

*From the Desk of Joan C. Lavine*

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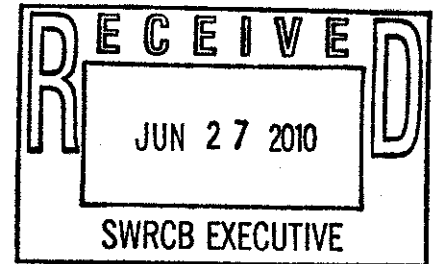
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June 27, 2010

Mr. Charles R. Hoppin, Chairman  
State Water Resources Control Board  
1001 "I" Street  
Sacramento, Ca. 95814  
Via Fax: 1-916-341-5620  
Via E-mail to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)  
Via USPS Express Mail



Attention: Jeanine Townsend, Clerk of the Board

TO MR. CHARLES R. HOPPIN, THE CHAIRMAN OF THE CALIFORNIA STATE WATER RESOURCES QUALITY CONTROL BOARD, AND TO THE RESPECTIVE MEMBERS OF SAID BOARD:

Re: COMMENT LETTER – MALIBU SEPTIC PROHIBITION

Re: residential single-family dwelling zoned real property located at 23900 Malibu Road, Malibu, California 90265, Mapbook 4458, Page 007, Parcel 018, solely owned by Joan C. Lavine, individually, and located within the proposed Malibu Civic Center septic ban area, in California State Water Resources Quality Control Board Resolution No. R4-2009-007, passed by the Los Angeles Regional Water Resources Quality Control Board on November 9, 2009.

I, Joan C. Lavine, hereby respectfully submit my comments opposing the proposed Malibu Civic Center septic ban area, as contained in California State Water Resources Quality Control Board Resolution No. R4-2009-007, passed by the Los Angeles Regional Water Resources Quality Control Board on November 9, 2009.

### **STATEMENT OF FACTS:**

DESCRIPTION AND LOCATION OF SUBJECT LAVINE MALIBU ROAD PROPERTY WITHIN THE PROPOSED BAN ZONE: The undersigned property owner and objector Joan C. Lavine presently owns, and, at all times since 1971, has owned all right, title and interest in and to the fee simple rights in a residential real property, zoned R-1 for residential single-family dwellings, located at 23900 Malibu Road, Malibu, California 90265, Mapbook

Tuesday, June 29, 2010 9:28 AM Page 1 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

4458, PAGE 007, Parcel 018. Hereinafter, the subject real property will be referred to as the "Lavine Malibu Road property".

This property owner Joan C. Lavine acquired the Lavine Malibu Road property from her Father Morris Lavine in or about 1971. Her Father Morris Lavine had purchased the property in or about 1945.

Said Lavine Malibu Road property is located in Malibu, California 90265, in the Malibu Civic Center area, to the south of Pacific Coast Highway, at the mouth of the Malibu Canyon, and on the beach front of the Malibu Colony, in an area known as the Malibu Colony outside the Colony gates.

Said Lavine Malibu Road property is located within the proposed California State Water Quality Control Board septic system ban district identified in California State Water Resources Quality Control Board Resolution No. R4-2009-007, passed by the Los Angeles Regional Water Resources Quality Control Board on November 9, 2009. Said property is subject to the proposed septic system ban in said Resolution R4-2009-007.

A single-family dwelling, in compliance with the designated R-1 zoning, exists on and occupies said property, and it has so existed and occupied it since about 1935. It has been used and occupied for its intended use as a single-family residence at all times since it was acquired by the Lavine family in or about 1945.

**CONSTRUCTION AND OPERATION OF AN ON-SITE WASTE MANAGEMENT SYSTEM SINCE 1945 ON LAVINE MALIBU ROAD PROPERTY:** At all relevant times mentioned herein since 1945, the municipal statutes, rules and regulations have authorized and permitted the lawful use and occupancy of the Lavine Malibu Road property, including, but not limited to the installation, use and operation of an on-site waste management system commonly known as a septic system. Thus, this property owner and objector Joan C. Lavine has at all relevant times held substantial vested real property interests in and to said Lavine Malibu Road property pursuant to said permitted construction at and use of said property.

From time to time, the property owners of the Lavine Malibu Road property, the undersigned Joan C. Lavine and her Father Morris Lavine, have obtained permits from the governing municipal agencies for the installation, upgrade, repair and operation of an on-site waste management system at the Lavine Malibu Road property. Pursuant to those permits and inspections by the duly authorized and duly acting building, health and safety officials, where required, the undersigned Joan C. Lavine and her Father Morris Lavine have installed, upgraded, repaired and operated an on-site waste management system known as a septic system.

**MALIBU CIVIC CENTER LACKS A PUBLIC SEWER SYSTEM. NONE IS PLANNED:** The Malibu Civic Center lacks a public sewer system available for residential property use on and in the vicinity of Malibu Road to the south of the Pacific Coast Highway.

No plans exist for the installation of a public sewer system by which residential property on or in the vicinity of Malibu Road, located to the south side of the Pacific Coast Highway, could be serviced or used presently or in the future.

Tuesday, June 29, 2010 9:28 AM Page 2 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

As a consequence of there being no alternative waste management system(s) to the use of a septic system, either presently or in the planned future, the undersigned owner will be deprived of all beneficial, viable economic and practical use of her R-1 zoned Lavine Malibu Road property if the outright and total ban of septic systems in the Malibu Civic Center becomes law.

NO NOTICE HAS BEEN GIVEN TO LAVINE MALIBU ROAD PROPERTY OWNER JOAN C. LAVINE OF VIOLATIONS, DEFICIENCIES OR UPGRADE REQUIREMENTS REGARDING WASTE DISCHARGE AT THE LAVINE MALIBU ROAD PROPERTY. NOR HAS THIS PROPERTY OWNER BEEN GIVEN ANY OPPORTUNITY TO REMEDIATE IF ANY SUCH PROBLEMS DO EXIST.

Prior to the passage on November 9, 2009, by the Los Angeles Regional Water Quality Control Board, of the California State Water Resources Quality Control Board Resolution No. R4-2009-007, of the resolution banning use of septic systems in the Malibu Civic Center area, the undersigned property owner Joan C. Lavine was not in any way notified that her property impermissibly discharged waste, pollution or contaminants, violated any health, safety, environmental or clean water laws, or in any way was non-compliant with any law, rule or regulation over which the California State Water Resources Quality Control Board has jurisdiction. She has not been notified that her property in any way created or caused a nuisance. She has never been cited for any said potential hazards described herein and in particular in this paragraph.

Prior to the passage on November 9, 2009, by the Los Angeles Regional Water Quality Control Board, of the California State Water Resources Quality Control Board Resolution No. R4-2009-007, of the resolution banning use of septic systems in the Malibu Civic Center area, the undersigned property owner was not in any way ordered to repair, remediate, cease and desist, correct, or bring her Lavine Malibu Road Property up to code. Thus, she has not been given the statutory and Due Process right to correct any perceived, unidentified deficiency so as to avoid her property being confiscated from her by an absolute ban on the use and operation of its septic system.

**VALUATION OF THE SUBJECT PROPERTY BEFORE AND AFTER THE REGULATORY "TAKING":** This undersigned property owner is of the opinion that the reasonable market value of her property would be about \$15,000,000 (Fifteen million dollars), but for the potential or actual ban of on-site waste management systems (septic systems) having the direct and proximate consequence of prohibiting all private residential use of her property.

Since the passage on November 9, 2009, by the Los Angeles Regional Water Quality Control Board, of the California State Water Resources Quality Control Board Resolution No. R4-2009-007, the resolution banning use of septic systems in the Malibu Civic Center area has substantially diminished the market value of the Lavine Malibu Road property. It will render said property substantially unmarketable and unsaleable at its reasonable market value so that it will be uninhabitable as of 2019. See Water C. § 13399.2.

**SIGNIFICANT REDUCTION IN AVAILABLE RESIDENTIAL HOUSING AND CLOSING OF COMMERCIAL AND RECREATIONAL OPERATIONS BY SEPTIC BAN IN**

Tuesday, June 29, 2010 9:28 AM Page 3 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

ENTIRE MALIBU CIVIC CENTER AREA: The Malibu Civic Center is a densely built residential and commercial hub in Malibu. The proposed Malibu Civic Center septic ban will have the practical direct consequence of removing all available Malibu residential housing units in that ban area, consisting of at least 400 residential units, some of which are multifamily units, and displacing several thousand people. It is estimated that about ten (10) percent of the City of Malibu's residents and occupants will lose their residential housing under such a ban.

Among those residential properties that the septic system ban will affect is the removal of the Lavine Malibu Road property as available residential housing.

The Malibu Civic Center is a major commercial and recreational center, too. Most, if not all, commercial and recreational operations in the Malibu Civic Center use on-site waste management systems. Banning septic system use would shutter those commercial and recreational endeavors. The financial consequence would be a loss of the Malibu Lagoon, Malibu Surfrider Beach, Malibu Pier, Adamson House, the Malibu Shopping Plaza with a Ralphs Market, the only major supermarket within about 8 to 10 miles in easterly Malibu.

Los Angeles County officials notified Los Angeles Regional Board members during the November 9, 2009, hearing on Resolution No. R4-2009-007, that the proposed septic ban would cause it to close its county beaches in the ban area, and to be unable to provide emergency fire and paramedic services from the current Los Angeles County Fire Station 88 on Malibu Road within the septic ban district.

**THE SEPTIC BAN WOULD CAUSE SIGNIFICANT REDUCTION IN THE MUNICIPAL, COUNTY AND STATE REAL PROPERTY TAX BASES, BOTH FROM REAL PROPERTY TAXES AND FROM THE OPERATION OF COMMERCIAL BUSINESSES THAT GENERATE SALES AND OTHER TAX REVENUES.**

By significantly diminishing the market value of the real properties in the ban area, and, by 2019, rendering them valueless, unsaleable and uninhabitable, a septic ban will have the immediate impact of diminishing assessed valuations of all real property in the Malibu Civic Center and removing a substantial portion of assessed taxable valuation of occupied real property from the tax bases of the various government entities so that the City of Malibu and Los Angeles County would lose substantial real property tax revenue. The State of California will likewise be impacted by a loss of sales tax revenue from the closure of commercial and recreational operations.

**NO EVIDENCE WAS RECEIVED INTO THE RECORD AT THE NOVEMBER 9, 2010, REGIONAL BOARD HEARING THAT POLLUTION WAS/IS GENERATED AT THE UNDERSIGNED PROPERTY OWNER'S MALIBU ROAD PROPERTY OR ANY OTHER RESIDENTIAL PROPERTY IN THE PROPOSED BAN DISTRICT, THAT PRESENTLY OR CAN REASONABLY BE EXPECTED IN THE FUTURE TO CONTAMINATE WATERS.**

Without credible, reliable evidence, unsubstantiated claims have been made that residential septic systems may be contaminating either ground water or coastal waters. The truth is that no nexus between residential septic systems on the one hand, and ground water or coastal water pollution, on the other, in the Malibu Civic Center has been established.

Tuesday, June 29, 2010 9:28 AM Page 4 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

The credible identified sources of suspected contamination in the Malibu Lagoon and Malibu Creek are the Tapia sewage treatment plant in the Santa Monica Mountains, seepage from the Santa Monica Mountains, the watersheds in and flowing through them, pollution coming from the Santa Monica Bay, and possibly commercial operations. Most of these suspected contamination sources are outside the jurisdictional boundaries of the City of Malibu and outside the Malibu Civic Center septic ban district.

**THE STATE WATER RESOURCES CONTROL BOARD LACKS  
CONSTITUTIONAL OR STATUTORY AUTHORITY TO PERMIT, REGULATE OR BAN  
SEPTIC SYSTEMS.**

The State Water Resources Control Board lacks direct condemnation authority or power.

The California State Water Resources Board through its Los Angeles Regional Water Quality Control Board delegated to municipal governments the limited jurisdiction it had regarding the regulation and permitting of septic system use and operation, first by resolution and then by "memorandums of understanding". See Resols Nos. 52-4, 53-6, R04-008.

**ARGUMENT AND COMMENTS OF JOAN C. LAVINE IN  
OPPOSITION TO THE REGIONAL WATER QUALITY  
CONTROL BOARD, RESOLUTION NO. R4-2009-007:**

THE SEPTIC SYSTEM BAN PROPOSED BY RESOLUTION NO. R4-2009-007, THAT THE LOS ANGELES REGIONAL WATER RESOURCES QUALITY CONTROL BOARD VOTED ON AND PASSED ON NOVEMBER 9, 2009, ENTIRELY FAILS TO COMPLY WITH THE STATUTORY REQUIREMENTS AND CONDITIONS OF WATER C. § 13280, TO ALLOW USE OF SEPTIC SYSTEMS WHERE WATER QUALITY CAN BE ATTAINED. THE RESOLUTION'S PROPOSED BAN IS NOT SUPPORTED BY EVIDENCE OR FINDINGS OF A DIRECT AND PROXIMATE CAUSAL CONNECTION, A NEXUS, BETWEEN WATER QUALITY IMPAIRMENT AND A POLLUTING OR CONTAMINATING RESIDENTIAL ON-SITE WASTE SYSTEM AS A CONDITION OF THAT ON-SITE SYSTEM BEING BANNED.

Water C. § 13280 provides:

**§ 13280. Determination denying discharge of water from disposal systems;  
substantial evidence**

A determination that discharge of waste from existing or new individual disposal systems or from community collection and disposal systems which utilize subsurface disposal should not be permitted shall be supported by substantial evidence in the record that discharge of waste from such disposal systems will result in violation of water quality objectives, will impair present or future beneficial uses of water, will cause pollution, nuisance, or contamination, or will unreasonably degrade the quality of any waters of the state.

Tuesday, June 29, 2010 9:28 AM Page 5 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

No evidence has been introduced into the record that the on-site septic system of the Lavine Malibu Road property has polluted or otherwise contaminated the area. No proof of violation of water quality standards has been offered or introduced into evidence. No proof of violation of water quality goals or objectives has been offered or introduced into evidence. No proof of nuisance has been offered or introduced into the record. There is no factual basis, and, thus, no causal connection or nexus, between unsubstantiated allegations of existence of pollution or contamination of ground or waters around it, particularly as to the Lavine Malibu Road property, and alleged impairment of water quality or water quality goals. The proposed ban therefore lacks a factual or legal basis to ban the use on-site waste management commonly called septic system.

THE SEPTIC SYSTEM BAN PROPOSED BY RESOLUTION NO. R4-2009-007, AND THE HEARING, TRIAL AND DETERMINATIONS ON NOVEMBER 9, 2009, BEFORE THE LOS ANGELES REGIONAL WATER RESOURCES QUALITY CONTROL BOARD HAVE FAILED TO COMPLY WITH THE STATUTORY CONDITIONS OF WATER C. § 13282 THAT WASTE DISCHARGES "SHALL BE PERMITTED SO LONG AS THE SYSTEMS ARE ADEQUATELY DESIGNED, LOCATED, SIZED, SPACED, CONSTRUCTED, AND MAINTAINED".

Water C. § 13282 provides in relevant part:

**§ 13282. Design, construction and maintenance of systems; notice**

(a) If it appears that adequate protection of water quality, protection of beneficial uses of water, and prevention of nuisance, pollution, and contamination can be attained by appropriate design, location, sizing, spacing, construction, and maintenance of individual disposal systems in lieu of elimination of discharges from systems, and if an authorized public agency provides satisfactory assurance to the regional board that the systems will be appropriately designed, located, sized, spaced, constructed, and maintained, the discharges shall be permitted so long as the systems are adequately designed, located, sized, spaced, constructed, and maintained.

The proposed ban ignores the statutory requirement that discharges be permitted if water quality, protection and prevention of harm can be "attained by appropriate design, location, sizing, spacing, construction, and maintenance of individual disposal systems in lieu of elimination of discharges from systems, and if an authorized public agency provides satisfactory assurance to the regional board that the systems will be appropriately designed, located, sized, spaced, constructed, and maintained".

By attempting an outright ban on septic system usage without first evaluating and determining whether the statutory criteria for water safety can be attained by appropriate design, location, sizing, spacing, construction, and maintenance of individual disposal systems, the Los Angeles Regional Water Quality Control Board disregarded its obligations and responsibilities mandated by Water C. § 13282 to allow the use of septic systems where the statutory standards set forth in Water C. § 13282 are met.

The Los Angeles Regional Water Quality Control has exceeded its authority and has

Tuesday, June 29, 2010 9:28 AM Page 6 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

omitted to act when it should have or has acted in a manner contrary to law by resolving to ban septic systems in the Malibu Civic Center rather than complying with the mandates of Water C. § 13282.

THE PROPOSED SEPTIC SYSTEM BAN TO BE PUT INTO EFFECT FOR THE MALIBU CIVIC CENTER, WHILE AREAS IN RIVERSIDE COUNTY ARE ALLOWED TO CONTINUE THE USE OF SEPTIC SYSTEMS IF ALTERNATIVE PUBLIC SYSTEMS DO NOT EXIST, IS INVIDIOUSLY DISCRIMINATORY AND UNEVEN-HANDED. MALIBU PROPERTY OWNERS ARE THUS DENIED THE EQUAL APPLICATION AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION BY THIS UNEQUAL TREATMENT.

Real property interests in the Malibu Civic Center are entitled to be treated and regulated by the same standards, rules and regulations and in the same fair and equitable manner as those in the Palm Springs area in the Mission Creek Aquifer and Desert Hot Springs Aquifer, where septic systems are to be outlawed only on the condition that a public sewer system is in place at the time of the ban going into effect.

Although an outright ban on the use of septic systems is proposed for the Malibu Civic Center where there is no alternative waste management system, the state Legislature has permitted the continued operation of septic systems if no available alternative exists in Riverside County. See Water C. § 13281(b)(1), providing:

(b)(1) To the extent that resources are available for that purpose, the regional board shall prohibit the discharge of waste from existing or new individual disposal systems on parcels of less than one-half acre that overlie the Mission Creek Aquifer or the Desert Hot Springs Aquifer in Riverside County, if a sewer system is available.

The Malibu Civic Center does not have the alternative of a public sewer system into which this property owner's property can be connected. None is proposed or planned. It is respectfully submitted that property interests in the Malibu Civic Center are entitled to the same regulatory standard of continued use of septic systems as those in the Mission Creek Aquifer or the Desert Hot Springs Aquifer in Riverside County that lack a public sewer system.

THE STATE WATER RESOURCES QUALITY CONTROL BOARD LACKS DIRECT CONDEMNATION OR EMINENT DOMAIN AUTHORITY.

Its legislatively authorized administrative authority is limited to permitting and regulating authority over the use of on-site waste systems, known as septic systems. The California State Water Resources Quality Control Board lacks statutory or delegated authority to ban septic systems in a manner that denies all reasonable viable, beneficial economic use of the property, because it does not have direct eminent domain or direct condemnation authority. Thus, California State Water Resources Quality Control Board would exceed its jurisdiction and act without jurisdiction by banning the use of septic systems in the Malibu Civic Center.

THE STATE WATER RESOURCES BOARD AND ITS LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD, CONTRARY TO THEIR STATUTORY OBLIGATIONS UNDER WATER C. § 13399.2, HAVE FAILED TO GIVE THIS PROPERTY

Tuesday, June 29, 2010 9:28 AM Page 7 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

OWNER NOTICE OF ANY DEFICIENCIES OR A FAIR AND REASONABLE OPPORTUNITY FOR HER TO REMEDIATE ANY PERCEIVED DEFICIENCIES. A PROPOSED BAN ON HER SEPTIC SYSTEM WITHOUT FAIR OR ANY NOTICE TO THIS PROPERTY OWNER AND A REASONABLE OPPORTUNITY FOR HER TO COMPLY WITH ANY DEFICIENCIES IS CONFISCATORY, ARBITRARY AND CAPRICIOUS, AND IS A COMPENSABLE "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION. THESE PER SE PREJUDICIAL DENIALS STATUTORY AND FEDERAL DUE PROCESS RIGHTS DEPRIVE THIS STATE BOARD OF THE AUTHORITY TO TAKE ANY ACTION.

This property owner has not been given notice of any deficiencies regarding septic system operation and use at her Lavine Malibu Road property. She has not been given a fair and reasonable opportunity to remediate any perceived deficiencies. Failure to give notice and opportunity to repair and remediate perceived or alleged pollution before depriving this property owner of all reasonable viable economic benefit to her substantial vested property rights violates this property owner's Due Process rights to fair notice and a reasonable opportunity to be heard, is confiscatory, arbitrary and capricious, and is in violation of the "takings" and "due process" clauses of the Fifth and Fourteenth Amendments, U.S. Constitutions. Hawthorne Sav. & Loan v. City of Signal Hill, 19 Cal.App.4th 148, 23 Cal.Rptr.2d 272 (1993, 2nd Dist.).

THE STATE LEGISLATURE HAS EXPRESSLY LIMITED THE ENFORCEMENT AUTHORITY OF THE STATE AND REGIONAL BOARDS OVER MINOR VIOLATIONS, RANGING FROM ORDERING REPAIRS TO CIVIL PENALTIES. WATER C. § 13399.2.

Banning septic system use and operation is outside the scope of their law enforcement authority to regulate minor violations granted the state and regional boards. Water C. § 13399.2 provides in pertinent part:

**§ 13399.2. Detection of violation; issuance of notice to comply; time for compliance; appeal; failure to comply; contents of notice; civil penalty**

(a) An authorized representative of the state board or regional board, who, in the course of conducting an **inspection**, detects a **minor violation** shall issue a **notice** to comply before leaving the site at which the **minor violation** is alleged to have occurred if the authorized representative finds that a **notice** to comply is warranted.

(b) A person who receives a notice to comply pursuant to subdivision (a) shall have the period specified in the notice to comply from the date of receipt of the notice to comply in which to achieve compliance with the requirement cited on the notice to comply. Within five working days of achieving compliance, the person who received the notice to comply shall sign the notice to comply, and return it to the representative of the state board or regional board, stating that the person has complied with the notice to comply. A false statement that compliance has been achieved is a violation of this division pursuant to subdivision (a) of

Tuesday, June 29, 2010 9:28 AM Page 8 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007



Section 13268, Section 13385, or subdivision (e) of Section 13387.

(c) A single **notice** to comply shall be issued for all **minor violations** cited during the same **inspection** and the **notice** to comply shall separately list each cited **minor violation** and the manner in which each **minor violation** may be brought into compliance.

d) A **notice** to comply shall not be issued for any **minor violation** that is corrected immediately in the presence of the **inspector**. Immediate compliance in that manner may be noted in the **inspection** report, but the person shall not be subject to any further action by the representative of the state board or regional board.

(e) Except as otherwise provided in subdivision (g), a notice to comply shall be the only means by which the representative of the state board or regional board shall cite a minor violation. The representative of the state board or regional board shall not take any other enforcement action specified in this division against a person who has received a notice to comply if the person is in compliance with this section.

This undersigned property owner objects that a septic system ban directed at her property and the entire Malibu Civic Center far exceeds the statutory authority and jurisdiction of the state board or regional board to obtain compliance with minor violations by the giving of a notice to comply pursuant to Water C. § 13399.2. Said boards exceed their jurisdiction to act and act without jurisdiction by banning septic systems where their enforcement authority is limited by statute as set forth hereinabove.

This proposed total and complete ban on the use and operation of a duly permitted septic system, without notice of deficiencies, without opportunity to remediate, and in the absence of alternative waste management systems, has the practical effect of a denying of all private economically viable use of the real property as of 2019, and its drastically diminishing its marketability by destroying its fee simple title and reducing it to a term of years. This is an impermissible regulatory "Taking" under the Due Process Clause of the Fifth and Fourteenth Amendments, U.S. Constitution. Lucas v. South Carolina Coastal Council, 505 US 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992); Hawthorne Sav. & Loan v. City of Signal Hill, 19 Cal.App.4th 148 (1992).

THE STATE WATER RESOURCES BOARD AND ITS LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD, CONTRARY TO THEIR STATUTORY OBLIGATIONS UNDER WATER C. § 13399.2, HAVE FAILED TO GIVE THIS PROPERTY OWNER NOTICE OF ANY DEFICIENCIES OR A FAIR AND REASONABLE OPPORTUNITY FOR HER TO REMEDIATE ANY PERCEIVED DEFICIENCIES. A PROPOSED BAN ON HER SEPTIC SYSTEM WITHOUT FAIR OR ANY NOTICE TO THIS PROPERTY OWNER AND A REASONABLE OPPORTUNITY FOR HER TO COMPLY WITH ANY DEFICIENCIES IS CONFISCATORY, ARBITRARY AND CAPRICIOUS, AND IS A COMPENSABLE "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION. THESE PER SE PREJUDICIAL DENIALS

Tuesday, June 29, 2010 9:28 AM Page 9 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

**STATUTORY AND FEDERAL DUE PROCESS RIGHTS DEPRIVE THIS STATE BOARD OF THE AUTHORITY TO TAKE ANY ACTION.**

In addition to the state board and regional board lacking authority to ban all septic systems in an area as articulated herein, said boards have failed to comply with Water C. § 13399.2, requiring that they give notice of any deficiencies regarding septic system operation and use at her Lavine Malibu Road property. She has not been given a fair and reasonable opportunity to remediate any perceived deficiencies. Failure to give notice and opportunity to repair and remediate perceived or alleged pollution before depriving this property owner of all reasonable viable economic benefit to her substantial vested property rights violates this property owner's Due Process rights to fair notice and a reasonable opportunity to be heard, is confiscatory, arbitrary and capricious, and is in violation of the "takings" and "due process" clauses of the Fifth and Fourteenth Amendments, U.S. Constitutions. Hawthorne Sav. & Loan v. City of Signal Hill, 19 Cal.App.4th 148, 23 Cal.Rptr.2d 272 (1993, 2nd Dist.).

This is an impermissible regulatory "Taking" under the Due Process Clauses of the Fifth and Fourteenth Amendments, U.S. Constitution. Lucas v. South Carolina Coastal Council, 505 US 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992); Hawthorne Sav. & Loan v. City of Signal Hill, 19 Cal.App.4th 148 (1992).

**THE WATER QUALITY CONTROL BOARD RESOLUTION NO. R4-2009-007, PREJUDICIALLY VIOLATES WATER C. § 13291.7 BY INTERFERING WITH THE JURISDICTION OF MUNICIPALITIES OVER LAND USE REGULATION.**

The California State Water Resources Board through its Los Angeles Regional Water Quality Control Board delegated any jurisdiction it had regarding the regulation or permitting of septic system use and operation to municipal governments, first by resolution and then by "memorandums of understanding". This goes back to years 1952 and 1953: State Water Resources Regulations Nos. 52-4 and 53-6; and Regulation No. R04-008 enacted in 2004. The current "Basin Plan" for the Los Angeles Regional Water Quality Control Board was enacted in 1994. See Basin Plan pages 4-17 and 4-46 to 4-47 referring to septic systems.

The California Constitution and the California Legislature have also established jurisdiction in municipal government to regulate land use.

The California State Water Resources Board and its Los Angeles Regional Water Quality Control Board are prohibited by California legislation, Calif. Water C. 13291.7, from interfering with land use regulation and jurisdiction of municipalities. By purporting to regulate by outright banning the use of septic systems as on-site waste disposal systems, it does just that: it interferes with the jurisdiction of municipalities over land use regulation by usurping the authority of municipal entities to regulate land use regarding waste management.

**IN THE ABSENCE OF UNIFORM STATEWIDE STANDARDS AND REGULATIONS REQUIRED BY WATER C. § 13291(a), ANY EXISTING NON SELF-EXECUTING STATUTORY OR REGULATORY AUTHORITY TO GO FORWARD, LEGISLATIVELY OR AS LAW ENFORCEMENT, REGULATING BY BANNING THE USE OR SEPTIC**

Tuesday, June 29, 2010 9:28 AM Page 10 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

SYSTEMS, IS INOPERATIVE. In the early part of this decade, in year 2000, proposed legislation by the California Legislature in AB 885/SB 290, was passed and put into effect, codified as California Water Code Sections 13290 and 13291. Water C. § 13291 requires the California State Water Resources Board to have enacted statewide uniform standards and regulations for permitting and regulating "on-site waste management systems". Those regulations and standards have not been enacted to date. All of the legislative enactments for the permitting and regulation of septic systems under the Water Code appear to be inoperative as a result.

AMENDMENT OF THE BAN RESOLUTION, AFTER THE COMMENT AND FILING DEADLINE, WHILE IT WAS PENDING BEFORE THE LOS ANGELES REGIONAL BOARD, PREJUDICIALLY DENIED THOSE OPPOSING IT A REASONABLE OPPORTUNITY TO BE HEARD IN VIOLATION OF DUE PROCESS OF LAW. On October 27, 2009, after the time for comment was closed, the pending proposed amendment scheduled for hearing and vote before the Los Angeles Regional Water Quality Control Board, on November 5, 2009, was itself amended. The Regional Board nevertheless refused to permit further comment in opposition or otherwise after the original deadline. This is a fundamental denial of a fair hearing where the resolution to be voted on was materially changed after the deadline for filing comments and mounting written challenges to it. It resulted in a prejudicial denial of fair notice of what to be considered and voted on and a reasonable opportunity to be heard and to interpose an opposition to it in violation of procedural due process of law. Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The November 9, 2009, Los Angeles Regional Board hearing was managed in such a manner that most property owners were denied a fair opportunity to be heard orally. Several hundred persons appeared at the one-day hearing, and many asked to speak. Individual owners were given less than five minutes to speak to protect their homes, and their oral testimony and offering of exhibits during the hearing were rejected and not made a part of the record as "untimely". The regional board should have scheduled several hearings over several days so as to accommodate all those property owners wanting to be heard.

The regional board generally rejected exhibits offered by commenting witnesses to be introduced into the record at the November 9, 2009, hearing in violation of the rights of those witnesses to be heard and to have access to the board with rebutting evidence.

**CONCLUSION:** The proposed Resolution No. R4-2009-007 would constitute regulation that denies all economically beneficial or productive use of this property owner's land and therefore would be a regulatory taking in violation of the "takings" and "due process" clauses of the Fifth and Fourteenth Amendments, U.S. Constitution.

The proposed septic system ban contained in the pending resolution to amend Los Angeles Regional Water Quality Control Board regulations, Resolution No. R4-2009-007, is inherently and as construed and applied to this property owner and her property located at 23900 Malibu Road, Malibu, California 90265, confiscatory, arbitrary and capricious, and constitutes an illegal "taking" of the undersigned owner's real property in violation of the Takings and Due Process of Law Clauses of the Fifth and Fourteenth Amendments, U.S. Constitution, the California Constitution, Article I, Section 19, and the State of California eminent domain statutes

Tuesday, June 29, 2010 9:28 AM Page 11 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

beginning at CCP § 1230.020, et seq. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

WHEREFORE, Joan C. Lavine, the undersigned property owner of the Lavine 23900 Malibu Road property, within the proposed septic system ban zone, prays that the Members of this State Water Resources Quality Control Board, reject the ban and vote "NO" on the proposed resolution, R4-2009-007.

Dated: June 27, 2010

Respectfully submitted,

JOAN C. LAVINE  
Owner, 23900 Malibu Road, Malibu, California  
Attorney at Law, California State Bar No. 048169

Tuesday, June 29, 2010 9:28 AM Page 12 of 12

LAVINE COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION  
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007