

From the Desk of Joan C. Lavine

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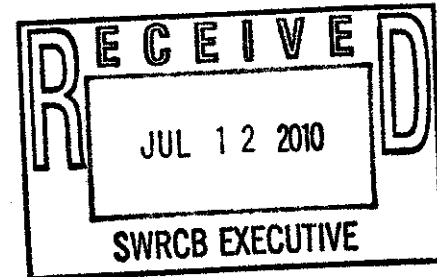
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July 9, 2010

Mr. Charles R. Hoppin, Chairman
State Water Resources Control Board
1001 "I" Street
Sacramento, Ca. 95814
Via Fax: 1-916-341-5620
Via E-mail to: commentletters@waterboards.ca.gov
Via USPS Express Mail



Attention: Jeanine Townsend, Clerk of the Board

TO MR. CHARLES R. HOPPIN, THE CHAIRMAN OF THE CALIFORNIA STATE WATER RESOURCES QUALITY CONTROL BOARD, AND TO THE RESPECTIVE MEMBERS OF SAID BOARD:

Re: COMMENT LETTER – MALIBU SEPTIC PROHIBITION (AMENDED)

Re: residential single-family dwelling zoned real property located at 23900 Malibu Road, Malibu, California 90265, Mapbook 4458, Page 007, Parcel 018, solely owned by Joan C. Lavine, individually, and located within the proposed Malibu Civic Center septic ban area, in California State Water Resources Quality Control Board Resolution No. R4-2009-007, passed by the Los Angeles Regional Water Resources Quality Control Board on November 9, 2009.

I, Joan C. Lavine, hereby respectfully submit my amended comments opposing the proposed Amendment to the Water Quality Control Plan for the Los Angeles Region (Basin Plan) To Prohibit On-Site Wastewater Disposal Systems in the Malibu Civic Center Area, as contained in California State Water Resources Quality Control Board Resolution No. R4-2009-007, passed by the Los Angeles Regional Water Resources Quality Control Board on November 9, 2009.

I hereby amend my original comments filed during June, 2010, before this State Board. I previously filed my original comments before this State Board on June 27, 2010, by E-Mail and by Fax, and on June 28, 2010, by delivery to the State Board's Clerk of a hard-copy and filing of same.

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LAVINE AMENDED COMMENT LETTER OPPOSING MALIBU SEPTIC PROHIBITION
STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

STATEMENT OF FACTS:

DESCRIPTION AND LOCATION OF SUBJECT LAVINE MALIBU ROAD PROPERTY WITHIN THE PROPOSED BAN ZONE: The undersigned property owner and objector Joan C. Lavine presently owns, and, at all times since 1971, has owned all right, title and interest in and to the fee simple rights in a residential real property, zoned R-1 for residential single-family dwellings, located at 23900 Malibu Road, Malibu, California 90265, Mapbook 4458, PAGE 007, Parcel 018. Hereinafter, the subject real property will be referred to as the "Lavine Malibu Road property".

This property owner Joan C. Lavine acquired the Lavine Malibu Road property from her Father Morris Lavine in or about 1971. Her Father Morris Lavine had purchased the property in or about 1945.

Said Lavine Malibu Road property is located in Malibu, California 90265, in the Malibu Civic Center area, to the south of Pacific Coast Highway, at the mouth of the Malibu Canyon, and on the beach front of the Malibu Colony, in an area known as the Malibu Colony outside the Colony gates.

Said Lavine Malibu Road property is located within the proposed California State Water Quality Control Board septic system ban district identified in California State Water Resources Quality Control Board Resolution No. R4-2009-007, passed by the Los Angeles Regional Water Resources Quality Control Board on November 9, 2009. Said property is subject to the proposed septic system ban in said Resolution R4-2009-007.

A single-family dwelling, in compliance with the designated R-1 zoning, exists on and occupies said property, and it has so existed and occupied it since about 1935. It has been used and occupied for its intended use as a single-family residence at all times since it was acquired by the Lavine family in or about 1945.

CONSTRUCTION AND OPERATION OF AN ON-SITE WASTE MANAGEMENT SYSTEM SINCE 1945 ON LAVINE MALIBU ROAD PROPERTY: At all relevant times mentioned herein since 1945, the municipal statutes, rules and regulations have authorized and permitted the lawful use and occupancy of the Lavine Malibu Road property, including, but not limited to the installation, use and operation of an on-site waste management system commonly known as a septic system. Thus, this property owner and objector Joan C. Lavine has at all relevant times held substantial vested real property interests in and to said Lavine Malibu Road property pursuant to said permitted construction at and use of said property.

From time to time, the property owners of the Lavine Malibu Road property, the undersigned Joan C. Lavine and her Father Morris Lavine, have obtained permits from the governing municipal agencies for the installation, upgrade, repair and operation of an on-site waste management system at the Lavine Malibu Road property. Pursuant to those permits and inspections by the duly authorized and duly acting building, health and safety officials, where required, the undersigned Joan C. Lavine and her Father Morris Lavine have installed, upgraded, repaired and operated an on-site waste management system known as a septic system.

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MALIBU CIVIC CENTER LACKS A PUBLIC SEWER SYSTEM. NONE IS PLANNED: The Malibu Civic Center lacks a public sewer system available for residential property use on and in the vicinity of Malibu Road to the south of the Pacific Coast Highway.

No plans exist for the installation of a public sewer system by which residential property on or in the vicinity of Malibu Road, located to the south side of the Pacific Coast Highway, could be serviced or used presently or in the future.

As a consequence of there being no alternative waste management system(s) to the use of a septic system, either presently or in the planned future, the undersigned owner will be deprived of all beneficial, viable economic and practical use of her R-1 zoned Lavine Malibu Road property if the outright and total ban of septic systems in the Malibu Civic Center becomes law.

NO NOTICE HAS BEEN GIVEN TO LAVINE MALIBU ROAD PROPERTY OWNER JOAN C. LAVINE OF VIOLATIONS, DEFICIENCIES OR UPGRADE REQUIREMENTS REGARDING WASTE DISCHARGE AT THE LAVINE MALIBU ROAD PROPERTY. NOR HAS THIS PROPERTY OWNER BEEN GIVEN ANY OPPORTUNITY TO REMEDIATE IF ANY SUCH PROBLEMS DO EXIST.

Prior to the passage on November 9, 2009, by the Los Angeles Regional Water Quality Control Board, of the California State Water Resources Quality Control Board Resolution No. R4-2009-007, of the resolution banning use of septic systems in the Malibu Civic Center area, the undersigned property owner Joan C. Lavine was not in any way notified that her property impermissibly discharged waste, pollution or contaminants, violated any health, safety, environmental or clean water laws, or in any way was non-compliant with any law, rule or regulation over which the California State Water Resources Quality Control Board has jurisdiction. She has not been notified that her property in any way created or caused a nuisance. She has never been cited for any said potential hazards described herein and, in particular, in this paragraph. To the best of her knowledge, her Lavine Malibu Road property does not violate any applicable TMDLs, nor has she received notice of violation of any applicable TMDLs.

Prior to the passage on November 9, 2009, by the Los Angeles Regional Water Quality Control Board, of the California State Water Resources Quality Control Board Resolution No. R4-2009-007, of the resolution banning use of septic systems in the Malibu Civic Center area, the undersigned property owner was not in any way ordered to repair, remediate, cease and desist, correct, or bring her Lavine Malibu Road Property up to code. Thus, she has not been given the statutory and Due Process right to correct any perceived, unidentified deficiency so as to avoid her property being confiscated from her by an absolute ban on the use and operation of its septic system.

VALUATION OF THE SUBJECT PROPERTY BEFORE AND AFTER THE REGULATORY "TAKING": This undersigned property owner is of the opinion that the reasonable market value of her property would be about \$15,000,000 (Fifteen million dollars), but for the potential or actual total ban and prohibition of on-site waste management systems (septic systems) having the direct and proximate consequence of prohibiting all private residential use of her property.

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Since the passage on November 9, 2009, by the Los Angeles Regional Water Quality Control Board, of the California State Water Resources Quality Control Board Resolution No. R4-2009-007, the resolution banning use of septic systems in the Malibu Civic Center area has substantially diminished the market value of the Lavine Malibu Road property. It will render said property substantially unmarketable and unsaleable at its reasonable market value by making it uninhabitable as of 2019. See Water C. § 13399.2.

SIGNIFICANT REDUCTION IN AVAILABLE RESIDENTIAL HOUSING AND CLOSING OF COMMERCIAL AND RECREATIONAL OPERATIONS BY SEPTIC BAN IN ENTIRE MALIBU CIVIC CENTER AREA: The Malibu Civic Center is a densely built residential and commercial hub in Malibu. The proposed Malibu Civic Center septic ban will have the practical direct and proximate consequence of removing all available Malibu residential housing units in that ban area, consisting of at least 400 residential units, some of which are multifamily units, and displacing several thousand people. It is estimated that about ten (10) percent of the City of Malibu's residents and occupants will lose their residential housing under such a ban and prohibition.

Among those residential properties that the septic system ban will affect is the removal of the Lavine Malibu Road property as available residential housing.

The Malibu Civic Center is a major commercial and recreational center, too. Most, if not all, commercial and recreational operations in the Malibu Civic Center use on-site waste management systems. Prohibiting septic system use in the entire Malibu Civic Center would shutter those commercial and recreational endeavors. The financial consequence would be a loss to the public and the community of the Malibu Lagoon, Malibu Surfrider Beach, Malibu Pier, Adamson House, the Malibu Shopping Plaza with a Ralphs Market, the only major supermarket within about 8 to 10 miles in easterly Malibu, and other shopping areas, to mention some of the lost tax revenue bases and recreational areas.

Los Angeles County officials notified Los Angeles Regional Board members during the November 9, 2009, hearing on Resolution No. R4-2009-007, that the proposed septic ban would cause it to close its county beaches in the ban area, and to be unable to provide emergency fire and paramedic services from the current Los Angeles County Fire Station 88 on Malibu Road within the septic ban district.

THE SEPTIC BAN WOULD CAUSE SIGNIFICANT REDUCTION IN THE MUNICIPAL, COUNTY AND STATE TAX BASES, BOTH FROM REAL PROPERTY TAXES AND FROM THE OPERATION OF COMMERCIAL BUSINESSES THAT GENERATE SALES AND OTHER TAX REVENUES.

By significantly diminishing the market value of the real properties in the ban area, and, by 2019, rendering them valueless, unsaleable and uninhabitable, a septic system ban will have the immediate impact of diminishing assessed valuations of all real property in the Malibu Civic Center and removing a substantial portion of assessed taxable valuation of occupied real property from the tax bases of the various government entities so that the City of Malibu and Los Angeles County would lose substantial real property tax revenue. The State of California will likewise

be impacted by a loss of sales tax revenue from the closure of commercial and recreational operations.

NO EVIDENCE WAS RECEIVED INTO THE RECORD AT THE NOVEMBER 9, 2010, REGIONAL BOARD HEARING THAT POLLUTION WAS/IS GENERATED AT THE UNDERSIGNED PROPERTY OWNER'S MALIBU ROAD PROPERTY OR ANY OTHER RESIDENTIAL PROPERTY IN THE PROPOSED BAN/PROHIBITION DISTRICT, THAT PRESENTLY OR CAN REASONABLY BE EXPECTED IN THE FUTURE TO CONTAMINATE WATERS. NO FINDINGS OF FACT SUPPORTING A CLAIM OF CONTAMINATION OR PROHIBITION DUE TO CONTAMINATION WERE MADE BY THE REGIONAL BOARD EITHER

Without credible, reliable evidence, unsubstantiated claims have been made that residential septic systems may be contaminating either ground water or coastal waters. The truth is that no nexus between residential septic systems on the one hand, and ground water or coastal water pollution on the other, in the Malibu Civic Center has been established.

The credible identified sources of suspected contamination in the Malibu Lagoon and Malibu Creek are the Tapia sewage treatment plant in the Santa Monica Mountains, seepage from the Santa Monica Mountains, the watersheds in and flowing through them, pollution coming from the Santa Monica Bay, and possibly commercial operations. Most of these suspected contamination sources are outside the jurisdictional boundaries of the City of Malibu and outside the Malibu Civic Center septic ban district. These mostly likely sources were supported by substantial evidence introduced by those in opposition to the resolution.

THE STATE WATER RESOURCES CONTROL BOARD LACKS CONSTITUTIONAL OR STATUTORY AUTHORITY TO PERMIT, REGULATE OR BAN SEPTIC SYSTEMS.

The State Water Resources Control Board lacks direct condemnation authority or power.

The California State Water Resources Board through its Los Angeles Regional Water Quality Control Board delegated to municipal governments the limited jurisdiction it had regarding the regulation and permitting of septic system use and operation, first by resolution and then by "memorandums of understanding". See Resolution Nos. 52-4, 53-6, R04-008.

**ARGUMENT AND COMMENTS OF JOAN C. LAVINE IN
OPPOSITION TO THE REGIONAL WATER QUALITY
CONTROL BOARD, RESOLUTION NO. R4-2009-007
(AMENDED):**

1. THE SEPTIC SYSTEM BAN AND PROHIBITION PROPOSED BY RESOLUTION NO. R4-2009-007, WHICH THE LOS ANGELES REGIONAL WATER RESOURCES QUALITY CONTROL BOARD VOTED ON AND PASSED ON NOVEMBER 9, 2009, ENTIRELY FAILS TO COMPLY WITH THE STATUTORY REQUIREMENTS,

CONDITIONS AND PREREQUISITES OF WATER C. § 13280, AND CONSTITUTIONAL RESTRICTIONS ON ITS EXERCISE OF ITS POLICE POWERS, REQUIRING IT TO ALLOW USE OF SEPTIC SYSTEMS WHERE WATER QUALITY CAN BE ATTAINED.

Water C. § 13280 provides:

§ 13280. Determination denying discharge of water from disposal systems; substantial evidence

A determination that discharge of waste from existing or new individual disposal systems or from community collection and disposal systems which utilize subsurface disposal should not be permitted shall be supported by substantial evidence in the record that discharge of waste from such disposal systems will result in violation of water quality objectives, will impair present or future beneficial uses of water, will cause pollution, nuisance, or contamination, or will unreasonably degrade the quality of any waters of the state.

The Regional Board did not receive one scintilla of evidence to support a determination that discharge of waste should not be permitted by the Lavine Malibu Road property. It, in fact, did not expressly make a determination that discharge of waste from the Lavine Malibu Road property disposal system will result in violation of water quality objectives, will impair present or future beneficial uses of water, will cause pollution, nuisance, or contamination, or will unreasonably degrade the quality of any waters of the state. And, as argued on below in argument section 3, no findings of fact to support such a determination were made by the Regional Board.

This Board's police power cannot be exercised to prohibit an activity where that activity can be regulated to eliminate the evil, harm or problem at issue, without entirely prohibiting it. San Diego TB v. City of East San Diego, 186 Cal. 252, 200 P. 393 (1921). The exercise of its police power to prohibit an activity, where regulation can reach the same goal and result, is arbitrary, capricious and unreasonable, and in violation of the guarantees of Due Process of Law under the 5th and 14th Amendments, U.S. Constitution, and California Constitution, Article I, Sections 7 and 19.

2. THE TOTAL SEPTIC SYSTEM BAN AND PROHIBITION PROPOSED BY RESOLUTION NO. R4-2009-007, AND THE HEARING, TRIAL AND DETERMINATIONS ON NOVEMBER 9, 2009, BEFORE THE LOS ANGELES REGIONAL WATER RESOURCES QUALITY CONTROL BOARD, HAVE FAILED TO COMPLY WITH THE STATUTORY CONDITIONS AND PREREQUISITES OF WATER C. § 13282 THAT WASTE DISCHARGES "SHALL BE PERMITTED SO LONG AS THE SYSTEMS ARE ADEQUATELY DESIGNED, LOCATED, SIZED, SPACED, CONSTRUCTED, AND MAINTAINED".

Water C. § 13282 provides in relevant part:

§ 13282. Design, construction and maintenance of systems; notice

(a) If it appears that adequate protection of water quality, protection of beneficial uses of water, and prevention of nuisance, pollution, and contamination can be attained by appropriate design, location, sizing, spacing, construction, and maintenance of individual disposal systems in lieu of elimination of discharges from systems, and if an authorized public agency provides satisfactory assurance to the regional board that the systems will be appropriately designed, located, sized, spaced, constructed, and maintained, the discharges shall be permitted so long as the systems are adequately designed, located, sized, spaced, constructed, and maintained.

The proposed ban totally prohibiting on-site residential waste management systems (septic systems) ignores the statutory requirement of Water C. § 13282, as well as the constitutional due process limits of the State and Regional Boards' police powers: That discharges be permitted 1) if water quality, protection and prevention of harm can be "attained by appropriate design, location, sizing, spacing, construction, and maintenance of individual disposal systems in lieu of elimination of discharges from systems, and 2) if an authorized public agency provides satisfactory assurance to the regional board that the systems will be appropriately designed, located, sized, spaced, constructed, and maintained".

By purporting to assert its police power to prohibit septic system usage by a total, outright ban, without first evaluating and determining whether the statutory criteria for water safety can be attained by appropriate design, location, sizing, spacing, construction, maintenance of individual disposal systems, the Los Angeles Regional Water Quality Control Board disregarded its obligations and responsibilities constrained by constitutional due process limits on its police powers and statutorily mandated by Water C. § 13282, to allow the use of septic systems where the statutory standards set forth in Water C. § 13282 are met.

The Los Angeles Regional Water Quality Control has exceeded its authority and has omitted to act when it should have or has acted in a manner contrary to law by resolving to ban and prohibit on-site wastewater disposal systems, i.e. septic systems, in the Malibu Civic Center rather than complying with the mandates of Water C. § 13282.

3. THE RESOLUTION'S PROPOSED TOTAL BAN AND PROHIBITION OF THE USE OF ON-SITE WASTE MANAGEMENT SYSTEMS IS NOT SUPPORTED BY EVIDENCE OR FINDINGS OF FACT THAT ESTABLISH A PROXIMATE CAUSAL CONNECTION, THAT IS, A NEXUS, BETWEEN WATER QUALITY IMPAIRMENT AND A POLLUTING OR CONTAMINATING RESIDENTIAL ON-SITE WASTE SYSTEM. THUS, NO LEGAL BASIS COMPORTING WITH DUE PROCESS OF LAW IS ESTABLISHED FOR ON-SITE SYSTEMS TO BE ENTIRELY BANNED AND PROHIBITED.

No evidence has been introduced into the record that the on-site wastewater disposal system, a septic system, on the Lavine Malibu Road property has polluted or otherwise

contaminated the area. No proof of violation of water quality standards has been offered or introduced into evidence. No proof of violation of water quality goals or objectives has been offered or introduced into evidence. No proof of violation or lack of compliance with TMDLs was introduced into the record. No proof of nuisance has been offered or introduced into the record. There is no factual basis, and, thus, no causal connection or nexus, between unsubstantiated allegations of existence of pollution or contamination of ground or waters around it, particularly as to the Lavine Malibu Road property, and alleged impairment of water quality or water quality goals. There were no findings made, either, of any such violations or lack of compliance.

The proposed septic system ban and prohibition therefore lacks a factual or legal basis, and lacks findings of same, to ban and prohibit the use on-site waste management commonly called septic system in the Malibu Civic Center area. See Southern California Edison v. State Board, 116 Cal.App.3d 751, 172 CR 306 (1981, 4th Dist.).

4. THE PROPOSED OUTRIGHT, UNCONDITIONAL, COMPLETE SEPTIC SYSTEM BAN TO BE PUT INTO EFFECT FOR THE MALIBU CIVIC CENTER, WHILE AREAS IN RIVERSIDE COUNTY ARE ALLOWED TO CONTINUE THE USE OF SEPTIC SYSTEMS IF ALTERNATIVE PUBLIC SEWER SYSTEMS DO NOT EXIST, IS INVIDIOUSLY DISCRIMINATORY AND UNEVEN-HANDED. MALIBU PROPERTY OWNERS ARE THUS DENIED THE EQUAL APPLICATION AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION BY THIS UNEQUAL TREATMENT.

Real property interests in the Malibu Civic Center are entitled to be treated and regulated by the same standards, rules and regulations and in the same fair and equitable manner as those in the Palm Springs area in the Mission Creek Aquifer and Desert Hot Springs Aquifer, where septic systems are to be outlawed only on the condition that a public sewer system is in place at the time of the ban going into effect.

Although an outright, unconditional, complete prohibition on the use of septic systems is proposed for the Malibu Civic Center where there is no alternative waste management system, the state Legislature has permitted the continued operation of septic systems in Riverside County if no available alternative exists there. See Water C. § 13281(b)(1), providing:

(b)(1) To the extent that resources are available for that purpose, the regional board shall prohibit the discharge of waste from existing or new individual disposal systems on parcels of less than one-half acre that overlie the Mission Creek Aquifer or the Desert Hot Springs Aquifer in Riverside County, if a sewer system is available.

Like areas of Riverside County exempted by Water C. § 13281(b)(1), the Malibu Civic Center does not have the alternative of a public sewer system into which this property owner's property can be connected. None is proposed or planned. It is respectfully submitted that property interests in the Malibu Civic Center, including this opposing property owner's Lavine Malibu Road property, are entitled to the same even-handed treatment and regulatory standard of continued use of septic systems as those similarly situated in the Mission Creek Aquifer or the

Desert Hot Springs Aquifer in Riverside County that lack a public sewer system.

Outright prohibition of on-site wastewater disposal systems in the entire Malibu Civic Center area is disproportionately harsh, and this disproportionate treatment of similarly situated Malibu property owners violates the Malibu Civic Center property owners' rights to the Equal Application and Equal Protection of the Laws, guaranteed by the 5th and 14th Amendments, U.S. Constitution, and Article I, Section 1, California Constitution.

5. THE STATE WATER RESOURCES QUALITY CONTROL BOARD LACKS DIRECT CONDEMNATION OR EMINENT DOMAIN AUTHORITY.

The State Water Resources Quality Control Board's legislatively authorized administrative authority is limited to permitting and regulating authority over the use of on-site waste systems, known as septic systems. The California State Water Resources Quality Control Board lacks statutory or delegated authority to completely outright ban septic systems in a manner that denies all reasonable viable, beneficial economic use of the property, because it does not have direct eminent domain or direct condemnation authority. Thus, California State Water Resources Quality Control Board would exceed its jurisdiction and act without jurisdiction by banning the use of septic systems in the Malibu Civic Center.

6. THE STATE LEGISLATURE HAS EXPRESSLY LIMITED THE ENFORCEMENT AUTHORITY OF THE STATE WATER RESOURCES CONTROL BOARD AND ITS REGIONAL BOARDS OVER MINOR VIOLATIONS, RANGING FROM ORDERING REPAIRS TO CIVIL PENALTIES. WATER C. § 13399.2.

Banning septic system use and operation is outside the scope of their law enforcement authority to regulate minor violations granted the state and regional boards. Water C. § 13399.2 provides in pertinent part:

§ 13399.2. Detection of violation; issuance of notice to comply; time for compliance; appeal; failure to comply; contents of notice; civil penalty

(a) An authorized representative of the state board or regional board, who, in the course of conducting an **inspection**, detects a **minor violation** shall issue a **notice** to comply before leaving the site at which the **minor violation** is alleged to have occurred if the authorized representative finds that a **notice** to comply is warranted.

(b) A person who receives a notice to comply pursuant to subdivision (a) shall have the period specified in the notice to comply from the date of receipt of the notice to comply in which to achieve compliance with the requirement cited on the notice to comply. Within five working days of achieving compliance, the person who received the notice to comply shall sign the notice to comply, and return it to the representative of the state board or regional board, stating that the person has complied with the notice to comply. A false statement that compliance has been

achieved is a violation of this division pursuant to subdivision (a) of Section 13268, Section 13385, or subdivision (e) of Section 13387.

(c) A single **notice** to comply shall be issued for all **minor violations** cited during the same **inspection** and the **notice** to comply shall separately list each cited **minor violation** and the manner in which each **minor violation** may be brought into compliance.

d) A **notice** to comply shall not be issued for any **minor violation** that is corrected immediately in the presence of the **inspector**. Immediate compliance in that manner may be noted in the **inspection** report, but the person shall not be subject to any further action by the representative of the state board or regional board.

(e) Except as otherwise provided in subdivision (g), a notice to comply shall be the only means by which the representative of the state board or regional board shall cite a minor violation. The representative of the state board or regional board shall not take any other enforcement action specified in this division against a person who has received a notice to comply if the person is in compliance with this section.

This undersigned property owner objects that a septic system ban prohibiting all use of on-site waste management directed at her property and the entire Malibu Civic Center far exceeds the statutory authority and police powers and jurisdiction of the State Water Resources Control Board or regional boards to obtain compliance with minor violations by the giving of a notice to comply pursuant to Water C. § 13399.2. Said boards exceed their jurisdiction to act and act without jurisdiction by banning septic systems where their enforcement authority is limited by statute as set forth hereinabove.

This proposed total, complete ban prohibiting the use and operation of a duly permitted septic system, without notice of deficiencies, without opportunity to remediate, and in the absence of alternative waste management systems, has the practical effect of a denying of all private economically viable use of the real property as of 2019, and has drastically diminished its marketability by destroying its fee simple title and reducing it to a term of years. This is an impermissible regulatory "Taking" under the Due Process Clause of the Fifth and Fourteenth Amendments, U.S. Constitution. Lucas v. South Carolina Coastal Council, 505 US 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992); Hawthorne Sav. & Loan v. City of Signal Hill, 19 Cal.App.4th 148 (1992).

7. THE STATE WATER RESOURCES BOARD AND ITS LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD, CONTRARY TO THEIR STATUTORY OBLIGATIONS UNDER WATER C. § 13399.2, HAVE FAILED TO GIVE THIS PROPERTY OWNER NOTICE OF ANY DEFICIENCIES OR A FAIR AND REASONABLE OPPORTUNITY FOR HER TO REMEDIATE ANY PERCEIVED DEFICIENCIES. A PROPOSED TOTAL BAN PROHIBITING ENTIRELY THE USE OF HER SEPTIC SYSTEM WITHOUT FAIR OR ANY NOTICE TO THIS PROPERTY OWNER AND A REASONABLE OPPORTUNITY FOR HER TO COMPLY WITH ANY DEFICIENCIES IS CONFISCATORY,

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STATE WATER RESOURCES QUALITY CONTROL BOARD RESOL. R4-2009-007

ARBITRARY AND CAPRICIOUS, AND IS A COMPENSABLE "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION. THESE PER SE PREJUDICIAL DENIALS OF HER STATUTORY AND FEDERAL DUE PROCESS RIGHTS DEPRIVE THIS STATE BOARD OF THE AUTHORITY TO TAKE ACTION(S) PROVIDED FOR BY THE RESOLUTION R4-2009-007.

This property owner has not been given notice of any deficiencies regarding septic system operation and use at her Lavine Malibu Road property. She has not been given a fair and reasonable opportunity to remediate any perceived deficiencies. Failure to give notice and opportunity to repair and remediate perceived or alleged pollution before depriving this property owner of all reasonable viable economic benefit to her substantial vested property rights violates this property owner's Due Process rights to fair notice and a reasonable opportunity to be heard, is confiscatory, arbitrary and capricious, and is in violation of the "takings" and "due process" clauses of the Fifth and Fourteenth Amendments, U.S. Constitutions. Hawthorne Sa. & Loan v. City of Signal Hill, 19 Cal.App.4th 148, 23 Cal.Rptr.2d 272 (1993, 2nd Dist.).

Not only do the state board and regional board lack authority to outright ban and prohibit the use and operation of all septic systems in an area as articulated herein and thus exceed their jurisdiction to act and act without jurisdiction, but said boards have failed to comply with Water C. § 13399.2, requiring that they give notice of any deficiencies regarding septic system operation and use at the Lavine Malibu Road property. Owner Joan Lavine has not been given a fair and reasonable opportunity to remediate any perceived deficiencies. Failure to give notice and opportunity to repair and remediate perceived or alleged pollution before depriving this property owner of all reasonable viable economic benefit to her substantial vested property rights violates this property owner's Due Process rights to fair notice and a reasonable opportunity to be heard, is confiscatory, arbitrary and capricious, and constitutes regulatory "taking" in violation of the "Takings" and "Due Process" clauses of the Fifth and Fourteenth Amendments, U.S. Constitutions. Hawthorne Sav. & Loan v. City of Signal Hill, 19 Cal.App.4th 148, 23 Cal.Rptr.2d 272 (1993, 2nd Dist.). Lucas v. South Carolina Coastal Council, 505 US 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992).

8. THE WATER QUALITY CONTROL BOARD RESOLUTION NO. R4-2009-007, PREJUDICIALLY VIOLATES WATER C. § 13291.7 BY INTERFERING WITH THE JURISDICTION OF MUNICIPALITIES OVER LAND USE REGULATION.

The California State Water Resources Board through its Los Angeles Regional Water Quality Control Board delegated any jurisdiction it had regarding the regulation or permitting of septic system use and operation to municipal governments, first by resolution and then by "memorandums of understanding". This goes back to years 1952 and 1953: State Water Resources Regulations Nos. 52-4 and 53-6; and Regulation No. R04-008 enacted in 2004. The current "Basin Plan" for the Los Angeles Regional Water Quality Control Board was enacted in 1994. See Basin Plan pages 4-17 and 4-46 to 4-47 referring to septic systems.

The California Constitution and the California Legislature have also established jurisdiction in municipal government to regulate land use. Calif. Constitution, Art. 11, Sec. 7.

The California State Water Resources Board and its Los Angeles Regional Water Quality Control Board are prohibited by California legislation, Calif. Water C. 13291.7, from interfering with land use regulation and jurisdiction of municipalities. By purporting to assert jurisdiction and authority by outright banning the use of septic systems as on-site waste disposal systems, it does just that: it interferes with the jurisdiction of municipalities over land use regulation by usurping the authority of municipal entities to regulate land use regarding waste management.

9. IN THE ABSENCE OF UNIFORM STATEWIDE STANDARDS AND REGULATIONS REQUIRED BY WATER C. § 13291(a) TO HAVE BEEN ENACTED BY THIS STATE BOARD, ANY EXISTING NON SELF-EXECUTING STATUTORY OR REGULATORY AUTHORITY WHICH LEGISLATIVELY OR AS LAW ENFORCEMENT, REGULATES BY PROHIBITING THE USE OF SEPTIC SYSTEMS, IS INOPERATIVE.

In the early part of this decade, in year 2000, proposed legislation by the California Legislature in AB 885/SB 290, was passed and put into effect, codified as California Water Code, §§ 13290 and 13291. Water C. § 13291 requires the California State Water Resources Board to have enacted statewide uniform standards and regulations for permitting and regulating "on-site waste management systems". Those enabling regulations and standards have not been enacted to date. Legislation and administrative provisions, obviously not self-executing, for the permitting and regulation of septic systems under the Water Code are consequently inoperative and unenforceable due to the lack of these enabling uniform standards and regulations.

Where the State Water Resources Control Board and its Regional Boards assert perceived power without lawful grant of authority to do so, they have usurped authority where none resides in them. By their usurpation they act without jurisdiction and in excess of it. Assertion of naked power without constitutional and statutory grant of authority is totalitarian and undemocratic, and violates both procedural and substantive Due Process of Law, guaranteed by the 5th and 14th Amendments, U.S. Constitution.

10. AMENDMENT OF THE BAN RESOLUTION R4-2009-007, AFTER THE REGIONAL BOARD'S COMMENT AND FILING DEADLINE, WHILE IT WAS PENDING BEFORE THE LOS ANGELES REGIONAL BOARD, PREJUDICIALLY DENIED THOSE OPPOSING IT A REASONABLE OPPORTUNITY TO BE HEARD IN VIOLATION OF DUE PROCESS OF LAW. On October 27, 2009, after the time for comment was closed, the pending proposed amendment scheduled for hearing and vote before the Los Angeles Regional Water Quality Control Board, on November 5, 2009, was itself amended. The Regional Board nevertheless refused to permit further comment in opposition or otherwise after the original deadline. This is a fundamental denial of a fair hearing where the resolution to be voted on was materially changed after the deadline for filing comments and mounting written challenges to it. It resulted in a prejudicial denial of fair notice of what to be considered and voted on and a reasonable opportunity to be heard and to interpose an opposition to it in violation of procedural due process of law. Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Due Process of Law Clauses, 5th and 14th Amendments, U.S. Constitution.

The November 9, 2009, Los Angeles Regional Board hearing was managed in such a manner that most property owners were denied a fair opportunity to be heard orally. Several

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hundred persons appeared at the one-day hearing, and many asked to speak. Individual owners were given less than five minutes to speak to protect their homes, and their oral testimony and offering of exhibits during the hearing were rejected and not made a part of the record as "untimely". The regional board should have scheduled several hearings over several days so as to accommodate all those property owners wanting to be heard.

The regional board generally rejected exhibits offered by commenting witnesses to be introduced into the record at the November 9, 2009, hearing in violation of the rights of those witnesses to be heard and to have access to the board with rebutting evidence.

CONCLUSION: The proposed Resolution No. R4-2009-007 would constitute such complete prohibition on the use of this opposing property owner's Lavine Malibu Road property that the prohibition would deny all economically beneficial or productive use of this property owner's land and therefore would be a regulatory taking in violation of the "takings" and "due process" clauses of the Fifth and Fourteenth Amendments, U.S. Constitution.

The proposed septic system ban and prohibition contained in the pending resolution to amend Los Angeles Regional Water Quality Control Board regulations, Resolution No. R4-2009-007, is inherently and as construed and applied to this property owner and her property located at 23900 Malibu Road, Malibu, California 90265, confiscatory, arbitrary and capricious, and constitutes an illegal "taking" of the undersigned owner's real property in violation of the Takings and Due Process of Law Clauses of the Fifth and Fourteenth Amendments, U.S. Constitution, the California Constitution, Article I, Section 19, and the State of California eminent domain statutes beginning at CCP § 1230.020, et seq. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

The November 9, 2009, Los Angeles Regional Water Quality Control Board vote to approve the septic system ban and prohibition is void for all of the above reasons.

WHEREFORE, Joan C. Lavine, the undersigned property owner of the Lavine 23900 Malibu Road property, within the proposed septic system ban zone, prays that the Members of this State Water Resources Quality Control Board, reject the total ban and prohibition of on-site waste management by opposing and voting "NO" on the proposed resolution, R4-2009-007.

Dated: July 9, 2010

Respectfully submitted,

JOAN C. LAVINE
Owner, 23900 Malibu Road, Malibu, California
Attorney at Law, California State Bar No. 048169