

California Regional Water Quality Control Board
Los Angeles Region

City Council Chambers, City of Glendale
613 E. Broadway, Glendale, California
July 14, 2011
548th Board Meeting

Item Number 12

Proposed Board Action Consideration of a tentative Resolution to authorize the Executive Officer to enter into a Memorandum of Understanding (MOU) between the City of Malibu, the Los Angeles Regional Water Quality Control Board (Regional Board), and the State Water Resources Control Board (State Board) regarding implementation of the Basin Plan Amendment prohibiting on-site wastewater disposal systems (OWDSs) in the Malibu Civic Center Area.

Summary of the Resolution On November 5, 2009, the Los Angeles Regional Board adopted Resolution R4-2009-007 approving an amendment to Chapter IV of the Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (Basin Plan), to prohibit OWDSs in the Malibu Civic Center Area, as defined in the Basin Plan Amendment. The Basin Plan Amendment was subsequently approved by the State Board on September 21, 2010, and by the Office of Administrative Law on December 23, 2010.

The Basin Plan Amendment prohibits all new OWDSs in the Malibu Civic Center Area and prohibits the discharge from existing OWDSs based on a phased schedule to cease discharges from Phase One systems by November 5, 2015 and Phase Two systems by November 5, 2019.

The Basin Plan Amendment does not prevent repairs, maintenance, and upgrades to existing OWDSs, provided that they do not expand the capacity of the systems or increase flows of wastewater.

The City of Malibu (City) objected to the Basin Plan Amendment. The City and the Regional Board and the State Board (together referred as Water Boards thereafter) entered into a tolling agreement by which they agreed to extend the time within which the City must bring an action against the Water Boards challenging their actions to approve the Basin Plan Amendment that will expire in October 2011. The

EXECUTIVE SUMMARY

Resolution for the MOU between the City of Malibu, the Los Angeles Regional Board and the State Board

purpose for the tolling agreement was to afford the parties an opportunity to reach agreement on implementation of the Basin Plan Amendment through the City's construction of one or more wastewater treatment facilities in the Malibu Civic Center Area.

The City and the Water Boards have proposed to enter into a Memorandum of Understanding (MOU) to memorialize their agreement to coordinate in the implementation of a wastewater treatment plan in the Malibu Civic Center Area.

The purpose of the MOU is to assure compliance with the Basin Plan Amendment through the construction of one or more centralized publicly owned wastewater treatment facilities (facility) and connection of properties within the prohibition boundary areas by the dates specified in the Basin Plan Amendment. To accomplish this purpose, the City would agree in the MOU to build one or more facilities based upon an agreed upon schedule. As proposed in the MOU, the City would agree, among other things, to connect properties to the facility based upon agreed phases, agree not to join or support third party lawsuits challenging the Basin Plan Amendment, agree to require upgrades to certain OWDSs if those properties do not connect to a facility, agree to conduct monitoring, and agree to a continued tolling agreement. The proposed schedule includes interim milestones to assure completion of the project during the time periods set forth in the Basin Plan Amendment. Certain properties may ultimately not be required to connect to a facility based on the Regional Board's review of results of monitoring to be conducted by the City.

The Water Boards would agree to the phased approach set forth in the MOU, agree to process waste discharge requirements in a timely manner, and would withhold amending the Basin Plan Amendment so long as the City is in compliance with the schedule. The Water Boards would reserve their rights to withdraw from the MOU and enforce the Basin Plan Amendment as originally written against all properties within the prohibition area if the City fails to substantially comply with the schedule. The Parties also would agree to coordinate in enforcement to assure protection of water quality and, if necessary, to amend the Basin Plan Amendment if it is ultimately determined that certain properties need not connect to a facility.

The Resolution adopting the Basin Plan Amendment directed the Executive Officer to require the City, pursuant to Water Code section 13225(c), to submit reports showing progress toward completing a project to construct a wastewater treatment facility. Water Code section 13225 does not authorize the Regional Board to require the

EXECUTIVE SUMMARY

Resolution for the MOU between the City of Malibu, the Los Angeles Regional Board and the State Board

City to construct a wastewater treatment facility, but it can require reports. Water Code section 13225 provides the Regional Board with authority to cooperate with local agencies to seek actions to protect water quality. The Tentative MOU is consistent with Water Code section 13225.

Regional Board staff considers the proposed MOU to be fair, reasonable and in the public interest. The MOU benefits the public interest by supporting the implementation of a plan to construct one or more publicly owned wastewater treatment facilities that will treat wastewater to meet Regional Board water quality standards and Department of Public Health human health standards for bacteria and nitrates in the vicinity of the Malibu Civic Center Area. The MOU will complement other activities of the Regional Board, such as the implementation of total maximum daily loads (TMDLs) and issuance of waste discharge requirements to certain properties in Malibu, and other activities of the City such as implementation of its ordinance to require new developments to have tertiary treatment, a grant to hire a coastal education specialist to address urban runoff , and a program to regulate septic system service providers. Further, the City is working with the Regional Board staff for a centralized treatment plant as a solution to comply with the Basin Plan Amendment and protect the water quality. The MOU does not modify the Basin Plan Amendment, which continues to prohibit new onsite systems in the Malibu Civic Center Area.

Stakeholder Participation and Comment

The tentative MOU was released on June 21, 2011 for a 10-day public comment period ending on July 1, 2011. Persons wishing to comment on the tentative MOU are invited to submit them in writing.

Summary of Comments and Response to Comments

Below is the list of 22 comment letters received by July 1, 2011 deadline, including one was submitted late.

1. Malibu Bay Co.
2. Malibu Road Association
3. Mariposa Land Company Ltd.
4. Vista Pacifica Townhome Association
5. Sally Benjamin
6. Coldwell Banker Malibu Colony
7. Meril May
8. Coldwell Banker Point Dume
9. Steve Soboroff
10. Heal the Bay
11. Santa Monica Baykeeper
12. Malibu Surfing Association

EXECUTIVE SUMMARY

Resolution for the MOU between the City of Malibu, the Los Angeles Regional Board and the State Board

13. Jeff Harris
14. Joan Lavine
15. Latham Watkins
16. AZ Winter Mesa LLC
17. R. Jeffery Follert
18. Steve Littlejohn
19. Toni Littlejohn
20. Tommy Nefcy
21. Louis Busch
22. Surfrider Foundation – Comment received late.

The key comments made by stakeholders and the response to comments prepared by Regional Board staff are summarized as follows:

1. The Tentative MOU does not provide an implementation plan if the voters do not agree to be included in an assessment district.

Response: The Tentative MOU has contemplated several alternatives in case the assessment districts are not formed. The Regional Board may terminate the MOU and take enforcement or regulatory action, such as issuance of administrative civil liability or cease and desist orders against any or all properties within the prohibition area, or issuance of waste discharge requirements in accordance with the requirements specified in the Prohibition.

2. The MOU negotiation process and opportunities for public comment were insufficient.

Response: Stakeholders were provided 10 days to submit written comments, stakeholders also have an opportunity to make oral comments at the board meeting.

3. The Executive Officer does not have the authority to amend a Basin Plan Amendment.

Response: The Regional Board staff disagrees with its characterization of the Tentative MOU as an attempt to allow the EO to amend the Basin Plan. The MOU does not amend the Basin Plan nor allow the Executive Officer to amend the Basin Plan. The MOU is an agreement between the parties to cooperate in the construction of one or more wastewater treatment facilities to achieve compliance with the prohibition. The MOU will be approved by the Regional Board, not the Executive Officer.

4. The NGO proposed specific language to address the contingency of voters rejecting an assessment district.

Response: Modifications to the Malibu Operating Permit Ordinance

EXECUTIVE SUMMARY

Resolution for the MOU between the City of Malibu, the Los Angeles Regional Board and the State Board

are not necessary to address the scenario in which the voters do not approve an assessment district. First, if the City amends its Ordinance to allow advanced OWDSs in areas covered by the prohibition, the amended ordinance would conflict with the existing prohibition that prohibits such discharges. If the Regional Board decides to require upgrades to OWDSs within the prohibition area, it can issue waste discharge requirements to properties within the prohibition area, and the owners would need to obtain an Operating Permit under Malibu's existing code.

5. The Tentative MOU delays treatment upgrades for some properties which are known to degrade water quality.

Response: Under the MOU, the Regional Board may independently require these properties to implement a disinfection system and other requirements in accordance with WDRs issued by the Regional Board. Regional Board staff plans to prioritize the investigation of this area, and take appropriate permitting or enforcement actions to implement the bacteria TMDL. Staff plans to complete this work long before 2019.

6. The tentative MOU does not include groundwater monitoring.

Response: The City agrees to provide the access to City-owned wells for groundwater sampling.

7. The tentative MOU has modified conditions in the Basin Plan Amendment.

Response: The MOU does not revise the Basin Plan Amendment. It is an agreement by the Regional Board to forego enforcement of certain aspects of the prohibition if the City complies with the schedule. A Basin Plan Amendment may ultimately be necessary to address Phase III parcels. The MOU does not preclude developed parcels from connecting to the Phase I treatment system, provided that the desire for inclusion is determined by the City in a manner allowing additional facilities to be connected.

8. The Tentative MOU's nitrogen requirement does not have sufficient regulatory basis.

Response: The Tentative MOU requires any centralized wastewater treatment facility to comply with a nitrogen standard of no greater than 10 mg/l, which could be lower as necessary to protect beneficial uses and comply with all water quality standards, including the State Board Resolution 68-16.

9. The MOU should specify the level of treatment at the central

EXECUTIVE SUMMARY

Resolution for the MOU between the City of Malibu, the Los Angeles Regional Board and the State Board

wastewater treatment facility and prioritize water recycling.

Response: The MOU requires the discharge from the centralized wastewater treatment facility to comply with all applicable laws and water quality standards including State Water Board Resolution 68-16 to protect beneficial uses. The tentative MOU also requires a plan for recycling including a storage plan.

Recommendation

Regional Board staff recommends adoption of this Resolution to authorize the Executive Officer to sign an MOU between the City and the Water Boards regarding phased implementation of the Basin Plan Amendment prohibiting on-site wastewater disposal systems in the Malibu Civic Center Area.

The MOU offers a reasonable approach to achieving compliance with the prohibition without the delay and cost of litigation with the City. Implementation of a prohibition is most effective with the cooperation of an entity with the ability to construct a centralized system. The MOU provides the opportunity for the City and the Regional Board to work together consistent with Water Code section 13225 to achieve construction of one or more centralized wastewater treatment facilities. In the MOU, already approved by the City, it agrees to construct a facility, conduct additional monitoring, and enforce its ordinances, in coordination with the Regional Board, as needed to protect water quality. The Regional Board agrees to withhold enforcement of certain aspects of the prohibition and to reconsider at a later date whether certain properties in Phase III, comprising only 15% of the flow, should remain in the prohibition area. However, if the City and the community fail to achieve the task, the Regional Board has significant enforcement tools to seek compliance with the Basin Plan Amendment Prohibition by all the dischargers subject to the prohibition.