



# ENVIRONMENTAL LAW FOUNDATION

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July 30, 2007

7/30/07 Public Hearing  
Bodega ASBS  
Deadline: 7/31/07 Noon

*Via Electronic Mail (commentletters@waterboards.ca.gov)*

Ms. Song Her  
Clerk to the Board, Executive Office  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100



**Re: Comment Letter - Bodega Marine Laboratory**

Dear Ms. Her:

On behalf of the Environmental Law Foundation, a non-profit, public interest organization dedicated to protecting water quality throughout California, I would like to thank you for the opportunity to submit comments on the proposed exception to the California Ocean Plan being considered for the Bodega Marine Laboratory (“BML”) allowing the Laboratory to discharge waste into the Bodega Area of Special Biological Significance (“ASBS”). It is our hope that this discharge will not lower water quality in the ASBS—a requirement under California’s antidegradation policy.

That policy sets out three tiers of protection that must be applied to protect water quality against degradation.<sup>1</sup> (See State Water Resources Control Board Resolution 68-16 (Oct. 24, 1968); 40 C.F.R. § 131.12.) First, existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. (40 C.F.R. § 131.12(a)(1).) This represents what is called “Tier I” protection. Second, where the quality of the waters exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the state (1) finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) assures water quality adequate to protect existing uses fully; and (3) assures that the highest statutory and regulatory requirements for all new and existing point

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<sup>1</sup> In 1986, the State Board interpreted Resolution 68-16, which embodies the state’s antidegradation policy, to incorporate the requirements set out in 40 C.F.R. § 131.12 for a state antidegradation policy under the Clean Water Act. (See *In re Rimmon C. Fay*, SWRCB WQO 86-17 (Nov. 20, 1986), p. 20 (“The federal antidegradation policy is part of the Environmental Protection Agency’s water quality standards regulations, and has been incorporated into the state’s water quality protection requirements.”); see also *id.* at p. 23, fn. 11 (“For waters subject to the federal antidegradation policy, both the requirements of the federal antidegradation policy and the express requirements of State Board Resolution No. 68-16 should be satisfied.”).)

sources and all cost-effective and reasonable best management practices for nonpoint source control are being achieved. (*Id.* § 131.12(a)(2).) This represents Tier II protection. Last, where high quality waters constitute an outstanding national resource, such as waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance, existing water quality shall be maintained and protected. (*Id.* § 131.12(a)(3).) This represents Tier III protection. In the present case, this policy clearly applies to the State Board's consideration of BML's Ocean Plan exception given that the granting of such exceptions is subject to the state's antidegradation policy. (William Attwater, Chief Counsel to the State Water Resources Control Board, mem. to the Regional Board Executive Officers (Oct. 7, 1987), p. 10 [hereafter "Attwater Memo"] ("The federal antidegradation policy is also applicable to special proceedings concerning proposed waivers or exceptions from otherwise applicable water quality objectives or control measures. Examples include proposed Ocean Plan exceptions."))

There is, however, nothing in the Proposed Mitigated Negative Declaration ("MND") before the Board or the Initial Study that indicates that the State Board has considered, let alone properly implemented, the state's antidegradation policy. For example, the state's antidegradation policy require at least *some* discussion of what background water quality is in the ASBS in order to determine whether water quality will be lowered by the proposed action.<sup>2</sup> (Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987), p. 3 [hereafter "EPA Guidance"] ("The first step in any antidegradation analysis is to determine whether or not the proposed action will lower water quality.")) The State Board, though, has failed in the MND or Initial Study to establish what background water quality is or what the likelihood is that the proposed action will lower water quality, despite clear evidence that the discharge actually does lower water quality. (*See* Division of Water Quality, State Water Resources Control Board, *Status Report: Areas of Special Biological Significance* (Aug. 2006), p. 33 (noting that monitoring presently demonstrates elevated levels of cadmium, mercury, copper, selenium, oxychlordan, gamma chlordan, and phenol as a result of the discharge).)

Such evidence ought to further trigger a follow-on requirement in the state's antidegradation policy that mandates that the State Board determine whether or not the ASBS is subject to either Tier I or Tier III protection. (EPA Guidance, p. 4 ("Prior to proceeding with a detailed analysis of these or similar actions, the affected water body should be assessed to determine whether or not it falls into either Tier I or Tier III.")) Despite this, the MND fails to make any determination about the level of protection that should be afforded the ASBS. In this connection, the Bodega ASBS clearly warrants Tier III protection given that the ASBS clearly is an Outstanding National Resource Water ("ONRW"). After all, the Bodega ASBS was designated an ASBS because of the diversity of habitat and biological assemblages present there. A 1979 reconnaissance report that recommended the continuing designation of the ASBS as an ASBS found that the ASBS "can be classified as pristine and relatively unimpacted by human

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<sup>2</sup> In this regard, present water quality, impacted by the continuing and previously unauthorized discharge into the ASBS, cannot serve as the baseline for analysis. Rather, the State Board should use background water quality absent the discharge as the baseline.

activity” and that the marine biota “are quite diverse,” and that the area is “unique.” (State Water Resources Control Board, *California Marine Waters, Areas of Special Biological Significance, Reconnaissance Survey Report, Bodega Marine Life Refuge, Sonoma County* (June 1979), p. 3.) Such a water constitutes an ONRW—a water of exceptional biological significance. Indeed, the State Board’s own counsel has previously stated that the “most obvious candidates for designation as outstanding National resource waters are Pacific Ocean waters designated as areas of special biological significance.” (Attwater Memo, p. 15.) Proper implementation of the State’s antidegradation policy, therefore, requires that the State Board designate the Bodega ASBS an ONRW and prohibit any discharge that would lower water quality therein, even if it should be insignificant.<sup>3</sup> (See Attwater Memo, pp. 15-16 (“the State and Regional Boards should consider, as part of individual permit decisions, whether the affected waters should be designated as outstanding National resource waters”); 40 C.F.R. § 131.12(a)(3).)

As mentioned above, however, the MND neither designates the ASBS an ONRW nor requires sufficient measures to maintain and protect the ASBS’s water quality. For instance, the requirements under the MND largely consist only of monitoring. The singular requirement that “[n]atural water quality conditions in the receiving water, seaward of the surf zone, must not be altered as a result of the discharge,” is not backed up by any other requirement in the proposed action. After all, the requirement that BML not discharge any constituents at levels in excess of the Ocean Plan’s water quality objectives does nothing to ensure that natural water quality conditions will be protected. The monitoring requirements likewise do nothing to assure that lower water will not result from the discharge and at best are too infrequent to determine whether background conditions are maintained throughout the period of the discharge. Lastly, the requirement for the development of a storm water management plan at some unspecified point in the future, which is not subject to any review or approval by the State Board, let alone any public review or comment, is also not adequate to ensure—at the time the State Board considers this exception—that water quality will not be lowered as a result of BML’s discharge. There is, therefore, no real and substantive assurance in the MND that water quality will be maintained and protected as required by the state’s antidegradation policy.

Overall, then, there is nothing in the present proposed action that suggests that that action is consistent with the state’s antidegradation policy.<sup>4</sup> Accordingly, we ask that the State Board revise the MND and any proposed resolution adopting the MND to account for the state’s antidegradation policy. We reserve the right to provide further comment regarding the Board’s implementation of the state’s antidegradation policy upon review of the revisions and would ask

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<sup>3</sup> The only recognized exception to the prohibition against degrading discharges is for short-term and temporary degradation. (EPA Water Quality Standards Handbook (2d ed.), p. 4-10.) BML’s discharge results in neither.

<sup>4</sup> Even if the ASBS is subject only to Tier II protection, which it is not, nothing in the MND demonstrates proper application of the state’s antidegradation policy given that none of the findings required by the state’s antidegradation policy—such as that the discharge is necessary or that it is required to accommodate important social or economic development—are present. (40 C.F.R. § 131.12(a)(2).)

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that the present matter be renoticed with the revisions in order to provide the public a full opportunity to review and comment on the revisions.

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Thank you for your time in considering these comments. If you have any questions, please do not hesitate to contact me. I look forward to working with you and the State Board to address these concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Gildor". The signature is written in a cursive style with a long horizontal stroke at the end.

Dan Gildor