California Regional Water Quality Control Board
Los Angeles Region

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Linda S. Adams
Cal/EPA Secretary

Arnold Schwarzenegger
Governor

January 25, 2010

Mr. Don Schmitz
Schmitz and Associates, Inc.
29350 West Pacific Coast Highway, Suite 12
Malibu, CA 90265

Dear Mr. Schmitz:

Revised Tentative Order for Waste Discharge Requirements Prohibiting Discharge, Malibu La Paz, 3700 La Paz Lane, Malibu, California (File No. 08-101)

The Los Angeles Regional Water Quality Control Board (Regional Board) transmits a revised tentative Order (attached), specifying waste discharge requirements that prohibit discharge from the proposed development by Malibu La Paz Ranch LLC, located on 15 acres at 3700 La Paz Lane in the City of Malibu. The Regional Board will consider the revised tentative Order and comments during a public meeting to be held at 9:00 a.m. on February 4, 2010, at Metropolitan Water District of Southern California located at 700 North Alameda Street, Los Angeles. It is expected that the Board will take action at the hearing; however, as testimony indicates, the Board at its discretion may direct further investigation.

In addition, and per your request, we are attaching eight comment letters received on January 19, 2010, including:

- Schmitz & Associates (on behalf of La Paz), dated January 19, 2010
- Cox Castle Nicholson (legal counsel to La Paz), dated January 19, 2010
- Lombardo and Associates (engineer of record), dated January 19, 2010
- Lombardo and Associates (engineer of record), dated January 19, 2010
- Heal the Bay, dated January 15, 2010
- Malibu Surfing Association, dated January 18, 2010
- Santa Monica Bay Keeper, dated January 19, 2010
- Pepperdine University, dated January 19, 2010

Should you have any questions, please call the Project Manager, Ms. Elizabeth Erickson, at (213) 620-2264, or the Unit Chief, Dr. Rebecca Chou, at (213) 620-6156.

Sincerely,

Wendy Phillips, Chief
Groundwater Permitting and Landfills Section

Enclosures: Revised Tentative Order and eight comment letters

cc with enclosures:

Mr. Craig George, Mr. Andrew Sheldon, Mr. Jim Thorsen, City of Malibu
Mr. Chris Deleau, Schmitz and Associates, Inc.
Ms. Tamar C. Stein, Cox Castle
Mr. Pio Lombardo, Lombardo and Associates
Mr. Chi Diep, CA Public Health, Drinking Water Program
Mr. Mark Pesterella, County of Los Angeles, Department of Public Works,
Mr. Carlos Borja, County of Los Angeles, Cross Connections
Ms. Tatiana Gaur, Santa Monica Baykeeper
Dr. Mark Gold, Heal the Bay
Mr. Michael Blum, Malibu Surfing Association
Ms. Rhiannon L. Bailard, Pepperdine University

State of California
California Regional Water Quality Control Board, Los Angeles Region

Order No. R4-2010-00x
Specifying Waste Discharge Requirements
Prohibiting Discharge
From the Malibu La Paz Ranch, LLC

File No. 08-101

T E N T A T I V E

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

Findings

1. On December 22, 2006, Malibu La Paz LLC ("La Paz" or "applicant") submitted an incomplete Application/Report of Waste Discharge ("ROWD") to the California Regional Water Quality Control Board for the Los Angeles Region ("Regional Board"). The ROWD described a proposed project that would support offices, retail stores, and restaurants, in seven buildings totaling approximately 100,000 square feet on 15 acres at 3700 La Paz Lane (Parcels A (APN # 4458-022-023) and B (APN #4458-022-024) in the City of Malibu.

2. In the engineering materials submitted with the ROWD dated December 22, 2006, the applicant proposed a treatment system with fixed activated sludge and disinfection using chlorine, with disposal capacity of 30,000 gallons per day (gpd) through: (a) discharge of 22,500 gpd to groundwater via leachfields, and (b) reuse of 7,500 gpd for spray irrigation. The applicant's proposal also included storage of 50,000 gpd to hold the treated wastewater during 38 to 90 days when evapotranspiration rates were too low to justify irrigation.

3. In the 31 months following the initial incomplete ROWD on March 2, 2007, the applicant changed its design and operating approach and revised the ROWD in supplemental submittals.

    a. On March 2, 2007, in response to notification from staff, the applicant submitted $900, as the application fee was missing from the December 22, 2006 ROWD.
    b. In late 2007, the applicant switched engineering consultants.
    c. On January 8, 2008, the applicant's new engineering consultant met with staff to provide a briefing on a 'no-net-discharge' design with significant deviations from the treatment and disposal systems proposed in the initial ROWD. Included in submittals over the next five days was a preliminary design for the addition of ultraviolet disinfection, and a lowered estimate of wastewater flow from the proposed development, from 30,000 gpd to 21,000 gpd, and a groundwater extraction system to control mounding on the site.

d. On December 2, 2008, the applicant advised staff that the City of Malibu overrode comments from the Regional Board in certifying an environmental impact report on the applicant's project on November 10, 2008.
e. On December 11, 2008, the applicant's representative testified before the Regional Board that the applicant's ROWD would recycle all wastewater generated on site.
f. On April 21, 2009, the applicant and staff from the Regional Board, California Department of Public Health (DPH), County of Los Angeles Department of Health Services, and the City of Malibu met, with the objectives of clarifying the applicant's current proposal, coordinating interagency requirements, and clarifying the status of the ROWD.
g. On May 14, 2009, the applicant submitted an engineering plan to supplement its ROWD, including an increase in flow to 37,000 gpd and included groundwater discharge through a leachfield. However, the applicant's submittal did not respond to all of staff's concerns expressed at the meeting on April 21, 2009.

4. Between March 2, 2007 and May 14, 2009, staff provided formal and informal comments to the applicant, among which include:

a. November 5, 2007: letter documenting comments provided to the applicant and the City of Malibu on June 28, July 27, August 27, September 27, and October 29, 2007.
b. January 15, 2008: letter to La Paz, stating that the January 10, 2008 ROWD is incomplete.
c. February 15, 2008 to June 11, 2008: letters setting forth the deficiencies in the ROWD, including a request that the applicant address the basin-wide concern that insufficient assimilative capacity remained in the aquifer for the new project, existing discharges treated in a future centralized facility and forthcoming the Legacy Park stormwater facility.
d. June 11, 2008: letter to La Paz stating that preparation of the WDRs can be considered once CEQA is approved by the City of Malibu and the ROWD is complete.
e. February 23, 2009 and March 11, 2009: letters from staff notifying La Paz that the ROWD remained incomplete.
f. March 26, 2009: e-mail to Lombardo and Associates (applicant's consultant), listing missing items.
g. April 21, 2009: comments provided by staff during a meeting, including, among others, (i) the proposal did not appear to be a 'zero discharge' project (the project is expected to result in a rise in the water table), (ii) the engineering report needed further design development; and (iii) a proposed provision for emergency discharge would not be protective of water quality.
h. July 2, 2009: letter notifying La Paz that the May 14, 2009 ROWD remained incomplete.

In addition, staff engaged in numerous additional meetings, e-mail exchanges, and phone calls with the applicant and the applicant's representatives.

TENTATIVE

5. On July 23, 2009, DPH approved a report submitted by the applicant (intended to comply with title 22, California Code of Regulations), which contained a conceptual engineering design for the water reuse component for the proposed development. DPH conditioned the approval on, among other conditions, (a) submission of additional engineering details on the plumbing design, operation of the disinfection system, and development of recycling rules and requirements for tenants reusing the treated wastewater; and (b) approval by the Regional Board, as DPH's purview is limited to reuse of the treated wastewater in a manner protective of public health, and does not extend to protection of beneficial uses of state water resources.

6. On July 23, 2009, La Paz filed a petition with the State Water Resources Control Board (State Board), asking the State Board to confirm that La Paz's application has been deemed approved as a matter of law. La Paz alleged that it followed all of the requirements of the Permit Streamlining Act, Government Code section 65920, et seq. and that La Paz's ROWD and Application is "deemed approved" by operation of law on August 31, 2009. In the alternative, La Paz asked the State Board to schedule a hearing on the merits of its ROWD. The Regional Board filed a response contesting La Paz's assertions.

7. California Water Code section 13263, subdivision (a) specifies the requirements for discharge: "The regional board, after necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving water upon, or into which the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

8. In the *Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties* (hereafter *Basin Plan*), the Regional Board designated beneficial uses and established water quality objectives for groundwater in the Malibu Valley Groundwater Basin and nearby surface waters:

   a. Groundwater: Municipal and Domestic Supply (Potential), Industrial Process and Service Supply, and Agricultural Supply.

   b. Malibu Lagoon: Navigation; Water Contact Recreation; Non-contact Water Recreation; Estuarine Habitat; Marine Habitat; Wildlife Habitat; Rare, Threatened, or Endangered Species Habitat; Migration of Aquatic Organisms; Spawning, Reproduction, and/or Early Development; Wetland Habitat.

   c. Malibu Creek: Water Contact Recreation; Non-contact Water Recreation; Warm Freshwater Habitat; Cold Freshwater Habitat; Wildlife Habitat; Rare, Threatened, or

TENTATIVE

Endangered Species Habitat; Migration of Aquatic Organisms; Spawning, Reproduction, and/or Early Development; Wetland Habitat.

d. Malibu Beach and Malibu Lagoon Beach (Surfrider Beach), Amarillo Beach, and Carbon Beach: Navigation; Water Contact Recreation; Non-contact Water Recreation; Commercial and Sport Fishing; Marine Habitat; Wildlife Habitat; Spawning, Reproduction, and/or Early Development; and Shellfish Harvesting.

9. California Water Code section 13243 states that a regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.

10. On November 5, 2009, the Regional Board adopted Resolution No. R4-2009-007, amending the *Basin Plan* to prohibit discharges from onsite wastewater disposal systems in the Malibu Civic Center area, as defined by that *Basin Plan* amendment. The applicant's proposed discharge is within the boundaries of the prohibition, and is subject to the prohibition on new discharges of waste. While the *Basin Plan* amendment is not a final regulation in that it still requires the approval of the State Board and the Office of Administrative Law, it is a clear and recent statement of policy and intent by the Regional Board with respect to the Malibu Civic Center. While not yet operative, the regulation is an appropriate matter for the Regional Board to consider in determining how to address the instant permit proceeding, and the Regional Board may appropriately consider it for purposes of consistency and the furtherance of regional policy.

11. Furthermore, the applicant's proposed discharge could affect nearby surface waters that are subject to total maximum daily loads (TMDLs) as described below:

    a. Malibu Creek Watershed Nutrient TMDL: The US EPA, on March 21, 2003, specified a numeric target of 1.0 mg/l for total nitrogen during summer months (April 15 to November 15) and a numeric target of 8.0 mg/L for total nitrogen during winter months (November 16 to April 14). Significant sources of the nutrient pollutants include discharges of wastewaters from commercial, public, and residential land use activities. The TMDL specifies a load allocation for on-site wastewater disposal systems of 6 lbs/day during the summer months and 8 mg/L during winter months.

    b. Malibu Creek and Lagoon Bacteria TMDL: The Regional Board specified numeric targets, effective January 24, 2006, based on single sample and geometric mean bacteria water quality objectives in the Basin Plan to protect the water contact recreation use. Sources of bacteria loading include storm water runoff, dry-weather runoff, on-site wastewater disposal systems, and animal wastes. The TMDL specifies load allocations for on-site wastewater disposal systems equal to the allowable number of exceedance days of the numeric targets. There are no allowable exceedance days of the geometric mean numeric targets. For the single sample numeric targets, based on daily sampling, in summer (April 1 to October 31), there are no allowable exceedance days, in winter dry weather (November 1 to March 31), there are three allowable exceedances days, and in wet weather (defined as days with

TENTATIVE

>=0.1 and the three days following the rain event), there are 17 allowable exceedance days.

c. Santa Monica Bay Beaches Wet and Dry Bacteria TMDL: For beaches along the Santa Monica Bay impaired by bacteria in dry and wet weather, the Regional Board specified numeric targets, effective July 15, 2003, based on the single sample and geometric mean bacteria water quality objectives in the Basin Plan to protect the water contact recreation use. The dry weather TMDL identified the sources of bacteria loading as dry-weather urban runoff, natural source runoff and groundwater. The wet weather TMDL identified stormwater runoff as a major source. The TMDLs did not provide load allocations for on-site wastewater disposal systems, meaning that no exceedances of the numeric targets are permissible as a result of discharges from non-point sources, including on-site wastewater disposal systems. There are no allowable exceedance days of the geometric mean numeric targets. For the single sample numeric targets, based on daily sampling, in summer (April 1 to October 31), there are no allowable exceedance days, in winter dry weather (November 1 to March 31), there are three allowable exceedances days, and in wet weather (defined as days with >=0.1 and the three days following the rain event), there are 17 allowable exceedance days.

12. California Water Code section 13263, subdivision (g) states that no discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into the waters of the state are privileges, not rights.

13. La Paz' ROWD was not deemed approved, and La Paz is not entitled to discharge, as a matter of law pursuant to Government Code section 65956 because La Paz has failed to provide a complete Report of Waste Discharge, the result of which is the inability of the Regional Board to prepare Waste Discharge Requirements that would allow the La Paz project to discharge wastewater. Regional Board staff advised La Paz in writing on January 15, February 15, and June 11, 2008 that its ROWD was incomplete, and specified the additional materials required for a complete application. Those letters also noted that La Paz' environmental impact report had not yet been certified. La Paz contends that the certification of its environmental impact report, and its notice to the Regional Board to that effect on December 2, 2008 triggered a new obligation by the Regional Board to send a new notice of incomplete application, notwithstanding that La Paz did not submit the previously requested materials. La Paz contends that 60 days after its public notice pursuant to Government Code section 65956, subdivision (b), its application was deemed approved (also pursuant to Government Code section 65956(b)).

14. Government Code section 65965, subdivision (c) states that failure of an applicant to submit complete or adequate information pursuant to the Permit Streamlining Act may constitute grounds for disapproving a development project.

15. Title 23, California Code of Regulations, section 2208, subdivision (a) states that whenever a project is deemed approved pursuant to Government Code section 65956 (of

TENTATIVE

the Permit Streamlining Act), the applicant may discharge waste as proposed in the ROWD until such time as the regional board adopts waste discharge requirements applicable thereto. No such discharge of waste shall create a vested right to continue such discharge. Furthermore, subdivision (b) of that section requires adoption of waste discharge requirements for any project deemed approved, "as soon as possible".

16. While the Regional Board does not believe La Paz application has been deemed approved, the Regional Board is aware of the petition referenced in Finding 6, above, and La Paz' claim to the contrary. Adoption of waste discharge requirements will therefore clarify the intent of the Regional Board with respect to the discharge requirements sought in La Paz' ROWD, and the requirements La Paz is obligated to meet.

17. The prohibition referred to in Finding 10 above contains a provision that allows "existing on-site wastewater disposal systems" in commercial areas six years to continue to use their existing systems before complying with the prohibition. The Regional Board believes that La Paz desires by its petition to the State Board (Finding 6) to obtain a determination that its discharges are already entitled, and therefore allow a claim that La Paz' system is an "existing on-site wastewater disposal system", entitled to operate until November 5, 2015. Notwithstanding the outcome of either proceeding, La Paz' system is not existing or operating. The prohibition's "grandfather" provision therefore would not apply to La Paz even if its discharges were entitled.

18. Alternatively, La Paz' intent may be to assert a claim that its permit should be considered as one of the class of projects with pending applications, which have been deemed existing under the prohibition. La Paz is not within that class. That class of projects is exclusively residential, and in any event, all projects that are members of that class were expressly identified in the prohibition. La Paz is not among them.

19. The Regional Board believes it would be both inconsistent with the intent of the prohibition, and would constitute a waste of resources to allow individual dischargers to construct systems that the Regional Board has determined should be phased out immediately.

20. With respect to the incomplete ROWD submitted by La Paz, the Regional Board has taken into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, and the need to prevent nuisance.

21. The Regional Board also has considered the provisions of Water Code section 13241 and the relevant water quality control plans that have been adopted.

22. La Paz has failed to provide a complete Report of Waste Discharge, the result of which is the inability of the Regional Board to prepare Waste Discharge Requirements that would allow the La Paz project to discharge wastewater.

23. Staff provided adequate response to the ROWD and modifications submitted by La Paz.

24. As currently proposed, La Paz cannot discharge waste without impairing the water quality of the Malibu Valley Groundwater Basin, or creating a nuisance.

25. Further, there are existing and continuing violations of State and Regional Board water quality standards in the City of Malibu that were addressed by the Regional Board in its November 5, 2009 *Basin Plan* amendment adopting a prohibition of wastewater discharges from onsite wastewater disposal systems. That prohibition applies to the La Paz project.

26. La Paz failed to submit a complete and adequate ROWD, which demonstrates that the proposed recycling project would meet water quality objectives in the *Basin Plan* that are protective of beneficial uses designated by the Regional Board for groundwater and nearby surface waters.

27. Issuance of waste discharge requirements for the La Paz project, as currently proposed, would not be protective of beneficial uses in the Malibu Valley Groundwater Basin and nearby surface waters.

THEREFORE, IT IS ORDERED that:

A. The Regional Board hereby issues Waste Discharge Requirements to La Paz. The sole requirement in these Waste Discharge Requirements is that that La Paz is prohibited from discharging waste from its project, as described in the current ROWD.

B. This Order is adopted without prejudice to La Paz filing another Report of Waste Discharge for its project for consideration by the Regional Board, subject to the requirements and prohibitions of the Basin Plan and of all other statutes, regulations, ordinances and laws.

I, Tracy J. Egoscue, 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 February 4, 2010.

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Tracy J. Egoscue
Executive Officer

TENTATIVE