

Gene A. Lucero
Direct Dial: +1 (213) 891-8332
gene.lucero@lw.com

355 South Grand Avenue
Los Angeles, California 90071-1560
Tel: +1.213.485.1234 Fax: +1.213.891.8763
www.lw.com

LATHAM & WATKINS LLP

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July 1, 2011

VIA EMAIL AND HAND DELIVERY

Dr. Eric Wu, Chief of Groundwater Permitting Unit
California Regional Water Quality Control Board,
Los Angeles Region
3020 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: **Comments on the Los Angeles Regional Water Quality Control Board's
Consideration of a Memorandum of Understanding with the City of Malibu
on the Malibu Civic Center Area Septic Prohibition**

Dear Dr. Wu:

Thank you for the opportunity to submit comments on behalf of various clients of mine that own commercial, residential and undeveloped properties in the Malibu Civic Center Area. These clients are potentially affected by the proposed Memorandum of Understanding ("MOU") between the Los Angeles Regional Water Quality Control Board ("Regional Board"), the City of Malibu ("City"), and the State Water Resources Control Board ("State Water Board") regarding the implementation of the 2009 Los Angeles Region Basin Plan amendment prohibiting on-site wastewater disposal systems ("OWDS") in the Malibu Civic Center Area (the "Basin Plan Amendment"). We understand that the MOU is designed to coordinate the implementation of a wastewater treatment plan in the Malibu Civic Center Area, as defined in the Basin Plan Amendment. My clients are very pleased that the Regional Board and the City have reached the implementation compromise outlined in the MOU and they look forward to working with both entities in the coming decade to help realize shared water quality goals in Malibu.

My clients also generally support the MOU's implementation strategy and timeline, but we would like to take this comment period to confirm our understanding about how the MOU handles a few key issues that we did not find directly addressed in the agreement text. Our understandings are based on our reading of the MOU and our conversations with both City and Regional Board staff, and address the following areas:

- Basin Plan Amendment Compliance During the MOU's Effective Period
- Undeveloped Parcels

- “Opting-In” to an Assessment District and Connecting to a Centralized Wastewater Treatment Plant

A. Basin Plan Amendment Compliance During the MOU’s Effective Period

The MOU’s outlined implementation schedule for the Basin Plan Amendment provides a reasonable and feasible path toward the realization of a centralized wastewater treatment plant(s) for the Malibu Civic Center Area that will improve water quality and enhance the quality of life in Malibu. However, the implementation schedule and proposed connection date for certain Malibu Civic Center Area properties differ in both timing and scope from the Basin Plan Amendment specified discharge prohibition dates. Specifically, under the Basin Plan Amendment, commercial dischargers are required to cease existing discharges by November 2015; residential dischargers must cease existing discharges by 2019. Under the MOU’s implementation schedule, certain commercial and residential properties are not required to connect to a centralized wastewater treatment system until 2019, 2025 or potentially not at all.

It is our understanding that with the adoption of the MOU, Malibu Civic Center Area property’s owner compliance obligation with respect to discharge is governed by the MOU implementation schedule, so long as the City is in substantial compliance with the MOU and property owners are discharging consistent with City requirements and Regional Board issued WDRs or waivers. MOU Article III.B provides that the Regional Board will “not enforce the prohibitions against property owners set forth in the Basin Plan Amendment so long as the City is in substantial compliance with the Plan set forth in Article II of this MOU and the property owners are in compliance with the Basin Plan Amendment conditions, applicable City requirements, and waste discharge requirements or a waiver issued by the Los Angeles Water Board.” Practically speaking, assuming the City is in substantial compliance with the MOU and property owners are discharging consistent with City requirements and Regional Board issued WDRs, we understand that the Regional Board will deem property owners to be in compliance with the Basin Plan Amendment conditions as well. This compliance will permit such property owners to continue operating under the MOU provisions (pursuant to the Regional Board’s enforcement discretion) until such period as the MOU requires connection to a centralized wastewater treatment facility or alternative compliance, or there is a new, applicable, amendment to the Basin Plan.

B. Treatment of Undeveloped Parcels

MOU Exhibit A, a boundary map entitled “Civic Center Wastewater Treatment Plan Phasing Options”, uses a coloring scheme to identify properties within the adopted Basin Plan Amendment prohibition area as located within MOU implementation Phase One, Phase Two, and Phase Three. The colored areas on Exhibit A capture the vast majority of the parcels within the Basin Plan Amendment prohibition area; however, there are also various parcels scattered throughout the prohibition area that are not identified as being included in either MOU Phase One, Phase Two, or Phase Three by Exhibit A. For purposes of these comments, we will refer to these parcels as the “Undeveloped Parcels.” Though the MOU does not expressly address Undeveloped Parcels, it is our understanding that Undeveloped Parcels will be treated similarly to Phase Three parcels in that they can utilize a OWDS accompanied by filtration and

disinfection between the date of the signing of this MOU and upon the determination that a Phase Three is or is not necessary, so long as the OWDS meets review and permitting requirements, which authorities both agencies retain pursuant to MOU Article VI.E. The ability to discharge from Undeveloped Parcels would of course still be subject to the MOU requirements for Phase Three properties. (*See* MOU Article III.B and *supra* Section A).

This understanding makes sense in the broader context of the MOU's implementation schedule. Over the next 10+ years the Regional Board will work with the City to determine whether or not a Phase Three is necessary to achieve the Basin Plan Amendment's state water quality goals. In an apparent acknowledgement of the timing and uncertainty of Phase Three, MOU Article II.C.3 expressly authorizes the City to permit Phase Three properties to "modify" existing buildings upon the installation of a filtration and disinfection system to the property's existing OWDS before a determination that Phase Three may or may not be necessary, as long as the modification is accompanied by an installation of a filtration and disinfection system to the property's existing OWDS and the modification is consistent with the public health and the Basin Plan Amendment. Undeveloped Parcels face a similar state of limbo during such time as the Regional Board and City investigate the need to connect those properties outside of MOU designated Phase One and Phase Two areas prior to 2025. It follows then that, like the Phase Three properties subject to the MOU's extended and uncertain implementation schedule, the Regional Board will permit Undeveloped Parcels to utilize an OWDS accompanied by filtration and disinfection between the date of the signing of this MOU and upon the determination that a Phase Three is or is not necessary. (*See supra* Section A).

C. "Opting-In" to an Assessment District and Connecting to a Centralized Wastewater Treatment Plant

MOU Article II.D provides that "[c]ertain properties within Phase Three, including Hughes Research Laboratory and other properties, may choose to join an assessment district, connect to the Wastewater Treatment facility, and pay all associated fees." Allowing properties outside of the MOU delineated phased areas to join an assessment district and connect to a centralized wastewater treatment plant before that property would otherwise be required is a welcome concept and reflective of the Basin Plan Amendment's water quality goals. Permitting "opt-ins" facilitates the removal of additional OWDSs from the Malibu Civic Center Area, spreads the cost of Basin Plan Amendment compliance across a greater number of dischargers, and offers property owners greater certainty in the future use and development potential of their assets. However, by only referencing Phase Three properties when discussing the potential to "opt-in", the MOU unintentionally causes confusion about whether or not other Malibu Civic Center Area properties have the option of joining an assessment district and connecting to a centralized wastewater treatment plant at an earlier stage than would otherwise be required by the MOU implementation schedule. We think it is clear that all Malibu Civic Center Area properties have that option.

It is our understanding that any Malibu Civic Center Area property (or any other property for that matter) has the option of joining an assessment district and connecting to a centralized wastewater treatment plant at any time subject to their ability to pay for this connection and the City's ability and willingness to permit this connection. The provision of municipal wastewater

disposal is within the City's police power, and the MOU expressly provides for the reservation of the legal authority and responsibilities of the signatories. (*See* MOU Article VI.E). Because the MOU in no way restricts the City from connecting any user who has the ability and willingness to pay for such service, it is clear that any parcel within the Prohibition may "opt-in" to an assessment district or connect to a centralized wastewater treatment facility at any time the option is available.

D. Conclusions

As Malibu Civic Center Area property owners, my clients see this MOU as a very positive step for both the Malibu environment and its economy and are pleased that the State Water Board, Regional Board and the City are considering this action. If the understandings outlined in this letter, which are based in part on conversations with Regional Board and City staff, are in fact accurate, my clients offer their full support at the July 14, 2011 Board Meeting for the Regional Board's authorization of its Executive Officer to sign the MOU.

Should you have any questions or wish to discuss our comments and proposals, please feel free to contact me at 213-891-8332.

Respectfully submitted,

A handwritten signature in black ink that reads "Gene Lucero" with a stylized flourish at the end.

Gene A. Lucero
of LATHAM & WATKINS LLP

cc: Tom Howard, Executive Director, State Water Resources Control Board
Jim Thorsen, City Manager, City of Malibu