



August 5, 2008

Robert Gold
A2 Winter Mesa LLC
C/O Big Rock Partners, LLC
315 South Beverly Drive
Suite 315
Beverly Hills, California 90212

SUBJECT: Jurisdictional Determination for the Approximately 25-Acre Property Located at 24600 Pacific Coast Highway, in the City of Malibu, Los Angeles County a/k/a The Crummer Trust Property (the "Property")

Dear Mr. Gold:

This letter report summarizes our professional conclusions regarding the presence of potential streams subject to the jurisdiction of the U.S. Army Corps of Engineers (Corps), California Department of Fish and Game (CDFG), and California Coastal Commission (CCC) jurisdiction in accordance with the City of Malibu Local Coastal Program for the above-referenced Property.¹

The Property is located in Los Angeles County [Exhibit 1], comprises approximately 25 acres and contains no blue-line drainages (as depicted on the U.S. Geological Survey (USGS) topographic map Malibu Beach, California [dated 1995 and photorevised in 1995]) [Exhibit 2]. The site also contains no streams as depicted on ESHA and Marine Resources Map 3, City of Malibu Local Coastal Program (LCP).² On June 30, 2008, regulatory specialists of Glenn Lukos Associates, Inc. (GLA) examined the Property to determine the whether the Property contains areas subject to (1) Corps jurisdiction pursuant to Section 404 of the Clean Water Act, (2) CDFG jurisdiction pursuant to Division 2, Chapter 6, Section 1600 of the Fish and Game Code, and the California Coastal Commission in accordance with mapped areas and areas otherwise meeting the definition of a stream under the Malibu LCP. Enclosed is a 150-scale aerial photo [Exhibit 3] that depicts the portions of the Property evaluated for the presence of streams that would be

¹ This report presents our best effort at estimating the subject jurisdictional boundaries using the most up-to-date regulations and written policy and guidance from the regulatory agencies. Only the regulatory agencies can make a final determination of jurisdictional boundaries. If a final jurisdictional determination is required, GLA can assist in getting written confirmation of jurisdictional boundaries from the agencies.

² <http://www.ci.malibu.ca.us/download/index.cfm?fuseaction=download&cid=1603>

Robert Gold
A2 Winter Mesa
August 5, 2008
Page 2

subject to Corps, CDFG, or CCC jurisdiction. Photographs to document the topography, vegetative communities, and area evaluated are provided as Exhibit 4.

There are no streams that would be subject to Corps jurisdiction associated with the Property.

There are no streams that would be subject to CDFG jurisdiction associated with the Property.

There are no streams that would be subject to CCC jurisdiction associated with the Property.

I. METHODOLOGY

Prior to beginning the field delineation a 150-scale color aerial photograph, a 150-scale topographic base map of the Property, and the previously cited USGS topographic map and the ESHA and Marine Resources Map 3, City of Malibu LCP were examined to determine the locations of potential areas of Corps/CDFG/CCC jurisdictional streambed. Areas of the Property that exhibited the potential for presence of streams and/or wetland vegetation, soils and hydrology were evaluated in accordance with guidance from the Corps, CDFG and Malibu LCP regarding the definition of streams promulgated by each agency. The Property was also evaluated for the presence of wetlands using the methodology set forth in the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual³ (Wetland Manual) and the 2006 Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Supplement (Arid West Supplement).⁴ On the basis of the outlined methodology two features, a swale/gully in the center of the property and another swale/gully on the western edge of the Property were identified for further evaluation.

The Soil Conservation Service (SCS)⁵ has mapped the following soil types as occurring in the general vicinity of the Property:

³ Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, U.S. Army Engineer Waterways Experimental Station, Vicksburg, Mississippi.

⁴ U.S. Army Corps of Engineers. 2006. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Supplement. Ed. J.S. Wakeley, R.W. Lichevar, and C.V. Noble. ERDC/EL TR-06-16. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

⁵ SCS is now known as the National Resource Conservation Service or NRCS.

Danville-Urban land complex, 0 to 9 percent slopes

This soil series is comprised of 80 percent of Danville, coastal, and similar soils, 15 percent urban land, and 5 percent minor components of Xerorthents, escarpments and Danville, very gravelly surface. Where this series occurs, it is generally located in urban areas within the southern California mountains.

Danville, Coastal

This well-drained soil formed in alluvium derived from metavolcanic and/or sedimentary rock. Slopes range from 2 to 9 percent on dominantly facing east to southwest alluvial fans and terraces. A typical profile consists of 0 to 4 inches clay loam and 4 to 60 inches clay.

Calcic Argixerolls, 30 to 75 percent slopes

This well drained soil is derived from parent material of colluvium and/or residuum weathered from calcareous sandstone. The soil is found on hills and steep terraces with slopes ranging from 30 to 75 percent. A typical profile consists of: 0 to 1 inches of Silt loam, 1 to 15 inches of Silty clay loam, 15 to 37 inches of Silt loam and 37 to 47 inches of weathered bedrock.

None of these soil units are identified as hydric in the SCS's publication, Hydric Soils of the United States⁶.

II. JURISDICTION

A. Army Corps of Engineers

Pursuant to Section 404 of the Clean Water Act, the Corps regulates the discharge of dredged and/or fill material into waters of the United States. The term "waters of the United States" is defined in Corps regulations at 33 CFR Part 328.3(a) as:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

⁶ United States Department of Agriculture, Soil Conservation Service. 1991. Hydric Soils of the United States, 3rd Edition, Miscellaneous Publication Number 1491. (In cooperation with the National Technical Committee for Hydric Soils.)

- (2) *All interstate waters including interstate wetlands;*
- (3) *All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect foreign commerce including any such waters:*
 - (i) *Which are or could be used by interstate or foreign travelers for recreational or other purposes; or*
 - (ii) *From which fish or shell fish are or could be taken and sold in interstate or foreign commerce; or*
 - (iii) *Which are used or could be used for industrial purpose by industries in interstate commerce...*
- (4) *All impoundments of waters otherwise defined as waters of the United States under the definition;*
- (5) *Tributaries of waters identified in paragraphs (a) (1)-(4) of this section;*
- (6) *The territorial seas;*
- (7) *Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section.*

In the absence of wetlands, the limits of Corps jurisdiction in non-tidal waters, such as intermittent streams, extend to the OHWM which is defined at 33 CFR 328.3(e) as:

...that line on the shore established by the fluctuation of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

1. Rapanos v. United States and Carabell v. United States

On June 5, 2007, the U.S. Environmental Protection Agency (EPA) and Corps issued joint guidance that addresses the scope of jurisdiction pursuant to the Clean Water Act in light of the Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* ("Rapanos"). The chart below was provided in the joint EPA/Corps guidance.

For project sites that include waters other than Traditional Navigable Waters (TNWs) and/or their adjacent wetlands or Relatively Permanent Waters (RPMs) tributary to TNWs and/or their adjacent wetlands as set forth in the chart below, the Corps must apply the significant nexus

standard to determine jurisdiction. However the significant nexus standard does not apply to the features such as ditches and swales as described below.

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

B. California Department of Fish and Game

Pursuant to Division 2, Chapter 6, Sections 1600-1603 of the California Fish and Game Code, the CDFG regulates all diversions, obstructions, or changes to the natural flow or bed, channel, or bank of any river, stream, or lake, which supports fish or wildlife.

The following definitions were considered by GLA for the potential presence of a “stream” subject to CDFG jurisdiction:

The term stream is defined in Title 14, California Code of Regulations (CCR), Section 1.72 as follows:

A stream is a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.

This definition includes two components within the first sentence. First, as stated in the opening clause of the sentence, is the concept that a stream is a body of water that flows at least periodically over a bed that exhibits banks. The second component, as set forth in the second clause of the same sentence, states that the water body “supports fish or other aquatic life”. This includes riparian vegetation. The second clause is connected to the first by the conjunctive “and” which means that **both** must be present for a water body to meet the definition of a stream.

The definition of “stream” in the Fish and Game Code includes two terms intended to characterize flow regimes: “periodically” and “intermittently”. The term intermittently has a clear meaning in the context of stream systems, and refers to streams that exhibit flows for extended periods because the groundwater level is above the invert of the channel for some period. In contrast, the term “periodically” is not used conventionally for purposes of describing stream flow.

Page II-2, Paragraph 1 of CDFG’s Field Guide⁷ states that “(t)he term stream can include intermittent and ephemeral streams”. The term “ephemeral” is regularly used to describe flow regimes that flow only in response to storm events. Groundwater, by definition does

⁷ California Department of Fish and Game, Environmental Services Division (January 1994). *A Field Guide to Lake and Streambed Alteration Agreements Sections 1600–1607 California Fish and Game Code*. The Field Guide is intended to provide guidance and is not a rule or law.

not contribute to flows in ephemeral streams. None of the terms that describe flow regimes carry any indication or assumption regarding presence or absence of riparian vegetation/habitat. Ephemeral drainages can and sometimes do support limited areas of riparian vegetation such as mulefat or other facultative “riparian” species that exhibit moderate to high levels of drought tolerance.

Because the Fish and Game Code definition requires (1) periodic or intermittent flows **and** (2) the presence of aquatic organisms (including riparian habitat), the presence of aquatic organisms is the key criterion for determining whether a feature meets the Fish and Game Code definition of a stream. This will be important in evaluating the two onsite features for the presence of CDFG jurisdiction.

C. Malibu LCP/California Coastal Commission

Determination of whether a particular landscape feature under the Malibu LCP requires careful evaluation of different components of the LCP: 1) the definition of “stream” provided in the definition section of the LCP, 2) LCP ESHA maps that designate specific features as “streams,” and 3) the discussion of “streams” and associated land use policies on pages 81-83 of the February 2003 Malibu LCP: Revised Findings (“Revised Findings”).

The Malibu LCP definition of a stream is as follows:

STREAM - is a topographic feature that at least periodically conveys water through a bed or channel having banks. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.

This definition generally mirrors the definition of stream from the California Fish and Game Code provided above with a few important distinctions. As shown in Table 1 below:

Table 1

CDFG Definition	Malibu LCP Definition
1. A stream is a body of water that flows at least periodically or intermittently through a bed or channel having banks	1. STREAM - is a topographic feature that at least periodically conveys water through a bed or channel having banks
2. and supports fish or other aquatic life	2.
3. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.	3. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.

The first difference is that the Malibu LCP replaces the CDFG term “body of water that flows at least periodically or intermittently” with what appears to be the more expansive phrase “is a topographic feature that at least periodically conveys water.” While the CDFG definition focuses on a true body of water, the LCP definition, in the absence of guidance from the ESHA Maps and the Revised Findings could be misinterpreted to include gullies or features that convey any types of flow, no matter how minimal or infrequent. The LCP definition has to be interpreted in the total context of the LCP Revised Findings in order to properly apply the regulations of the LCP.

The second difference is that the Malibu LCP stream definition does not include CDFG’s requirement that streams support fish or other [faunal] aquatic life. The CDFG definition that recognizes a stream as a “body of water” is consistent with the concept that streams can support fish or other faunal life (for example, even intermittent streams that flow for a few months, can support various species of vertebrates that exhibit an aquatic life phase such as toads and frogs as well as a suite of invertebrates such as insect larvae (e.g., dragon flies, damsel flies, midges, etc.).

The Revised Findings include language that further clarifies the intent of the LCP in defining and ultimately protecting stream. First, a major emphasis is placed on protection of stream-dependent riparian habitat and while not every portion of a stream will have riparian habitat, the emphasis clearly indicates that riparian habitat is an important component of streams. Also, in discussing potential invasion by non-native species, it is recognized that streams and associated riparian habitats are characterized by “the presence of surface or subsurface water throughout much of the year”, which is consistent with the CDFG definition that includes the ability to support fish and other aquatic animals and plants (i.e., riparian habitat).

III. RESULTS

A. Corps Jurisdiction

1. Central Swale/Gully

The central portion of the Property includes a swale-like feature that steepens into a gully as it gets closer to the coast. The bottom of the swale/gully exhibits very limited signs of flow at intermittent locations along the bottom of the gully, however much/most of the swale/gully bottom, which extends for only about 295 feet, does not exhibit signs of flow and is heavily vegetated with upland vegetation. This feature does not exhibit indicators for the presence of an OHWM as defined at 33 CFR 328.3(a). Specifically, the swale/gully does not exhibit “characteristics such as clear, natural line impressed on the bank, shelving, changes in the

character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

The vegetation both on the slopes and in the gully bottom is dominated by upland shrubs typically associated with coastal sage scrub or grasslands with an understory of mostly non-native grasses and forbs. The habitat is best characterized as coastal sage scrub, or in some areas, as coastal sage scrub/grassland ecotone. The vegetation within and adjacent to the feature includes: California encelia (*Encelia californica*, UPL), Laurel Sumac (*Malosma laurina* UPL), Giant Wildrye (*Leymus condensates*, UPL), California Morning Glory (*Calystegia macrostegia*, UPL), Fennel (*Foeniculum vulgare*, UPL), and Coyote Brush (*Baccharis pilularis*, UPL). There were no wetland indicator species within the gully nor are there any common facultative/riparian species such as Mulefat (*Baccharis salicifolia*, FACW) associated with the swale/gully. Site photographs of this feature are enclosed as Exhibit 4.

The feature is most accurately characterized as a swale or erosional feature; e.g. gullies or small wash characterized by low volume and flows that are infrequent or of short duration. As noted in the Rapanos guidance above, such features are not considered "Waters of the U.S." by the Corps.

Westerly Swale/Gully

The western portion of the Property includes a similar swale-like feature that rapidly steepens into a gully as it gets closer to the coast. The bottom of this swale/gully exhibits limited signs of flow at various points. Because of runoff from Bluffs Park, this swale/gully bottom, which extends for only about 240 feet, does exhibit signs of ephemeral flow. This feature does exhibit at least one indicator for the presence of an OHWM as defined at 33 CFR 328.3(a). Specifically, while the swale/gully does not exhibit “characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, or destruction of terrestrial vegetation, it does exhibit some vegetative litter and debris, due to local runoff. However, because of the size of the watershed, the potential flows are very ephemeral, flowing only in response to moderate to heavy rainfall.

The vegetation both on the slopes and in the gully bottom is dominated by upland shrubs typically associated with coastal sage scrub or grasslands with an understory of mostly non-native grasses and forbs. The habitat is best characterized as chaparral, coastal sage scrub, and in some areas, invasive exotic species such as castor bean (*Ricinus communis*, FACU), Laurel Sumac (*Malosma laurina* UPL), Giant Wildrye (*Leymus condensates*, UPL), California Morning Glory (*Calystegia macrostegia*, UPL), Fennel (*Foeniculum vulgare*, UPL), Coyote Brush (*Baccharis pilularis*, UPL) and ashy-leaved buckwheat (*Eriogonum cinereum*, UPL). There was one potential riparian species, which, under the proper circumstances, can indicate the presence of a

wetland or stream flow. It is located on the slope in the upper portion of the swale, before it steepens into a gully. At this location, an arroyo willow (*Salix lasiolepis*, FACW) was observed. However this single clump of willow does not account for a predominance of the vegetation, which is clearly upland in character.⁸ Site photographs of this feature are enclosed as Exhibit 4.

The location of the willow on the slope - i.e. not in the gully bottom – is best explained by the phreatophytic⁹ character of willows, which in such settings are dependent on a perched water condition as opposed to a stream flows, which in this setting are so ephemeral as to not be capable of supporting willows or other riparian species that need between two and six feet of water per year.¹ The distance of the willow to the bottom of the gully, combined with the complete absence of other vegetation, indicative of stream flow, prompted discussion with the project geotechnical consultant, who confirmed the presence of porous terrace formations that trap lenses of subsurface water or soil moisture at the terrace formation/bedrock interface.¹⁰ Because the arroyo willow, is a phreatophyte, capable of extending its roots to obtain subsurface water, combined with very limited flow in the gully, it is presumed that the willow is supported by these perched water conditions as opposed to any nominal flows in the gully.

The feature is most accurately characterized as a swale or erosional feature; e.g. gullies or small wash characterized by low volume and flows that are infrequent or of short duration. As noted in the Rapanos guidance above, such features are not considered "Waters of the U.S." by the Corps.

B. CDFG Jurisdiction

1. Central Swale/Gully

As noted above, for Corps jurisdiction, the Central swale/gully exhibits only limited signs of ephemeral flow. More importantly there is no evidence that surface water is present for sufficient duration to provide even minimal support for fish, other stream-dependent vertebrates such as mammals or amphibians, or invertebrates including aquatic insects (e.g., water striders, water boatmen, back swimmers, toe biters, or varieties of beetles) or insects that exhibit an aquatic larval form (e.g., dragonflies, mayflies, damselflies, or mosquitoes). In addition, the swale/gully supports no wetland or riparian vegetation of any kind. Rather the swale/gully supports only

⁸ It is likely that the willow, which is in the portion of the swale that does not exhibit indicators of flow that it is tapped into subsurface water as willows are documented phreatophytes.

⁹ Phreatophytes are species that extend roots to the groundwater table. Willows such as the arroyo willow on this site is widely recognized as a phreatophyte. See for example: Moore, Julie, James King, A.S. Bawazir, and T.W. Samis, 2000 (updated 2004). *A Bibliography of Evapotranspiration with Special Emphasis on Riparian Vegetation*: New Mexico Water Resource Institute. <http://wrii.nmsu.edu/publish/miscrpt/m28/m28.pdf>

¹⁰ Pers. Com. Andi Culbertson and Eldon Gath, August 4, 2008

upland vegetation including: California encelia (*Encelia californica*, UPL), Laurel Sumac (*Malosma laurina* UPL), Giant Wildrye (*Leymus condensates*, UPL), California Morning Glory (*Calystegia macrostegia*, UPL), Fennel (*Foeniculum vulgare*, UPL), and Coyote Brush (*Baccharis pilularis*, UPL). Site photographs of this feature are enclosed as Exhibit 4. Given these characteristics, the swale/gully does not meet CDFG's definition of a stream due to the absence of or potential to support any aquatic organisms or riparian habitat. This conclusion receives additional support from stream mapping performed by CDFG in northern California for purposes of managing fisheries habitat. For this application, CDFG "considers only solid blue line streams when determining stream order...on the USGS 1:24,000 topographic map[s]." ¹¹ As such, small swales, gullies and ravines such as on the Property are not considered "streams" by CDFG.

2. Westerly Swale/Gully

The westerly swale/gully receives limited runoff from Bluffs Park located immediately to the north and northwest, as storm water is conveyed along the adjacent road and picked up in a storm drain and discharged to the upper portions of the gully. Flows are ephemeral, only occurring in direct response to rainfall. The ephemeral hydrologic regime of the western swale/gully, as for the central swale/gully already discussed, is so brief that it is not capable of supporting aquatic organisms of any kind. Furthermore, the swale supports a predominance of upland vegetation with only one small individual clump of willow in the upper portions of the swale/gully, above where at least some sign of flow becomes evident (i.e., presence of litter and debris).

The habitat is best characterized as chaparral, coastal sage scrub, and in some areas, invasive exotic species such as castor bean (*Ricinus communis*, FACU), Laurel Sumac (*Malosma laurina* UPL), Giant Wildrye (*Leymus condensates*, UPL), California Morning Glory (*Calystegia macrostegia*, UPL), Fennel (*Foeniculum vulgare*, UPL), Coyote Brush (*Baccharis pilularis*, UPL) and ashy-leaved buckwheat (*Eriogonum cinereum*, UPL). As discussed in detail above under Corps jurisdiction, there is one potential riparian indicator species within the upper portion of the swale; however, as noted in the above discussion, the willow in this context is dependent upon perched subsurface water and not stream flow and is not an indicator of stream-like conditions.

Given these characteristics, the westerly swale/gully does not meet CDFG's definition of a stream due to the absence of or potential to support any aquatic organisms or riparian habitat. As noted for the central swale/gully, this conclusion receives additional support from stream mapping performed by CDFG in northern California for purposes of managing fisheries habitat. For this

¹¹ http://www.krisweb.com/stream/stream_order_kris.htm

application, CDFG “considers only solid blue line streams when determining stream order...on the USGS 1:24,000 topographic map[s].”¹² As such, small swales, gullies and ravines such as on the Property are not considered “streams” by CDFG.

C. Malibu LCP/Coastal Commission

1. Central Swale/Gully

As noted above, the Central Swale/Gully does not exhibit an OHWM and in accordance with the Corps’ Rapanos guidance, would not be considered a water of the United States. Similarly, this feature does not meet CDFG’s definition of a stream as it lacks clearly defined bed, banks, and channel and importantly, exhibits no potential for supporting any forms of aquatic life, either animals or plants.

Also as noted above, when considered in the appropriate context, the LCP definition of a “stream” is easily interpreted, and it is clear that while the gully is a “topographic feature” it is not a feature that exhibits consistent characteristics of a stream, including bed, banks, or channel over its short (< 300-foot length). In the context of the LPC, it is also important to note that this topographic feature was not mapped on the City’s ESHA Map 3, which while including mostly significant stream systems (e.g., Malibu Creek) also includes other, much larger ephemeral drainages that support riparian vegetation. This is significant since the Property was the subject of Commission attention in connection with an earlier project for a corporate retreat in the mid 1980s. Based on the lack of inclusion within the LCP as a mapped “stream” and the lack of a bed, bank and channel, combined with the inability of this feature to support aquatic animal or plant life, the feature would not be considered a stream. This conclusion is supported by the Revised findings, which stress the function of riparian habitat associated with streams as well as the ability to support aquatic wildlife based on the presence of water that is present for extended periods. The following explanation is offered in further support of this interpretation.

The Revised Findings with respect to Stream Protection conclude that “that the Malibu LIP conforms with and is adequate to carry out the stream protection policies (Policies 3.32-3.35 of the Land Use Plan.” In reaching this conclusion, the Commission discussed Chapter 4.5 of the LIP, which “requires that new development provide a buffer of no less than 100 feet from *the outer edge of riparian vegetation, or from the outer edge of the stream bank where riparian vegetation is not present.*” (Emphasis added) By requiring that a buffer zone for new development adjacent to a stream be measured from either “the outer edge of riparian vegetation” or “the outer edge of the stream bank where riparian vegetation is not present” the LCP requires a

¹² http://www.krisweb.com/stream/stream_order_kris.htm

feature to either have riparian vegetation or a stream bank in order to be defined as a stream. Neither the central nor western gully has either riparian vegetation or stream banks. Therefore neither can be defined as streams pursuant to the LCP. In addition, the Property is specifically mentioned in both the City of Malibu LUP and LIP. Chapter 2.78 of the LUP discusses contemplated uses of the Property and the zoning maps and the LIP designate the Property has the only mapped Planned Development Zone in Malibu. It is particularly significant that the Property was extensively scrutinized during the draft and certification of the LCP without the designation of either the central or western gullies as streams or ESHA. This intense scrutiny further supports the conclusion that neither of these features meets the definition of a stream contained in the LCP. Finally, as noted under the discussion of CDFG jurisdiction above, this feature falls well below the minimum threshold used by CDFG for defining streams.

2. Westerly Swale/Gully

As discussed above, under CDFG jurisdiction, the Westerly Swale/Gully receives offsite runoff from the adjacent Bluff Park, such that approximately 135 feet from the top of the swale, incision is visible in the gully bottom, and it is evident that water flows during storm events. Because of the steepness of the gully and the characteristics of the watershed, flow only occurs during actual storm events and likely stop within minutes of the cessation of rainfall. From where incision is evident in the gully bottom, indicators for the presence of bed, bank and channel are at least minimally present; however, it is not clear that this is sufficient to make a determination that a stream is present under the LCP's definition. As noted for the Central Swale/Gully, the Westerly Swale/Gully was not mapped on the City's ESHA Map 3, which while including mostly significant stream systems (e.g., Malibu Creek) also includes other ephemeral drainages. Consistent with the discussion in the subsection immediately above addressing previous site reviews, it is important to note that the area immediately to the west of the Property is Mapped as ESHA on the City's ESHA Map 3 and the decision not to include the western gully on the ESHA map indicates that the issue of whether or not the western swale contains a stream or is ESHA has been addressed. Based on the lack of inclusion within the LCP as a mapped "stream" and the inability of this feature to support aquatic animal or plant life, the feature should not be considered a stream. This conclusion is also supported by the Revised Findings, which stress the function of riparian habitat associated with streams as well as the ability to support aquatic wildlife based on the presence of water that is present for extended periods. Finally, as noted under the discussion of CDFG jurisdiction as well as the Central Swale/Gully, this feature falls well below the minimum threshold used by CDFG for defining streams.

Robert Gold
A2 Winter Mesa
August 5, 2008
Page 14

IV. DISCUSSION

Both the Corps and CDFG provide reasonably clear definitions of what is required for the presence of a stream or watercourse that is subject to regulation under the Clean Water Act and California Fish and Game Code, respectively. In his written opinion on Rapanos, Justice Scalia concluded that under the Clean Water Act, the phrase “waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams” as defined in Webster’s New International Dictionary.¹³

The majority’s use of the term “forming geographic features” is similar to the Malibu LCP phrase “is a topographic feature” in defining what a stream is and is not. In addition, the use of these two phrases appears to be consistent with the “streams” mapped on the LCP ESHA Maps, which are generally limited to streams that in fact are considered streams in ordinary parlance. Furthermore, the language addressing streams in the Revised Findings is very consistent with this concept of a stream, both of which require the ability to support aquatic wildlife or (at a minimum) riparian habitat in order for a “geographic” or “topographic” feature to be defined as a stream.

Given these considerations, it is GLA’s opinion that the Central and Westerly Gullies on the Property are not streams under the LCP and that the proposed project, which proposes full avoidance of these features, exhibit no potential to affect streams as defined by the Corps; CDFG; or in the LCP, including the associated ESHA Maps and discussed in the Revised Findings.

If you have any questions about this letter report, please contact Tony Bomkamp at (949) 837-0404 ext. 41.

Sincerely,

GLENN LUKOS ASSOCIATES, INC.



Tony Bomkamp
Regulatory Specialist

¹³ Rapanos et ux., et al v. United States Nos. 04-1034 and 04-1384. United States Supreme Court, argued February 21, 2006, decided June 19, 2006, p 1.

Robert Gold
A2 Winter Mesa
August 5, 2008
Page 15

S0784-2b_JD_080608.doc