



COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

"To Enrich Lives Through Effective and Caring Service"

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February 21, 2012

IN REPLY PLEASE
REFER

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Dear Ms. Townsend:

COMMENT LETTER – AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE SPECIAL PROTECTIONS

The enclosed comments are being submitted on behalf of the County of Los Angeles and the Los Angeles County Flood Control District in response to the State Water Resources Control Board's Notice of Adoption Hearing regarding the General Exception to the California Ocean Plan Waste Discharge Prohibition for Selected Discharges into Areas of Special Biological Significance, including Special Protections for Beneficial Uses and the Associated Program Environmental Impact Report, dated February 9, 2012.

We look forward to your consideration of these comments. If you have any questions, please contact me at (626) 458-4300 or ghildeb@dpw.lacounty.gov or your staff may contact Ms. Angela George at (626) 458-4325 or ageorge@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works

GARY HILDEBRAND
Assistant Deputy Director
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Enc.

cc: Chief Executive Office (Dorothea Park)
County Counsel (Judith Fries)
Department of Beaches and Harbors

COMMENTS OF THE COUNTY OF LOS ANGELES AND THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT ON REVISED “SPECIAL PROTECTIONS” FOR AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE

INTRODUCTION

The County of Los Angeles (County) and the Los Angeles County Flood Control District (LACFCD) appreciate this opportunity to comment on the revised Special Protections for Areas of Special Biological Significance (ASBS). The County and the LACFCD wish to thank State Water Board staff for including revisions that clarify and improve the Special Protections. These improvements will allow all dischargers to more efficiently focus their limited resources on ensuring the maintenance of Ocean Water Quality (NOWQ) in all ASBSs.

Given the State Water Board’s position that the discharge of stormwater into ASBS requires an exception under the Ocean Plan, the County and the LACFCD support the use of such a process and look forward to the completion of the Special Exception process, which commenced nearly eight years ago.

The County and the LACFCD, however, have some concerns with respect to the certain revisions of the Special Protections, which are discussed further below. The County and the LACFCD respectfully incorporate all of their previous comments on earlier versions of the Special Protections to the extent that those comments were not addressed in the revised Special Protections.

A. Natural Ocean Water Quality (NOWQ) Iterative Process

The Special Protections have been revised to add new Sections I.A.2.h.(5) and I.B.2.c.(5), which provide that “[c]ompliance with this section does not excuse violations of any term, prohibition, or condition contained in these Special Protections.”

The County and the LACFCD have a significant concern with this new language. The provision potentially would allow judicial interference in the process of ensuring that discharges are not causing an undesirable alteration of NOWQ. If a discharger is working to revise its ASBS Compliance Plan to incorporate new or modified BMPs, the discharger should be allowed to do so without risk that a Clean Water Act citizens’ suit be brought against it. Under the revised Special Protections, such a suit could be brought for allegedly causing an undesirable alteration of NOWQ, in violation of the Compliance Plan incorporated into the SWMP, which is an enforceable provision of an MS4 or other NPDES permit. In such a suit, the federal district court is authorized to

order injunctive relief, leading to the potential for different, and potentially incompatible, remedies from those being performed under the ASBS Compliance Plan. The new language is also inconsistent with the revised Flow Chart, Attachment 1, showing the steps that must be followed in addressing compliance with the requirement to maintain NOWQ.

The dischargers already face liability for failure to comply with the requirements of the Special Protections. The State Water Board, a Regional Water Board or a third party can enforce the Special Protections once incorporated into an NPDES permit or waste discharge requirement. In addressing the causes of an alteration of NOWQ (which may have been caused by a transitory discharge or other causes beyond the immediate control of the discharger), the discharger must be able to benefit from the iterative process set forth in Sections 1.A.2.h and 1.B.2.h. Otherwise, the process is rendered meaningless if a Clean Water Act lawsuit can be brought.

The County and the LACFCD urge the State Water Board either to delete Sections I.A.2.h.(5) and I.B.2.c.(5) or to make clear that those provisions refer to **other** terms, prohibitions or conditions contained in the Special Protections.

B. Natural Stream Flows

The revised Special Protections, in Sections I.A.1.e. and I.B.1.e., provide a new category of permitted non-storm water discharges for non-anthropogenic flows from naturally occurring streams. The County and LACFCD strongly support this revision, since natural streams represent historic discharges into the ASBS, even those streams that have been channelized prior to discharge into the ASBS. The prohibition of such flows could potentially cause a change in NOWQ by changing the natural flow characteristics into an ASBS.

Thus, natural stream flows (as well as naturally occurring groundwater seepage) should not be subject to the requirements of Sections I.A.1.e.(3) and I.B.1.e.(3), that non-storm water discharges not cause or contribute to a violation of water quality objectives in Chapter II of the Ocean Plan nor alter NOWQ in an ASBS. Such flows are not, by definition, anthropogenic. The NOWQ for the adjacent ASBS has been influenced by such flows over history and these flows have contributed to what must be considered NOWQ for the ASBS in question.

Thus, the County and LACFCD suggest the following revision (in **bold**) to Sections I.A.1.e.(3) and I.B.1.e.(3) of the Special Protections document:

Authorized non-storm water discharges (**except for naturally occurring groundwater seepage via a storm drain or non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain**) shall not cause or contribute to a violation of the water quality objectives in Chapter II of the Ocean Plan nor alter natural ocean water quality in an ASBS.

C. Definition of “Good Cause”

The County and LACFCD strongly support the provision in Sections I.A.3.f and I.B.3.f allowing the Executive Director of the State Water Board or the executive officer of a regional water board to authorize additional time for dischargers to comply with the requirement in Sections I.A.3.d-e and I.B.3.d-e. The County and LACFCD previously have commented that four years from the Special Protections effective date could not be complied with, based on experience with structural controls intended to address bacteria in Santa Monica Bay. We also have commented that the “immediate” requirement to effectively prohibit all non-stormwater dischargers similarly was impossible to comply with.

The County and LACFCD supported the language in the last draft of the Special Protections, which left the issue of “good cause” to the discretion of the Regional Water Board. The board, or its executive officer, is in the best position to determine if the reason for delay is valid. The State Water Board should not and cannot pre-determine what particular facts will or will not constitute “good cause.”

While staff has attempted to set forth grounds for “good cause” in terms of “physical impossibility” and “lack of funding,” these grounds are both too limited and appear to overlook realities faced by municipalities. For example, the LACFCD experienced delays in constructing structural BMPs in the Santa Monica Bay area because of delays in the land acquisition process, the need for Coastal Commission approvals, and requirements under the California Environmental Quality Act (CEQA). These difficulties were discussed in comments filed with the State Water Board last year and will not be repeated here. However, the limited definition of “physical impossibility” does not cover all of these and similar delay-causing events, thus making the provision for “good cause” too restrictive.

Also, the requirement that a discharger notify a water board “in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline” is problematic and unwieldy. For example, a discharger may know now that it is required to obtain Coastal Commission approval for structures built in the Coastal Zone. The time required for that approval involves a timeframe that could push first operation of the structural control beyond the four-year deadline. Would the discharger be barred from relief if it did not notify the

water boards almost immediately upon the effective date of the Special Protections, but instead waited until it knew exactly what delay would ensue? Because of this potential for ambiguity, the 30-day notice period should be deleted.

Further, the limitations on “lack of funding” do not acknowledge the requirements of Proposition 218 or Proposition 26, which limit the ability of municipalities to raise funds for water quality purposes through fees. Thus, the requirement to show the “relationship of storm water fees to annual household income” is irrelevant to any finding of adequate funding, since the ability to obtain such fees depends on a vote of the people, not the ability of the municipality to impose the fees.

The County and LACFCD therefore request either that the language in the version of the Special Protections circulated in October be retained or that the State Water Board adopt the following revised language for Sections I.A.3.(f)/I.B.3.(f) (which incorporates the definition of “physical impossibility” in the Glossary):

The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) **may, for good cause shown**, authorize additional time for a discharger to comply with the special conditions d. and e. **“Good cause” shall require the discharger to demonstrate that it exercised reasonable diligence in attempting to meet the time schedules set forth in special conditions d. and e. and that the cause for the inability to meet those time schedules was due to causes beyond the discharger’s reasonable control, including, without limitation, any act of God, war, fire, earthquake, windstorm, flood or natural catastrophe; unexpected and unintended accidents; determination that planned structural control technology was insufficient to meet objectives, geological instability issues or other unforeseen construction delays; civil disturbance, vandalism, sabotage or terrorism; restraint by court order or public authority or agency; action or non-action by, or inability to obtain or delay in obtaining the necessary authorizations or approvals from a governmental agency other than discharger; or, delays due to the acquisition of property.**

Additionally, “good cause” may be based on lack of funding. In such a case, a discharger which is a municipality (cities, counties and flood control districts) must demonstrate that it has made timely and complete applications for all available bond and grant funding, and that either such funding is not available or is inadequate. If the discharger is a non-municipality governmental agency, it must demonstrate that it

made a good faith effort to acquire funding through that agency's budgetary process.

The County and the LACFCD recommend that the definition of "Physical Impossibility" be deleted, as it would have been already incorporated.

D. Comments on Monitoring Program

1. Toxicity Monitoring for Storm Water Outfalls: In Section IV.A.3.b.(3), the revised Special Protections require analysis of storm water runoff for critical life stage chronic toxicity. Chronic life stage toxicity testing for storm water discharges is not appropriate. Storm events are highly dynamic and variable and thus not representative of the condition under which species such as invertebrates or algal species live in the marine environment. Further, storm events usually do not last more than 12 hours, while chronic toxicity testing is conducted over about five to seven days, much longer than the actual storm duration. Thus, the requirement for chronic toxicity testing for storm drain samples is unjustified, has no scientific basis for evaluation of NOWQ and should be removed from the Special Protections monitoring requirements.

2. Point of Sampling Receiving Waters: Section IV.B.2.b of the Special Protections requires that ocean receiving water "must be sampled in the surf zone at the location where the runoff makes contact with ocean water (i.e. at "point zero"). This requirement is not consistent with the Ocean Plan, which states that "compliance with the water quality objectives . . . shall be determined from samples collected at stations . . . where initial dilution is completed." Ocean Plan page 4. The Special Protections should be revised either to reflect that storm water sampling be conducted at stations where initial dilution is completed or, alternatively, that dilution factors be assigned for storm water discharges.

E. Comments on Glossary Changes

1. Elimination of definition of "Effectively prohibited": The revised Special Protections eliminate the definition of "effectively prohibited." This phrase applies to the stoppage of non-storm water discharges into the ASBS and can be found in Sections I.A.3.a. and I.B.3.a. The removal of the definition is puzzling, as this language recognizes that discharges of non-storm water may occur despite the best efforts of the permittee. The problem is exacerbated in urban areas by MS4 permits which allow the discharge of such non-storm water streams as irrigation runoff into the MS4, where it can then be discharged into the ASBS. Dischargers also have limited or no ability to govern the conduct of third parties.

The County and the LACFCD therefore request that the definition of "effectively prohibited" be included in the Glossary.

F. CEQA Comment

Because of changes to the Special Protections document, which is Attachment B to the Final Environmental Impact Report (FEIR), the FEIR should be updated to reflect such changes. For example, the discussion of authorized non-storm water discharges contained on pages 62-63 of the FEIR should be updated to reflect natural streams.