

EXHIBIT D

JENKINS & HOGIN, LLP
A LAW PARTNERSHIP

MICHAEL JENKINS
CHRISTI HOGIN
MARK D. HENSLEY
BRADLEY E. WOHLBERG
KARL H. BERGER
GREGG KOVACEVICH
JOHN C. COTTI
ELIZABETH M. CALCIANO
LAUREN B. FELDMAN
PAUL E. BENNETT II

MANHATTAN TOWERS
1230 ROSECRANS AVENUE, SUITE 110
MANHATTAN BEACH, CALIFORNIA 90266
(310) 643-8448 • FAX (310) 643-8441
WWW.LOCALGOVLAW.COM

WRITER'S EMAIL ADDRESS:
LFELDMAN@LOCALGOVLAW.COM

October 29, 2009

VIA E-MAIL AND U.S. MAIL

Regional Water Quality Control Board
Los Angeles Region
Attention Dr. Rebecca Chou, Chief Ground Water Permitting Unit
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: Second Supplement to City of Malibu Comments on proposed amendment to the Basin Plan to prohibit on site wastewater disposal systems in the Civic Center Area of the City of Malibu

Dear Dr. Chou:

Since the public comment period closed on October 8, 2009, the Regional Board staff has substantially revised *all* of the documents prepared in support of its proposed Basin Plan amendment to prohibit OWTS in the Civic Center Area. As recently as October 27, 2009, staff materially revised the Tentative Resolution to eliminate the exemption for "zero discharge" systems. The Technical Staff Report, Environmental Staff Report (ESR) and all five Technical Memoranda supporting staff's findings have also been substantially revised, and only released to the public on or after October 23, 2009. These revised documents total over 400 pages of technical analysis. These revisions, made just days before the public hearing, are material to the findings set forth in the Tentative Resolution and require thorough review and technical analysis. Furthermore, Regional Board staff's responses to public comments have only been released in part as of today, one week before the hearing. In the interest of meaningful public review and participation, the affected parties need a reasonable amount of time to assess and analyze the substantial revisions to staff's supporting materials and the City requests that the November 5, 2009 hearing be continued.

JENKINS & HOGIN, LLP

October 8, 2009

Page 2

A review of the revised ESR and Tentative Resolution reveals that the project description has changed in some significant respects. First, the project description has removed the exemption for “zero discharge” systems that was referenced in footnote 1 of the draft ESR. Second, in several places the ESR has been changed from establishing a five-year schedule to cease discharges from existing systems to stating that discharges must cease “by 2014”—a difference of nearly one year assuming action is taken at the November, 2009 meeting. It is not clear from the environmental analysis how this deadline will be implemented. These changes in the project description are significant by any measure and revealing them for the first time after the close of the public comment period frustrates CEQA’s core purpose. Time and again, the California courts have recognized that an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient environmental document. *Endangered Habitats League, Inc. v. State Water Resources Control Bd.* (1997) 63 Cal.App.4th 227, 242. Changes in a project description vitiate the CEQA process as a vehicle for intelligent public participation. *Id.*

In addition to the shifting project description, the revised ESR includes a number of substantive changes and additions. Several areas of the analysis that were previously marked as “no impact” are now marked as “less than significant” or “less than significant with mitigation.” A number of new potential adverse impacts are disclosed in the body of the analysis as well. And, several additional mitigation measures have been added to deal with these heretofore undisclosed consequences of the proposed project. The significant new information that has been added to the ESR mandates its recirculation in order to allow the public a meaningful opportunity to comment on all of the new information. Furthermore, the draft ESR that was circulated was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded from the outset.

Additionally, the City questions the release of only two of the five Peer Review Memoranda, and disagrees with staff’s response to comments on the regulatory process that the peer reviews are not a proper subject for public comment. External peer review is a necessary element of the Board’s rulemaking procedure under state law, and Finding No. 7¹ in the Tentative Resolution asserts that the peer reviewers confirmed the Technical Staff Report was based upon sound scientific knowledge, methods and practices. The public must have the opportunity to verify and comment on the merits of this conclusory statement.

¹ The Tentative Resolution dated October 27, 2009, discusses the peer review in Finding No. 7. Earlier drafts released of the Tentative Resolution discuss peer review in Finding No. 6; however, the strike-out October 27, 2009 Tentative Resolution does not indicate any revisions to the Findings section have been made.

JENKINS & HOGIN, LLP

October 8, 2009
Page 3

Accordingly, the City of Malibu hereby requests that the Board continue the November 5, 2009 hearing date, direct the ESR to be recirculated for public review and comment consistent with CEQA, and release all of the Peer Review Memoranda for public comment.

Very truly yours,

A handwritten signature in cursive script that reads "Lauren Feldman". The signature is written in black ink and is positioned above the printed name.

Lauren Feldman
Assistant City Attorney, City of Malibu

cc: Tracy J. Egoscue, Executive Officer