

Client Alert

Latham & Watkins

Environment, Land & Resources Department

The City of Malibu and the Regional Water Board Reach an Agreement on a Possible Malibu Sewer System

In what may herald the beginning of the end of a decades-long struggle between the City of Malibu (City) and the Los Angeles Regional Water Quality Control Board (Regional Board), on July 14, 2011, the Regional Board unanimously adopted a Memorandum of Understanding (MOU)¹ implementing the Regional Board's prohibition on septic discharges in the Malibu Civic Center area, which was adopted in 2009 pursuant to an amendment to the Los Angeles Region Basin Plan.² The MOU reflects the culmination of nearly nine months of intense negotiations and a 20 year dispute between the Regional Board and the City over how to handle the beautiful seaside community's less-lovely by-products. The MOU offers the City and property owners greater flexibility in complying with the Regional Board's septic prohibition and represents an effort at a broad-based compromise that enjoys at least partial support from impacted Malibu businesses and homeowners. However, the flexibility gained with the July 14 decision is a delicate balance — the MOU allows either the City or Regional Board to terminate the MOU at any time.

This *Client Alert* provides a brief background on the prohibition banning septic discharges in the Malibu Civic Center area and summarizes the MOU's

proposed implementation schedule and the key provisions impacting Malibu-area property owners.

Banning Septic Systems in Malibu — The 2009 Basin Plan Amendment

On November 5, 2009, the Regional Board passed a resolution banning new discharges from onsite septic systems (the Basin Plan Prohibition) in the Malibu Civic Center. The Regional Board justified this controversial prohibition by citing the alleged contribution of on-site wastewater discharges to the impairment of water resources in and around Malibu's Civic Center. The State Water Resources Control Board approved the Regional Board-adopted Basin Plan Prohibition on September 21, 2010, and it became effective in December 2010. In addition to prohibiting the development of any new on-site wastewater disposal systems (OWDSs), the Basin Plan Prohibition requires the phasing-out of discharges from existing OWDSs in the Malibu Civic Center area by November 5, 2015 (for commercial dischargers), or by November 5, 2019 (for residential dischargers). The Basin Plan Prohibition permits repairs and maintenance to existing systems, but does not allow any increase in discharges from existing

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systems. The Regional Board and State Water Board approved the Basin Plan Prohibition over the strong objections of the City of Malibu and a broad range of Malibu businesses and homeowners. Following the adoption of the Basin Plan Prohibition, the City, many businesses and several homeowners threatened suit.

The 2011 Memorandum of Understanding

On June 21, 2011, the Regional Board announced that it would consider a MOU between the City, the State Water Board and the Regional Board designed to coordinate the implementation of a wastewater treatment plan in the Malibu Civic Center area as required by the Basin Plan Prohibition. The City of Malibu approved the MOU on June 27, 2011, and the Regional Board unanimously approved the MOU at a public meeting on July 14, 2011.

Though the MOU does not amend the Basin Plan Prohibition itself (meaning the Basin Plan Prohibition's discharge prohibitions remain in place), the Regional Board agrees in the MOU to exercise its discretion to not enforce its own regulations. Practically speaking, the agreement not to enforce the Basin Plan Prohibition significantly adjusts the timing of compliance with the discharge prohibitions contained in the Basin Plan Prohibition for certain affected properties. Still, because the MOU does not amend the Basin Plan itself, the Regional Board may terminate the MOU at any time for any reason and take any available enforcement or regulatory action, such as issuance of administrative civil liability or cease-and-desist orders against any or all properties within the prohibition area.

MOU Implementation Schedule

Phase One

The Basin Plan Prohibition requires all commercial dischargers in the

prohibition area to cease discharging through OWDSs by 2015. The MOU Phase One keeps the 2015 prohibition date for the commercial properties in the central Civic Center of Malibu, but places other commercial properties throughout the prohibition area in MOU Phases Two and Three, both of which contemplate discharge through OWDS beyond the Basin Plan Prohibition deadlines.

During Phase One, the MOU requires that the City design and construct a central wastewater treatment facility capable of serving those properties included in the Phase One ban area. The MOU anticipates that an assessment district composed of all Phase One properties will fund the construction of this central facility. The City must form the Phase One assessment district by September 30, 2013, to remain in compliance with its MOU obligations. Assuming the assessment district passes, all Phase One area properties must connect to a central wastewater treatment facility before the Phase One ban takes effect on November 5, 2015.

Phase Two

In addition to Malibu Colony and Serra Retreat residences, the MOU Phase Two area includes many properties that were previously identified as "commercial" properties subject to the Basin Plan Prohibition's earlier 2015 discharge deadline. Under the MOU implementation schedule, Phase Two properties must cease discharge through OWDSs and connect to a central wastewater treatment facility by November 5, 2019. The MOU specifies that the wastewater facility required for MOU Phase Two compliance may be either the same facility constructed in Phase One, or an alternatively located wastewater treatment facility specifically constructed for Phase Two properties. The City must make the decision to connect Phase Two properties to the existing Phase One central wastewater treatment facility or to construct a new facility by June 30, 2015. The MOU

also requires the formation of a special assessment district for Phase Two properties by September 30, 2017.

Phase Three

Phase Three consists of those properties in the Basin Plan Prohibition boundaries not included in either MOU Phase One or Phase Two, such as Malibu Knolls, Malibu Road, the Hughes Research Laboratory, and certain Sweetwater Mesa parcels.³ The MOU will require Phase Three properties to connect to a central wastewater treatment plant “if necessary” after the completion of Phases One and Two. The MOU requires the City to implement a monitoring/sampling program to determine if Phases One and Two have resulted in meaningful decreases in water-quality impairment. If based on those studies the Regional Board determines that Phase Three is necessary, the MOU requires that all nonexempt Phase Three properties cease discharges through OWDSs by November 5, 2025. The MOU recognizes that if the Regional Board determines that Phase Three is not necessary, the Regional Board may need to amend the Basin Plan to remove MOU identified Phase Three properties from the Basin Plan Prohibition boundaries.

Other MOU Provisions

Option to Join Assessment District

The MOU provides that properties within Phase Three may choose to join an assessment district and connect to the central wastewater treatment facility. These “certain properties” are described only as the “Hughes Research Laboratory and properties south from the Civic Center on Pacific Coast Highway to the boundary of the Prohibition.” The Regional Board made it clear during the deliberation of the MOU at its July 14, 2011, meeting that it encourages any property that wants to join an assessment district early to do so — not just certain properties in Phase Three.

“Modification” of Existing Buildings

Under the MOU, the City may permit Phase Three properties to “modify” existing buildings prior to the determination that Phase Three may or may not be necessary. However, such “modification” must be accompanied by the installation of a filtration and disinfection system to the property’s existing OWDSs, and be consistent with both the public health and the Basin Plan Prohibition. During the consideration of the MOU, the Regional Board debated whether the MOU permitted the expansion of existing OWDSs under the MOU’s modification provision. Though Regional Board staff indicated that its intent was to allow expansion, certain members of the Regional Board itself appeared to take the position in deliberations that the MOU did not permit an increase in wastewater flows through modified OWDSs. Time will tell how the Regional Board will exercise its enforcement discretion if it is presented with a modification to a Phase Three property that causes an increase in flows from the property’s OWDS.

Enforcement of the 2009 Basin Plan Prohibition

The Regional Board has taken the position that the MOU does not amend the Basin Plan or give the Executive Officer the ability to amend the Basin Plan and that the prohibitions on discharges contained in the Basin Plan Prohibition remain in effect. By entering the MOU, the Regional Board simply agrees to exercise its discretion not to enforce its own regulations. Stated differently, property owners will still be subject to the Basin Plan Prohibition discharge restrictions, but the Regional Board will decline to enforce the prohibition against dischargers. However, the Regional Board may terminate the MOU at any time for any reason and take any available enforcement or regulatory action, such as issuance of administrative civil liability or cease-and-desist orders

against any or all properties within the prohibition area. The MOU provides flexibility for dischargers, but because it does not amend the Basin Plan itself, it does not provide certainty that the dischargers will have the opportunity to take advantage of that flexibility.

Failure to Form an Assessment District

The MOU provides that if waste dischargers fail to form special assessment districts to fund the central wastewater treatment facilities, the Regional Board may enforce all State policies to gain compliance with applicable water-quality goals. Such policies include requiring dischargers to upgrade their OWDSs by November 5, 2019. This provision seems aimed at softening the potential impact of the Basin Plan Prohibition by allowing discharges from upgraded OWDSs should an assessment district fail. However, a failure to form an assessment district is a violation of the MOU and may trigger an enforcement of the Basin Plan Prohibition by the Regional Board. With this understanding, the MOU may not provide much comfort for Civic Center landowners hoping to avoid a prohibition on discharging by upgrading their existing OWDSs should an assessment district fail.

Conclusion

The Regional Board and City of Malibu appear committed to working together to construct a central wastewater treatment facility by 2015, and to address water quality issues in the Malibu Civic Center moving forward. Assuming the Regional Board and City continue working together in the implementation of the MOU, there may finally be a cease-fire in the decades-old Malibu septic wars.

Endnotes

- ¹ Memorandum of Understanding Regarding Phased Implementation of Basin Plan Amendment Prohibiting On-site Wastewater Disposal Systems in the Malibu Civic Center Area (July 1, 2011 amended July 14, 2011).
- ² Cal. Reg'l Water Quality Control Bd., Los Angeles Region, Res. No. R4-2009-007 (Nov. 5, 2009).
- ³ MOU Phase Three interestingly does not include those undeveloped properties within the Basin Plan Prohibition boundaries in any Phase.

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