU Resolution; and

9 Remands the matter to the Regional Board with specific direction to the Regional
10 Board to comply with the Water Code and Basin Plan in any future agreements
11 with the City of Malibu:

12 **VIII. STATEMENT OF POINTS AND AUTHORITIES.**

13 See Section V. above. Petitioners request that this Petition be held in abeyance, and
14 reserve the right to supplement the legal arguments and authorities in support of this Petition.

15 **IX. STATEMENT THAT THE PETITION HAS BEEN SENT TO THE**
16 **APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGERS.**

17 A true and correct copy of this Petition was mailed via First Class mail on August 12,
18 2011 to the Regional Board, State Board and to the City of Malibu.

19 Samuel Unger, Executive Officer
20 California Regional Water
21 Quality Control Board
22 Los Angeles Region
23 320 West 4th Street, Suite 200
24 Los Angeles, CA 90013
25 sunger@waterboards.ca.gov

26 Frances McChesney
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17 Tom Howard
18 Executive Director
19 State Water Resources Control Board
20 1001 I Street
21 Sacramento, CA 95814
22 thoward@waterboards.ca.gov

23 Dated: August 12, 2011
24 Respectfully submitted,

Tatiana K. Gaur

25 Tatiana Gaur
26 Attorney for Petitioners Santa Monica
27 Baykeeper and Heal the Bay
28

EXHIBIT 1

Tatiana Gaur

From: Liz Crosson
Sent: Friday, August 12, 2011 1:53 PM
To: Tatiana Gaur
Subject: FW: Malibu Tentative MOU

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Executive Director/Baykeeper
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From: Eric Wu [<mailto:ewu@waterboards.ca.gov>]
Sent: Wednesday, August 10, 2011 1:51 PM
To: Liz Crosson
Cc: Deborah Smith; Rebecca Chou; Samuel Ungert
Subject: RE: Malibu Tentative MOU

Hi Liz,

It is under circulation to get signatures. I will keep you informed once it is posted on our website:

Eric

Eric Wu, Ph.D., P.E.
Senior Water Resources Control Engineer
Chief of Groundwater Permitting Unit
Los Angeles Regional Water Quality Control Board
320 W. 4th Street, Suite 200
Los Angeles, CA 90013
(213) 576-6683
(213) 576-5777 Fax
ewu@waterboards.ca.gov

>>> Liz Crosson <liz@smbaykeeper.org> 8/10/2011 11:36 AM >>>
Hi Eric - any news on the final Malibu Septics MOU and Resolution?

Thanks!

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From: Eric Wu [<mailto:ewu@waterboards.ca.gov>]
Sent: Monday, August 01, 2011 8:11 AM
To: Liz Crosson
Subject: Re: Malibu Tentative MOU

Hi Lisa,

Yes, the final version will be posted, and I will notify you when it is done, or send you a copy of it.

Eric

Eric Wu, Ph.D., P.E.
Senior Water Resources Control Engineer
Chief of Groundwater Permitting Unit
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>>> Liz Crosson <liz@smbaykeeper.org> 7/29/2011 7:21 PM >>>

Hi Eric -

I was looking on the Regional Board website and did not see the final Malibu MOU and Resolution as approved by the Regional Board on July 14, 2011. Are you going to post these on the website? Would it be possible to send them to me?

Thank you,

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EXHIBIT 2

MEMORANDUM OF UNDERSTANDING
BETWEEN
CITY OF MALIBU
AND
REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES
REGION AND STATE WATER RESOURCES CONTROL BOARD
REGARDING
PHASED IMPLEMENTATION OF BASIN PLAN AMENDMENT
PROHIBITING ON-SITE WASTEWATER DISPOSAL SYSTEMS
IN THE MALIBU CIVIC CENTER AREA

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**MEMORANDUM OF UNDERSTANDING
REGARDING PHASED IMPLEMENTATION OF BASIN PLAN AMENDMENT
PROHIBITING ON-SITE WASTEWATER DISPOSAL SYSTEMS
IN THE MALIBU CIVIC CENTER AREA**

This Memorandum of Understanding (MOU) is made and entered into by and between the CITY OF MALIBU (City) on the one hand and the REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, and the STATE WATER RESOURCES CONTROL BOARD on the other hand (together the Water Boards), collectively referred to herein as the "Parties" or individually as "Party."

WHEREAS, On November 5, 2009, over the City's objections, the Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) adopted Resolution R4-2009-007 approving an amendment to Chapter IV of the Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (Basin Plan), to prohibit on-site wastewater disposal systems (OWDSs) in the Malibu Civic Center Area, as defined in Resolution R4-2009-007, (Basin Plan Amendment).

WHEREAS, On September 21, 2010, over the City's objections, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2010-0045 approving the Basin Plan Amendment.

WHEREAS, On December 23, 2010, the Office of Administrative Law approved the regulatory provisions of the Basin Plan Amendment, the final step for the amendment to take effect.

WHEREAS, the Basin Plan Amendment prohibits all new OWDSs in the Malibu Civic Center Area and prohibits the discharge from existing OWDSs based on a phased schedule to cease discharges from Phase One systems by November 5, 2015 and Phase Two systems by November 5, 2019. The Basin Plan Amendment does not prevent repairs, maintenance, and upgrades to existing OWDSs, provided that they do not expand the capacity of the systems or increase flows of wastewater.

WHEREAS, in October 2010, the City and the Water Boards entered into a tolling agreement by which they agreed to extend the time within which the City must bring an action against the Water Boards challenging their actions to approve the Basin Plan amendments, which agreement was extended and now due to expire October 2011. The purpose for the tolling agreement was to afford the parties an opportunity to reach agreement on a phased implementation, boundaries and other matters related to the substance of Basin Plan Amendment.

WHEREAS, the Parties have provided interested persons with an opportunity to comment on the MOU and have considered those comments prior to execution by the Parties.

WHEREAS, the parties have reached agreement and wish to memorialize the agreement in this MOU.

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NOW, THEREFORE, the Parties do hereby agree as follows:

ARTICLE I – Purpose and Effect of MOU

- A. **Purpose of MOU:** The purpose of this MOU is to further the objectives of the Porter-Cologne Water Quality Control Act and to memorialize the Parties' agreement to coordinate in the implementation of a wastewater treatment plan (as detailed below) in the Malibu Civic Center Area, as defined in the Basin Plan Amendment, that employs both a plan and schedule to construct one or more state-of-the-art centralized wastewater treatment facilities in the Malibu Civic Center Area and a comprehensive regulatory program with respect to OWDSs.
- B. **Effect of MOU:** The Parties agree to implement the prohibitions established in the Basin Plan Amendment in the manner set forth in this MOU. As long as the City is in compliance with the schedule set forth in this MOU, the Los Angeles Water Board will not amend the Basin Plan Amendment inconsistent with this MOU. The Parties agree to maintain a tolling agreement as long as this MOU remains in effect.
- C. **Authority to Enter into MOU:** The City has authority to enter into this MOU, which is within the scope of its police powers. The Water Boards have authority to enter into this MOU pursuant to California Water Code sections 13165 and 13225.

ARTICLE II – Responsibilities of City

The City shall implement a wastewater treatment plan (Plan) in the Malibu Civic Center Area consisting of the following tasks:

- A. **Phase One:** By November 5, 2015, for the wastewater discharge of those properties within the boundaries of the yellow area shown on the map of the Malibu Civic Center Area attached hereto as Exhibit A and incorporated herein by this reference (Boundary Map), the City shall design and construct a central Wastewater Treatment Facility. In order to fund the construction of the waste water treatment facility, it is necessary that an assessment district be approved and formed in accordance with all applicable laws, including but not limited to Prop 218, which includes the property owners served by Phase One. Once approved, all property owners within the approved assessment district are required to connect to the Wastewater Treatment Facility. The City's Wastewater Treatment Facility may consider the use of deep well or groundwater injections without reverse osmosis as a method of dispersal of effluent from the proposed Wastewater Treatment Facility. The City must obtain Waste Discharge Requirements (WDRs), for the proposed Wastewater Treatment Facility and all water must be treated to meet or exceed the requirements of applicable laws, regulations, and policy, including the Porter-Cologne Water Quality Control Act, the federal Clean Water Act, the Basin Plan, standards for advanced wastewater treatment set forth in Title 22 California Code of Regulations, Division 4, and total nitrogen of 10 milligrams per liter (mg/l). The City

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shall work in coordination with the Los Angeles Water Board and shall comply with the following deadlines to complete Phase One of the Plan.

1. By **September 30, 2011**, submit a schedule and list of public outreach meetings and materials developed to inform the public about the development of a wastewater treatment facility.
2. By **December 31, 2011**, complete and submit to the Los Angeles Water Board a recycle/reuse study which shall identify the potential location and options to maximize the reuse of the Title 22 effluent.
3. By **June 30, 2012**, complete and submit to the Los Angeles Water Board a conceptual groundwater injection plan that is based on field testing and modeling.
4. By **March 31, 2013**, complete and submit the certified Environmental Impact Report for the project in compliance with the California Environmental Quality Act (CEQA).
5. By **June 30, 2013**, complete and submit the design for the Wastewater Treatment Facility, which shall include the facility layout, electrical and pumping requirements, sewer line plans and profiles, disposal well design. Also submit to the Los Angeles Water Board a complete report of waste discharge pursuant to the California Water Code.
6. By **September 30, 2013**, complete the formation of an assessment district for all properties within the Malibu Civic Center Area Phase One and provide that information to the Water Board.
7. By **October 1, 2013**, complete a plan to obtain all funding and property necessary to complete the Phase One project.
8. By **October 30, 2013**, complete and release a Bid Package for construction of the Phase One Wastewater Treatment Facility.
9. By **March 31, 2014**, complete contractor selection and initiate construction of the Phase One Wastewater Treatment Facility.
10. By **November 5, 2015**, complete the Phase One project, including successful startup of the Phase One Wastewater Treatment Facility and the connection of all properties within the Phase One boundaries to the Wastewater Treatment Facility. The City is required to operate the Facility in compliance with the WDRs.

B. **Phase Two:** By November 5, 2019, within the coral-colored area shown on the attached Boundary Map, the City shall require all those developed properties to be connected to a

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central Wastewater Treatment Facility. The Facility shall be the same Facility as described in Phase One or an alternatively located central Wastewater Treatment Facility designed to the same standards as Phase One and subject to waste discharge requirements issued by the Los Angeles Water Board. In order to fund the construction of the wastewater treatment facility improvements and connections thereto, it is necessary that an assessment district be approved and formed in accordance with all applicable laws, including but not limited to Prop 218, which includes the property owners served by Phase Two. Once formed, all property owners within the approved assessment district are required to connect to the Wastewater Treatment Facility.

The City shall comply with following deadlines to complete Phase Two of the Plan:

1. By **June 30, 2015**, inform the Los Angeles Water Board whether the City intends to connect properties within the Phase Two boundaries to the City's Phase One Wastewater Treatment Facility or construct an alternative facility.
2. By **December 31, 2016**, complete and submit to the Los Angeles Water Board a conceptual groundwater injection plan for Phase Two, if applicable, that is based on field testing and modeling.
3. By **March 31, 2017**, complete and certify a subsequent or supplement Environmental Impact Report, if required, pursuant to CEQA.
4. By **June 30, 2017**, complete and submit to the Los Angeles Water Board a Design for Phase Two, including any alternative facility, which shall consist of facility layout, electrical and pumping requirements, sewer line plans and profiles, disposal well design. Also submit to the Los Angeles Water Board a complete report of waste discharge, if necessary, pursuant to the California Water Code.
5. By **September 30, 2017**, complete the formation of an assessment district for all properties within the Malibu Civic Center Area Phase Two and provide that information to the Water Board.
6. By **November 1, 2017**, complete and release a Bid Package for construction of the Phase Two Wastewater Treatment Facility.
7. By **March 31, 2018**, complete contractor selection and initiate construction of the Phase Two facility, if necessary.
8. By **November 5, 2019**, complete Phase Two project, including successful startup of the Phase Two Wastewater Treatment Facility and the connection of all properties within the Phase Two boundaries to the Wastewater Treatment Facility. The City is required to operate the Facility in compliance with the WDRs.

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C. Phase Three:

1. The City will begin Phase Three (fuchsia-colored area on Boundary Map), if necessary, upon completion of Phase One and Two, and upon completion of a water quality sampling program. The water quality sampling program shall be designed and implemented to determine whether the implementation of Phase One and Two have resulted in a meaningful decrease in Bacteria and Nitrogen in Malibu Lagoon (lagoon) as follows:
 - i. Bacteria reduction: Within 1 year after Phase One is completed, there should be a one log reduction in bacteria measured as Most Probable Number (MPN) on a consistent basis (75% of samples), and within 1 year after Phase Two is completed, there should be a further one log reduction in bacteria (as MPN). Sampling should include a minimum of 6 locations within the lagoon as agreed upon by the City and the Los Angeles Water Board and include 2 dry seasons. Base line sampling data shall be collected for 12 months prior to completion of the treatment system.
 - ii. Nitrogen reduction: Within 1 year after Phase One is completed, there should be a 50% reduction (in mg/l) in total nitrogen concentration (measured as mg/l) on a consistent basis (75% of samples) and within 1 year after Phase Two is completed, there should be a further 50% reduction in total nitrogen concentration (in mg/l). Sampling should include a minimum of 6 locations within the lagoon as agreed upon by the City and the Los Angeles Water Board and include 2 dry seasons. Base line sampling data shall be collected for 12 months prior to completion of the treatment system.
2. Should the City and the Los Angeles Water Board determine that the implementation of Phase One and Phase Two have resulted in bacteria and nitrogen reduction as set forth in II.C.1 above the City shall proceed with implementation of Phase Three excluding any properties that the Los Angeles Water Board concludes and the City has demonstrated to have no contribution to bacteria or nutrient impacts to the Malibu Creek and Malibu Lagoon. Phase Three shall be completed and all properties connected to the Wastewater Treatment Facility by November 5, 2025.
3. Between the date of the signing of this MOU and upon the determination that a Phase Three is or is not necessary, the City may authorize property owners within Phase Three areas to modify existing buildings upon installation of a filtration and disinfection system to their existing OWDSs in accordance with City regulations and waste discharge requirements only if the City finds that the modification is consistent with the protection of public health and the Basin Plan Amendment and if the property owner is notified of the provisions of the Basin Plan Amendment

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and the MOU. On March 31 and September 30 of each year, the City shall send written reports of any modifications approved in Phase III to the Los Angeles Water Board.

D. Certain Properties: Certain properties within Phase Three, including Hughes Research Laboratory and other properties, may choose to join an assessment district, connect to the Wastewater Treatment Facility, and pay all associated fees. The Los Angeles Water Board may independently require said properties to otherwise implement a disinfection system in accordance with waste discharge requirements or a waiver issued by the Los Angeles Water Board.

E. Water Sampling:

1. The City shall conduct water quality monitoring to evaluate the effectiveness of the Wastewater Treatment Facility, as described in paragraph C. above, throughout all project phases and shall be concluded no later than November 2021. The City shall submit to the Los Angeles Water Board a water monitoring and reporting program for Executive Officer approval by November 5, 2013 and update as directed by the Executive Officer.

2. The City shall also conduct water quality monitoring to evaluate water quality in the ocean adjacent to the Malibu Road homes for a period of two years beginning no later than July 1, 2014. Included and a part of the same water monitoring and reporting program identified in E.1., the City shall provide an ocean water monitoring and reporting program that identifies three locations along Malibu Road for water quality testing. Depending on the results of the monitoring, the Los Angeles Water Board may issue upgraded OWDS requirements to the homes. If a sufficient number of homes along Malibu Road elect to connect during Phase I or II, the property owners will be required to join or form an assessment district and pay applicable fees.

F. Quarterly Reports: The City shall submit, or cause to be submitted, quarterly progress reports to the Los Angeles Water Board on March 31st, June 30th, September 30th, and December 31st of each year until such time that the Los Angeles Water Board determines that compliance with the prohibitions have been achieved.

ARTICLE III – Responsibilities of the Water Boards

A. No Amendments: The Water Boards agree that they will not adopt any amendment to the Basin Plan Amendment, as long as this MOU is in effect, except that the Parties understand that amendments to the Basin Plan Amendment may be necessary to implement Phase Three and will cooperate to achieve the purposes of this MOU.

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- B. **Failure to Comply/No Third Party Beneficiary:** The Water Boards agree that they will not enforce the prohibitions against the property owners set forth in the Basin Plan Amendment so long as the City is in substantial compliance with the Plan set forth in Article II of this MOU and the property owners are in compliance with the Basin Plan Amendment conditions, applicable City requirements, and waste discharge requirements or a waiver issued by the Los Angeles Water Board. Notwithstanding the foregoing, this MOU does not create any rights in or obligation to any third party and may only be enforced by the Parties to this MOU.
- C. **WDR processing:** The Los Angeles Water Board agrees to process and issue waste discharge requirements in a timely manner so not to delay the City's ability to meet the deadlines set forth in this MOU and the deadlines set forth in this MOU shall be extended by the amount of time beyond six months that the City's request for waste discharge requirements is pending before the Water Boards. The Los Angeles Water Board's decision to issue waste discharge requirements will be based on the administrative record after a public hearing and nothing in this MOU prejudices its decision.
- D. **Funding Assistance:** The Los Angeles Water Board agrees to assist the City in obtaining funding for the Facility and any associated water quality monitoring.
- E. **Studies:** The City will continue to supply the Los Angeles Water Board with any ongoing or new water quality studies and monitoring reports that are completed within or near the Prohibition Area. The Los Angeles Water Board will consider all relevant available information in determining whether to remove any properties within Phase Three from the prohibition boundaries; specifically and without limitation, the Parties agree to evaluate whether new reports provide sufficient scientific evidence that inclusion of certain areas within Phase Three is no longer justified within the Prohibition boundary. The Los Angeles Water Board and the City intend to work cooperatively on any necessary amendment to the Basin Plan Amendment.

ARTICLE IV – Tolling

- A. **Tolling Extended:** The Parties agree that the period during which the City must bring an action against the Water Boards challenging any aspect of the Water Board actions, including but not limited to the procedures the Water Boards followed and its environmental review under the CEQA, is hereby tolled and extended as of the effective date of this MOU for as long as this MOU is in effect, unless the tolling agreement is terminated earlier or extended by the Parties (the "Tolling Period"). The tolling agreement becomes effective on the date this MOU is signed by the City.
- B. **No Time-Bar Defenses:** The Parties further agree that there shall be a suspension of any and all applicable statutory limitations and non-statutory periods, including, without limitation, the equitable doctrine of laches, which may otherwise apply to the City's claims, during the Tolling Period.

- C. **No Revival of Stale Claims:** Nothing in this Agreement shall revive any claim, which, as of the commencement of the Tolling Period, would have been barred by any applicable statute of limitations.
- D. **No Admission:** The entry into this Agreement by the Parties shall not be construed to represent any admission by any Party with respect to the subject or sufficiency of any Party's claims or any defenses thereto.
- E. **Lawsuits:** The City agrees that while this MOU is in effect it will not file any litigation regarding the Basin Plan Amendment against the Water Boards, nor will it join in or support any third party lawsuits against the Water Boards that may arise from the implementation of this MOU or the adoption of the Basin Plan Amendment.

ARTICLE V – Term of MOU

- A. **Term of MOU:** The term of this MOU shall begin upon its approval by the Parties and shall terminate on completion of Phase Three, unless terminated earlier pursuant to this Article. During the term of this MOU, the Parties agree to negotiate, in good faith, modifications to the MOU that may be reasonably necessary to assure implementation of the Plan, including, but not limited to, the following changed circumstances:
 - 1. There is a material change in the regulatory framework for wastewater management or water quality standards relevant to the implementation of the Plan in the Malibu Civic Center Area or the Basin Plan Amendment that would require additional time to implement; or
 - 2. There is a material change in the cost or other impediment that warrants the Parties attention in order to assure successful implementation of the Plan in the Malibu Civic Center Area that would require additional time to implement.
- B. **Termination:** This MOU may be terminated by the City, the State Water Board, or the Los Angeles Water Board by giving 45 days prior written notice in accordance with the notice provisions in Article VI(A) hereof. Said termination shall be effective only upon a duly noticed public meeting conducted by the City, the State Water Board, or the Los Angeles Water Board.

ARTICLE VI – General Provisions

- A. **Notices:** Any notices or other communication required or permitted by this MOU shall be in writing and shall be delivered to the Representatives of the Party at the addresses set forth below. Parties shall promptly notify each other of any change of contact information provided below. Written notice shall include notice delivered via email. A notice shall be deemed to have been received on (a) the date of delivery, if delivered by hand during

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regular business hours, or by confirmed facsimile or by email; or (b) on the third business day following deposit in the United States mail, postage prepaid to the addresses set forth below:

To the State Water Board:

Tom Howard
Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
Email: toward@waterboards.ca.gov

and

Michael A.M. Lauffer
Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
Fax: (916)341-5199
Email: mlauffer@waterboards.ca.gov

To the Los Angeles Water Board:

Samuel Unger
Executive Officer
Los Angeles Regional Water Quality Control Board
320 W. Fourth Street, Suite 200
Los Angeles, CA 90013
Phone: (213) 576-6605
Fax: (213) 576-6640
Email: sunger@waterboards.ca.gov

and

Eric Wu
Chief of Groundwater Permitting Unit
Los Angeles Regional Water Quality Control Board
320 W. Fourth Street, Suite 200
Los Angeles, CA 90013
Phone: (213) 576-6683
Fax: (213) 576-5777
Email: ewu@waterboards.ca.gov

and

Frances McChesney

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Staff Counsel IV
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
Phone: (916) 341-5174
Fax: (916) 341-5199
Email: fmcchesney@waterboards.ca.gov

To the City:

Jim Thorsen
City Manager
City of Malibu
23825 Stuart Ranch Road
Malibu, CA 90265
Phone: (310) 456-2489 ext. 226
Fax:
Email: jthorsen@ci.malibu.ca.us

and.

Jennifer Voccola
Environmental Programs Coordinator
City of Malibu
23825 Stuart Ranch Road
Malibu, CA 90265
Phone:
Fax: (310) 456-3356
Email: jvoccola@ci.malibu.ca.us

and

Christi Hogin
Jenkins & Hogin, LLP
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, CA 90266
Phone: (310) 643-8448
Fax: (310) 643-8441
Email: chogin@localgovlaw.com

- B. Relationship of the Parties:** The Parties are and shall remain at all times as to each other, wholly independent entities. No Party to this MOU shall have power to incur any debt, obligation, or liability on behalf of another Party or otherwise act as an agent of another Party except as expressly provided to the contrary by this MOU.

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- C. **Cooperation, Further Acts:** Parties shall cooperate fully with one another to attain the purposes of this MOU.
- D. **Amendments:** All amendments must be in writing, approved and executed by all Parties.
- E. **Reservation of Rights:** Each Party shall be solely responsible and liable in connection with its actions associated with its responsibilities under this MOU. For purposes of this MOU, the relationship of the parties is that of independent entities and not as agents of each other or as joint venturers or partners. The parties shall maintain sole and exclusive control over their personnel, agents, consultants, and operations. Nothing in this MOU is intended to limit the legal authority or responsibilities of the Parties, except as agreed to herein. The Los Angeles Water Board intends to terminate the MOU if the City is not in substantial compliance with the Plan set forth herein; in which case, the Water Boards may enforce the Basin Plan Amendment as written against the City and other entities as authorized by the Porter-Cologne Water Quality Control Act or other applicable law,
- F. **Third Parties:** Nothing in this MOU is intended to create duties or obligations to or rights in third parties to this agreement or effect the legal liability of the parties to this MOU.
- G. **Enforcement:** The Parties agree to cooperate in implementation of the Basin Plan Amendment as set forth in this MOU. The Los Angeles Water Board and the State Water Board have jurisdiction to enforce the Basin Plan Amendment. The City agrees to coordinate in any enforcement action by supplying the Water Boards with property and owner information. The City agrees to require connection to the Wastewater Treatment Facility for every parcel within an approved assessment district. Should any property owner within an assessment district refuse to connect, the Parties agree to coordinate in all necessary action as described above to gain compliance. The City and the Water Boards shall use their respective enforcement authorities to attain compliance with the Basin Plan Amendment.

If an assessment district is not approved by dischargers, the Los Angeles Water Board may enforce all State policies, plans, or regulations to gain compliance, including the requirement to upgrade each OWDS to advance treatment, or other appropriate means by November 5, 2019. Advanced treatment for OWDS is defined as disinfection treatment to a level that meets applicable water quality standards for Fecal Indicator Bacteria and/or denitrification not to exceed a total nitrogen concentration of 10 mg/l for those properties impacting an impaired water body with a nutrient TMDL. All property owners that are required to upgrade their system will need to obtain City of Malibu building permits and obtain an operating permit in accordance with City ordinances. The City's operating permit program requires that advanced residential OWDS must be inspected every three years by a certified OWDS inspector. The Los Angeles Water Board will also require effluent monitoring for these systems that shall be submitted and reviewed by the Los

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Angeles Water Board on a quarterly basis for Total Suspended Solids, Total Nitrogen, Total Phosphorus, and Fecal Indicator Bacteria as appropriate.

- H. **Dispute Resolution:** The Parties agree to attempt to informally resolve any disputes that arise with respect to this MOU prior to terminating the MOU by notifying the other party if a dispute arises and identifying the issues in dispute. Each party reserves its rights if informal dispute is not effective.
- I. **Governing Law:** This MOU is governed by, interpreted under and construed and enforced in accordance with the laws of the State of California.
- J. **Authorized signatures:** The Parties hereby represent and warrant that their respective signatory of this MOU is duly authorized to execute and bind the agency for which he signs.
- K. **Severability:** If any provision of this MOU shall be determined by any court to be invalid, illegal or unenforceable to any extent, the remainder of this MOU shall not be affected and this MOU shall be construed as if the invalid, illegal or unenforceable provision had never been contained in this MOU.

IN WITNESS WHEREOF, the Parties to this MOU have caused this MOU to be executed on their behalf as of the date specified below, respectively, as follows:

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FOR THE STATE WATER RESOURCES CONTROL BOARD:

Dated: _____, 2011

Tom Howard
Executive Director
State Water Resources Control Board

Tom Howard

APPROVED AS TO FORM:

Michael A. M. Lauffer
Chief Counsel
State Water Resources Control Board

Michael A. M. Lauffer

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FOR THE LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD:

Dated: _____, 2011

Samuel Unger
Executive Officer
Los Angeles Regional Water Quality Control Board

Samuel Unger

APPROVED AS TO FORM:

Frances L. McChesney
Staff Counsel IV
State Water Resources Control Board.

Frances L. McChesney

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FOR THE CITY OF MALIBU:

Dated: _____, 2011

Jim Thorsen
City Manager
City of Malibu

Jim Thorsen

ATTEST:

Lisa Pope
City Clerk
City of Malibu

Lisa Pope

APPROVED AS TO FORM:

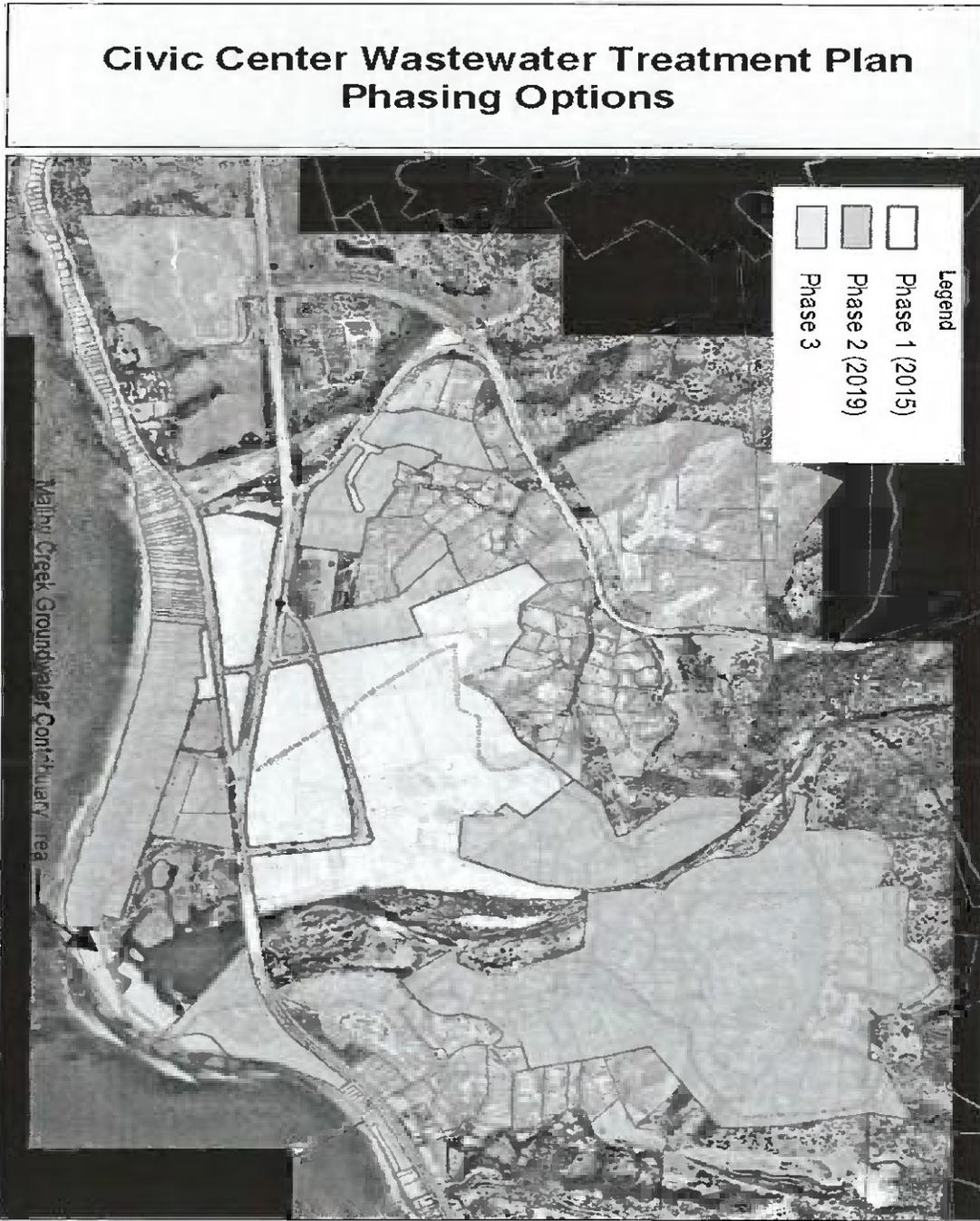
Christi Hogin
City Attorney
City of Malibu

Christi Hogin

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EXHIBIT A: Boundary Map



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**STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

RESOLUTION NO. XX-XX

**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**

WHEREAS, the California Regional Water Quality Control Board, Los Angeles Region (Regional Board), finds:

1. On November 5, 2009 the Regional Board adopted Resolution R4-2009-007 approving an amendment to Chapter IV of the Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (Basin Plan), to prohibit on-site wastewater disposal systems (OWDSs) in the Malibu Civic Center Area, as defined in Resolution R4-2009-007, (Basin Plan Amendment).
2. On September 21, 2010 the State Water Resources Control Board (State Water Board) adopted Resolution No. 2010-0045 approving the Basin Plan Amendment.
3. On December 23, 2010, the Office of Administrative Law approved the regulatory provisions of the Basin Plan Amendment, the final step for the amendment to take effect.
4. The Basin Plan Amendment prohibits all new OWDSs in the Malibu Civic Center Area and prohibits the discharge from existing OWDSs based on a phased schedule to cease discharges from Phase One systems by November 5, 2015 and Phase Two systems by November 5, 2019. The Basin Plan Amendment does not prevent repairs, maintenance, and upgrades to existing OWDSs, provided that they do not expand the capacity of the systems or increase flows of wastewater.
5. The City of Malibu (City) objected to the adoption of the Basin Plan Amendment and expressed its intent to file a lawsuit challenging the Basin Plan Amendment. In October 2010, the City and the Regional Board and the State Water Board (the Water Boards) entered into a tolling agreement by which they agreed to extend the time within which the City must bring an action against the Water Boards challenging their actions to approve the Basin Plan Amendment, which agreement was extended and now due to expire in October 2011. The purpose of the tolling agreement was to afford the Parties an opportunity to reach agreement on a phased implementation, boundaries and other matters related to the substance of Basin Plan Amendment.
6. The Parties have developed a Memorandum of Understanding (MOU) to memorialize the Parties' agreement to coordinate in the implementation of a wastewater treatment plan for the

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Resolution No. XX-XX

Malibu Civic Center Area, as defined in the Basin Plan Amendment, that employs both a plan and schedule to construct one or more centralized wastewater treatment facilities (facility) in the Malibu Civic Center Area and a comprehensive regulatory program with respect to OWDSs.

7. The MOU provides, in summary, the following provisions:

7.1. In the MOU, the City agrees to construct one or more facilities according to a specified schedule that contains specific milestones to assure completion of Phase One by November 5, 2015 and Phase Two by November 5, 2019.

7.2. The City and the Water Boards agree that certain properties, in the area designated as Phase Three, may not be connected to a Facility based on monitoring data to be collected by the City under the oversight of the Regional Board. If it is determined that the Phase Three properties must be connected to a Facility, they must be connected by November 5, 2025.

7.3. If an assessment district is not approved by dischargers, the Los Angeles Water Board may enforce all State policies, plans, or regulations to gain compliance, including the requirement to upgrade each OWDS to advance treatment, or other appropriate means by November 5, 2019. Advanced treatment for OWDS is defined as disinfection treatment to a level that meets applicable water quality standards for Fecal Indicator Bacteria and/or denitrification not to exceed a total nitrogen concentration of 10 milligrams per liter (mg/l) for those properties impacting an impaired water body with a nutrient total maximum daily load (TMDL). All property owners that are required to upgrade their system will need to obtain City of Malibu building permits and obtain an operating permit in accordance with City ordinances. The City's operating permit program requires that advanced residential OWDS must be inspected every 3 years by a certified OWDS inspector. The Los Angeles Water Board will also require effluent monitoring for these systems that shall be submitted and reviewed by the Los Angeles Water Board on a quarterly basis for Total Suspended Solids, Total Nitrogen, Total Phosphorus, and Fecal Indicator Bacteria as appropriate.

7.4. The Regional Board agrees not to amend the Basin Plan Amendment as long as the MOU is in effect, not to enforce the Basin Plan Amendment against property owners who comply with the terms of the Basin Plan Amendment and waste discharge requirements or waivers issued by the Regional Board, and to coordinate with the City with respect to enforcement. The Parties acknowledge, however, that modification of the Basin Plan Amendment may be necessary if it is determined that Phase Three properties are determined not to be required to connect to a facility and the MOU does not preclude future amendments.

8. The Regional Board reserves its rights to terminate the MOU at any time and enforce the Basin Plan Amendment.

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Resolution No. XX-XX

9. The Regional Board has authority to enter into this MOU pursuant to California Water Code sections 13165 and 13225,
10. The Regional Board has determined that the proposed MOU is fair, reasonable and in the public interest, and further is consistent with the goals and purposes of the Porter-Cologne Water Quality Control Act (California Water Code § 13000 *et seq.*), in that it benefits the public by assuring the implementation of a plan to construct one or more publicly owned wastewater treatment facilities that will result in elimination of discharges of waste from OWDS, including bacteria and nitrates, to waters of the state, and protection of public health in the vicinity of the Malibu Civic Center Area. The MOU will compliment other activities of the City, including implementation of OWDS regulations to require more frequent inspections and upgrades to septic systems if necessary, and activities of the Los Angeles Water Board, including implementation of TMDLs and issuance of waste discharge requirements to certain properties in Malibu. Further, the City is working with the Regional Board to construct a centralized treatment plant as a solution to comply with the Basin Plan Amendment and protect the water quality.
11. The Regional Board provided notice of its intention to consider this matter at a public meeting and provided an opportunity for interested persons to comment on the proposed MOU. The City of Malibu also held a public meeting to consider the MOU after proper notice.
12. The Regional Board, at a public meeting, heard and considered all comments pertaining to this matter.

THEREFORE, BE IT RESOLVED THAT the California Regional Water Quality Control Board, Los Angeles Region, authorizes the Executive Officer to sign the Memorandum of Understanding between the City of Malibu, the Regional Water Quality Control Board, Los Angeles Region, and the State Water Resources Control Board Regarding Implementation of the Basin Plan Amendment for the Malibu Civic Center Area Prohibition.

I, Samuel Unger, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Los Angeles Region, on July 14, 2011.

Samuel Unger, P.E.
Executive Officer

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EXHIBIT 3



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

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.

EXHIBIT 4



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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.

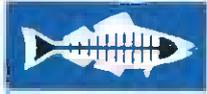
Negotiations between the City of Malibu and the Regional Water Board have been proceeding for over 8 months, yet the proposed MOU has many holes and lacks clarity. Specifically we are concerned that under the MOU, the City of Malibu is not sufficiently held accountable for water quality improvements 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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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 31st, 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.

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

EXHIBIT 5



July 22, 2011

SENT VIA EMAIL AND U.S. MAIL

State Water Resources Control Board
Attn: Tom Howard, Executive Director
P.O. Box 100
Sacramento, CA 95812-0100

RE: Tentative Memorandum of Understanding Regarding the Phased Implementation of Basin Plan Amendment Prohibiting On-Site Wastewater Disposal Systems in the Malibu Civic Center Area

Dear Mr. Howard:

Santa Monica Baykeeper ("Baykeeper") respectfully requests the State Water Resources Control Board ("State Board") hold a public hearing to consider the Tentative Memorandum of Understanding ("Tentative MOU") executed between the City of Malibu and the Los Angeles Regional Water Quality Control Board ("Regional Board") in relation to the Basin Plan Amendment Prohibiting On-Site Wastewater Disposal Systems in the Malibu Civic Center Area ("Basin Plan Amendment" or "Septics Prohibition"). As you are well aware, to become effective the MOU requires the signature of the State Board Executive Director and Chief Counsel. There are several reasons why Baykeeper requests a public hearing prior to any action by the State Board staff. First, the Tentative MOU is inconsistent with the Basin Plan Amendment's compliance deadlines and requirements. Second, it fails to hold the City of Malibu accountable for violations of the Basin Plan Amendment. Lastly, the public process at the Regional Board on this issue was grossly inadequate.

The Tentative MOU is inconsistent with the Basin Plan Amendment, the regulatory provisions it purports to implement, and is thus 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). The Tentative MOU extends the ultimate compliance deadline and significantly changes the phasing for achieving compliance with the Basin Plan Amendment. For example, the Tentative MOU extends the compliance date for some facilities for four to ten years despite known water quality problems and a history of violations, and appears to allow expansion of existing OWDSs in direct contravention of the Septics Prohibition. Further, under the Tentative MOU, properties in the new "Phase Three" may never be required to comply with the Basin Plan Amendment at all.

The Tentative MOU also fails to hold the City of Malibu accountable for its non-compliance. The language of the MOU essentially excuses anticipated violations of the Basin Plan's requirements by the City of Malibu should the city fail to establish assessment districts to fund the proposed sewer connections. Indeed, the Tentative MOU fails to adequately describe how the City will comply should the voters reject the assessment district, a result which is highly likely. Removing accountability again contravenes the provisions of the Basin Plan Amendment.



**SANTA MONICA
BAYKEEPER**

Lastly, the public had inadequate opportunity to submit comments to the Regional Board on this issue. The public was given a mere eight business days notice before the comment period ended on July 1, 2011. Negotiations related to the Tentative MOU did not include the various stakeholders involved in this issue for over a decade, including Baykeeper and State Board technical staff.

The Basin Plan Amendment was approved both by the Regional Board and the State Board to address the pervasive bacterial contamination and nutrient issues that plague Malibu Creek, Malibu Lagoon, and Surfrider Beach. Substantial evidence in the form of several technical memoranda and peer-reviewed science supported the decision to move forward with the Septics Prohibition and a lengthy public process led to this result. We believe the State's decision to move forward with the Basin Plan Amendment was one of the most significant accomplishments for water quality in southern California in the last decade. Yet, now the Regional Board seeks to undermine this process via an illegal MOU negotiated behind closed doors.

A public hearing in front of the State Board would provide the many stakeholders an opportunity to provide valuable input and would give the State Board and its staff further opportunity to review and assess the inconsistencies of the Tentative MOU with the Basin Plan Amendment. I have attached Santa Monica Baykeeper's detailed comments submitted to the Regional Board describing those discrepancies further.

Thank you for your consideration.

Sincerely,

Liz Crosson
Executive Director
Santa Monica Baykeeper

Cc: Charlie Hoppin, Chair, State Board (via email)
Fran Spivy-Weber, Vice-Chair, State Board (via email)
Tam Doduc, State Board (via email)
Jonathon Bishop, State Board Chief Deputy Director (via email)