



Cox, Castle & Nicholson LLP  
2049 Century Park East, 28<sup>th</sup> Floor  
Los Angeles, California 90067-3284  
P 310.277.4222 F 310.277.7889

Tamar C. Stein  
310.284.2248  
tstein@coxcastle.com

January 19, 2010

File No. 47864

VIA EMAIL AND U.S. MAIL

Mary Ann Lutz, Board Chair  
Members of the Board  
Attn: Dr. Rebecca Chou  
Regional Water Quality Control Board, Los Angeles Region  
320 West 4th Street  
Los Angeles, CA 90013

Re: Issuance of Waste Discharge Requirements, Malibu La Paz Ranch, LLC  
(File No. 08-101); Hearing on February 4, 2010

Dear Chair Lutz and Board Members:

I represent Malibu La Paz Ranch, LLC ("La Paz"), the applicant for the above referenced waste discharge requirements ("WDRs"). This letter addresses legal issues regarding the Los Angeles Regional Water Quality Control Board's ("Regional Board") tentative order issued on December 17, 2009 ("Tentative Order").<sup>1</sup>

**A. This Hearing Is Pursuant to 23 Cal. Code Regs § 2208**

La Paz's application was deemed approved as a matter of law as of August 31, 2009, pursuant to the Permit Streamlining Act, Gov't Code § 65920 et seq. ("PSA"). The Regional Board has conceded as much by going forward with this hearing. The PSA required the Regional Board to determine, in writing, within 30 days of submission, whether the La Paz's application was complete. (Govt. Code, § 65943 (b); see also 23 CCR § 3761.) Since the Regional Board did not respond to La Paz within 30 days, La Paz's application was deemed complete as of January 2, 2009. (*Id.*) The Regional Board had 180 days from January 2, 2009 to act on La Paz's application. (Govt. Code, § 65952 (a)(2); 23 CCR § 3760.) Whether an agency fails to provide a hearing within the required 180-days, the PSA allows the applicant to provide public notice that the application will be deemed approved. (Govt. Code § 65956(b).) On June 16, 2009, La Paz provided public notice that the

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<sup>1</sup> By participating in this hearing on its WDR application before the Regional Board, La Paz does not waive its rights under the Permit Streamlining Act or pursuant to its petition which is before the State Water Resources Control Board ("State Board"). (See Gov. Code § 65940.5; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1439.)

application would be deemed approved if the Regional Board did not act by August 31, 2009. The Regional Board failed to act, and La Paz's application was deemed approved as of August 31, 2009.

Despite the claims in the Tentative Order, the Regional Board could not be having this hearing unless the application were complete. The background section of the Tentative Order is incomplete and even misleading. An accurate chronology prepared by Schmitz & Associates, in conjunction with La Paz's engineer, Lombardo Associates, Inc., is attached as Exhibit 1. The chronology demonstrates that the application is complete and that La Paz has provided all of the documentation that the Regional Board has requested.

Because the application has been deemed approved, the only authority by which the Regional Board can consider this matter is under 23 CCR § 2208 which states, in pertinent part, "whenever a project is deemed approved pursuant to [the PSA], due to a regional board failure to act on a report of waste discharge, the applicant may discharge waste as proposed in the report of waste discharge until such time as the regional board adopts waste discharge requirements applicable thereto" and "[t]he regional board shall adopt appropriate waste discharge requirements pursuant to California Water Code Section 13263 or waive the adoption of such requirements pursuant to Section 13269 as soon as possible for any project deemed approved." The Tentative Order cites this regulation at Section 13.

#### **B. 23 Cal Code Regs § 2208 Mandates the Regional Board to Issue WDRs**

Pursuant to 23 CCR § 2208, the Regional Board has no discretion whether to adopt the WDRs and "shall adopt appropriate waste discharge requirements" or "waive the adoption of such requirements." (23 CCR. § 2208(b).) The language of § 2208 is clear and courts consistently construe regulations in a manner which supports the effectiveness of the regulation. Regulatory language is afforded its plain meaning; therefore, "shall" means the adoption or waiver of WDRs is mandatory, not discretionary. (See *Sustainability of Parks, Recycling, and Wildlife Legal Defense Fund v. Count of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1359; *National Paint & Coatings Ass'n, Inc. v. South Coast Air Quality Management District* (2009) 177 Cal.App.4th 1494, 1514-1515.) Moreover, § 2208 uses both "may" and "shall" in prescribing action by the Regional Board, further evidence that the drafters of § 2208 intended for "shall" to mandate action, as opposed to the permissive use of "may." (See *People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1298.) Therefore, the Regional Board's discretion is limited to determining whether to adopt or waive the WDRs; it has no power to deny WDRs entirely.

The Tentative Order appears to rely on the provision in 23 CCR, § 2208 (a) which states that "no such discharge of waste shall create a vested right to continue such discharge." However, this provision does not mean that the Regional Board can act arbitrarily in violation of applicable legal standards. Further, the standard to be applied in this case is different than if the application had not already been deemed approved as a matter of law. Once a permit is issued, the power of the government agency to revoke the permit is limited. (See *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1530.) The permit is subject to a heightened standard and the permit can be revoked only if the permittee fails to comply with permit conditions or there is a compelling public necessity, such as that the use constitutes a nuisance. (*Id.*, citing *O'Hagen v.*

*Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158; see also *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294.) Furthermore, “in order to justify the interference with the constitutional right to carry on a lawful business it must appear that the interests of the public generally require such interference and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.” (*Bauer, supra*, 75 Cal.App.4th at 1294, *O’Hagen, supra*, 19 Cal.App.3d at 159.) In other words, whether the action “could be believed to be sufficiently necessary to the public welfare as to justify the impairment” to the property owner. (*Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 649.) For example, one justification would be if the use “creates a condition dangerous to the public health or safety.” (*Id.*) The Regional Board has not presented any evidence whatsoever that La Paz facility will cause any dangerous conditions.

The Regional Board may not arbitrarily deny, revoke or amend La Paz’s permit. It has failed to present any compelling public necessity to revoke or amend La Paz’s permit.

**C. La Paz Meets All The Standards For Issuance of WDRs**

Water Code, § 13263 specifies the standards for issuance of WDRs. It states:

“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 [water quality objectives].”

The reports from Lombardo Associates, Inc. attached as Exhibit 2, summarize how La Paz satisfies all of these standards and refutes the unfounded contentions of the Tentative Order. La Paz’s facility complies with all statutory requirements, including, but not limited to, the requirements of the Basin Plan, applicable TMDLs, and all other adopted regulations.

La Paz’s onsite wastewater treatment system proposes to recycle 100% of the wastewater generated onsite for landscaping and toilet flushing. The state-of-the-art system is the epitome of “green” technology. This system will treat wastewater to tertiary levels in compliance with Title 22 of the California Code of Regulations (“CCR”) and has been approved by the California Department of Health.

Lastly, with respect to preventing a nuisance, since La Paz’s project complies with all statutory criteria, it cannot be a nuisance as a matter of law. “Nothing that is done or maintained under the express authority of a statute can be deemed a nuisance.” (Civ. Code § 3482; *Carson Harbor Village v. Unocal Corp.* (C.D. Cal. 1997) 990 F.Supp. 1188, 1197 [discharges permitted by Regional Board cannot be a nuisance]; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1258 [same].)

In any event, neither the Tentative Order nor the record in this matter provides any evidence whatsoever that La Paz's project will cause a nuisance. The law is clear that nuisances cannot be based solely on a fear of future injury. (See *Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041-1042.) The proof that a nuisance will result cannot "cannot be speculative and must amount to more than the conclusory opinions of experts". (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1213, citing *Jardine v. City of Pasadena* (1926) 199 Cal. 64, 75.) "To establish a nuisance the plaintiff must demonstrate an actual and unnecessary hazard." (*Beck, supra*, 44 Cal.App.4th at 1160; *People v. Oliver* (1948) 86 Cal.App.2d 885, 889-890.) The Regional Board has not presented any evidence that La Paz's facility will create a nuisance.

**D. The Court Has Ruled That The La Paz Project Will Not Result In Cumulative Impacts**

The Tentative Order suggests at section 3(d), by reference to Regional Board comments to the City of Malibu (the "City") on the La Paz EIR, that the La Paz project contributes to "the cumulative effects of new projects on existing septic systems and Legacy Park commitments in the Civic Center Area." The Los Angeles Superior Court rejected this claim by upholding the environmental impact reports prepared by the City for the La Paz and Legacy Park projects against challenges brought by Santa Monica Baykeeper. (*Santa Monica Baykeeper v. City of Malibu, et. al*, Los Angeles Superior Court Case No. BS118289; Order Denying Writ issued December 21, 2009; *Santa Monica Baykeeper v. City of Malibu*, Los Angeles Superior Court Case No. BS120033, Order Denying Writ issued December 22, 2009.) In so doing, the Court ruled that the La Paz project would not have any cumulative impacts to groundwater quality because "compliance with the Total Maximum Daily Load (TMDL) program is mandatory" for La Paz and future projects; therefore, cumulative impacts would be less than significant. Likewise, in the Legacy Park decision, the Court ruled that the Legacy Park project would "not discharge anything to the groundwater" and, therefore, "there is no requirement or reason to analyze cumulative effects." Copies of the Court's rulings are attached as Exhibits 3 and 4, respectively.

**E. The Prohibition Cannot Be Imposed On La Paz**

The Tentative Order states that La Paz is subject to the prohibition for on-site wastewater treatment systems adopted by the Regional Board on November 5, 2009. (Tentative Order, § 10.) However, the prohibition has not been approved by the State Board and, therefore, is not in effect. Water Code, § 13245 plainly states, "[a] water quality control plan, or a revision thereof adopted by a regional board, shall not become effective unless and until it is approved by the state board." Simply put, the Regional Board has no authority to enforce the prohibition against La Paz because it has not been approved by the State Board.

**F. La Paz Must Be Treated The Same As Other Projects In the Civic Center Area**

La Paz should be treated the same as other projects in the Civic Center Area, such as the Malibu Lumber Yard Project. Procedural due process "always requires a relatively level playing

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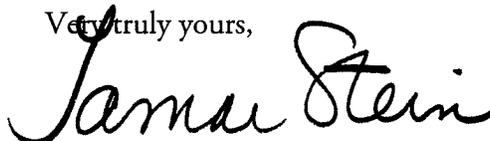
field, the 'constitutional floor' of a 'fair trial in a fair tribunal,' in other words, a fair hearing before a neutral or unbiased decision-maker." (*Shaw v. County of Santa Cruz* (2009) 170 Cal.App.4th 229, 266; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.) "Biased decisionmakers are impermissible and even the probability of unfairness is to be avoided." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170.) "The broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor of assuring that such hearings are fair." (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.)

Throughout the process before the Regional Board, La Paz has been singled out and requirements have been imposed on La Paz that have not been placed on others. The chart attached at Exhibit 2 shows how La Paz's system meets or exceeds the standards applied to the Lumber Yard project.

Basic principles of due process, equal protection and fairness require that the Regional Board treat all applicants the same. As such, La Paz requests that the Lumber Yard and Legacy Park files be made part of the administrative record for La Paz's Project.

For the foregoing reasons, La Paz requests that the Board confirm, without change, that the WDRs/WRRs already approved as a matter of law under the PSA as required by Section 2208 of Title 23 of the California Code of Regulations.

Very truly yours,



Tamar C. Stein

TCS/JRR:rs1

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**EXHIBIT 1**

January 19, 2010

Ms. Wendy Phillips  
California Regional Water Quality Control Board (CARWQCB)  
Los Angeles Region  
320 West 4th Street, Suite 200  
Los Angeles, CA 90013

Re: December 17, 2009 Tentative Order for Issuance of  
Waste Discharge Requirements Prohibiting Discharge Malibu La Paz, 3700 La Paz  
Lane, Malibu, CA File No. 08-101

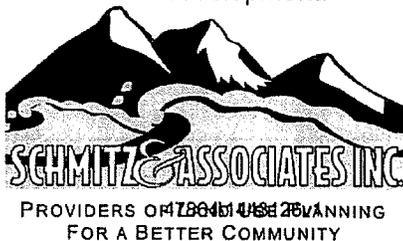
Dear Ms. Phillips:

On behalf of Malibu La Paz Ranch ("La Paz" or "Applicant"), LLC, Schmitz & Associates, Inc. ("Schmitz") submits the following comments in response to the Los Angeles Regional Water Quality Control Board ("Board") December 17, 2009 Tentative Order for Issuance of Waste Discharge Requirements Prohibiting Discharge at Malibu La Paz, 3700 La Paz Lane, Malibu, CA 90265 (File No. 08-0101). This response has been prepared in conjunction with La Paz's Wastewater Engineer, Lombardo Associates, Inc.

As explained below, the Tentative Order is incomplete and misleading. The responses below are numbered to correspond to the numbered paragraphs in the Tentative Order.

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 112,508 square feet on 15 acres at 3700 La Paz Lane in the City of Malibu.

1. The Tentative Order misstates the contents of La Paz's application and original submittal. On December 22, 2006 Schmitz employee, Matthew Dzurec, submitted on behalf of the applicant, an application for a Report of Waste Discharge ("Application") to the Los Angeles Regional Water Quality Control Board. The application concerned two separate proposed projects (.15 Floor Area Ratio ("FAR") Project and the .20 FAR Project). Both projects were similar in nature and proposed similar treatment methods and discharge volumes; plans were submitted to the Board for both projects on December 22, 2006. The Board states incorrectly in paragraph 1 of its findings that only one project was proposed for a 112, 058 sq. ft commercial development. La Paz has never submitted an application for 112, 058 sq. ft. of proposed development. La Paz's .15 FAR project proposed 99,117 sq. ft. of commercial retail and office space while La Paz's .20 FAR project iteration proposed 132, 058 sq. ft. of commercial retail and office development.



**SCHMITZ & ASSOCIATES, INC.**

HEADQUARTERS - MALIBU OFFICE  
29350 PACIFIC COAST HWY., SUITE 12  
MALIBU, CA 90265

TEL: 310.589.0773 FAX: 310.589.0353

EMAIL: [INFO@SCHMITZANDASSOCIATES.NET](mailto:INFO@SCHMITZANDASSOCIATES.NET)

REGIONAL - CONEJO VALLEY OFFICE  
5234 CHESEBRO ROAD, SUITE 200  
AGOURA HILLS, CA 91301

TEL: 818.338.3636 FAX: 818.338.3423

WEBSITE: [WWW.SCHMITZANDASSOCIATES.COM](http://WWW.SCHMITZANDASSOCIATES.COM)

The Board also states inaccurately that La Paz submitted an "incomplete" application to the Board. After submitting its application to the Board the applicant did not receive a written response to its application for over a year from the date of submittal. In fact, the applicant did not receive any form of communication from the Board regarding its application until February 28, 2007 when Schmitz employee Matt Dzurec received a phone call from Board staff member Rod Nelson requesting only that the applicant provide the Board with a \$900 check for processing fees.

2. In the engineering materials submitted with the December 22, 2006 ROWD, 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 of on-site landscaping. The applicant's proposal also included storage of 50,000 gpd to hold the treated wastewater during 38 to 90 days when irrigation would not be appropriate.

2. This paragraph mischaracterizes the design and function of La Paz's original proposed wastewater system (Ensitu Engineering design). La Paz's original 2006 Application did not propose spray irrigation as is stated. Spray irrigation with reclaimed effluent would require the approval of a Title 22 compliant Wastewater Treatment Facility by the California Department of Public Health ("CADPH") and no such facility was proposed in the December 22, 2006 application. In fact La Paz originally proposed to dispose of all of its effluent through drip irrigation (Geoflow®) at approximately one foot below grade. La Paz's wastewater engineer at that time, Ensitu Engineering, posited that much of the treated effluent that would be dispersed through the drip irrigation would be evapotranspired by plant root uptake thus minimizing the amount of treated wastewater that would enter the groundwater. The engineer designed the system in accordance with standard engineering practices and factors of safety to accommodate peak flows of up to 36,220 GPD (.20 Preferred Project) and 29,620 GPD for the smaller .15 FAR project iteration (alternative project). Ensitu found that average (actual) daily effluent flows would be 7500 GPD. Hence, the 7500 GPD figure reflects the actual wastewater flows predicted to be dispersed (via drip irrigation only) on site. The original application proposed to utilize 5 "infiltrator chambers" only in the event that soil horizon leaching would not be appropriate (i.e., where wet weather made soil horizon leaching inadvisable and where the applicant's proposed 50,000 gallon effluent storage tank was full.) In other words, the applicant did not propose to discharge effluent to the more conventional leach fields (infiltrator chambers) until it was absolutely necessary. Board comments stating that the applicant proposed the "discharge of 22,500 gpd to groundwater via leach fields, and reuse of 7,500 gpd for spray irrigation of onsite landscaping" is therefore entirely inaccurate.

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 many supplemental submittals.

3. Once again the Board never claimed the application was incomplete until January 15, 2008 (over one year after submittal) and no request was made by the Board to the applicant (in 2007) for additional materials. The timeline in this paragraph is missing many key dates and much significant information which are as follows:

- Between February 28, 2007 and April 12, 2007, Schmitz made several attempts by telephone and email to contact Board staff to obtain a filing determination for its application. There were several discussions with Board staff wherein they advised of their current workload and processing backlogs, but no filing determination was provided by Board staff.
- On April 12, 2007, Board staff member Toni Calloway left a telephone message for Schmitz Associate Planner Steven Reyes stating that two new engineers were to be hired by the Board next week and at that time La Paz's application would be assigned to a staff member for review.
- In early May of 2007, Board staff member Wendy Phillips informed Associate Planner Steve Reyes by telephone that Board staff would not process La Paz's application until La Paz had received California Environmental Quality Act ("CEQA") approval from the City of Malibu.
- Following the May 2007 telephone conference with Board staff member Wendy Phillips, Schmitz contacted the Board multiple times in an effort to obtain further comment and direction from the Board. The Board advised that it would not offer further comment nor would it process the application until such time as the City of Malibu had completed the CEQA process and certified the Final Environmental Impact Report ("FEIR").
- On or about September 27, 2007 the City of Malibu circulated the La Paz Draft Environmental Impact Report ("DEIR") for review through the State Clearing House beginning the 45 day review period required by CEQA. The public review period ended on November 13, 2007. All responsible agencies including the Los Angeles Regional Water Quality Control Board were presented with copies of the DEIR for review and comment. The Board did not offer written comment during the 45 day review period.
- On October 29, 2007 Donald W. Schmitz II, AICP, representative of the applicant, participated in a telephone conference with Board staff members as well as representatives for the City of Malibu. Board staff raised concerns regarding potential cumulative impacts from other proposed development projects in the City of Malibu. The Board reiterated its comments in a letter dated November 7, 2007. The EIR responded to this comment letter<sup>1</sup>.
- Board staff alleges plainly in its Tentative Order dated December 17, 2009 that *"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 many supplemental submittals."* This characterization of La

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• <sup>1</sup> The FEIR, which was certified on November 10, 2008 by the City of Malibu addressed all of the Board's comments adequately including Board concerns regarding potential cumulative impacts from wastewater disposal. See also the court's decision in Santa Monica Baykeeper v. City of Malibu, et. al., Los Angeles Superior Court Case No BS118289; Oder Denying Writ issued December 21, 2009 wherein the court held that the La Paz Project would not have any cumulative impacts to water quality.

Paz's application implies that La Paz haphazardly modified its application thus causing delays to the processing thereof. La Paz objects to this characterization of events inasmuch as all project revisions were precipitated by comments from Board staff. Specifically, while La Paz maintains that its project wastewater treatment and disposal strategy never posed a cumulatively considerable impact as alleged by Board staff, La Paz, in response to concerns articulated by Board staff, voluntarily revised its approach in January of 2008 in submitting its "No discharge" Title 22 Wastewater Treatment Plant Design. This design was submitted to Board staff on January 8, 2008 for staff's consideration and in response to staff's stated concerns in their November 7, 2007 La Paz DEIR comment letter.

- On January 8, 2008, La Paz representatives met with Board staff on behalf of La Paz to discuss the No Discharge Wastewater Treatment Plant ("WWTP") Design as well as the status of La Paz's application. At that meeting, Executive Director Egoscue promised to expedite the processing of the new WWTP design which was submitted that same day. Executive Officer Egoscue stated that she and her staff were very enthusiastic about the prospect of La Paz's proposed No Discharge Title 22 wastewater system.
- On January 15, 2008 staff issued its first written notice of incomplete application filing (discussed further infra).
- From January 15, 2008 until February 15, 2008 the applicant's representatives met with and corresponded with Board staff in an effort to expedite its application. The applicant's representatives submitted additional materials and information requested by Board staff in an effort to complete its application for filing and expedite the matter for a hearing.
- February 15, 2008. The Board issues its second letter of incompleteness. The Board's February 15, 2008 letter Notification of Incomplete Application for Waste Discharge Requirements identifies five (5) issues that need to be addressed:
  1. A Title 22 Engineering Report with the California Department of Public Health (CDPH) must be approved before the ROWD will be finalized.
  2. The design must be modified to meet the plumbing code assumptions for water use even if the WDR/WRR is for lower discharge volumes, which has been performed.
  3. Documentation on the operation of existing irrigation systems must be provided to confirm the ET estimates.
  4. The waste discharge from the project must be accommodated in the subsurface after consideration of the discharges from Malibu Lumber, Legacy Park WWTP, and Legacy Park Storm water disposal in the worst case.
  5. You [applicant] must specify the odor control features.

- From February 15, 2008 until April 2, 2008 the applicant's representatives met in person with and coordinated via telephone and emails with Board staff members in an effort to provide all information requested by Board staff.
- April 1, 2008. The La Paz Development Wastewater Master Plan, dated April 1, 2008, was submitted to the Board on April 2, 2008 for review and comment. The April 1, 2008 Plan addressed the Board's February 15, 2008 letter (5) issues as follows:
  1. **Title 22 Engineering Report approval by CDPH.** La Paz disagreed as to the need for the CADPH Title 22 Engineering Report Approval at this stage of its project. La Paz advised the Board that Title 22 Engineering Report approval by the CADPH is performed after Construction Plans and Specifications are prepared. Notwithstanding La Paz's objection, La Paz requested and received CADPH approval of its Engineering Report on two separate occasions, with CADPH approval of the conceptual design on May 30, 2008 and CADPH approval of the Title 22 Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water on July 23, 2009.
  2. **The treatment design must meet the plumbing code assumptions for water use.** La Paz modified its project treatment design to meet the plumbing code flows in accordance with Board staff's request to do so in its February 15, 2008 letter. The May 6, 2009 Title 22 Engineering Report provides for treatment of code flows as requested.
  3. **Documentation on existing irrigation systems to confirm the ET estimates.** La Paz disputed the need for this request as the ET estimates were developed using CA Department of Water Resources (DWR) published and industry standard techniques. As noted in a companion correspondence, we have provided the Board with a summary of 10 years of irrigation and ET information from the nearby (less than one mile) Pepperdine University Title 22 recycled water irrigation system and ET measurement facilities which substantiate the following significant matters:
    - a. ET in the Malibu Civic Center area is 120% of CIMIS data that was used as the basis of the La Paz wastewater Plan. The implications of this data is that the La Paz reuse system is conservatively designed, i.e., estimates on wastewater reuse for irrigation in La Paz's Title 22 Engineering Report are conservative.
    - b. Groundwater recharge occurring below irrigated areas is not materially different than in non-irrigated areas in the Malibu Civic Center. Consequently there is no basis upon which to find that any appreciable groundwater mounding impacts are likely to occur.
  4. **Project discharge accommodated in the sub-surface after consideration of the discharges from Malibu Lumber, Legacy Park WWTP, and Legacy Park Storm water disposal in the worst case.** La Paz has provided the Board with

a "Steady State Groundwater Study" with several addendums as well as the "Transient Modeling" requested by Board staff. La Paz's Title 22 Engineering Report contains all requisite modeling requested by the Board. This modeling demonstrates conclusively that both standard irrigation practices as well as any potential emergency discharge of off specification effluent will not have any appreciable or cumulatively considerable impact on groundwater levels. Conversely, any changes in groundwater conditions caused by others will not affect La Paz wastewater management.

**5. Specify the odor control features.** Contained within April 1, 2008 Master Plan.

- On May 2, 2008 Board staff member Elizabeth Erickson stated (via email correspondence) that receipt of conceptual approval from the CADPH would complete La Paz's *application*. In this email, Ms. Erickson also requested that two other Malibu development projects, i.e., the Malibu Lumber Yard and the Windsail development projects, receive only conceptual approval by CADPH of their proposed Title 22 Wastewater Treatment Plants prior to the Los Angeles Regional Water Quality Control Board issuing WDR/WRRs for those projects. Ms. Erickson clearly acknowledged that CADPH review and approval of the Final Title 22 Engineering Report for those projects would occur after permitting by the Board.
- Board staff failed to respond to the applicant's April 3, 2008 application submittal packet in writing within 30 days as required by the Permit Streamlining Act.
- On June 11, 2008 the applicant and its representatives received a letter from Board Executive Officer Tracy Egoscue stating that the Board will not complete La Paz's application for processing until such time as the Board has received evidence of CEQA review completion (i.e., a Notice of Decision of project approval and certification of the projects' EIR). This is the first time that the Board has presented in writing this reason for delaying permit processing.
- During the months of June and July of 2008 the City of Malibu and the CADPH conducted their reviews of the April 1, 2008 La Paz Engineering Report (submitted to the Board on April 3, 2008) and both agencies issued project concept review approvals.
- From July 2008 until November of 2008 the City of Malibu conducted multiple hearings to review the La Paz .15 and .20 Projects (Planning Commission Meetings and City Council hearings).
- On November 10, 2008 the City Council for the City of Malibu approved both Projects and certified the FEIR.
- On November 24, 2008 the City Council conducted a second reading of the ordinance which is intended to implement the Malibu La Paz Development

Agreement and associated project entitlements for the .20 Development Agreement Project. Shortly thereafter the City issued its Notice of Determination ("NOD") which was posted in the Los Angeles County Recorder's Office and submitted to the State Clearing House as required by Law.

- On December 2, 2008 Schmitz sent an email correspondence to Elizabeth Erickson, Board staff member, confirming that the project has been approved and the EIR certified; Schmitz, on behalf of the applicant, attached the NOD to the correspondence for both projects and stated that the project should now be considered "complete" for processing in accordance with the June 11, 2008 letter from the Executive Officer of the Board.
- Board staff did not respond to the applicant's December 2, 2008 submittal within 30 days as required by law. The application was deemed complete as a matter of law pursuant to the Permit Streamlining Act as of January 2, 2009. Board staff did not respond in writing to the applicant's December 2, 2008 correspondence until February 23, 2009.
- February 12, 2009: La Paz legal counsel Stanley Lamport, Esq. of Cox Castle & Nicholson sent a letter to the Board asserting that La Paz's application has been deemed complete as a matter of law pursuant to the Permit Streamlining Act.
- March 11, 2009: Jeffrey Ogata, Legal Counsel for the SWRCB responded to La Paz's legal Counsel's assertions denying that the application was in fact complete. The Board requested, inter alia, that La Paz prepare a Title 22 Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water ("Title 22 Engineering Report") and associated engineering drawings and obtain final CADPH approval of the same before the Board can complete the application. No other similarly situated applicant has been asked to do this. This goes against standard policy which is to obtain final review and approval from CADPH after the Board issues the discharge permit with conditions (WDR/WRR). Mr. Ogata's statements are contrary to what Board staff had previously articulated to the applicant regarding CADPH processing as a prerequisite to application completion. As noted in the previously referenced May 2, 2008 email correspondence from Board staff member Elizabeth Erickson to Chi Diep at CADPH, only conceptual review from CADPH would be required to deem La Paz's application complete for processing.
- Notwithstanding La Paz's position that its application had been deemed complete and that final approval from the CADPH of its Title 22 Engineering Report was unnecessary to complete its WDR/WRR application, La Paz agreed to prepare the Title 22 Engineering Report and associated materials and submit the same to CADPH for its "final" approval. From March 11, 2009 to May 12, 2009 La Paz prepared engineering drawings to be used in its Title 22 Engineering Report which were sufficient to obtain final approval from CADPH. As previously noted, other similarly situated projects were not required to prepare engineering drawings prior to obtaining permit approval from the Board.

- On April 24, 2009 La Paz representatives met with Board staff to review La Paz's Title 22 Engineering Report and accompanying materials. Staff advised that La Paz would have to modify its Wastewater Treatment System Design in several respects or the Board would not process the project or complete the application. Specifically, during this meeting staff member Wendy Phillips stated for the first time that unless La Paz takes the following actions Board staff would not complete La Paz's application or schedule its permit matter for hearing: 1. Modify the ROWD to completely prohibit any and all discharge including any emergency discharge that may be required by Title 22 of the California Code of Regulations; 2. Agree to add a process of reverse osmosis to the system to remove salts from wastewater prior to reuse for irrigation; 3. Place lysimeters beneath the leach fields to measure wastewater discharge and; 4. Place several groundwater monitoring wells *off-site* at legacy park or on adjacent properties in an effort to ascertain any potential contribution that La Paz's system may have on adjacent properties (groundwater mounding). The requests to modify La Paz's design as specified by Board staff during the April 24, 2009 meeting were not previously requested of the applicant at any time prior to said meeting.
- On May 12, 2009 La Paz submitted its engineering report to the CADPH for final approval.
- On May 21, 2009 La Paz representatives received an email from Board staff member Elizabeth Erickson reiterating that the Board would not permit any discharge, emergency or otherwise by La Paz.
- On May 22, 2009 Tamar Stein, Esq., legal counsel for La Paz, responded to Ms. Erickson's email correspondence of May 21, 2009 stating that it was unlawful and otherwise inappropriate for Board staff to mandate that the applicant modify its wastewater treatment plant design as a prerequisite to the applicant receiving a hearing on its application or as a prerequisite to project approval.
- La Paz obtained FINAL approval of its Title 22 Engineering Report from the CADPH on July 23, 2009. This approval was transmitted to the Board on the same day it was received.
- On July 23, 2009 La Paz filed its petition with the State Water Resources Control Board ("State Board") for review of a failure of the Regional Board to act on its application. The petition is currently pending before the State Board (A-2036).
- La Paz subsequently followed all procedures required under the Permit Streamlining Act and notified the Board and the General Public that its application was deemed approved by operation of law. La Paz maintains that its application was deemed approved as of August 31, 2009 due to inaction by the Board on its application.

- On December 17, 2009 La Paz received notice that the Board intended to convene a hearing on February 4, 2010 to review La Paz's ROWD Application. It is La Paz's position that La Paz is currently permitted to discharge as a matter of law and that any action taken by the Board must be taken in compliance with §2208 of Title 23 of the California Code of Regulations regarding subsequent Board consideration of a permit matter previously approved as a matter of law in accordance with the Permit Streamlining Act and the Water Code.

- c. On January 10, 2008, the applicant's new engineering consultant met with staff to provide a briefing of significant deviations to the treatment and disposal systems proposed in the initial ROWD. Included in a submittal on that day 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. The consultant also discussed a possible groundwater extraction system to control mounding on the site. Staff asked the consultant to provide clarification of the proposal for extracting groundwater, including disposal of the extracted groundwater, which would likely contain wastewater.

**3(c):** The applicant proposed groundwater extraction as one possible means of achieving a mass water balance. The feasibility of the applicant's design did not then and does not currently propose groundwater extraction; rather this was a topic the applicant wished to discuss with the Board staff. La Paz's Engineering Report adequately describes the manner in which it will achieve mass balance of a No Wastewater Discharge System.

- 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.

**3(d):** The City responded adequately to the Board's comments in the Responses to Public Comments section of the FEIR for La Paz; it did not "override" comments by the Board as is stated in this paragraph.

- e. On December 11, 2008, the applicant's representative testified before the Regional Board that the applicant intended to modify the ROWD to recycle all wastewater generated on site.

**(3)(e):** First it is unclear to La Paz who the Board is referring to in this paragraph. Who is the "applicant's representative?" The applicant does not have a copy of the December 11, 2008 meeting minutes and cannot deny or confirm the precise comments made at that hearing; however the administrative record clearly demonstrates that from January 2008 until present the applicant has consistently proposed 100% recycling and reuse of its wastewater onsite (No Discharge). The applicant's submittals throughout 2008 demonstrate its intent to recycle all

**wastewater generated on site. There were no significant project changes contemplated during the December 11, 2008 hearing.**

- g. On May 14, 2009, the applicant submitted an engineering plan to supplement its ROWD, including an increase in flow to 37,000 gpd. However, the applicant's submittal did not respond to all of staff's concerns expressed at the meeting on April 21, 2009.

**(3)(g):** The Tentative Order does not specify which of staff's concerns have not been addressed. La Paz can only assume that the Board's "concerns" relate to staff's requested changes in treatment plant design which were as previously noted inappropriately made by staff in violation of Water Code §13360. The increase in flow was solely responding to staff's requirement for design based upon code flows as was requested in the Board's February 28, 2008 incompleteness letter (i.e, that change was driven by Board staff comments). The applicant submitted the Title 22 Engineering Report for the Production, Distribution & Use of Title 22 Disinfected Tertiary Recycled Water as requested by the Board. It is La Paz's contention that the report contains more than sufficient information necessary to process La Paz's permit and that the Board staff appears to be taking issue with the manner of compliance proposed by the applicant not the purported lack of information presented by the applicant.

- f. April 21, 2009: comments provided during a meeting, including, among others, (i) the proposal did not appear to be a 'zero discharge' project (given an anticipated 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.

**4(f):** La Paz does not agree with Board staff's comment that there is "an anticipated rise in the water table." Nothing in La Paz's engineering report or accompanying materials predict a rise in the groundwater table. La Paz acknowledges that it prepared and submitted a transient water mounding study as part of its April 2, 2009 Title 22 Engineering Report; that this study did model "temporary" rises in groundwater beneath certain areas of the leach fields used for "emergency" discharge of off specification flows; however, La Paz maintains that its no discharge system will not, under normal operating conditions, create any rise in groundwater. La Paz's project engineer, Lombardo & Associates, Inc., will be submitting additional materials under separate cover providing 10 years of data for Pepperdine University demonstrating that standard irrigation practices with reclaimed water can and do achieve a mass balance without occasioning a rise in groundwater levels contrary to the Board staff's assertions. While temporary and cumulatively inconsiderable rises in groundwater may occur due to off-specification discharges, these events are not anticipated to occur with any regularity and, as noted in the FEIR and the Title 22 Engineering Report, will not impact groundwater quality or the functioning of existing septic systems on adjacent properties. While the applicant is pleased to present its "No Discharge" system to the Board it should be noted that "No Discharge" is not a prerequisite to achieving compliance with the applicable TMDLs, rules and regulations applicable to La Paz's project.

Regarding comment (iii) the Board provides no support for this contention. The discharge of off specification effluent would still be high quality effluent and would need to meet the rigorous standards for discharge that would be specified in La Paz's WDRs.

The Board did not require the Malibu Lumber Project to store off specification effluent. La Paz maintains that any off-specification effluent will be discharged in conformance with the water quality standards established by the Basin Plan and the TMDLs established for the region.

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.

5. It is a misstatement that the July 23, 2009 CADPH approval was only for a conceptual design. La Paz provided complete CADPH Title 22 Engineering Report documents and designs. The additional details CADPH requested are provided as part of final design. The Tentative Order does not take into account that the CADPH does not normally review projects until Construction Documents are prepared or facilities built. The CADPH stated that they have only reviewed one other project at this early stage of project development comparable to the La Paz project. Nothing in the Memorandum of Understanding between the State Water Resources Control Board and the CADPH requires any documentation to be provided, reviewed or approved beyond what La Paz has already provided.

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.

10. La Paz avers to Board staff's application of the Basin Plan Amendment ("BPA") to its project. §13245 of the CA Water Code States that no Basin Plan Amendment shall be effective and have the force of law until such time as the State Water Resources Control Board shall approve it; hence, as the State Water Resources Control Board has yet to approve the BPA the Regional Board may not proscribe discharges based thereupon. La Paz is not subject to the pending BPA.

14. 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.

14. La Paz objects to the conclusory nature of the findings in paragraph 10 which are not sufficient to find a "nuisance" so as to justify prohibiting discharge. It appears that the Board is alleging that the findings in 13263 cannot be made; however, the Board provides no support for this contention whatsoever. The Board has recently approved

17,000 gallons per day of discharge at the adjacent Malibu Lumber site. La Paz's project is superior to the Malibu Lumber project because La Paz proposes zero discharge of effluent (vs. 17,000 gpd) and La Paz has much greater depth to groundwater beneath its proposed leach fields thus allowing for superior site conditions upon which to naturally remove any remaining contaminants. The Tentative Order does not explain why the Lumber Yard project which is directly adjacent to La Paz's site can be permitted and found to be consistent with all rules and regulations while La Paz's project is alleged to be inconsistent. La Paz contends that such findings cannot be made and that its project is being treated disparately without any scientific basis upon which to support such disparate treatment.

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

15. La Paz does not concur with this finding. The finding is entirely conclusory and without any factual support. See applicant's responses to paragraphs 10 and 14 which are incorporated herein by reference.

16. 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.

16. La Paz does not concur with Board staff that its ROWD is incomplete and further objects that the Board does not currently have enough information to write a permit for discharge and recycling requirements.

17. Staff provided adequate response to the ROWD and modifications.

17. As explained above, Board staff did not comply with the Permit Streamlining Act provisions previously referenced or with the provisions of §13264(a)(2) of the Water Code.

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

18. La Paz does not concur with this finding. The finding is entirely conclusory and without any factual support. See applicant's responses to paragraphs 10 and 14 which are incorporated herein by reference.

19. 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.

19. La Paz does not concur with this finding. See applicant's responses to paragraphs 10 and 14 which are incorporated herein by reference.

20. 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.

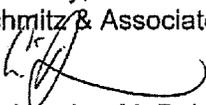
20. La Paz does not concur with this finding. The finding is entirely conclusory and without any factual support. See applicant's responses to paragraphs 10 and 14 which are incorporated herein by reference.

21. 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.

21. La Paz does not concur with this finding. The finding is entirely conclusory and without any factual support. See applicant's responses to paragraphs 10 and 14 which are incorporated herein by reference.

This concludes our comments on the Board's Tentative Order. La Paz's legal counsel and Wastewater Engineer will be submitting other correspondence and materials under separate cover. Should you have any questions please do not hesitate to contact us.

Sincerely,  
Schmitz & Associates, Inc.



Christopher M. Deleau  
Special Projects Manager

**EXHIBIT 2**

Environmental Engineers/Consultants

**LOMBARDO ASSOCIATES, INC.**

49 Edge Hill Road

Newton, Massachusetts 02467

(617) 964-2924

Portable: (617) 529-4191

Fax: (617) 352-5477

E-mail: pio@LombardoAssociates.com

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www.lombardoassociates.com

January 19, 2010

Ms. Wendy Phillips  
California Regional Water Quality Control Board (CARWQCB)  
Los Angeles Region  
320 West 4th Street, Suite 200  
Los Angeles, CA 90013

Dear Ms. Phillips:

Re: December 17, 2009 Tentative Order for Issuance of  
Waste Discharge Requirements Prohibiting Discharge  
Malibu La Paz, 3700 La Paz Lane, Malibu, CA  
File No. 08-101

In response to the Los Angeles Regional Water Quality Control Board (LARWQCB) December 17, 2009 Tentative Order for Issuance of Waste Discharge Requirements Prohibiting Discharge at Malibu La Paz, 3700 La Paz Lane, Malibu, CA 90265 (File No. 08-0101), on behalf of the Owner, La Paz Ranch, LLC, Lombardo Associates, Inc. (LAI) submits the following comments that demonstrate that the proposed project will achieve an effluent quality and groundwater impact that is in compliance with TMDL requirements for nitrogen, phosphorus and bacteria. The LaPaz wastewater systems is far superior than the recently LARWQCB permitted comparable advanced wastewater treatment and disposal systems in the Malibu Lagoon watershed. The LaPaz system will beneficially reuse all wastewater and its nutrients. There will be no nuisance conditions resulting from the project and any statements to that point have no basis in facts.

As illustrated on the attached Table entitled Malibu Civic Center - Malibu Creek Lagoon Wastewater Discharge Permits - Comparables Analysis, the LaPaz wastewater system will have, essentially no discharge of nitrogen and phosphorus as the landscape irrigation nutrient fertilizer demand is greater than the amount contained within the raw wastewater and the site's landscape irrigation demand is far greater than the amount of wastewater produced after in-building recycling. Consequently all wastewater and its nutrients will be beneficially reused. These are major positive environmental aspects of the project and consistent with CA State Water Reuse Policies.

LaPaz's only discharge would consist of wastewater salts and emergency discharges when the treated effluent does not achieve reuse standards and there is no capacity to treat the "off-specification for reuse effluent". LaPaz has proposed to be a responsible participant in any LARWQCB plan resulting from the State Water Resources Control Board's requirement that salt management programs be prepared for watersheds. It is noted that a Malibu Civic Center wastewater treatment system engineered by LaPaz's Engineer of Record, using a much simpler version of the proposed LaPaz technology, has been consistently achieving Title 22 effluent

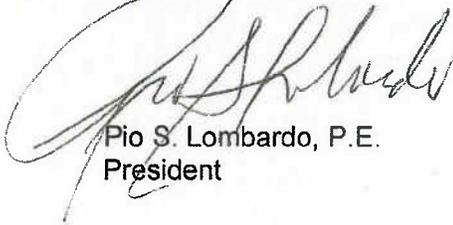
Ms. Wendy Phillips  
January 19, 2010  
Page 2

requirements. Consequently, the frequency of emergency discharges is anticipated to be very low in part due to the great history and as well as the extensive redundancy that is part of the LaPaz Wastewater System. Depth from the discharge to groundwater for the emergency discharges will be 5 – 30+ feet with the majority of the site emergency discharge occurring in areas with depth to groundwater being 10+ feet. Transient groundwater modeling of emergency effluent discharge indicates that there would be no discernible impact on the wastewater systems of other properties.

As illustrated on the attached Table entitled Malibu Civic Center - Malibu Creek Lagoon - Water Quality - TMDL Compliance Analysis, the LaPaz wastewater system will be in compliance with TMDL requirements. With essentially no net groundwater discharge of nutrients associated with landscape irrigation and essentially no bacteria as required for Title 22 standards, the LaPaz project is in compliance with TMDL requirements and the LaPaz project would not impair any other site from complying with TMDL requirements.

If you have any questions or comments on this matter, please do not hesitate to contact me by telephone (617) 964-2924 or E-mail [Pio@LombardoAssociates.com](mailto:Pio@LombardoAssociates.com).

Yours truly,



Pio S. Lombardo, P.E.  
President





**Malibu Civic Center - Malibu Creek Lagoon - Water Quality - TMDL Compliance Analysis**

Location	TMDL Discharge Requirements		US EPA Lagoon Water Quality Criteria	Malibu Creek Plaza Effluent Standards			Lumber Yard Effluent Standards			LaPaz Plan		
	Nov 16 - April 14	April 15 - Nov 15		01-010	R4-2008-0211	Reuse Effluent Quality (4)	Average	Max	Average	Max	Max Mass	% of TMDL
Constituent	Flow	Units (gpd)	Max	Design Flow	Max	Max	Max	Max	Max	Max	Max	% of TMDL
Total Nitrogen	8.0	mg/l	10.0	3.50	17,000	17,000	17,000	17,000	17,000	0.0	0.0	0%
Total Phosphorus	0.10	mg/l	0.10	0.14	1 or 3	1 or 3	1 or 3	1 or 3	1 or 3	0.0	0.0	0%
Fecal Coliform (1)	200	MPN/100 ml	Geometric mean	200	2	2	2	2	2	See note (5)	See note (5)	
E. coli	126	MPN/100 ml	Single sample	200	200	200	200	200	200	See note (5)	See note (5)	
Enterococcus (2)	35	MPN/100 ml	Single sample	104	104	104	104	104	104	See note (5)	See note (5)	
Total Coliform	1,000	MPN/100 ml	Single sample	10,000 or 1,000 if FCTC-0.1	10,000 or 1,000 if FCTC-0.1	10,000 or 1,000 if FCTC-0.1	10,000 or 1,000 if FCTC-0.1	10,000 or 1,000 if FCTC-0.1	10,000 or 1,000 if FCTC-0.1	2	23	

(1) Total Maximum Daily Loads (TMDL)

(2) Code Flows as required by LARWOGB.

(3) It is proposed that effluent not meeting requirements would be discharged on temporary emergency basis. Turbidity or Total coliforms are only expected causes - both of which are removed by drainfield soils. In LaPaz's opinion based upon comparables and the ability to retreat "off-spec" effluent, few if any emergency discharges are envisioned.

(4) Prior to Reuse for In-Building Non-Potable and Landscape Irrigation

(5) Total Nitrogen & Phosphorus effluent quality will be dictated by landscape fertilizer requirements. Landscape demand for N & P is greater than raw wastewater so therefore all nutrients will be beneficially reused. Any nutrients removed in the treatment process will need to be added for landscape fertilization requirements.

(6) Discharged to Groundwater during normal operations

(7) Septic loading is typically 60 mg/l TN and 8 - 12 mg/l TP. EPA TMDL assumes 30% soil TN removal and 90% TP removal. 83% TN removal results in effluent quality of 4.2 or 2.1 mg/l 90% TP reduction results in TP effluent quality of .1 mg/l

**EXHIBIT 3**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/21/09

DEPT. SE H

HONORABLE THOMAS I. MC KNEW, JR.

JUDGE

T. FRALA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDIN

NONE

NONE

Deputy Sheriff Reporter

10:00 am

BS118259

Plaintiff  
Counsel

NO APPEARANCES

SANTA MONICA BAYKEEPER  
vs  
CITY OF MALIBU

Defendant  
Counsel

NO APPEARANCES

'CEQA'

NATURE OF PROCEEDINGS:

RULING ON TRIAL 12/08/09 WRIT OF MANDAMUS;

Petitioner SANTA MONICA BAYKEEPER'S petition for writ of mandate is DENIED. CCP section 1094.5, PRC section 21168.

Real party in interest MALIBU LA PAZ RANCH, LLC's request for judicial notice is GRANTED, EC sections 452, 453.

A challenge to an EIR is reviewed for an abuse of discretion. PRC section 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Id. An agency fails to proceed "in a manner required by law" when it fails to comply with the informational and procedural requirements of CEQA. Save Our Peninsula Com. v. Bd. of Supervisors (2001) 87 Cal. App. 4th 99, 115. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App. 4th 645, 670.

The court must uphold a decision if there is substantial evidence in the record to support the

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12/21/09  
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/21/09

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JUDGE

T. FRALA

DEPUTY CLERK

HONORABLE

JUDGE

PRO TEM

ELECTRONIC RECORDING

NONE

NONE

Deputy Sheriff Reporter

10:00 am

BS118259

Plaintiff  
Counsel

NO APPEARANCES

SANTA MONICA BAYKEEPER

VS

Defendant  
Counsel

NO APPEARANCES

CITY OF MALIBU

'CEQA'

NATURE OF PROCEEDINGS:

agency's decision. PRC section 21168; Laurel Heights Improvement Ass'n v. Regents of the Univ. of California (1988) 47 Cal. 3d 376, 392. Substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Id., 14 CCR section 15384(a). Petitioner bears the burden of presenting credible evidence that the agency's findings and conclusions are not supported by "substantial evidence." Jacobson v. County of Los Angeles (1977) 69 Cal. App. 3d 374, 388. As discussed below, petitioners have not met that burden.

PROJECT DESCRIPTION

15.2 undeveloped acres located within the Malibu Creek flood plain and about 1/4 mile from the Pacific Ocean. The "project" actually consist of two office and retail projects: a .20 FAR (Floor Area Ratio) project under a Design and Development Agreement which would also dedicate 2.3 acre parcel for municipal use (the proposed project) and a .15 FAR project (the preferred alternative). The City determined that a single EIR could be prepared and the process for approvals could proceed simultaneously. Although both projects were approved only one of them will be built. The .15 project is consistent with the Local Coastal Plan and will not require Coastal Commission approval. The .20 project will require Coastal Commission approval. The two projects are

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12/21/09  
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DATE: 12/21/09

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HONORABLE THOMAS I. MC KNEW, JR.

JUDGE T. FRALA

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HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING

NONE

NONE

Deputy Sheriff Reporter

10:00 am

BS118259

Plaintiff  
Counsel

NO APPEARANCES

SANTA MONICA BAYKEEPER

vs

Defendant  
Counsel

NO APPEARANCES

CITY OF MALIBU

'CEQA'

## NATURE OF PROCEEDINGS:

essentially the same except for the dedication of a portion for municipal use and the increased square footage.

The Project area is near Malibu Creek and Malibu Lagoon, two water bodies identified as impaired or threatened by the Water Quality Control Board. It is also in an area of relatively shallow ground water that is prone to flooding. Water quality impacts are a concern and this challenge focused on the EIR's analysis of cumulative impacts, particularly with respect to hydrology and water quality, the improper deferral of mitigation measures and the claim that the City's findings were inadequate.

Although the project changed slightly during the review process, the changes were occasioned by comments from the public or conditions imposed by the responsible agencies. The description fully describes all integral components, ensuring all impacts were adequately analyzed. It is clear that the smaller "perferred alternative" (.15 FAR) project would utilize the same wastewater treatment system as the larger proposed (.20) project. 11621-11787.

## RECIRCULATION

The City determined that recirculation was not required because the Wastewater Treatment System will further reduce environmental impacts when compared to the septic system that was originally proposed. 4692-

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/21/09

HONORABLE THOMAS I. MC KNEW, JR.

HONORABLE

NONE

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JUDGE PRO TEM

NONE

T. FRALA

DEPT. SE H

DEPUTY CLERK

ELECTRONIC RECORDING

Deputy Sheriff Reporter

10:00 am

BS118259

SANTA MONICA BAYKEEPER

vs

CITY OF MALIBU

'CEQA'

Plaintiff Counsel

Defendant Counsel

NO APPEARANCES

NO APPEARANCES

NATURE OF PROCEEDINGS:

4693, 7237, 7337. The decision was based on independent analysis, expert hydrological and water quality studies and conformance with Environmental Health Division review. 733, 734, 11619-11787. That a single city staff member may have thought the recirculation was appropriate does not change the fact that there was substantial evidence in the administrative record to support the decision not to recirculate. 870-871. CEQA guidelines require recirculation if a significant change in the project that would deprive the public of an opportunity to comment upon a substantial adverse impact on the environment. 14 CCR section 15088.5 Incorporation of the zero net discharge wastewater treatment system, decreases instead of "increases the severity of an environmental impact." Cf 14 CCR section 15088.5(a)(2). It also represents a feasible project alternative that would "clearly lessen the significant environmental impacts of the project" that was adopted, rather than declined by the projects proponents. Cf 14 CCR section 15088.5(a)(3). While materially different than the septic system previously proposed it does not represent a significant change that would necessitate recirculation. If petitioner's interpretation of recirculation requirements were the law, every improvement to a project in response to comments would require another round of environmental review subjecting a project to endless review. The City's decision not to recirculate is presumed to be correct and petitioner has failed to meet its burden on this issue. Western Placer Citizens for an

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/21/09

DEPT. SE H

HONORABLE THOMAS I. MC KNEW, JR.

JUDGE T. FRALA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING

NONE

NONE

Deputy Sheriff Reporter

10:00 am

BS118259

Plaintiff Counsel

NO APPEARANCES

SANTA MONICA BAYKEEPER

Defendant Counsel

NO APPEARANCES

vs  
CITY OF MALIBU

'CEQA'

NATURE OF PROCEEDINGS:

Agricultural and Rural Environment v. County of Placer  
(2006) 144 Cal. App. 4th 890, 903.

IMPACT ANALYSIS

In determining the adequacy of the environmental analysis, the court does not "pass on the correctness of the report's environmental conclusions, but only on its sufficiency as an informative document." Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 392.

The EIR determined that the project will not change the currents of nearby creeks because stormwater will be contained on site ensuring that flow rates are "at or below the flow rates that currently exist on site." 9772. The EIR concluded that the "impacts from drainage and flooding will be reduced to less than significant levels." Id. The project's extensive drainage system was designed to accommodate stormwater flows. 9769-9772. The water quality management plan analyzed both water quality control measures and storm water drainage capacity and incorporates mitigation maintenance measures. 2683-2693, 2851, 7267-7268.

The impact on groundwater was also analyzed. 11673-11674, 1440-1625, 11716, 11746, 10058. The EIR then concluded that the "Zero Net Discharge System" will not result in a significant rise in groundwater levels across the site including the areas adjacent to the subterranean parking structures." 9862-9863.

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12/21/09  
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/21/09

DEPT. SE H

HONORABLE THOMAS I. MC KNEW, JR.

JUDGE

T. FRALA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING

NONE

NONE

Deputy Sheriff Reporter

10:00 am

BS118259

Plaintiff  
Counsel

NO APPEARANCES

SANTA MONICA BAYKEEPER

VS

Defendant  
Counsel

NO APPEARANCES

CITY OF MALIBU

'CEQA'

NATURE OF PROCEEDINGS:

Petitioner argues that the EIR does not discuss the effect on the direction and flow of the ground water, an issue that was not specifically raised during the review process and therefore cannot be raised now. Even though the effect on flow and direction of ground was not discussed in the EIR, the oversight is not prejudicial. Obviously, if the project does not impact the mounding of groundwater on the site, it cannot effect the flow of subsurface water. 9862-9863. Furthermore, the EIR analyzed the project's impact on groundwater quality. Noting that the system will "meet the Title 22 standards for disinfected tertiary treatment," and that any discharge would need to comply with Waste Discharge Requirements (WDR) imposed by the Regional Water Quality Control Board, the EIR concluded that even the discharge of "off spec" wastewater would result in less than significant impacts to groundwater quality. 9774-9778. Compliance with applicable laws or regulations is adequate mitigation in this situation. See Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal. App. 3d 1337, 1355.

Petitioner has not shown that the issue of flooding impacts on people was raised at the administrative level. Nevertheless, the court finds that this human impact analysis is implicit in the analysis of the impacts of flooding on structures. 9768-9769, see Sequoyah Hills Homeowners Ass'n v. City of Oakland (1993) 23 Cal. App. 4th 704, 716. If the project is designed to withstand adverse impacts to its

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structures, common sense dictates that the measures will also protect the persons using those structures.

The impacts on wildlife by the proposed manmade wetlands was adequately analyzed. Recognizing that the project site is not within an Environmentally Sensitive Area or other protected area, the EIR then concluded that the Manmade Wetlands area will create a beneficial impact to wildlife. 9774, 9781, 10018. The EIR analyzed the natural processes that would occur in the wetlands and, as a result, concluded that with annual and long term maintenance programs in place the habitat value of the wetlands could be optimized. 7268, 9774.

CUMULATIVE IMPACTS

With respect to cumulative impacts, agencies are not required to "provide evidence supporting every fact" contained in the EIR. See Association of Irrigated Residents v. County of Madera (2003) 107 Cal. App. 4th 1383, 1403. An EIR's cumulative impacts analysis "need not include all information available on a subject." Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App. 4th 729, 748. Past projects were considered as part of the baseline conditions of the project. 9638, 9655-9656. Petitioner claims that the cumulative projects list omitted two related projects, the Malibu Legacy Park and the Malibu Lumber Yard. The City responded to those comments during the review period by explaining that those projects were proposed after the City issued

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the Notice of Preparation (NOP) for the La Paz Project. The CEQA Guidelines require analysis of the conditions that "exist at the time the Notice of Preparation is published." 14 CCR section 15125. The NOP provides an appropriate cutoff date for future projects required to be in the analysis. San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal. App. 3d 61, 71-77. These projects need not be included in the analysis, nevertheless, the EIR recognized that wastewater discharge generated by related projects would be required to meet the Wastewater Discharge Requirements toward attaining both state and federal water quality standards in the Civic Center Area. (9778-9779, 9862-9863. Futhermore, a cumulative analysis of past projects is adequate where, as here, it was included in the baseline conditions and environmental settings portion of the EIR. City of Long Beach v. LAUSD (2009) 176 Cal. App. 4th 889, 910-911.

Contrary to petitioner's claims the EIR did not use an improper "ratio" approach. The EIR did find that certain cumulative impacts were significant and that the project's contribution was significant, but concluded that projects contribution could be mitigated to less than significant level through compliance with applicable state and federal. The EIR considered the incremental to the cumulative cumulative effect, not merely its proportional share of an already adversely effected environmental condition, when determining that the project's impact

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would be rendered less than cumulatively considerable. 9778-9779. Relying on the facts that existing and future projects would be required to comply with water quality control plans, the EIR reasonably determined that the project as mitigated, would have a less than significant impact.

Complainance with Total Maximum Daily Load (TMDL) program is mandatory. The EIR concluded "the wastewater discharge generated by the related projects, as well as the proposed project would... be required to meet the TMDL standards set forth in the WDR, which is considered a vehicle for moving towards attainment of federal and state water quality standards in the Civic Center Area." (9778-9779, 9862-9863. Petitioner argues that the reliance on TMDL compliance improperly defers the cumulative impact analysis. This specific issue was never raised during the review process before the City and cannot be considered now. In any case, the CEQA Guidelines acknowledge "with some projects, the only feasible mitigation for cumulative impacts may involve the adoption of ordinances or regulations rather than impositions of conditions on a project by project basis." 14 CCR section 15130(c).

DEFERRED MITIGATION

The soil leaching management plan is not deferred mitigation conditioned approval on the development of a plan with specific performance standards. 7269, 9777-9778, 10094, 11676. The referenced

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NATURE OF PROCEEDINGS:

water quality standards mandates testing prior to discharge, describes maximum contaminant levels, acceptable pH levels and other restrictions. Request for judicial notice Exhibit 1 (LARWQCB's Order N. 93-010). The final system design, after Los Angeles Regional Water Quality Control Board (LARWQCB)'s approval "shall be engineered to meet effluent limits specified in the WDRs, taking in to account the USEPA." 9780, 10077. A condition requiring compliance with environmental regulations is a common and reasonable mitigating measure. Leonoff v. County of Monterey (1990) 222 Cal. App. 3d 1337, 1355, see also Sundstrom v. County of Mendocino (1988) 202 Cal. App. 3d 296, 308.

ADEQUACY OF FINDINGS

Under CEQA, the City is required to make written findings regarding a project's significant impacts on the environment PRC section 21081. The findings are entitled to a presumption of correctness. City of Poway v. City of San Diego (1984) 155 Cal. App. 3d 1037, 1043. The court must resolve any doubt "in favor of the findings and decision." El Dorado Union High School Dist. v. City of Placerville (1983) 144 Cal. App. 3d 123, 130. With respect to hydrology and water quality issues, the City found the mitigation measures would sufficiently mitigate the projects impacts. 7340-7342. These findings are supported by the analysis in the EIR. 9768-9778, 9769, 9772, 9773. The City also made findings with respect to other environmental impacts such as air quality, geology

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## NATURE OF PROCEEDINGS:

and soils, public utilities and environmental hazards. 7239-7247, 7339-7348. The City determined that these impacts could be mitigated. 7366, 7369, 7344-7346, 7377-7389, 7346-7347 and 7391. CEQA does not require that the City make a separate finding for each subimpact. Agency findings "need not be stated with the formality required in judicial proceedings." *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 517 fn16. If the basis for a finding is found in the EIR and the agency's findings incorporate the EIR's discussion, detailed explanations are not required for each impact. *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal. App. 4th 477, 479. The City incorporated the analysis contained in the EIR into its findings. 7338.

It is presumed that the municipal entities complied with the law, and petitioners bear the burden of proving otherwise. *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal. App. 4th 729, 740. Any alleged failure to comply must also be shown to be prejudicial, i.e., the alleged error or omission is of such magnitude as to "preclude informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Id.* at 748, PRC section 21005. Petitioners have not established that there was any prejudicial abuse of discretion. Accordingly, the respondent's decision should be upheld. The petition is denied.

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Plaintiff  
Counsel

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CITY OF MALIBU

'CEQA'

NATURE OF PROCEEDINGS:

Respondent is to prepare an order and judgment denying petition.

Respondent is to arrange with the court's judicial assistant to retrieve the lodged certified administrative records and to maintain and preserve them until 60 days following final determination of the action, including any appeals.

A copy of this minute order is faxed this to:

BRIAN GAFFNEY  
TATIANA GAUR  
GREGG KOVACEVICH  
TAMAR STEIN

(415) 777-9809  
(310) 305-7985  
(310) 643-8441  
(310) 277-7889

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**EXHIBIT 4**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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Plaintiff  
Counsel

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NATURE OF PROCEEDINGS:

RULING ON TRIAL 12/14/09 WRIT OF MANDAMUS;

Petitioner SANTA MONICA BAYKEEPER's petition for writ of mandate is DENIED. CCP section 1094.5, PRC section 21168.

Petitioner SANTA MONICA BAYKEEPER's motion to augment the record is DENIED. CCP section 1094.5(e). The court finds the Malibu Lumberyard MND was mentioned only once, in passing, in discussing the history of neighboring projects. 5674. It was not "relied" on by the EIR being challenged. PRC section 21167.6(e)(10). There is no evidence that it was before the decision makers, or that petitioner could have presented it to the decision makers at the time the City was considering the project. Therefore, the motion is denied.

Petitioner SANTA MONICA BAYKEEPER's request for judicial notice is DENIED. EC sections 452, 453. The only evidence that is relevant is that which was before the agency at the time it made its decision. Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 574 fn4. Extra-record evidence is barred.

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A challenge to an EIR is reviewed for an abuse of discretion. PRC section 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Id. An agency fails to proceed "in a manner required by law" when it fails to comply with the informational and procedural requirements of CEQA. Save Our Peninsula Com. v. Bd. of Supervisors (2001) 87 Cal.App. 4th 99, 115. When an agency fails to comply with the mandatory procedures, the decision must be set aside. Sierra Club v. State Bd. of Forestry (1994) 7 Cal. 4th 1215, 1236. However, the petitioner is not challenging the City's failure to follow procedures, rather it attacks the EIR as lacking required information. Petition at paragraph 3.

"A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App. 4th 645, 670. "In determining the prejudicial effect of the failure to disclose, a court must resolve any factual issues in favor of the lead agency, if supported by substantial evidence." Barthelemy v. Chino Basin Muni. Water Dist. (1995) 38 Cal. App. 4th 1609, 1620. The purpose of an EIR is "to inform the public and its responsible officials of the environmental

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Plaintiff  
Counsel

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consequences of their decisions before they are made." Laurel Heights Improvement Ass'n v. Regents of the Univ. of California (1993) 6 Cal. 4th 1112, 1123. In determining the adequacy of the environmental analysis, the court does not "pass on the report's environmental conclusions, but only on its sufficiency as an informative document." Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 392.

PROJECT DESCRIPTION

Malibu Legacy Park is planned to occupy approximately 15 undeveloped acres located within Malibu's Civic Center Area. The project is located at the terminus of the Malibu Creek watershed where Malibu Creek drains into Malibu Lagoon. The project, designed by a team of experts, has three elements; 1) a stormwater detention, treatment and re-use element; 2) a habitat restoration element; and 3) a passive park element. 1565-1590, 8176-8179, 8182-8191. A fourth element, a wastewater treatment plant, was eliminated from the revised final EIR.

The stormwater element includes an eight acre foot detention pond which, in combination with the City's existing stormwater treatment facility located across the street, will allow the City to capture and treat virtually all of the stormwater flows that pass through the Civic Center Area. The habitat restoration element will involve the reintroduction of several different types of habitats allowing

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native plants and wildlife to thrive while providing an opportunity for the beneficial use of treated wastewater from a nearby shopping center. The public park will utilize treated wastewater, which is currently disposed subsurface on a portion of the property, for irrigation of the park and habitat areas.

The City initially hoped that the project site could be used for a centralized sewage treatment plant. However, site specific analysis revealed that the property is simply not suitable for a wastewater treatment facility. 8209-8210, 6196. The property is not large enough to accommodate a treatment wetland. 5694-5695, 8210.

CONSTRUCTION PHASE IMPACTS.

Geosyntec, one of the consulting firms on the project, did an extensive analysis of the hydrology and water quality impacts of the project. 8193-8196. The EIR mentions that construction "could" have a significant impact on the environment. 5899. As further explained in the EIR, the potential construction phase erosion, sedimentation and hazardous materials impacts depend on those variables listed and apply to any project site anywhere. 5899. Rather than speculate on what might happen, the EIR addresses the real issue of what will be done to avoid any significant impacts regardless of what those variables will be. 5899-5892. A General Construction Permit must be obtained under the NPDES program. Best Management Practices

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(BMPs) will be incorporated into the project under both the General Construction Permit and the Stormwater Pollution Prevention Plan (SWPPP) and detailed mitigation measures were developed to ensure that potential hydrological impacts will be reduced to less than significant. 6295, 5899-5903. A SWPPP and the implementing BMPs are necessarily dynamic: the runoff control measures in place are constantly evaluated and adjusted as the project site evolves. See 8206-8207 (commenting on normal practice). Prophecy is not required in an EIR and there is nothing to be gained by pointless speculation. Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 398.

While the EIR focuses on the mitigation, it does not forego the analysis completely, as petitioner suggests. A discussion of soils and erosion is located in the geologic section. 5827, 5829, 5830, 5833, 5839, 5840. The studies considered several factors including soil erosion, extent of grading, precipitation, topography and proximity to drainage channels. 5618, 5691, 5904. Extensive modeling of actual storm events over the course of 57 years provided accurate analysis which was explained at the public hearing by expert Ken Susilo. 8193-8196.

The grading and trenching will be above groundwater level. 8207. Even if temporarily exposed, the mitigation measures will reduce the impacts to less

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than significant. 5902-5903. The grading has been completed. Petitioner did not seek temporary restraint or a preliminary injunction to prevent any perceived threat of adverse impact from grading activities.

DISCHARGE OF TREATED WASTEWATER

The project does not include the subsurface discharge of treated wastewater form a neighboring development. That project was approved, without a challenge, more than 2 years prior to this project. The project does include the beneficial reuse of the treated effluent from Malibu Lumber. 5614, 5969-597. In fact, the project anticipates a shift away from subsurface disposal to re-use for irrigation of the park and habitat areas. The net effect of the park project will be to reduce the amount of discharge to groundwater. 1576-1590.

CUMULATIVE GROUNDWATER IMPACTS

As discussed above, the Legacy Park project will not discharge anything to the groundwater. 6187-6201. The incremental contribution is zero and obviously less than "cumulatively considerable." 14 CCR section 15064(h)(1). Therefore, there is no requirement or reason to analyze cumulative effects.

"The ultimate decision of whether to approve a project. . . is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information. . . required by CEQA." Santiago County Water Dist. v. County of Orange (1981) 118 Cal.

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App. 3d 818, 829. "The level of specificity of an EIR is determined by the nature of the project and the 'rule of reason' rather than any semantic label accorded to the EIR." Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency (2000) 82 Cal. App. 4th 511, 533. Absolute perfection is not required. Concerned Citizens of South Central L.A. v. LAUSD (1994) 24 Cal. App. 4th 826, 839. It is presumed that the municipal entities complied with the law, and the petitioners bear the burden of proving otherwise. Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal. App. 4th 729, 740. Any alleged failure to comply must also be shown to be prejudicial, i.e., the alleged error or omission is of such magnitude as to "preclude informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." Id. at 748. PRC section 21005. Petitioner has not established that there was any prejudicial abuse of discretion. Accordingly, the respondent's decision should be upheld. The petition is denied.

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