



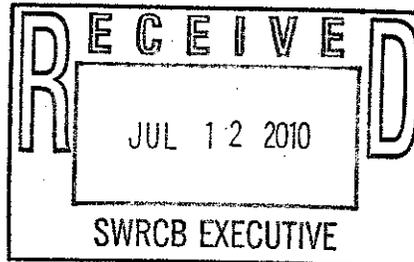
County of Los Angeles
CHIEF EXECUTIVE OFFICE

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WILLIAM T FUJIOKA
Chief Executive Officer

July 12, 2010

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Board of Supervisors
GLORIA MOLINA
First District

MARK RIDLEY-THOMAS
Second District

ZEV YAROSLAVSKY
Third District

DON KNABE
Fourth District

MICHAEL D. ANTONOVICH
Fifth District

Dear Ms. Townsend:

COMMENT LETTER – MALIBU SEPTIC PROHIBITION

Enclosed are the County of Los Angeles' comments on the amendment to the Water Quality Control Plan for the Los Angeles Region to incorporate a prohibition of on-site wastewater disposal/treatment systems in parts of the City of Malibu and unincorporated Los Angeles County.

We look forward to your consideration of our comments. If you have any questions, please contact Mr. Mark Pestrella, Deputy Director, Los Angeles County Department of Public Works, at (626) 458-4001, or via e-mail at mpestrel@dpw.lacounty.gov.

Sincerely,

WILLIAM T FUJIOKA
County Executive Officer

WTF:BC
DSP:os

Enclosure (1)

- c: Supervisor Zev Yaroslavsky, Third Supervisorial District
P. Michael Freeman, Fire Chief
Margaret Donnellan Todd, County Librarian
Dr. Jonathan E. Fielding, Director and Health Officer of Public Health
Gail Farber, Director of Public Works
Richard J. Bruckner, Director of Regional Planning

**COUNTY OF LOS ANGELES
COMMENTS ON AMENDMENT TO THE LOS ANGELES REGION BASIN PLAN TO
INCORPORATE ON-SITE WASTEWATER DISPOSAL SYSTEM PROHIBITION FOR
THE MALIBU CIVIC CENTER AREA**

**1. REQUEST FOR PROVISION ALLOWING THE CONTINUED USE OF ON-SITE
WASTEWATER TREATMENT SYSTEMS**

The County of Los Angeles ("County") owns four public facilities in the area affected by the On-site Wastewater Treatment System ("OWTS") prohibition adopted in the Basin Plan amendment. The facilities are: County Fire Station 88, Road Maintenance Yard 336, a public restroom facility located at Surfrider Beach, and the Malibu Civic Center (which houses the County library, Superior Court, and field office of Waterworks District 29). These County facilities provide critical public services. Fire Station 88 is an essential public safety facility as defined by the State of California Building Code.

The U.S. Environmental Protection Agency and both State and local health departments have all confirmed that OWTS are a safe and effective means of private sewage disposal. The OWTSs serving the County facilities within the proposed prohibition area have been approved by the local building official, health officer and the Los Angeles Water Board ("Regional Board"). Additionally, the County believes it can produce evidence that these systems do not cause or contribute to exceedances of groundwater and/or surface water standards.

The County therefore requests that the State Board either amend the Basin Plan Amendment or return the Amendment to the Regional Board with directions to include a provision allowing the continued use of OWTSs at the above-identified County facilities.

This issue was raised by the County in its comments before the Regional Board. A review of the Regional Board's several responses to all comments made did not reveal any response to this comment.

As an additional comment directed to the State Board, if the Board elects not to exempt these critical County facilities and approves the Basin Plan amendment, the County would request that it be afforded a safe harbor (*i.e.*, continued operation of the OWTS beyond the deadlines set forth in the Basin Plan amendment) if the alternative to individual OWTSs is not operational by the dates called for in the Basin Plan amendment. Obviously, shutdown of such critical facilities as a fire station and a court operation would be drastic and create potential health and safety concerns for the residents of the Malibu area.

2. **NEED FOR STATE BOARD REVIEW OF ISSUES CONCERNING ALTERNATIVES TO OWTS**

Water Code section 13283 provides that the State Board must, in reviewing a determination "that discharge of waste from existing or new individual disposal systems should not be permitted," include "a preliminary review of possible alternatives necessary to achieve protection of water quality and present and future beneficial uses of water, and prevention of nuisance, pollution, and contamination, including, but not limited to, community collection and waste disposal systems which utilize subsurface disposal, and possible combinations of individual disposal systems, community collection and disposal systems which utilize subsurface disposal, and conventional treatment systems."

The State Board's notice does not include evidence of any of the review required by Water Code section 13283. Moreover, the amended notice proposes to cut off the right of interested parties to comment with the submission of the comments due on July 12, 2010, even though the Section 13283 review has not been released to the public. State Board staff must conduct the review required by Section 13283 and provide that review to interested parties for comment prior to the State Board taking action on the Basin Plan amendment.

The Regional Board has indicated that it has conducted the Section 13283 review, stating in paragraph 9 of the final Regional Board resolution that "the Regional Board has conducted a preliminary review of possible alternatives, as documented in the staff report." A review of the Final Environmental Staff Report does not, however, reveal any discussion of the required alternatives of "community collection and waste disposal systems which utilize subsurface disposal" or a combination of such systems, individual disposal systems and conventional treatment systems, as is specifically required by Water Code section 13283.

As this comment concerns either actions by the State Board taken following the Regional Board's action in adopting the Basin Plan amendment, or the Final Environmental Staff Report, prepared after the deadline for comments, it could not have been raised by the County before the Regional Board.

3. **NOTICE AND HEARING REQUIREMENTS**

The notice and hearing provided by the Regional Board for the Basin Plan amendment did not meet the legal requirements set forth in the Administrative Procedure Act ("APA") or the regulations applicable to Regional Board hearings in Title 23 of the Code of Regulations.

Notice of the proposed prohibition was provided via publication, via e-mail and to persons who had requested notice. However, notice was not provided to individual property owners or business owners who would be affected by the OWTS prohibition. Also, the hearing notice provided only that interested persons

could file written comments, and would be given an opportunity to speak at the Regional Board meeting on November 5, 2009. Such a failure to provide adequate notice and opportunity to be heard violated statutory and regulatory protections. See, e.g., Govt. Code section 11410.10 *et seq.*; Title 23 Code Reg. sections 648-648.8.

While amendment of a Basin Plan is a regulatory act, and ordinarily not subject to an adjudicative hearing requirement, specific provisions of the Water Code require the Board to make determinations of fact before deciding to prohibit OWTS operation in the Civic Center area. The Board must make one or more findings as to the impact of OWTS on water quality (Water Code section 13280) and must do so by considering "all relevant evidence related to the discharge," including specific issues set forth in Water Code section 13281(a), which include evidence of contamination, existing and planned land use, the factors set forth in Water Code section 13241 and other issues. These findings require an adjudicative hearing, as provided in Title 23 Code Reg. section 648(a): "[A]djudicative proceeding" means an evidentiary hearing for determination of facts pursuant to which . . . a Regional Board formulates and issues a decision." See also Govt. Code section 11410.10 (requirement for adjudicative hearing applies to "a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision"). In addition, the property rights of homeowners and business owners are directly affected by the OWTS ban, requiring adherence to constitutional requirements of due process, including adequate notice and hearing.

The APA provides that "the agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." Govt. Code section 11425.10(a)(1). The hearing regulations applicable to the Regional Board provide that the parties to an adjudicative hearing "shall include the person or persons to whom the agency action is directed." Title 23 Code Reg. section 648.1(a). However, affected persons were not given the opportunity to present written evidence at the hearing. Moreover, the proposed Basin Plan amendment was modified at the hearing, after the end of the comment periods (both oral and written) without prior notice or opportunity to comment, in violation of the requirements of Govt. Code section 11346.8(c). The failure of the Regional Board to provide proper notice to affected property owners and to provide interested parties with the rights guaranteed to them under the California statutory law and the Regional Board's own procedural regulations require that the Basin Plan amendment be returned to the Regional Board with directions that proper notice and a hearing be held in accordance with law and regulation.

Most of this comment regarding the procedural inadequacy of the notice and hearing provided by the Regional Board was raised before the Regional Board, with the exception of matters relating to the conduct of the hearing itself, which

obviously was conducted after the deadline for comment. Board staff responded to the County's comment regarding inadequate notice by indicating that it met the "legal requirements for noticing" and "took additional discretionary efforts to outreach to the community." This response, however, did not indicate that individual notice to property owners – the requirement of the APA – was made. With respect to the County's comment concerning the inadequacy of the hearing provided, the Regional Board staff noted only that "[t]his Basin Plan amendment is a quasi-legislative action. Therefore, the APA does not apply." As noted above, the County disagrees with this analysis, as the need for fact finding and due process concerns require an adjudicative hearing.

4. **CONCERNS REGARDING SUBSTITUTE ENVIRONMENTAL DOCUMENT COMPLIANCE AND COMPLIANCE WITH WATER CODE SECTION 13241**

Project and Alternatives

The Final Environmental Staff Report ("ESR") prepared for the project does not fully define the project. According to the ESR, the project consists of the prohibition of OWTSs. The alternatives discussed include: (1) an initiative by local government to cease discharges through OWTS by providing community services to collect and dispose/reuse wastewater; and (2) a "no action" alternative. However, since it is directly foreseeable that the community will necessarily require an alternative to OWTS, and since the Regional Board's proposed Resolution directs the City to plan and construct a project to comply with the prohibition, Alternative 1 should be considered as part of the project and its effects on the environment should be analyzed along with the prohibition. Additionally, the ESR does not separately analyze the project and each of the three "possible projects" that are suggested under Alternative 1 in order to provide a meaningful ability to compare the impacts from each.

Further, the ESR does not analyze any alternatives involving a partial ban (for example directed toward dischargers for whom a direct link has been established with the impairments cited). The environmental impacts anticipated from a targeted prohibition would likely be less than the proposed total prohibition. A discussion of reasonably foreseeable alternative means of compliance with the prohibition is required by Public Resources Code section 21159(a). A review of possible alternatives to achieve protection of water quality is also required by the State Board, pursuant to Section 13283 of the Water Code (see discussion in Section 2, above).

Regional Board staff responded to these comments by indicating, first, that it lacked "sufficient detail" to "make more than a preliminary analysis of potential impacts." With respect, such a response represents a plain violation of the Regional Board's obligations, as was found by the Court of Appeal in *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392. That case established that staff must analyze the foreseeable impacts and

foreseeable mitigation associated with the proposed project. Even though precise details cannot be known at this time, there is sufficient detail in the ESR to enable staff to discuss environmental impacts at the level required under CEQA. Second, staff responded that a partial OWTS ban was not reasonable because "there is not sufficient data about the status of individual OWTSs to make it a reasonable alternative. A partial ban would not eliminate or reduce significant environmental impacts as there would still be the need for compliance projects." This response ignores the thrust of the comment, which would focus not on individual OWTS but rather on areas where there allegedly was an impact on water quality. In any event, the ESR did not provide a sufficient discussion of why the partial prohibition was rejected, in violation of CEQA's requirements.

Mitigation

With respect to the project or Alternative 1, the ESR does not identify mitigation measures required which would reduce impacts to below a level of significance. The analysis of Alternative 1 contains a checklist which identifies potentially significant impacts to several areas, including water, land use, public service, utilities and service systems and recreation, as well as mandatory findings of significance. However, the discussion of these impacts, as well as specific mitigation measures designed to reduce the impacts, are deferred to project level review. Since these impacts are reasonably foreseeable as a result of the proposed prohibition on OWTS, the impacts should be fully vetted and reasonably foreseeable mitigation measures should be identified as part of the ESR. Such analysis is required under Public Resources Code section 21159(a). See *City of Arcadia*.

Similarly, for impacts identified as less than significant with mitigation incorporated, the ESR does not identify specific measures and demonstrate how they would reduce the severity of the impact to below the level of significance.

With respect to aesthetics, the County previously commented that impacts were not properly analyzed. The ESR has been revised to find a less than significant impact with mitigation incorporated. Additionally, the analysis in this section notes that during construction, "the aesthetics of residents and visitors may be offended," and that the impacts would be temporary. CEQA does not exempt impacts which may be temporary in nature. Further, there is no indication of how or whether the use of temporary screens or landscaping would effectively reduce the aesthetic impact identified.

In discussing human health impacts, while the final ESR was revised to indicate that the impacts would be "less than significant with mitigation incorporated," the suggested mitigation was merely reference to compliance with unidentified "Health and Safety Plans" and unspecified "Cal OSHA regulations." The level of detail did not rise to that required by CEQA.

The section entitled "Discussion of Environmental Evaluation" concludes that there are mitigation measures available to reduce potentially significant environmental impacts to less than significant levels without describing the measures necessary or the manner in which they will reduce the impacts.

The Regional Board's response to these comments¹ was inadequate, as it used the excuse that since "details of these projects do not exist," a more detailed analysis was not possible. Certainly, the options outlined in the ESR for addressing the volume of wastewater suggest immediately identifiable impacts as well as mitigation measures. And, it was not the job of the commenters to perform this analysis, as suggested by the Regional Board in citing the CEQA guidelines, title 14 Code Reg. section 15086(d). This section applies to comments made by "responsible agencies" and "trustee agencies" in response to a draft EIR, and not to the comments of public agencies on a substitute environmental document. Citation of this section is inapposite and did not excuse the Regional Board's failure.

Unavoidable Significant Adverse Impacts

The unavoidable significant adverse impacts section does not specify which impacts would be significant and unavoidable, as required by Section 15126.2 of the CEQA Guidelines.

The Regional Board responded to this comment by indicating that it had supplemented the discussion of unavoidable significant adverse impacts in the final ESR. That discussion, however, is still not adequate. Instead of grappling with the impacts, the ESR only notes that to "the extent that there are unavoidable significant adverse impacts, those impacts are temporary in nature, predominately arising from construction of compliance projects, and temporary nuisance impacts associated with abatement of the use of OWTSSs." This "discussion" does not describe these impacts, even though the ESR appears to acknowledge that they exist.

Feasibility

The ESR does not contain information to demonstrate that a project could be completed within the periods required in the Basin Plan Amendment. In the event that these timeframes are insufficient to allow for completion of an alternative system for wastewater discharge, the ESR should identify the impact of a prohibition in the absence of another means of addressing wastewater disposal for the area subject to the prohibition.

A similar comment was made by the County to the Regional Board. Regional Board staff responded by stating that "[s]taff does not believe that it is a

¹ The revised analysis of human health impacts was made after the County's comments were submitted.

reasonably foreseeable conclusion that no action will be taken by the prohibition deadline date, and thus did not evaluate the impacts from the losing of the entire Malibu Civic Center area." With respect, this response was inapposite to the issue raised by the County. The issue concerned the problem, also raised earlier in these comments, of what would occur if the alternative system to individual OWTS was not completed by the deadlines set forth in the Basin Plan amendment. Because the amendment does not have any "safe harbor" for the property owners affected by the OWTS ban, presumably, those property owners will be required to find other wastewater disposal alternatives. Such alternatives clearly would have environmental consequences. For example, were the County not able to operate Fire Station No. 88, fire protection in the Malibu area would be adversely affected. Given the significant steps required even to fund a central wastewater treatment plant (which will also require the formation of a special assessment district, a step requiring an election and potential additional delay), the potential for environmental consequences arising from the ceasing of operation of individual OWTS is "reasonably foreseeable."

Global Climate Change

The County noted in comments to the Regional Board that the ESR does not address the impacts to global climate change from the project or from any of the alternatives, including construction related impacts and impacts from removal of existing equipment. The Regional Board's response indicates that greenhouse gases were not quantified due to a lack of agency guidance on how to determine the significance of greenhouse gases. However, as of the date the ESR was completed, methodologies are available to perform a quantitative and/or qualitative analysis of global climate change effects of the project. This type of analysis is not considered speculative. Some sections of the ESR have been revised to mention climate change. However, there is no analysis provided and no support for the simple conclusion that there will be no change in climate under the Air Quality Section. The ESR did not identify the direct and indirect GHG impacts from construction and operation of the project on either a project or cumulative impacts level, which is required due to the global nature of this type of impact.

Salt Water Intrusion

Given that the Malibu Civic Center area is located in close proximity to the ocean, the OWTS prohibition could have serious consequences on the underlying groundwater aquifer due to potential seawater intrusion in the long-term. The impact from possible intrusion has not been analyzed.

Regional Board staff did not address the issue of seawater intrusion in the final ESR or in the responses to comments. However, in responding to a comment from the City of Malibu, staff acknowledged that "seawater intrusion may have contributed to degradation of water quality." In light of that acknowledgement,

staff should have responded to the County's comment, which suggested that eliminating the discharges from OWTS (which form a freshwater barrier) would encourage additional seawater intrusion.

Recommendation

In the final ESR, Regional Board staff concludes that the proposed project (defined solely as the prohibition) constitutes the most environmentally advantageous program. As noted above, the proposed project should include the design of a project to provide an alternative means of discharging wastewater. Notwithstanding this argument, no comparison between the impacts from the project as defined and proposed Alternative 1 is provided. Further, there is no discussion of an alternative consisting of a targeted prohibition or a possible hybrid approach which could both meet the stated goals of the project and address the discharges which may be linked to the cited water quality impairments.

Growth Inducing Impacts

The ESR finds that the proposed prohibition is not expected to induce growth in the Civic Center area since it will not lead to additional immigration and "would not remove an obstacle to land use...". This statement has not been adequately supported.

The final ESR continues to find a less than significant impact with mitigation. The language in Section 12 of the ESR concludes that "the proposed project will not create an additional demand for housing, nor will the development of any compliance project" which has not been supported. The mitigation proposed appears to be the City of Malibu's update of its General Plan to develop a growth reduction strategy. This type of measure is speculative and is not binding mitigation. Section 15126.4 of the CEQA Guidelines requires that mitigation measures be fully enforceable. Project that would remove obstacles to population growth, including the example provided in this section of the Guidelines, of a major expansion of a wastewater treatment plant, must be analyzed.

Amendment of Project Without Environmental Review

There were significant changes in the project after CEQA comments had been submitted. In particular, the removal of the zero discharge exemption option and amendments to the Basin Plan amendment that changed project boundaries and compliance schedules were not subject to CEQA analysis.

Water Code section 13241 Issues

In making the determination whether to ban discharges from OWTS in a given area, the Regional Board is required to consider "all relevant evidence" related to the discharge, including "those factors set forth in Section 13241" Water Code section 13281(a). Nowhere in the final ESR accompanying the Basin Plan Amendment is there an adequate discussion of these factors, which are: "(a) Past, present, and probable future beneficial uses of water. (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto. (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area. (d) Economic considerations. (e) The need for developing housing within the region. (f) The need to develop and use recycled water."

While certain aspects of these factors are discussed in the ESR (which contains a discussion of the potential costs of alternatives to OWTS, a centralized treatment plant, sewer lines and decentralized treatment plants), that discussion is fragmented and incomplete. There also is no discussion on the need for developing housing within the region, and how a ban on OWTS might affect that need. While the ESR proposes that the treatment plants could generate recycled water, there is no discussion of how that recycled water might be used in the Malibu Civic Center area. The ESR acknowledges, for example, that some of the recycled water generated might have to be disposed of to the subsurface due to limited availability for use. This issue requires additional consideration. And, there is no discussion of the "coordinated control of all factors which affect water quality in the area," given that no consideration is given to considering other factors that would affect water quality, including other potential sources of bacteria or using a hybrid approach (as suggested above) focusing on certain OWTS rather than a blanket prohibition on all OWTS in the Civic Center area.

The County notes also that the final Regional Board resolution approving the Basin Plan amendment contained no specific findings on the Water Code section 13241 factors or on the other factual determinations required under Water Code section 13281(a) to be made by the Regional Board before it acts to ban OWTS discharges.

This comment was made before the Regional Board, which responded that it had made the requisite analysis in the final ESR and that it had made the requisite findings in the final resolution. However, as noted above, neither the ESR nor the resolution contains the analysis or findings required by the Water Code.