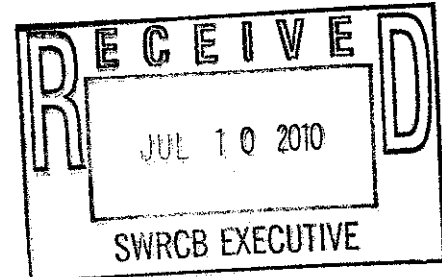


**BIG ROCK**  
PARTNERS LLC

June 25, 2010

**BY EMAIL-commentletters@waterboards.ca.gov**  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
Attn: Jeanie Townsend, Clerk to the Board



**Re: Comment Letter-Malibu Septic Prohibition**

Dear Board Members:

On behalf of AZ Winter Mesa, LLC, ("AZWM") I would like to thank the State Water Resources Control Board ("State Board") for the opportunity to submit comments in connection with the ***PROPOSED APPROVAL OF AN AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE LOS ANGELES REGION TO PROHIBIT ON-SITE WASTEWATER DISPOSAL SYSTEMS IN THE MALIBU CIVIC CENTER AREA*** (hereinafter sometimes referred to as the "Basin Plan Amendment").

As per the ***NOTICE OF OPPURTUNITY FOR PUBLIC COMMENT*** to the Proposed Approval of the Basin Plan Amendment, it is our understanding that our comments concerning the Basin Plan Amendment to the Los Angeles County Regional Board ("LARWQCB"), which were dated October 7, 2009 and received by the LARWQCB on October 8, 2009 are part of the Administrative Record and are being incorporated by reference. We believe the that statement contained in the Notice of Opportunity for Public Comment, that unless a commenter explains why and in what manner each of the responses to provided by the LARWQCB was inadequate or incorrect, that the State Board will presume that the LARWQCB's response adequately addressed the commenter's concerns, is contrary to the prior statement that prior comments are included as part of the administrative record and is an improper attempt to limit the Administrative Record. AZWM stands by all of its comments contained in its October 7, 2009 comment letter to the LARWQCB and requests that the State Board review these comments. In an effort to keep our comments to a minimum we will highlight the broader issues we raised and explain why we believe the LARWQCB's response to those comments was inadequate or incorrect.

**Statement of Position**

AZWM unequivocally supports the State Board's objective to improve the water quality for both existing and potential beneficial uses in the State of California and specifically in the Malibu Civic Center area. To this end we have delivered to the City of Malibu a willing seller letter with respect to an approximately ½ acre parcel of land owned by AZWM immediately adjacent to the Colony Plaza wastewater treatment plant in Winter Canyon- a site which the City is considering for the location of the compliance project. If the City determines to locate a wastewater treatment plant at the site of the existing Colony Plaza treatment plant, this parcel could provide the City with additional area for such a plant, if needed.

We also strongly believe that the Basin Plan Amendment will not progress improved the water quality for both existing and potential beneficial uses in the Malibu Civic Center area. Rather if approved in its current form, we believe that the Basin Plan Amendment will have the unintended consequence of delaying the realization of this objective for the following two reasons. First, we believe the boundary of the proposed prohibition area is too large, making it technically unfeasible because there is not sufficient infiltration area available to disperse the large quantities of treated wastewater that would be produced from the proposed prohibition area, into a small, concentrated aquifer. In order to disperse the clean effluent, the City would need to install an ocean outfall or discharge into the Malibu Creak aquifer. Either of these approaches would most likely face opposition, from various groups and regulatory bodies, thus delaying or preventing the achievement of our shared goal of improved water quality. Second, history has demonstrated, i.e., Los Ossos, that unless there is strong community support for a wastewater management plan, the implementation of such plan and the achievement of its objects can be delayed significantly.

In addition we believe that the documentary support for the Basin Plan Amendment is flawed the following reasons:

- The Staff Report and the supporting Technical Memoranda do not meet the requirements of a functional equivalent under the California Environmental Quality Act ("CEQA") for an Environmental Impact Report ("EIR") and therefore the Basin Plan Amendment is arbitrary and capricious;
- Winter Canyon should be removed from the Prohibition areas because neither the Staff Report nor the Technical Memoranda contain substantial evidence supporting the inclusion of Winter Canyon in the Prohibition area; and
- The Basin Plan Amendment does not comply with the Porter-Cologne Clean Water Act.

Therefore, we respectfully requested that the State Water Resources Control Board ("State Water Board") remand the Basin Plan Amendment and direct the staff of the

LARWQCB to continue to work with the City of Malibu and stakeholders, including those parties who support the Basin Plan Amendment, to work collaboratively to develop both interim and long term solutions that address water quality issues in the Civic Center area of the City of Malibu ("Civic Center Area"). To this end, we support the City's Community based wastewater treatment system. This proposed system has significant support from the large commercial users in the Civic Center Area, which support is absolutely necessary in order to establish the required assessment district, a critical first step for any compliance project. We believe that the City's proposed system is also technically feasible thereby providing a timely solution while targeting the users with the highest potential impact to water quality by focusing on commercial and residential sources closest to Malibu Creek. The City's proposal contains enforceable milestones and a reasonable timeframe. We also respectfully suggest that such a remand would represent an unequivocal step toward the implementation of the recommendations contained in the Little Hoover Commission. January 2009 report entitled *Cleaner Structure, Cleaner water: Improving Performance and Outcomes at the State Water Boards* and therefore a significant step toward our shared goal of protecting and improving water quality not only in the Malibu Civic Center area but throughout the State of California.

#### **Background**

Big Rock Partners, LLC is the manager of AZWM, the owner of two contiguous parcels of land located in Winter Canyon, commonly known as the "Towing Site" (23917-23923 Malibu Road) and the "Crummer Site" (24108, 24120, 24134, 24150 and 24174 Pacific Coast Highway). These properties are included in Table 4-zz as residential projects that have progressed through the entitlement process to the point where they will be exempt from the prohibition of new discharges but will be subject to the prohibition from discharging in ten (10) years if the State Water Board approves the Basin Plan Amendment. AZWM purchased the Crummer Site in August 2005 and the Towing Site in April 2006, with the intention of developing each property for residential use. The Towing Site is approximately 5.5 acres and is zoned for four units per acre. The Crummer Site is 24 acres of undeveloped land adjacent to Malibu Bluffs Park, and AZWM has filed applications with the City and Coastal Commission to build five (5) single-family residences on the property.

An EIR for the Towing Site, the design of which included an on-site wastewater treatment plant, with advanced treatment and disposal on site of the cleaned effluent, was certified by the City of Malibu in August, 2009 after a thorough review by the City, including its Department of Environmental Health and Geology Departments. This review process resulted in a number of design modifications to ensure that the system meets both the City's strict requirements for new discharges as well as the LARWQCB's requirements. As such, AZWM can unequivocally state with first hand knowledge the City's commitment to upholding its responsibility of protecting public health and the quality of ocean water.

**LARWQCB's Response to AZWM's Comments were inadequate and/or incorrect.**

**The Staff Report and the supporting Technical Memoranda do not meet the requirements of a functional equivalent under the California Environmental Quality Act ("CEQA") for an Environmental Impact Report ("EIR") and therefore the Basin Plan Amendment is arbitrary and capricious.**

1. **Comment-**The boundaries of the Prohibition area have been expanded significantly since the publication of the Staff Report. The Staff Report fails to analyze the environmental impacts of the Prohibition and compliance projects subsequent to the expansion of the Prohibition area.

**LARWQCB Response-**None.

2. **Comment-**The Staff Report fails to analyze other potential causative factors to the degradation of the groundwater quality in the Prohibition area. State Water Resources Control Board Resolution No. 88-63 (as revised by Resolution No. 2006-0008) provides that "*all surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards with the exception of*" where "*there is contamination either by natural process or by human activity (unrelated to the specific pollution incident) that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable practices...*" The Staff Report further fails to analyze whether the groundwater in the Prohibition area could be reasonably treated for domestic use using either Best Management Practices or best economically achievable treatment practices after the enactment of the Prohibition

**LARWQCB Response-**The Staff concurs that "State Board Resolution 88-63 contains possible exceptions for waters that may not be suitable for drinking water, but that issue is not the subject of this prohibition."

This response is inadequate or incorrect as the technical justifications for the Basin Plan Amendment contained in the five Technical Memoranda, including Technical Memorandum #2 which concludes that pathogens and nitrogen in wastewaters impair underlying groundwater as a potential source of drinking water. Therefore, the issue of whether the groundwater in the prohibition area maybe suitable for drinking water is indeed an issue related to the Basin Plan Amendment.

3. **Comment-**The Staff Report does not contain any analysis of potential cumulative environmental impacts from future LARWQCB actions in the City of Malibu.

**LARWQCB Response-**Staff disagrees with the comment that no CEQA methodology was used as there is a list of the other projects considered in the original analysis.

This is inaccurate. The Staff Report does not contain an analysis of the potential cumulative environmental impacts from future LARWQCD actions in the City of Malibu, despite indications in the Staff Report and public comments from LARWQCB staff, that future projects are contemplated.

**Winter Canyon should be removed from the Prohibition areas because neither the Staff Report nor the Technical Memoranda provides substantial evidence supporting the inclusion of Winter Canyon in the Prohibition area.**

1. **Comment-** Winter Canyon and [Malibu Creek watershed] have from a hydrologic perspective been consistently viewed as separate and distinct watersheds and basins...There is no scientific basis to conclude that Winter Canyon and the Malibu [Creek] Civic Center Area watersheds are hydraulically connected. These two areas are very different with respect to aquifers, water levels and flow gradient. In fact in 2003 the DWR delineated the boundaries of the [Malibu Civic Center Area], termed "Malibu Valley Groundwater Basin and in 2004 defined it as "a small alluvial basin located along the Los Angeles County coastline. The basin is bounded by the Pacific Ocean on the south, and by non-water bearing, Tertiary-age bedrock on all remaining sides. The valley is drained by Malibu Creek into the Pacific Ocean." The map delineating the DWR limits of the Malibu Valley Groundwater Basin (DWR Basin Number 4-22) does not include Winter Canyon.

**LARWQCD Response-**There was no response to this comment.

2. **Comment (126)-** Technical Memorandum #4 (page T4-9) states that "the greatest volume of wastewater from Sector I is discharged into the Winter Canyon drainage, but the Winter Canyon flow is estimated to have a relatively low contribution (1%) to Malibu Lagoon." This Memorandum then states that "[m]ost of the wastewater discharged in Winter Canyon is *assumed* to discharge into Malibu Beach." (Emphasis added). However, no support is given for the assumption that most wastewater from Winter Canyon is discharged to Malibu Beach.

Neither Technical Memorandums #3 or #4 contain any information on the water quality at Amarillo Beach or an analysis of the possible impacts of the mixing of waters that might occur south of Malibu Road, at the ocean/groundwater interface on Surfrider Beach, the Malibu Lagoon or Creek. In the event groundwater coming from Winter

Canyon contained pathogens, water cannot be transported by long-shore currents from the ocean off Winter Canyon into the Lagoon because the Lagoon is topographically higher than the ocean and except in breach conditions is prevented from entry by a sand bar.

On page T4-12 of Technical Memorandum #4, a discussion of the 180 homes located in Sector IV indicates that "Wastewater, from the five commercial properties and most (107) of the homes, discharges directly to the ocean and the beaches north of Malibu Lagoon. A portion of the nutrient and bacteria load discharged to the beach can be transported with sediments toward the Lagoon by the prevailing long-shore movement of northwest to southeast. Once transported toward the lagoon, it can enter the Lagoon through tidal inflow. The U.S. Environmental Protection Agency estimated that tidal inflows contribute only 1% of the nutrient load in the Malibu Lagoon. Staff estimates that 1% of the 42,040 gpd of wastewater discharged in the main area of Section IV could reach the Lagoon, but *acknowledges the proportion could be much smaller.*" After acknowledging that potentially none of, but at most 1% of wastewater discharge from the main area of Section IV, the majority of which is being discharge from systems that do not have advanced treatment systems, the inclusion of Winter Canyon in the Prohibition area simply cannot be justified. In fact, the information contained in Technical Memorandum #4 negates the purported technical justification for including Winter Canyon in the Prohibition area.

In view of the complete lack data on the quality of the ground water in Winter Canyon, on October 1, 2009 AZWM (in conjunction with Malibu Bay Company which owns the property immediately to the east of the Towing) had Earth Consultants International ("ECI") collect groundwater samples from four monitoring wells: TY-MW-1, TY-MW-5, MBCWC-MW-2 and SMBRP-11 and tested the samples for the following: Fecal Coliform, Total Coliform, Born, Chloride, Nitrate, Nitrite, Sulfates and TDS. It should be noted that TY-MW-1 is located at the northern portion of the Towing Site. The results of these tests are contained in ECI Reported dated October 7, 2009 (See copy annexed hereto as Exhibit "5"). The Report states: "The analytical results suggest that the aquifer waters do not meet Secondary drinking water standards due to elevated concentrations (above MCL) of chloride, sulfate and TDS. Additionally Total Coliform was detected in the groundwater samples collected from the northern-most and southern-most monitoring wells in the study area. The absence of Total Coliform in the groundwater samples collected from the two wells between the northern-most and southern-most monitoring wells suggest that Coliform entering the system from up gradient sources (north of Pacific Coast Highway) are removed before the groundwater reaches Malibu Road. The source of Coliform in the groundwater sample collected from Well SMBRP-11 appears to be the septic systems of homes directly south of Malibu Road." These tests results further confirm that Winter Canyon, including AZWM's properties are not contributing pathogens in wastewater to the beaches and ocean, including Amarillo Beach, Surfrider Beach, the Malibu Lagoon or Malibu Creek.

**LARWQCB Response**—“Staff acknowledges that there is not a beach monitoring station at the mouth of Winter Canyon.....Given the relatively high flows of wastewater in Winter Canyon...and pollutants in groundwater (reference key tables in Koo’s TM#2), staff believes that pathogens in groundwater impair Amarillo Beach, via ground water flow and subsurface hydrdomodifications. In addition, along shore currents carry pollutants east to Malibu Beach. The beaches on either side of Amarillo Beach (Malibu Beach to the east, and Puerco Beach to the west) are impaired.

This response is both inadequate and incorrect. LARWQCB response states that because there is high flows of wastewater in Winter Canyon and pollutants in groundwater staff “believes” that pathogens in groundwater from Winter Canyon impair Amarillo Beach, groundwater flow. This belief is inconsistent with the conclusion contained in ECI’s October 7, 2009 Report which was based on groundwater samples, that the absence of Total Coliform in the groundwater samples collected from the two wells between the northern-most and southern-most monitoring wells suggest that Coliform entering the system from up gradient sources (north of Pacific Coast Highway) are removed before the groundwater reaches Malibu Road and therefore, Winter Canyon should not be included in the prohibition area. In addition, by LARWQCB own admission there is no beach monitoring station at Amarillo Beach, so a statement that the water quality at Amarillo Beach is impaired from groundwater from Winter Canyon by the LARWQCB’s admission is conjecture.

**The Basin Plan Amendment does not comply with the Porter-Cologne Clean Water Act.**

**Comment**- The failure to include a revised Summary of Economics reflecting the expanded Prohibition area, future development within the Prohibition area, and possible future compliance efforts required outside the Prohibition area, also renders the Staff Report noncompliant with the California Water Code. Water Code section 13241 requires the Regional Board to consider, when exercising its discretion, a list of non-exclusive factors, including beneficial uses, environmental characteristics, realistic outcomes, economics, the need for housing, and the need to recycle water. California law further requires the Regional Board to provide a record of the required analysis which is sufficient to demonstrate that it has meaningfully weighed and considered each of the prescribed non-exclusive factors. *See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (“the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . [and] the relationships between evidence and findings and between findings and ultimate action. . .”).

**LARWQCB Response**-None

**Conclusion.**

We respectfully urge the State Board to remand the Basin Plan Amendment to the LARWQCB and request that they work collaboratively with the City and other stakeholders which will allow the City to proceed with its proposed community based wastewater treatment system because we believe that this will achieve our shared goal of improved water quality in the Malibu Civic Center area in the shortest amount of time.

Thank you for your time and consideration.

Very truly yours,

/s/ Robert Gold

Robert Gold

CC: Governor Arnold Schwarzenegger  
Mr. Jim Thorsen, City Manager, City of Malibu  
Linda S. Adams, Secretary, California Environmental Protection Agency