



November 4, 2014

Mr. Samuel Unger, Executive Officer
Los Angeles Regional Water Quality Control Board
320 West Fourth Street, Suite 200
Los Angeles, CA 90013

Via email: samuel.unger@waterboards.ca.gov; Don.Tsai@waterboards.ca.gov; ewu@waterboards.ca.gov

Re: Comments on Tentative Resolution No. R14-XXX Authorizing the Executive Officer to Sign A Revised Memorandum of Understanding with the City of Malibu and the State Water Resources Control Board Regarding the Malibu Civic Center Area Prohibition (“Tentative Resolution”) and Tentative Revised Memorandum of Understanding with the City of Malibu and the State Water Resources Control Board Regarding the Malibu Civic Center Area Prohibition (“Tentative Revised MOU”)

Dear Mr. Unger,

On behalf of Heal the Bay and Los Angeles Waterkeeper (“Waterkeeper”), non-profit environmental organizations dedicated to protecting our coastal watersheds, we provide comments on the Tentative Resolution and Tentative Revised MOU.

Our organizations have been actively involved for decades in water quality and habitat restoration issues within Malibu, including advocating for Resolution No. R4-2009-007¹ (“Septic Prohibition” or “Prohibition”) that prohibits on-site wastewater disposal systems in the Malibu Civic Center Area. Monitoring data and studies have clearly established that on-site wastewater disposal systems in the Civic Center area are a major source of nutrients and pathogens to Malibu Creek, Lagoon and Surfrider Beach and pose a serious threat to humans and aquatic life. In August 2011, the Los Angeles Regional Water Quality Control Board (“Regional Board”) and the City of Malibu (“City” or “Malibu”) entered into a Memorandum of Understanding (“2011 MOU”) setting forth steps and deadlines to comply with the Septic Prohibition. Specifically, to ensure septic discharges in the Prohibition area are eliminated as required by the Regional Board, the City committed to design and construct a centralized wastewater treatment facility for the Civic Center area (“Civic Center WWTF”) to ensure residential and commercial properties in the prohibition area are connected to the Civic Center WWTF by the deadlines required by the Septic Prohibition. The proposed Tentative Revised MOU seeks to amend the deadlines for both Phase I (commercial) and Phase II (residential) properties to June 30, 2017 and November 5, 2022 respectively.

The completion of the Civic Center WWTF project in accordance with the schedule set forth in the Septic Prohibition is critical for restoring beneficial uses to Malibu Creek and Lagoon and coastal waters in a timely fashion. While we recognize the City’s significant efforts related to the design, planning and implementation of the Civic Center WWTF, we do not believe the proposed modified compliance deadlines for Phases I and II are justified. These delays will result in continued degradation of the impaired water resources the Septic Prohibition was designed to protect. More importantly, the proposed significant

¹ California Regional Water Quality Control Board, Los Angeles Region, Amendment to the *Water Quality Control Plan for the Coastal Watersheds of Ventura and Los Angeles* to prohibit on-site wastewater disposal systems in the Malibu Civic Center Area (Resolution No. R4-2009-007).



extensions of Phase I and II deadlines are inconsistent with the Septic Prohibition. We appreciate the opportunity to provide these comments.

I. The Proposed Extension of Phase I and Phase II Deadlines Is Unjustified and Inconsistent with the Septic Prohibition and the Basin Plan

The 2011 MOU compliance deadlines for Phase I, II, and III properties are as follows: Phase I – November 5, 2015, Phase II – November 5, 2019, and Phase III – November 5, 2025. In 2012, the City of Malibu informed the Regional Board and the public that it would likely be unable to meet the November 5, 2015 deadline for Phase I commercial properties. Nonetheless, the City stated that it anticipates any delay in compliance with Phase I requirements will be no longer than nine to twelve months or by November 5, 2016. Since then, the City has consistently assured the Regional Board and stakeholders that it would do its best to make up for this delay during the construction process. Importantly, the City has not indicated that it expects any further delay with respect to Phase I.

Surprisingly, the Tentative Revised MOU proposes to push the Phase I deadline by 18 months instead of the 9 to 12 months the public and the Board were previously informed of. The June 30, 2017 Phase I final compliance deadline, and supporting interim deadlines, proposed in the Tentative Revised MOU are thus inconsistent with delays the City and Regional Board have discussed with stakeholders up to this point. Importantly, no meaningful justification for extending the Phase I final deadline beyond the 9 to 12-month delay, of which the Regional Board and all interested parties have been aware of, was provided in the Tentative Revised MOU or supporting documents.

In addition to proposing a significant delay to Phase I interim and final deadlines, the Tentative MOU seeks to extend the final Phase II compliance deadline, and associated interim deadlines, by three years. Specifically, the proposal calls for a shift in the final deadline from November 5, 2019 to November 5, 2022. Once again, no justification for this significant delay is provided.

As we have stated in the past, any attempts to amend the Septic Prohibition's deadlines and requirements through the 2011 Septic MOU are illegal. *See* Cal. Water Code § 13245 (outlining the procedure for amending the water quality control plans); *See State Water Quality Control Board Cases* (2006) 136 Cal.App.4th 674, 729 (the State Board could not properly adopt an agreement proposing a different implementation of a water quality control plan because the implementation "fundamentally altered" the water quality control plan and "such an alteration could be accomplished only through a properly noticed and conducted regulatory proceeding"). Since the stated goal of the 2011 MOU is to implement the Septic Prohibition we, regardless of our support of Malibu's efforts to accomplish the construction of the Civic Center WWTF, cannot support the proposed unjustified extension of the Septic Prohibition Phase I and II timelines from six years and ten years, respectively, to seven and a half years and thirteen years, respectively.

The Septic Prohibition was adopted to prevent further impairment of Malibu Creek and Lagoon from septic system discharges. The deadlines for all phases of the Prohibition were selected and carefully evaluated by the Regional Board and all stakeholders. These deadlines are an essential part of the Prohibition and are the mechanism to ensure the goals of the Prohibition are met. Allowing septic systems to continue polluting impaired waterways years beyond the deadlines outlined in the Septic Prohibition, as proposed in the Tentative Revised MOU, directly contradicts the intent and letter of the Prohibition and will result in continued degradation of designated beneficial uses for the Malibu Creek and Lagoon and coastal waters. The Regional Board should not allow this delay.



II. The MOU's Characterization of Regional Board's Obligations if Assessment District Is Not Approved Is Inconsistent with the Septic Prohibition and the Basin Plan

Under the Tentative Revised MOU, "If an assessment district is not approved by dischargers, the Los Angeles Water Board *may enforce* all State policies, plans, or regulations to gain compliance, including the requirement to upgrade each OWDS to advance treatment, or other appropriate means by November 5, 2019...All property owners that are required to upgrade their system will need to obtain City of Malibu building permits and obtain an operating permit in accordance with City ordinances...."² Contrary to this statement, in order to comply with the Septic Prohibition, if the Civic Center WWTF is not implemented by 2019 for any reason (including failure to approve an assessment district) the Regional Board has the obligation to enforce the requirements of the Prohibition and ensure discharges of septic systems are eliminated as required by the Basin Plan. *See* Septic Prohibition at 5; *see also State Water Quality Control Board Cases* (2006) 136 Cal.App.4th 674, 732 (California water boards must comply with their own water quality control plans pursuant to Section 13247 of the Water Code). In short, under the Septic Prohibition, no property owners would be allowed to discharge treated wastewater via on-site wastewater disposal systems in the Civic Center Area beyond Septic Prohibition deadlines. Because the language provided above is inconsistent with the Regional Board's obligations and legal requirements, it should be removed from the Tentative Revised MOU.

The construction of the Civic Center Wastewater Treatment Facility is an extremely important project for water quality protections in the City of Malibu and the impaired Malibu Creek, Malibu Lagoon and nearby beaches. Despite our opposition to the 2011 MOU as an implementation tool for the Septic Prohibition, Heal the Bay and Waterkeeper have consistently supported the efforts of the City of Malibu and the Regional Board to accomplish this goal by the deadlines set forth in the Septic Prohibition. As discussed, however, we oppose the Tentative Revised MOU's proposal to significantly extend Phase I and II deadlines. We urge the Regional Board to reject further significant extensions of the deadlines and to clarify in the MOU language that the Board will take steps to ensure compliance with the Septic Prohibition and the Basin Plan. If you have any questions, please contact Heal the Bay at (310) 451-1500 or Los Angeles Waterkeeper at (310) 394-6162. We look forward to working with the City of Malibu and the Regional Board toward accomplishing the goals of the Septic Prohibition.

Sincerely,

A handwritten signature in black ink that reads "Peter Shellenbarger".

Peter Shellenbarger, MESM
Science and Policy Analyst, Water Quality
Heal the Bay

A handwritten signature in black ink that reads "Kirsten James".

Kirsten James, MESM
Science and Policy Director, Water Quality
Heal the Bay

A handwritten signature in black ink that reads "Tatiana K. Gaur".

Tatiana Gaur
Senior Attorney
Los Angeles Waterkeeper

² Tentative Revised MOU at 13 (emphasis added).