

May 19, 2011

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Electronic delivery to [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Subject: Comment Letter – Areas of Special Biological Significance (ASBS) Special Protections (Comments on the Program Draft Environmental Impact Report for an Exception to the California Ocean Plan For ASBS Waste Discharge Prohibition For Storm Water and Nonpoint Source Discharges, With Special Protections, State Clearinghouse Number 2011012042)

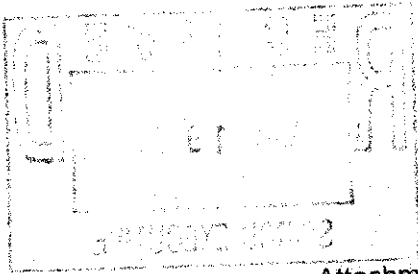
Dear Ms. Townsend and members of the State Water Resources Control Board:

The City of Monterey (City) appreciates the opportunity to review and comment on the Program Draft Environmental Impact Report ("DEIR") for "Exception to the California Ocean Plan for Areas of Special Biological Significance Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, With Special Protections." We appreciate the efforts of the State Water Resources Control Board (SWRCB) and its staff to develop the General Exception and Special Protections.

Recent City efforts towards the protection of the ASBS include the pursuit of grant funds to update the Monterey Integrated Regional Water Management Plan and to incorporate projects such as the completion of a storm water alternatives analysis/feasibility study to manage storm water flows and a bacterial source tracking study for the Pacific Grove ASBS. Also, and in partnership with the City of Pacific Grove, the City of Monterey has been tentatively awarded grant funds to rehabilitate portions of the sanitary sewer collection system in the ASBS watershed shared between the two Cities. Additionally, the City of Pacific Grove has partially completed its dry weather diversion project. Upon final completion, all of the dry weather flows contributed to the City of Pacific Grove storm drain system by areas within Monterey will be diverted to the local wastewater treatment plant during the dry season. Lastly, and always on-going, the City of Monterey continues to implement and put much effort into our Municipal Storm Water Permit to protect local water quality of the Monterey Bay coastline.

The comments and attachments provided herein address the DEIR and issues raised under both the California Environmental Quality Act ("CEQA"), as well as issues raised under the Porter Cologne Act. The attachments include the following:

- Attachment A: Detailed City comments regarding DEIR
- Attachment B: Proposed Alternative Approach for SWRCB consideration and DEIR evaluation



- Attachment C: Communications between City and SWRCB regarding applicability of General Exception to City
- Attachment D: Hovden Way outfall map, City of Monterey discharge, Outside of ASBS

As explained in scoping comments filed in March, 2010, by the City and others, a key difficulty with this DEIR is the vague and frequently changing definition of the project, specifically regarding the proposed conditions of the general exception and special protections. This, in turn, combines with the general failure of the DEIR to disclose and analyze reasonably foreseeable aspects of the program, in particular the expected range of treatment and/or control measures likely to be necessary for the discharging agencies to comply with Ocean Plan water quality standards or otherwise. The net result is a truncated analysis of potential environmental effects that we believe seriously understates the full range of those effects.

The DEIR evaluates the environmental effects of only a limited subset of potential compliance measures (catch basin inserts, vortex separation systems, road and parking lot sweeping and public education). However, as recognized by the later identification of potential measures listed in the economic analysis (Table 7.4.1), the compliance measures may also include detention, retention, or infiltration ponds, end-of-pipe treatment facilities and other measures that have substantially greater impacts. In some circumstances, dischargers may be forced to re-route storm water discharges entirely around an ASBS or perform diversion of storm water flows to local Publicly Owned Treatment Works (POTWs) not designed and constructed with sufficient excess flow capacity to accept these flows (DEIR footnote 3, p. 59). For purposes of CEQA, this failure to analyze the full range of compliance options leads to a serious understatement of the potential environmental impacts of the project as a whole.

For those impacts that are discussed, the DEIR is generally dismissive of all significant environmental impacts that are foreseeable. Generally, the discussion of impacts is qualitative and general, more at the level of an initial study than that required of an EIR. For most effects, the authors leave it to the project-level environmental statements to address impacts and mitigation from the anticipated projects resulting from this statewide project. Yet this violates CEQA by not taking into account the "whole of the action".

Additionally, it is not reasonable for the SWRCB to impose the project requirements contemplated on dischargers without first developing a firm scientific basis to conclude that doing so will improve water quality to such a high degree as to justify the expenditures necessary for compliance. Also, the definition of "natural water quality" is yet to be well-defined (as concluded by the Natural Water Quality Committee), even though this is the compliance measure by which enforcement is planned to occur.

Furthermore, we believe storm water runoff is not waste per se, as it is presented and proposed to be regulated in this DEIR; rather, it is the pollutants that may be in runoff that are waste (SWRCB, 2001, Water Quality Order 2001-15). The proposed project is based on a categorical approach that would regulate storm water runoff as waste. As discussed in Attachment A Section IX, we contend that this foundation is fundamentally

flawed and is not a legal mandate that the SWRCB must apply to storm water and other forms of runoff to ASBS. Also, categorizing all discharges from urban areas as "waste" may have serious unintended and undesirable consequences. For example, we are currently working, at the request of our Regional Water Quality Control Board, to develop what is known as a Low Impact Development (LID) program. One of the basic tenets of LID is to slow, sink and spread storm water within new developments. This will include impoundments and wetlands. Essentially labeling all runoff as "waste" will put us in the predicament of discharging "wastes" to surface impoundments and create a whole host of additional regulatory issues that were never intended to be applied to runoff.

Monterey faces an unusual circumstance - a portion of our town is an upstream ("up-pipe") contributor to another drainage system to the ASBS, but the City has no points of discharge to the Pacific Grove ASBS. This fact has not been adequately disclosed or analyzed in the DEIR, or properly defined within the project description, which lacks clear applicability thresholds for this project/program to storm water permittees. The City requests that the SWRCB define within the project description the applicability thresholds or criteria being utilized to determine who is required to be an applicant to this proposed program and who is not. Specifically, the City has no point of discharge into an ASBS as defined in the DEIR at 329 Glossary and Acronyms.

The Pacific Grove ASBS was defined in the mid-1970s as an area adjacent to the city of Pacific Grove, with the ASBS boundary ending at the city limit line of Pacific Grove. The ASBS is not adjacent to the City of Monterey. Yet, the City was directed by the Regional Board to apply for an exception and we did so without prejudice to addressing this question (see listing in DEIR Table 2, p. 32). We continue to be confused as to how Monterey or any other indirect discharger fits into this process since we do not have any points of discharge as defined in the DEIR at page 329.

If the intention of the proposed project (Alternative D, General Exception and Special Protections) is to include compliance with certain water quality standards of points upstream from the points of discharge to an ASBS, then this needs to be disclosed in the DEIR project description, since the resulting environmental impacts could be significant. The City requests the SWRCB clarify project applicability in the project definition, as well as clearly delineate the terms or criteria upon which a storm water permittee is or is not subject to the proposed Ocean Plan General Exception and Special Protections (preferred Alternative D) contemplated therein. Although not all encompassing of the communications, some correspondence on this particular matter between the City and SWRCB staff can be found in Attachment C of this letter. Nevertheless, Monterey continues to be committed to working with the City of Pacific Grove on ASBS protections for that portion of watershed and storm flows originating from the City of Monterey.

We also note that the potential economic impacts of compliance with the discharge prohibition and/or special protections have now been estimated by the SWRCB, apparently for the first time. These estimates demonstrate the scale of the economic burdens that would be placed on the municipalities that must comply. In addition, the SWRCB has also presented new scientific information from the Natural Water Quality Committee (NWQC) that raises serious questions regarding the environmental benefits of reducing discharges to these areas. As we discuss in Attachment A, these comparative

costs and benefits have never been evaluated as required under the Porter Cologne Act. For purposes of CEQA, these costs, if truly imposed on municipalities, will divert limited resources from other important activities necessary to maintain community viability. Such losses of community services and the resulting impacts should be evaluated, especially in light of the unknown level of water quality benefit to be gained by implementation of the proposed project.

Consequently, the City of Monterey along with several other entities has developed an Alternative Approach for SWRCB consideration in lieu of the currently proposed "Special Protections" and suggests it for evaluation in a revised DEIR. The Alternative Approach found in Attachment B to this letter presents a more logical and sound scientific and equitable approach to protecting the State's ASBS by creating a demonstrated cause-and-effect linkage between identified water quality problems within an ASBS and an identified source causing the problem(s). Stakeholders in the Monterey Peninsula believe the five-step, alternative approach presented is a more rational means of being responsive to the Ocean Plan by protecting natural water quality and the beneficial uses of the oceans.

The shortcomings in the DEIR are too extensive to be corrected through simple responses to comments. In particular, the inadequate project description and subsequent limitation on the environmental analyses, and the complete failure to analyze land-use and cumulative impacts, as well as no alternative version of Special Protections, will necessitate that the DEIR be substantially revised and recirculated for additional public comments.

The City Engineer and I attended the hearing on May 18, 2011. At that hearing, Board member Doduc asked the interested parties to provide input regarding three basic approaches to the currently contemplated ASBS protections. Those approaches are: amend the Ocean Plan, continue with exceptions or begin enforcement actions. Without doubt, we believe that the exception process is the only short-term means to address the conundrum presented by the Ocean Plan. And at the root of this conundrum is, for all practical purposes, the assumption that every drop of rain and all bodies of water are "waste". In the longer-term, we believe that the Ocean Plan should be amended in a way that provides a practical definition to the term "waste". But we understand that doing so will take significant stakeholder input and it is likely to meet stiff resistance. We do not believe that enforcement action is warranted or necessary. The evidence to date demonstrates that even in the heavily urbanized southern California region the health of the ASBS is being protected.

We also need to comment on a response given by Mr. Gregorio to a question that was raised as a result of one of my remarks. The remark was that the City of Monterey has no points of discharge into the Pacific Grove ASBS. I made this comment because it is an irrefutable fact. The question posed to staff was essentially, is this a true statement? The State Water Board staff's response was somewhat circuitous and it didn't directly answer the question. The response included remarks about an outfall located under the Monterey Bay Aquarium (at Hovden Way) which lies southeast of the Pacific Grove ASBS boundary, not within the ASBS. This outfall is in fact 300 feet away from the boundary of the ASBS (see map of Hovden Way outfall in Attachment D). Mr. Gregorio also

mentioned there are outfalls located within the property of the Hopkins Marine Station. The City of Monterey does contribute flow via upstream connections to this outfall, but once again, the outfall is within the City of Pacific Grove and in the Hopkins Marine Station property. I believe that perhaps Mr. Gregorio was trying to say that the relationship between Hopkins Marine Station as the "discharger" and the City of Pacific Grove as an upstream contributor is analogous to the City of Pacific Grove as a "discharger" and the City of Monterey as an upstream contributor in terms of the approach to regulating the Station Exception under consideration, Pacific Grove, as an upstream contributor and in fact, a very significant contributor, was not called upon to participate in the Marine Station's Exception request. Yet Monterey is being compelled to participate in an exception process when we do not own, control, operate or maintain outfalls that discharge into the Pacific Grove ASBS.

We recognize the work that the staff has put into the preparation of the General Exception and Special Protections and this Draft Environmental Impact Report. Our comments are made in the spirit of having a thorough and sound, scientifically-based environmental impact analysis and rational cost-benefit approach to the resulting General Exception program. And we hope that none of our comments, as extensive as they are, are taken as an indication that we do not believe that an exception is the correct course of action - it is the correct course of action. And we are willing to play a part in reasonable regulations pertaining to the Pacific Grove ASBS in our continued collaboration with the City of Pacific Grove for the health of our local waterways.

Please contact City Engineer Tom Reeves at (831)646-3448 if you have any questions concerning the comments contained herein or attached.

Sincerely,



Chuck Della Sala  
Mayor

- Attachments:
- (A) Detailed comments regarding DEIR
  - (B) Proposed Alternative Approach for SWRCB consideration and DEIR evaluation
  - (C) Communications between City and SWRCB regarding applicability of General Exception to City
  - (D) Hovden Way outfall map, City of Monterey discharge, Outside of ASBS

cc: Fred Meurer, City Manager  
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Sections I through IX below are the City of Monterey's Detailed Comments on the Program Draft Environmental Impact Report (DEIR) for an Exception To The California Ocean Plan For ASBS Waste Discharge Prohibition For Storm Water and Nonpoint Source Discharges, With Special Protections (State Clearinghouse Number 2011012042)

I. PROJECT DESCRIPTION

A threshold problem exists with the project description in the DEIR. This results from a lack of clarity in terms of the definitions, expectations, and standards of the general exception conditions and special protections. In particular, by basing the measure of compliance on a comparison of discharge levels to the levels that may be measured in the future at currently unspecified reference sites, and using a poorly defined methodology, the ultimate regulatory requirements being imposed by the program are currently vague and uncertain. In effect, the program would impose numeric-based effluent limitations on storm water discharges, without even specifying the numeric limits in advance. Where such limits are included, such as the references to the Ocean Plan Table B water quality objectives (referred to herein as Table B), concern exists as to whether full compliance is even possible since existing water quality at several preliminary "reference" sites already exceeds those levels. Additionally, the general exception and special protections are unclear in numerous key respects addressed in Section V below, which could result in discharge prohibitions without possibility for an exception in a potentially broad range of circumstances.

A cornerstone of any environmental impact report is a clearly defined "project". In fact, "the correct and complete definition of all reasonably foreseeable elements of a proposed project is the single most important element of the CEQA compliance process... The term "project" refers to the whole of an action that has the potential, directly or ultimately, to result in a physical change to the environment (CEQA Guidelines Section 15378). This includes all phases of a project that are reasonably foreseeable, and all related projects that are directly linked to the project" (University of California CEQA Handbook, Chapter 2.1, 2003). The project description has been characterized as the "sine qua non" of an informative, legally adequate EIR. Without an adequate description to serve as the basis for analysis in the EIR, CEQA's objectives of furthering public disclosure and informed environmental decision-making cannot be fulfilled. The project must be "accurate, stable, and finite". County of Inyo v. City of Los Angeles (1977) 71 CA3d 185, 199.

A program EIR such as this one allows the agency to "characterize the overall program as the project being approved at that time." Discussion following CEQA Guidelines Section 15168. Although the level of detail required of such a program EIR may be less than that for the subsequent implementing activities (e.g., Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal.App.4<sup>th</sup> 351), this does not authorize the agency to disregard reasonably foreseeable consequences of the program's approval. Id. That is particularly true here where the "program" is primarily an aggregation of a set of individual activities (the exceptions) being analyzed together given their generally similar environmental effects.

Only through an accurate view of the project and its environmental consequences may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (i.e. the "no project" alternative), and weigh other alternatives in the balance.

The DEIR fails to describe measures that will need to be taken by discharging agencies to comply with the conditions of the general exception and special protections. Section 15378(a) of the CEQA Guidelines defines "project" as "the whole of an action, which has the potential

for resulting in a physical change in the environment, directly or ultimately." The California Supreme Court has indicated that the project description must include all relevant parts of a project, including reasonably foreseeable future activities. *Laurel Heights Improvement Association v. Regents* (1988) 47 C3d 376. In doing so, the court established the following two-part test:

We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.

*Id.* at 433. It is clearly foreseeable that discharging agencies may be required to take a broad range of actions with significant effects on the environment in response to this regulatory program. The full scope of these potential actions, however, are not included within the project description or analyzed in terms of the resulting environmental effects. See CEQA Guidelines Sections 15063(d)(3), 15064(d), 15168(c)(5). In particular, a key requirement of the Special Protections is the cessation of all non-storm water runoff (ref. Project Description, page 34, DEIR). As stated numerous times in the past, cessation of dry weather flows, especially if they include "winter dry season" flows as now interpreted by Board staff, will result in massive amounts of new infrastructure including pumping stations, force mains and treatment plants, and energy needs, all of which is foreseeable but not analyzed in the DEIR.

The very brief project definition in Chapter 2 does not accomplish this CEQA disclosure requirement as a whole, and thus, is inadequate to assess the project for significant environmental impacts. Reasonably foreseeable projects (compliance measures) directly linked to the contemplated Special Protections include a wide variety of structural and non-structural BMPs and potential wastewater treatment plant retrofits and expansions, most of which are not contemplated in this DEIR project description or analyses, but then several BMPs are presented in Table 7.4.1 only. A good-faith, reasoned project description and impact analyses should include disclosure and environmental review of a probable mix of BMPs implemented to accomplish the Special Protections based on the wide array of water quality constituents to be enforced.

Hence, the BMPs presented and analyzed in DEIR Chapter 6 - Catch Basin Inserts, Vortex Separators, Street Sweeping, and Public Education - are not an adequate representation of BMPs necessary to treat storm water to the Ocean Plan Table B water quality objectives (the threshold of significance utilized in certain of the impact analyses), nor do these compliance measures allow for a valid analyses of potentially significant impacts. Existing information concerning the efficacy of many of these BMPs is often anecdotal or subjective and it leaves the impression that these BMPs alone will not be able to achieve the levels of pollution reduction sought by the State. Certainly, there may exist some areas where this limited suite of BMPs may be able to meet the water quality objectives; however, there are large areas such as the Monterey Peninsula where such BMPs are not likely to achieve significant reductions - especially a 90% reduction in wet-weather flow pollutants as required in A.2.d of the Special Protections. During wet-weather, sweeping is often not possible and catch basin inserts and vortex separators can only treat lower flows. This leaves the regulated community questioning what we are going to be required to do.

Measures in addition to Catch Basin Inserts, Vortex Separators, Street Sweeping, and Public Education are discussed in the EIR, but their impacts are not evaluated. For example, the DEIR recognizes that: "It is anticipated that the applicants identified in this General Exception project will implement various individual or collaborative projects to comply with the terms and



conditions or Special Protections. As part of the scoping and environmental analysis conducted for the General Exception project, project types identified include: Low Impact Development (LID); dry-weather flow diversions; and Best Management Practices (BMPs), such as Pollution Prevention BMPs and Treatment BMPs, such as infiltration basins and Gross Solids Removal Devices (GSRDs)." DEIR at page 17, 58-59, 270, 311. Elsewhere, re-routing discharges and other end-of-pipe treatment facilities are discussed, but again are not analyzed for their environmental impacts. The fact that additional actions, such as storm water re-routing, detention, retention and infiltration basins, and more extensive end-of-pipe facilities, are described in sufficient detail to allow at least a preliminary economic analysis in Chapter 7 of the DEIR, and that the State Board chose to include them in that analysis, indicates that these BMPs are reasonably foreseeable future actions that could result from the proposal, and that they are sufficiently defined to permit evaluation now of the environmental consequences of implementing those actions.

This is not a situation where the future actions are so speculative or uncertain that it is infeasible to describe them or analyze the resulting effects. While it may be true that project description is so vague and uncertain that it is difficult to predict with certainty the ultimate measures that will be taken by the discharging agencies, this does not mean that the potential future actions can be largely disregarded. Instead, under CEQA's "rule of reason" a reasonable forecast must be included.

In sum, the analysis in the DEIR fails to fulfill the claim on page 227 that the DEIR "... considers the reasonably foreseeable environmental impacts of the foreseeable methods of compliance, the reasonable foreseeable feasible mitigation measures, and the reasonable foreseeable alternative means of compliance, which would avoid or reduce the identified impacts."

## II. ALTERNATIVES AND ASSOCIATED ENVIRONMENTAL ANALYSES AND IMPACTS

An EIR is required to describe a reasonable range of alternatives to the proposed project, or to its location, that would feasibly attain most of the project's basic objectives while reducing or avoiding any of its significant effects. CEQA Guidelines Section 15126. The alternatives analysis also must include sufficient information about each alternative to allow evaluation, analysis and comparison with the proposed project.

The alternatives analysis is necessary for the public agency to carry out its obligations under CEQA Guidelines 15021: "A public agency should not approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment." Additionally, CEQA Guidelines Section 15021(b) states "In deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors".

Feasible alternatives exist to the proposed Special Protections of Alternative D, such as that proposed by the City and others in Attachment B of this letter. Other alternatives than those examined should be explored in light of the potentially significant and cumulative environmental impacts (not yet fully analyzed) of the Special Protections and the resulting economic and social ramifications of project implementation. Additionally, Guidelines Section 15168(b)(4) states, "Allow the Lead Agency to consider broad policy alternatives and program-wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts". This supports the need to explore other broad policy alternatives and mitigation measures when problems or cumulative impacts are

identified early on, which we feel is the case with the Special Protections that guide the General Exception process.

The Summary of the DEIR describes three alternatives in addition to the proposed General Exception and Special Protections: the no-project with no exception (Alternative A), an Ocean Plan amendment to allow existing discharges into ASBS with special conditions (Alternative B, "Prescriptive Alternative"); and a General Exception without enforcement for non-compliance with waste discharge prohibitions. DEIR at page 11-15. The alternatives appear to change as seen elsewhere in the DEIR. The "Prescriptive" Alternative B is differently described as including attainment of the "natural water quality" standard. DEIR at page 53. Another alternative of implementing individual exceptions for each storm water and nonpoint source discharger is briefly described as "Alternative C" on DEIR at pages 53-54, but not analyzed in the Summary Chapter or elsewhere. Yet another alternative of "relocating all discharges" is mentioned on DEIR at page 43, but so far as we can determine is not mentioned elsewhere. ("Alternatives under consideration include no action, relocation of all discharges, and proposing a General Exception which serves as the basis of this document." DEIR at page 43.) Chapter 4 of the DEIR does discuss additional sub-alternatives to specific conditions imposed under the general exemption, but upon examination, these sub-alternatives are simply facets of the principal alternatives of no action, an Ocean Plan amendment, and the proposed action. DEIR at page 56-60.

No other alternatives to the substantive Special Protections requirements of the proposal are included. In particular, various parties have requested that the State Board consider applying the "maximum extent practicable" (MEP) approach, which is applicable to these dischargers under Section 402(p) of the Clean Water Act, or some variation thereof that includes appropriate enhancements responding to the ASBS status of these locations. The exclusion of all other substantive alternatives violates CEQA's mandate to consider a reasonable range of alternatives. As discussed below in Section IX, consideration of a much broader range of alternatives is authorized, indeed compelled, by the Porter Cologne Act and CEQA.

Further, rather than comparing the environmental effects of the few and limited alternatives that were considered, the DEIR simply favors the preferred alternative on the basis that the "exception process is nearly complete." DEIR at page 55. The DEIR rejects the "Prescriptive" or "Ocean Plan Amendment" alternative on the basis that it "would continue to face stiff opposition and, if proposed, would require a significant commitment of resources to prepare planning documents based upon the issues raised and the written comments previously received." DEIR at page 53. There is absolutely no analysis of the comparative environmental impacts of the alternatives, despite the obligation under CEQA for the DEIR to do so.

### III. ENVIRONMENTAL BASELINE

An EIR is required to describe "the physical environmental conditions in the vicinity of the project" as they exist when the Notice of Preparation for the EIR is published. CEQA Guidelines Section 15125. Here, the environmental baseline presented in Chapter 5 of the DEIR largely consists of general background information without substantial focus on those facets of the baseline that are the most material to the analysis of environmental impacts.

Most critically, the "watershed and land use characterization" fails to adequately and accurately describe the situation faced by the Cities of Monterey and Pacific Grove, which are substantially urbanized and where any additional facilities required as a result of the State Board's action will have significant land use and recreational impacts, among others. Table 5.4.1 of the DEIR does show the percentage of impervious surface areas adjacent to each of

the ASBSs, and indicates that the areas next to the Pacific Grove ASBS are 64.52% impervious. DEIR at page 112. Notably, out of the 24 ASBSs, the Pacific Grove ASBS is the third highest, following the La Jolla and Robert E. Badham ASBSs.

Other than this single percentage figure, however, there is absolutely no discussion in the environmental baseline of the existing, built-out land use setting of the Pacific Grove ASBS watershed. The three brief paragraphs in Chapter 5.4 that relate to the Pacific Grove ASBS only superficially describe the watershed and, with a brief reference to Greenwood Park, doesn't speak to the naturally occurring groundwater table/seepage found throughout, and omits discussion of existing developments, land use restrictions, or other pertinent land use baseline factors, such as the cessation of the sewage treatment plant in Pacific Grove. DEIR at page 117. This missing baseline information is critical to the analysis of the resulting land use, recreation, watershed/hydrologic characteristics, and other impacts that would result from the State Board's proposed action. Of course, this lack of setting information is compounded by the lack of analysis of watershed and land use impacts in Chapter 6 of the DEIR.

Additionally, the DEIR discussion at pages 147-149 appear to not fully consider the findings of the 1979 SWRCB Report (No. 70-11) due to a perceived lack of comparable results to more recent studies. However, this 1979 Report has several significant results and findings about the biotic conditions and water quality of Pacific Grove ASBS, which are important baseline conditions that should be considered within this DEIR. Additionally, the DEIR should note appropriately that since 1979, some pollutant threats to the Pacific Grove ASBS have been mitigated through such mechanisms as removing the Pacific Grove wastewater treatment plant and diverting sewage to regional treatment facilities, implementation of MS4 storm water NPDES permits, dry weather diversion projects, and so on. None of the existing discharge controls appear to be included in this document's discussions.

DEIR Chapter 5.7.10 also mischaracterizes the Pacific Grove ASBS discharge situation when it states that: "The City of Monterey and the City of Pacific Grove discharge to this ASBS and, combined, have 44 municipal storm drains greater than 0.25 meters carrying residential and road runoff into the ASBS. These are the discharges that are considered to be of a higher threat due to the nature of the impervious surface area of the watershed and amount of roads parallel to the intertidal zone and shoreline." This statement is incorrect for the City of Monterey. The City has zero (0) points of discharge into the ASBS; and thus, the first sentence should be revised to reflect this. All points of discharge to the Pacific Grove ASBS are located within the City of Pacific Grove. The City of Monterey does have a discharge at Hovden Way, but this discharge is at least 300 feet away from the ASBS.

DEIR Attachment 2 water quality data table incorrectly characterizes the "waterbody" category for the City of Monterey samples as "discharge". The samples were taken in upstream storm drains and not at points of discharge to the ASBS. Also, this clarification of sample location may somewhat alter the results, figures, and conclusions presented in DEIR Chapter 5.8.1 through 5.8.3.

Additionally, DEIR Table 5.7.1 notes the Pacific Grove ASBS as "Higher Threat" and is highlighted in yellow as being affected by a 303(d)-listed water body. This table and these statements are in error; per the current State 303(d) list, the Pacific Grove ASBS is not affected by a 303(d) listed water body. These errors should be corrected. Lastly, the term "higher threat" used throughout for this ASBS is not defined. The DEIR needs to define "higher threat" for discharger clarity and understanding. Also, please explain the comparative baseline being used to denote a "higher" versus lower threat.

Chapter 5.7.21, which describes existing waste discharge prevention and treatment measures such as BMPs or other controls, does not include information about existing MS4 permittee efforts towards pollution prevention. The City of Monterey believes that the millions of dollars spent to implement the Monterey Regional Storm Water Management Permit and Program, and its related BMPs should be reflected in the baseline conditions as current on-going, and significant waste discharge prevention efforts to protect water quality.

Finally, the DEIR's analysis in many respects applies a historic baseline that would assume that discharges to ASBSs have already ceased. However, this is not the case, and this assumption does not reflect the existing physical conditions as required by CEQA Guidelines Section 15125(a). The DEIR needs to fully analyze the environmental effects of a discharge prohibition from a proper baseline, since: (1) those effects have never been analyzed before under CEQA; (2) to the extent that the discharge prohibition is imposed it reflects a past action that must be included in the cumulative impacts analysis, and (3) failure to do so would result in the application of an incorrect environmental baseline.

#### IV. ENVIRONMENTAL IMPACT ANALYSES

The heart of the DEIR starts on page 227, in Chapter 6.0 entitled "Environmental Analysis." In that chapter, the DEIR glosses over some very significant and foreseeable environmental impacts. For instance, the report attempts to address construction impacts and a few of the less important on-going impacts, yet it completely avoids many significant and foreseeable long-term impacts (see DEIR impact and mitigation discussions at 245-246, 257-259, 270, etc.). This lack of sufficient analyses and disclosure of environmental consequences is in conflict with CEQA Guideline Section 15151 Standards for Adequacy of an EIR. Without an adequate impact analysis, the DEIR also fails to be in compliance with CEQA Guidelines Section 15126.4 Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects, which states that an EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy. CEQA Guideline 15126.4 (A)(1)(B) states that the formulation of mitigation measures should not be deferred until some future time. Unfortunately, the deferral of mitigation measures is the path chosen in several instances throughout this Chapter when concluding that an adverse impact can be mitigated to less than significant.

The DEIR, at page 227, claims that "... any potential impacts of implementing the proposed alternatives would be focused, short-term and ultimately produce long-term beneficial improvements to water quality and the removal of pollutants discharged to the ocean". Likewise, the DEIR asserts: "Specific projects employed to implement Special Protections may have some adverse impacts to the environment, but these impacts are generally expected to be limited, short-term or may be mitigated through design and scheduling." DEIR at page 312. We do not agree with the DEIR's "short-term" assumption. As stated and discussed herein, the potential exists for long-term impacts as a result of reasonably foreseeable compliance measures (BMPs) that were not contemplated in the DEIR. Thus, these BMPs are not adequately accounted for in the environmental impact analyses or were mitigations defined in the DEIR (see the discussion in Section I herein regarding the DEIR's project description). Such long-term impacts of reasonably foreseeable compliance measures and their statewide demand for energy consumption, should be evaluated on a programmatic level and cumulatively for this project.

One case in point would be the impact to air quality. On page 236 of the DEIR under the heading "Impacts Of The Proposed Mitigation Measures" the author states: "As part of the

scoping and environmental analysis conducted for the General Exception project, these environmental resources were considered, but no potential for adverse impacts to these resources were identified." Then on the following page under Chapter 6.2-1, the author states that "The General Exception Project has the potential to have a potentially significant adverse effect on air quality." DEIR Chapter 6.2 discusses impacts from construction activities and maintenance for the most benign BMPs. The air quality analysis switches between impacts during construction to impacts after construction on a seemingly arbitrary basis. The analysis does not address the green house gases that will be emitted, or the energy supply necessary, as a result of the statewide pumping and treating of all of the dry weather and wet season, dry weather ASBS flows.

On DEIR page 227 the authors state in the second paragraph that there exist 27 Responsible Parties and that it is reasonable to make generalizations about the environmental impacts to a region that spans from Humboldt County to the City of San Diego. This could not be further from the truth. The northern regions, north of Marin, are very sparsely populated and much of the ASBSs are bounded by state and federal lands with almost no development. The southern region of the state is generally heavily urbanized and the central region is truly a mixture of the two with some areas extensively developed while others are only slightly developed. It would be more reasonable for the authors to analyze the impacts on an ASBS-by-ASBS basis or more appropriate scale than that proposed.

All of the impact discussions in the DEIR suffer from the failure to consider the full range of compliance measures that may need to be undertaken by dischargers, as discussed herein at Section I above. Among the more substantial measures are detention, retention and infiltration basins, re-routing of discharges, and treatment facilities. These would generally need to be constructed in coastal areas that frequently are highly scenic, may be substantially urbanized, and often represent significant recreational resources. Without considering these more substantial measures, the DEIR generally understates the resulting impacts, in many cases by orders of magnitude. The DEIR also generally fails to identify the specific mitigation measures that would be available to address these impacts, and draws unsupported conclusions that mitigation will be available to reduce impacts to a less than significant level.

The DEIR also attempts to defer analysis to a later stage, based on the argument that: "Any potential environmental impacts associated with the implementation of the General Exception Special Protections measures depend upon the specific compliance projects selected by the responsible parties identified herein, most of whom are public agencies subject to their own CEQA obligations. (See Pub. Res. Code § 21159.2, project specific compliance projects). This program level EIR identifies broad mitigation approaches that could be considered at the program level for common selected BMPs. Consistent with PRC § 21159.2, this EIR does not engage in speculation or conjecture, but rather considers the reasonably foreseeable environmental impacts of the foreseeable methods of compliance, the reasonable foreseeable feasible mitigation measures, and the reasonable foreseeable alternative means of compliance, which would avoid or reduce the identified impacts." DEIR at page 227. However, much more is currently foreseeable than admitted in the DEIR, and the analyses and formulation of mitigation measures cannot be deferred (see CEQA Guideline 15126.4) as the State Board has attempted to do.

With these broad observations, the key problems with the discussion of particular impacts in the DEIR are presented below:

Aesthetics:

In our scoping comments, we indicated our view that all four elements of the analysis of aesthetics in the initial study checklist should be considered potentially significant impacts. Additionally, the impacts may not be mitigated, especially in our jurisdictional area along the coastal areas of the Monterey Peninsula where end-of-pipe projects may substantially adversely impact a scenic vista, damage a scenic resource, degrade existing visual character of the surroundings, or create new light or glare that may adversely affect views in the area. An example of likely impacts of a treatment system and its aesthetic impacts was shown in the City's scoping comments.

The discussion of aesthetics in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts. The DEIR's assertion that these impacts can only be evaluated in the future at the project level is incorrect, since typical compliance measures could be described and analyzed now.

For example, regarding potential impacts on scenic vistas, the DEIR indicates that "If, during the project analysis phase, a proposed project is determined to have a significant visual resource impact under CEQA, then CEQA dictates that mitigation measures must be incorporated into the project unless such measures are not feasible." DEIR at page 231. Such deferral of analysis is prohibited by CEQA where a more substantive discussion could be provided now. Quite clearly, the visual impacts of detention basins and end-of-pipe treatment facilities could be evaluated in the context of typical coastal settings. That evaluation, if done honestly, would conclude that in many contexts mitigation will be unavailable to reduce the impacts to a less than significant level.

In minimizing the potential impacts, the DEIR also makes assumptions about the compliance measures that are unsupported, such as the assertion that "most elements of conventional treatment systems are located underground," that any above-ground components will "have relatively low profile" and that the facilities "may also be small relative to the conveyance they serve." DEIR at page 232. None of these statements are true with respect to several of the more substantially impacting measures that may be needed.

#### Agriculture and Forest Resources:

The DEIR fails to evaluate potential impacts to agricultural and forest resources. Although not pertinent to the City of Monterey, impacts may result from the implementation of this program in coastal agricultural and forest lands where a reasonably foreseeable project, such as a structural BMP or treatment infrastructure, may need to be constructed and thus, would result in the conversion of farmland or forest land to non-agricultural and non-forest land uses.

#### Air Quality:

The discussion of air quality impacts in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts. The DEIR's assertion that these impacts can only be evaluated at a project level is incorrect, since typical compliance measures could be described and analyzed now.

For example, with respect to construction period air quality impacts, a set of typical projects and their associated construction requirements could have been described and analyzed. In fact, this is what the DEIR does for several of the less impacting measures such as catch basin inserts, street sweeping and public education. The same thing could be done for the construction of detention/retention/infiltration basins, discharge relocation facilities, or end-of-pipe treatment facilities. Without undertaking such an analysis, it is impossible to draw valid conclusions regarding the potential air pollution impacts of the State Board's proposal.

#### Biological Resources:

The discussion of biological resources in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts. The DEIR's assertion that these impacts can only be evaluated in the future at the project level is incorrect, since typical compliance measures could be described and analyzed now.

In addition to the unsupported assumptions regarding compliance measures discussed above, the biological resources discussion adds another assumption: "BMP repairs, replacements, and upgrades . . . would occur on sites that already have been disturbed . . . and by virtue of their ongoing use are highly unlikely to support sensitive habitat that could be affected . . ." DEIR at page 245-246. This assumption is not going to be the case in many circumstances. In many locations, we anticipate that currently undisturbed open space and recreational lands may be the only available options for certain of the measures that may be required.

The biological resources analysis, in particular the discussion on page 247, also applies an incorrect baseline. Generally, under CEQA, the baseline for analysis consists of the existing physical conditions present as of the filing of the notice of preparation. Instead, however, the analysis appears to apply a hypothetical baseline comprised of a natural water quality condition. From this incorrect baseline, the DEIR then incorrectly concludes that continuation of the status quo would result in a potentially significant impact.

The DEIR also vacillates on the question of whether the existing condition presents an environmental problem, broadly describing certain research results and suggesting some adverse effects on ASBSs from storm water discharges but then offering conclusions like: "there is some question whether the differences are due to discharges" and "the data was inadequate to attribute the variation to the impacts of the discharge." DEIR at page 247; see also DEIR at page 310.

The DEIR also states that the existing controls are "inadequate" – a conclusory statement unsupported by the factual information available. Hence, the biological evaluation fails to provide information or explanations regarding the source of this assumption, and includes internally inconsistent statements regarding this conclusion.

The DEIR also fails to address the biological impacts that would result if program implementation and compliance necessitates diversions of flow away from, and in some instances into, the Areas of Special Biological Significance (ASBS), which may have impacts on the existing marine environment's flora and fauna and the nutrients provided from this runoff.

### Cumulative Impacts:

The DEIR introduces the subject of cumulative impacts on page 304, but then inexplicably omits any substantive analysis. This is a major statewide program that could involve, in the State Board's own estimation, tens of millions if not billions of dollars in capital improvement actions, which will have significant cumulative impacts in a number of environmental areas, including at minimum biology, hydrology and water quality, land use and public services (including recreation). These impacts need to be analyzed and it is clear error for the DEIR to have failed to do so. The total failure to evaluate cumulative impacts cannot be cured in the final EIR, since the public is entitled to comment on that analysis.

### Cultural Resources:

The discussion of cultural resources in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts.

Significant portions of the Monterey Peninsula, and thus the City of Monterey and City of Pacific Grove, are historically significant and contain extensive archaeologically sensitive areas and historic resources. For the City of Monterey, this is evidenced in the City's General Plan Historic Preservation Element, Historic Preservation Ordinance, and General Plan EIR. The Monterey Peninsula's archaeologically sensitive areas include most of the coastal area (and extend inland), where reasonably foreseeable projects of the proposed program would be required to be constructed and implemented. Per CEQA Sections 21100(e) and 15126.4(b), we request known historic and archaeological resources affected by the likely placement of compliance measures in the on-shore coastal areas, and as demonstrated in previously approved land use documents, be described in the environmental baseline, and fully evaluated for significant impacts (cumulative and otherwise) and impacts reduced or feasible mitigation measures proposed.

### Economic and Social Effects:

The DEIR does not adequately evaluate the economic impacts resulting from the cost of sampling, analyses, reporting, transporting and treating water that currently flows into the ocean. As our neighbor in ASBS, we're aware the City of Pacific Grove has and is constructing millions of dollars worth of dry weather diversion facilities. In addition to these costs, dischargers in the Monterey region are expected to shoulder the cost of sampling and analysis at a cost of well over \$1 million for the first five years. Then there are the costs that the local sewer agencies require for capacity, pumping, and treating of the diverted water. The DEIR glosses over these issues in Chapter 6.9. The Monterey Peninsula cities do not have discretionary funds to apply towards the ASBS. These additional costs will have a definite, profound and potentially devastating impact on our ability to deliver services to our citizens. These significant impacts were not adequately addressed in Chapter 7.0 of the DEIR.

The requirements of the program and the reasonably foreseeable projects that we envision (which are not yet defined in the project description or elsewhere), are believed to have a substantial economic impact on the community. This in turn, may result in the need for a jurisdiction such as ours to shift funds/resources from important and/or necessary functions and operations to accommodate the implementation of the proposed program.



The economic and social effects evaluation needs to more fully address the significant financial burden placed on local jurisdictions, and subsequently the residents, development community, and businesses, for the physical improvements necessary to be implemented to achieve compliance with the subject program. Also, the shift of resources (funds and staffing) from other important and/or necessary City functions and operations to accommodate the physical implementation of the proposed program could directly or indirectly impact human beings. As stated in *Guide to CEQA*, by Remy et. al., "Where an EIR does identify significant environmental effects, related economic and social impacts are not irrelevant."

Most of the economic analysis contained in Chapter 7 of the DEIR focuses on a description of the proposed monitoring program and the resulting costs of that program. The reasonableness of the costs of this monitoring program under the standards of the Porter Cologne Act is discussed herein at Section IX. below. Our principal concern, however, is with the under-estimation of the costs of the compliance measures that may be necessary under the State Board's proposed program. As with several of the environmental impact discussions, the discussion of economic effects in DEIR Chapter 7.0 suffers from the general failure of the DEIR to evaluate the more costly potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities.

The DEIR does estimate the costs of eliminating discharges to ASBSs by building facilities to re-route those discharges. DEIR at page 294-295. The DEIR's coast-wide estimate is derived from estimates made by Caltrans that it would cost in excess of \$500 million to move 184 of that State agency's discharges, at a cost of \$2.7 million per discharge. Extrapolating this to the approximately 1,673 discharges that are the subject of the exception applications, the DEIR arrives at an eye-popping total cost of \$4.5 billion. To place it in perspective, this figure is in the same order of magnitude as the entire state budget for prisons, or for the University of California. It is approximately the same level as the remaining state bond funds for repairs and upgrades to the entirety of the state's levee system. Such an investment is clearly unaffordable, particularly in the context of the current budget crisis. The DEIR acknowledges as much when it indicates that "This is a minimum estimate, probably only applicable to storm drains and small nonpoint sources runoff. . . . Undoubtedly, the costs would actually be vastly greater than what is estimated above." DEIR at page 295.

For other potential compliance measures, the DEIR includes a brief, qualitative discussion at pages 295-299, principally consisting of Table 7.4.1 which ranks those costs as being "low", "moderate", or "high" without defining those terms. DEIR at page 297-298. However, even this vague listing fails to address potentially costly options such as diversion and treatment through sanitary sewage treatment facilities.

The DEIR also attempts to extrapolate economic costs and impacts from its experience to-date with applications received for state bond funds under Proposition 84. There, the DEIR lists the project related costs for a number of these projects, which according to the DEIR's calculations cost from \$147,000 to \$185,000 per project. Extrapolating this to a subset consisting of 294 discharges out of the 1,673 discharges that are the subject of exception applications, the DEIR arrives at an estimate of \$43 to \$54 million statewide. All of the assumptions in this analysis are questionable, but the most critical assumptions are that only these 294 discharges will require costly controls, and that the assumed controls would result in compliance with the special protections. These critical assumptions are unsupported in the analysis. As a result, the true costs are likely to be far greater, and with an unknown level of water quality benefit to the ASBS.

Beyond that, the DEIR attempts to mollify the dischargers with the assurance that: "The costs associated with compliance with the Special Protections are less than compliance with the Ocean Plan's standing ASBS absolute waste discharge prohibition." DEIR at page 8. "There will be costs for controls, but there is a set-aside in Proposition 84 (\$35 million) to address ASBS discharges." DEIR at page 16. Clearly, at the higher end of the potential compliance cost range, state bond fund amounts of the Proposition 84 scale will be totally inadequate.

#### Greenhouse Gas Emissions:

The discussion of greenhouse gas emissions in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts.

The analysis of greenhouse gas emissions also generally describes an approach without applying the approach to the State Board's program statewide. The potential cumulative greenhouse gas impacts from the implementation of this program statewide, and the energy demand it will create, should be evaluated.

#### Hydrology and Water Quality:

The discussion of hydrology and water quality in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts. The DEIR's assertion that these impacts can only be evaluated in the future at the project level is incorrect, since typical compliance measures could be described and analyzed now. Please analyze impacts of typical compliance measures (like those listed in Table 7.4.1) in this DEIR.

As with the biological resources analysis, the DEIR also applies an incorrect baseline to the analysis of hydrology and water quality. Generally, under CEQA, the baseline for analysis consists of the existing physical conditions present as of the filing of the notice of preparation. Instead, however, the analysis appears to apply a hypothetical baseline comprised of a natural water quality condition. From this incorrect baseline, the DEIR then incorrectly concludes that continuation of the status quo would result in a potentially significant impact.

The DEIR on page 263 also applies a threshold of significance, not found in the CEQA Guidelines, where a project would "Violate any ambient natural ocean water quality objective . . ." First, the Ocean Plan and Basin Plans do not presently contain any such water quality objective, as discussed below in Section VI. Moreover, under CEQA, applying such a standard of significance assumes an incorrect environmental baseline that would likely result in the continuation of the status quo being deemed to have a significant effect, which again is not appropriate under CEQA.

The DEIR asserts, without support or explanation, that the current discharge controls are "inadequate." DEIR at page 269. We believe this conclusory statement is unsupported by factual information, and attempting to make this conclusion on a coast-wide basis mischaracterizes the factual record.

The DEIR also fails to address the hydrology and water quality impacts that would result if program implementation causes diversions of flow away from, and in some instances into, the Areas of Special Biological Significance (ASBS), which may have impacts both in terms of water quantity and quality. In particular, the impacts of moving or terminating what may have been historic freshwater and nutrient inputs to the aquatic ecosystem need to be evaluated.

The discussion of hydrology and water quality impacts closes with a short list of "thresholds of significance" on page 273 that does not match the list on page 263. This text seems to have been included in error, but if it was intentional we do not believe that these thresholds would properly measure significance under CEQA.

#### Land Use and Planning:

The discussion of the environmental baseline includes Chapter 5.4 Watershed and Land Use Characterizations, but the environmental analysis of the proposed project does not address this topic. Likewise, land use impacts are disregarded in the comparative analysis of alternatives. DEIR at page 9, Table S.1.

As we indicated in our scoping comments, the potential exists for this program's requirements and the reasonably foreseeable projects that result to conflict with existing land use and coastal plans, policies, and zoning, or habitat and natural community conservation. As such, we indicated our position that "no impact" would not be a viable conclusion for parts b) and c) of the initial study checklist for this environmental issue. Mitigation, such as General Plan, Coastal Plan, and/or zoning revisions, may be possible and necessary. However, since the program may induce the need for structural BMPs in/around riparian and drainage areas that are typically open space and conservation areas, it is unclear if mitigation would be viable, as revisions to a habitat/natural community plans to allow construction could have potentially significant impacts.

The land area of our City that flows into the City of Pacific Grove and eventually to the ASBS is mostly residential with no open space parcels for the future construction of BMPs. As a result, the implementation of BMPs in this area may result in the loss of housing and conflict with existing land use policy and zoning. We believe this is an example of a potentially significant land use impact of the program contemplated in the DEIR.

In addition, an EIR is required to discuss any inconsistencies between the proposed project and applicable general plans and regional plans. CEQA Guidelines Section 15125(d). There are numerous inconsistencies between the potential compliance measures and applicable land use plans, including the City of Monterey General Plan Elements and other affected cities, and applicable local coastal plans. These inconsistencies need to be evaluated in the EIR.

#### Public Services:

The discussion of public services impacts in the DEIR suffers from the general failure of the DEIR to evaluate the more highly impacting potential compliance measures such as detention/retention/infiltration basins and end-of-pipe treatment facilities, relying on largely unspecified mitigation measures to arrive at unsupported conclusions regarding the resulting impacts. The DEIR's assertion that these impacts can only be evaluated in the future at the project level is incorrect, since typical compliance measures could be described and analyzed now.

Potential significant impacts could result from physical improvements to parks to accommodate the project/program objectives. In a mostly developed, or built-out, community like those on the Monterey Peninsula, no other viable location may be available for structural BMPs except those lands designated as open space or parks.

We do not agree with the following statement on DEIR at page 281: "...nor would it create new demand for community services since no capital improvements are included in this general exception project". We believe this evaluation approach is flawed – the proposed project would most definitely result in capital improvement projects. This DEIR should attempt to disclose the reasonably foreseeable projects that would result from its implementation to adequately assess potentially significant environmental impacts and mitigation needed for the program. A vast majority of the reasonably foreseeable projects resulting from this program would be structural in nature and would require increased City staffing. And given the economic realities, increased staffing in one area means decreasing staff in another area of services that the City delivers. And given the economic realities, increased staffing in one area means decreasing staff in another area of services that the City delivers.

#### Recreation:

See comments on the public services discussion, above.

#### Utilities and Service Systems:

Despite scoping comments requesting a discussion of the impacts of the State Board's proposal on utilities and service systems, the DEIR does not address the issue. We believe the proposed program would have potentially significant impacts on utilities and service systems, specifically in terms of the issues identified in parts b), c), and e) of the initial study checklist (CEQA Appendix G, XVII. Utilities and Service Systems). Reasonably foreseeable projects directly related to the implementation of this program could have substantial impacts on existing local wastewater treatment facilities (DEIR at page 59, footnote 3) and/or result in the construction of new storm water drainage facilities or expansion of existing facilities, all of which may cause significant environmental impacts. Such projects could result in significant capital improvement program burden, as well, which is contrary to the conclusion made in the State Board's explanation provided in the last paragraph on DEIR at page 281.

In relation to electrical infrastructure, the impact analyses is lacking compliance with CEQA Sections 15126.4(a), Section 21100(b)(3), and Appendix F Energy Conservation (Part II EIR Contents) to provide thorough discussion regarding the proposed project's energy consumption, implications, and mitigations. Specifically, we request this DEIR include energy consumption and requirements information in the project description, energy supplies and use patterns in the environmental settings, statewide energy impacts and feasible mitigation measures in the environmental analyses, and compare the alternatives in the DEIR in terms of overall energy consumption and in reducing wasteful, inefficient, and unnecessary consumption of energy.

#### Significant and Unavoidable Impacts

The discussion of significant and unavoidable impacts at pages 308-311 of the DEIR largely repeats the analysis of biological resources and hydrology and water quality impacts, addressed above. For the same reasons as previously presented, defining the existing baseline as a significant and unavoidable impact reflects an incorrect analysis under CEQA.

This discussion also fails to address the significant and unavoidable impacts of the construction, implementation, and long-term operation and maintenance of reasonably foreseeable compliance measures that may be necessitated by the State Board's proposed action on the contemplated project. This failure is evident throughout the discussion of the environmental analyses as described in numerous instances above and in this Section IV.

## V. DISCHARGERS' REQUESTS FOR CLARIFICATION OF THE PROPOSAL

In our scoping comments as well as other entities' NOP scoping comments, a number of clarifications were requested by the City and others in regards to the draft Special Protections. Many of these clarifications were not made in the DEIR, so we are repeating these comments here for consideration of the DEIR and to correct vague, ambiguous, and inconsistent definitions and verbiage:

I.A.1.a(3)(iv): Please define "Storm Water". The definition of what is "storm water" is very crucial to understanding the scope of the Project. When read in a literal fashion, this could mean that water being discharged from a storm drain cannot contain any amount of anthropogenic pollutants, even if the great majority of the water is rain directly from the sky. If this is the case, then the scope of the Project will be entirely different than if a more reasonable interpretation of storm water is made, such as any water being discharged during or shortly after a rain event with certain limitations on anthropogenic pollutants. The definition of this key term is vague and therefore, the Project is vague.

I.A.1.b: Referring to the comment above, if the literal interpretation of the term storm water is used (i.e. absolutely no amount of anthropogenic pollutants are allowed), then this requirement wouldn't seem to make sense, unless the requirement is to also treat even the unadulterated rainfall. The environmental implications of this could be far-reaching. The definition of the Project is vague.

I.A.1.e(2): These exceptions do not include inevitable occurrences such as water main breaks. Is this intentional? This will influence the Environmental analysis. Please clarify.

I.A.1.e(3): This provision if taken literally would negate a number of the exceptions stated in the preceding listing of exceptions. For example, flows from fire fighting activity may well "contribute" to a violation of the Ocean Plan and alter the "natural water quality". Therefore, the definition of the Project is vague. Please resolve this inconsistency.

I.A.2.c(4): The term "outfall drains" is not clear. Please define this term. Does this mean the end of pipe where water enters into the ASBS or is this to also include the outlet pipes from upstream drains and catch basins? This lack of clarity will influence the analysis of the environmental impacts of the Project. Therefore, the definition of the Project is vague. Please clarify the point(s) in the storm drain system where this applies.

I.A.2.d(2): This provision states that a 90% reduction of pollutants is to be accomplished as determined as measured from a baseline that is effective on the date that the Special Protections are approved. This condition assumes that the baseline data will be available on the date that the Special Protections are approved. If this data is not available, it's unclear where the starting point for comparison will be. And since this baseline data isn't available today, it's unclear what measures would need to be taken to comply. Therefore, the scope of the Project is unclear. Please clarify.

## City of Monterey – Detailed Comments (May 10, 2011)

In addition the SWRCB needs to clarify the basis for the selection of a 90% pollution reduction, which may not be achievable and which may exceed the reductions attained by end-of-pipe treatment.

I.A.2.g and throughout the Special Protections: The water quality standard for discharges is vague. One standard is "natural water quality", which we now know through scientific studies does not always meet the other water quality standards contained in the Ocean Plan such as Tables "A" and "B". This can have a direct impact on the extent of infrastructure needed to attain the objectives. Please describe how the "natural water quality" is going to be determined. Without having "natural water quality" clearly defined before the environmental review is conducted, the reviewers cannot understand the goals and therefore the impacts of the Project. The scope of the Project is vague.

I.A.3.a: It is unclear how the impacts from the cessation of all non-authorized, non-storm water discharges on or before the "effective date" are going to be analyzed if the EIR is going to analyze the foreseeable impacts that will result and presumably, be completed before the "effective date". How then does this apply and what will the Project scope be in this regard? Please explain for project clarity and environmental analysis.

I.B.1.b: It is unclear how this statement applies to the treatment of storm water and therefore what the environmental impacts will be from preventing an alteration to the "natural water quality". If the flows are only storm water containing no anthropogenic pollutants, then how could it "alter natural ocean water quality"? If the intention is that storm water cannot alter natural water quality even if it is beneficial, then this will have drastically different environmental impacts than polluted storm water (i.e. non-storm water) having the potential of detrimentally impacting the natural water quality. Therefore, the Project definition is vague. Please explain for Project clarity.

I.B.2.c: As with comment 3, this condition assumes that the baseline data will be available on the date that the Special Protections are approved. If this data is not available, it's unclear where the start point for comparison will be. Therefore, the scope of the Project is unclear.

I.B.3.a through .e: As with comment 3, this condition assumes that the baseline data will be available on the date that the SPs are approved. If this data is not available, it's unclear where the start point for comparison will be. Therefore, the scope of the Project is unclear.

II. "Additional Requirements for Parks and Recreation Facilities": "Parks and Recreation Facilities" are not defined in the Special Protections. Therefore, the scope of the Project is unclear. Please define for Project clarity and environmental analysis.

III. "Waterfront And Marine Operations": Where is the term "Waterfront and Marine Operations" defined? Does it include incidental uses such as sea kayak launching or a davit for launching individual boats? Without a definition, the scope of the Project is unclear. Please provide definitions for Project clarity and environmental analysis.

IV. "Monitoring Requirements": The scope and definition of what is to be done under this part of the proposed General Exception and Special Protections will have considerable bearing on the costs to the permittees. Most small agencies will need to curtail or eliminate services to the public in order to afford the costs associated with the proposed General Exception and Special Protections.

IV.A.1: The term "measurable storm event" is not defined. Please define for Project clarity and environmental analysis.

IV.A.2.a: The proposed Special Protections do not state how often the runoff flows must be measured or calculated. Please clarify for environmental analysis.

IV.A.3: Minimum frequency of sampling and number of samples is not clear. Please define these values for all sampling tasks required.

IV.B.1.e: It's not clear how far up or down the coast the marine debris study would need to be conducted. Some types of marine debris can stay afloat for many miles. Source tracking for marine debris will likely result in onerous costs. Please clarify the scope for this element of the Project.

Glossary: As noted above, there are numerous issues with the definition of the Project and many are related to terms that are not defined or described adequately to assess the environmental impacts from the Project. Please provide the definitions necessary for clarity and understanding of the Project scope, applicability to dischargers, and environmental review.

## VI. SPECIAL PROTECTIONS AND DEFINITION OF "NATURAL WATER QUALITY"

The proposed Special Protections fail to acknowledge or address the issues with the vague and indeterminate definition of "natural water quality". Despite basing its proposed program on the attainment of "natural water quality" in ASBSs, the DEIR concedes that: "First, it is uncertain what constitutes natural water quality. Second, it is uncertain which discharges cause alterations in natural water quality. Finally, it is uncertain what the extent and magnitude of natural water quality impacts are on a statewide basis." DEIR at page 287. Moreover, as the Natural Water Quality Committee found in its September 2010 Technical Report 625, contained in Attachment 8 of the DEIR ("NWQC Report"), "Natural ocean water would be expected to vary noticeably both from place to place, and from time to time." NWQC Report, preface. Moreover, "the reality is that vast areas of the ocean are no longer pristine. Truly natural water quality probably does not now exist in California's coastal ocean, and may be rare throughout the world." *Id.* Further, the NWQC Report concluded that: "it is not practical to identify a unique seawater composition as exhibiting *natural water quality*." NWQC Report at 4. Further, "Although 'maintenance of natural water quality conditions' in ASBS would be desirable, such a goal may not always be realistic." NWQC Report at 13.

Notwithstanding these practical realities, the NWQC suggested an approach that appears to have been adopted as the recommendation of the State Board staff, based upon the following definition of "natural water quality":

"That water quality (based on selected physical chemical and biological characteristics) that is required to sustain marine ecosystems, and which is without apparent human influence, *i.e.*, an absence of significant amounts of:

- a) man-made constituents (e.g., DDT);
- b) other chemical (e.g., trace metals), physical (temperature/thermal pollution, sediment burial) and biological (e.g., bacteria) constituents at levels that have been elevated due to man's activities above those resulting from the naturally occurring processes that affect the area in question; and

- c) non-indigenous biota (e.g., invasive algal bloom species) that have been introduced either deliberately or accidentally by man."

Although the NWQC acknowledged that "it is not practical to identify a unique seawater composition as exhibiting *natural water quality*" it continued:

"Nevertheless, the committee believes that it is practical to define an *operational natural water quality for an ASBS*, and that such a definition must satisfy the following criteria:

- it should be possible to define a *reference* area or areas for each ASBS that currently approximate *natural water quality* and that are expected to exhibit the likely natural variability that would be found in that ASBS,
- any detectable human influence on the water quality must not hinder the ability of marine life to respond to natural cycles and processes.

Such criteria will ensure that the beneficial uses identified by the Ocean Plan are protected for future generations."

NWQC Report at 4, 43-44. Thus, as described in the DEIR: "Under this scenario, natural water quality is defined qualitatively and the range of concentrations and conditions is determined at reference stations, taking into account natural changes to water quality that occur as a result of the storm event." DEIR at page 67.

At the same time, the NWQC suggested an entirely different approach, largely disregarded by State Board staff, reflecting an enhanced best management practices system: "Although 'maintenance of natural water quality conditions' in ASBS is probably not always an achievable goal, a goal to 'minimize anthropogenic influence on water quality' in ASBS is realistic and provides a direction forward for continuing improvement." NWQC Report at 13. We request an alternative approach such as this be evaluated by the State Board, recognizing "natural water quality conditions" may not be achievable.

Further, the NWQC Report suggests that more information is necessary before a program is adopted: "In order to avoid significant expenditures that do little to protect ASBS, an assessment of existing and potential anthropogenic influences on each ASBS should be conducted." NWQC Report at 14. The alternative of delaying action until adequate scientific information is available also needs to be considered.

Moreover, the NWQC Report made specific suggestions about the natural water quality approach based on reference sites that are not reflected in the State Board's proposal. For example, the NWQC concluded that: "it is clear from preliminary results that a regional reference condition approach is necessary to define 'natural' in ASBS. The NWQC agreed that comparing an ASBS to a minimal number of isolated reference sites is inadequate to describe these complex and dynamic habitats." NWQC Report at 16. However, the current proposal appears to apply an approach relying on a limited number of reference sites that the NWQC has labeled inadequate.

Also, according to the NWQC, "the reference area approach may have its limitations as in the case of widespread anthropogenic influences (i.e., PAHs, TCDDs) or the situation where distant sources impinge on reference site water quality. (i.e., transport of large storm water plumes)." NWQC Report at 17. "All of these causes of natural variability, and impacts from unanticipated anthropogenic contributions, should be investigated before final natural water



quality ranges can be ascertained." NWQC Report at 18. These problems do not seem to have been addressed in the current proposal.

Although the State Board includes sampling results from several "potential reference stations" it does not identify those reference stations in the DEIR. DEIR at page 211. Instead, it includes a description of "primary criteria" for reference sites, as follows:

- Located in receiving water at the mouth of watersheds with limited anthropogenic influences and with no offshore discharges in the vicinity.
- Limited anthropogenic influence defined as a minimum of 90% open space.
- Preferably, the few anthropogenic sources in a reference watershed will be well attenuated (e.g., natural space buffers between a highway and the high tide line).
- There should be no 303(d) listed waterbodies either in the reference watershed or in the coastal zone."

DEIR at page 288. The DEIR also identifies "additional secondary criteria" that are "deemed important," but which may not lead to "complete exclusion":

- A range of reference watershed sizes that are inclusive of the ranges observed in watersheds that discharge to ASBS.
- A range of reference watershed geologies that are inclusive of the geologies observed in watersheds that discharge to ASBS.
- A range of reference beach substrate that includes sand, cobble, and rock.
- Reference watersheds that include channel island and mainland sites."

DEIR at page 288.

Per ASBS comments submitted to the SWRCB by the Associate Director of Hopkins Marine Station (03/11/2011) on the proposed idea of such "reference sites" for the Pacific Grove ASBS, we've learned that due to the extreme heterogeneity of this ASBS, marine ecologists have concluded that finding two sites identical in all relevant characteristics so as one is a reference site and one is a discharge site is not possible. Additionally, the Hopkins letter expressed concern related to the scientific validity and lack of statistical integrity of the planned approach, and shared that forces unrelated to seawater and storm water discharge are the primary drivers of water quality and ecosystem status, and these other forces create a high level of "background noise" that may disrupt the State's proposed water quality analyses for compliance with the General Exception projects currently contemplated.

The revised draft Special Protections in Attachment B also adds the following statement at several locations:

"If the initial results of post-storm receiving water quality testing indicate levels higher than the 85th percentile of reference water quality data, then the discharger must re-sample. If after re-sampling the post-storm levels are still higher than the 85th percentile of reference water quality data for any constituent, then natural water quality is exceeded." DEIR, Appendix 1 at B-5. The scientific basis for this approach is not described and it still leaves a number of key questions with the methodology unaddressed. And, it's important to note that the scientific community is also raising concerns about the scientific basis and methodology similarly proposed in the three (3) General Exception projects currently under environmental review.

As a result of this vague and subjective description of "natural ocean water quality" and the associated process for determining and monitoring reference sites, dischargers are simply left

guessing as to what the scientific basis is and what will be required of them. There are dozens of material aspects to these descriptions that could have a major effect on the resulting requirements. These need to be clarified and analyzed before the proposed program is adopted. In doing so, the State Board needs to address the problems with the proposed approach identified by the NWQC.

**VII. ADDITIONAL COMMENTS REGARDING REVISED DRAFT SPECIAL PROTECTIONS (DEIR APPENDIX 1)**

In addition to the problems resulting from basing this proposal on a "natural ocean water quality" standard based on an incomplete approach to selecting and monitoring reference sites, the multiplicity of alternative standards, combined with the fact that several of the standards are measured in relation to water quality levels that have not yet been determined, creates a very complicated situation for dischargers. For example, the facilities needed for attaining a 90% pollutant reduction may end up being different from those necessary to attain natural water quality, which in turn may be different from those needed to achieve the Table B levels. If none of these standards is achievable, the resulting discharge prohibition could require an entirely different set of measures. It is important for dischargers to have a clear picture from the outset of the full suite of compliance needs so that plans can be made, and measures designed and implemented, without risk of a later need to adopt different measures.

The timelines included in the Special Protections also will be difficult if not impossible to achieve. For example, permitting and building the necessary facilities in constrained rights of way in the coastal zone will require compliance with CEQA and coastal zone permitting, at a minimum. The funds will need to be found, feasibility/alternatives studied, facilities designed, CEQA review performed and completed, environmental and discretionary permits obtained, contracts awarded, and construction completed. All steps in a project's final construction may not be achievable in the four years provided under the Special Protections.

We also disagree with the statement on page 60 of the DEIR that "Upon consideration, staff does not believe that construction dewatering is essential for emergency response purposes, structural stability or slope stability." This statement is incorrect. Construction dewatering is done for various reasons, but often it is done to stabilize soils. Stabilizing excavations is essential for slope and structural stability of adjacent structures.

At DEIR page 52, first paragraph of "Alternative A: No-Project Alternative (i.e., No Exception)", the third sentence states that relocating the flows could be one way to meet the discharge prohibition. Then in the next sentence, the authors jump to the categorical conclusion that relocating flows could potentially cause far greater impacts on the biological integrity of the ASBS than the discharge itself through demolition, excavation and construction required to remove the existing discharge. Yet in the same document, the authors state that the installation of BMPs can be done with mitigations that would reduce impacts to where they are less than significant. The construction and long-term impacts of diverting flows may be less than the impacts of having to install BMPs, and to pump and treat millions of gallons of water per year.

Additionally, the authors of this DEIR and the Special Protections have failed to define key terms such as "dry weather flows", "non-storm water runoff" and "wet weather flows". An excerpt from the DEIR (p. 58) follows:

#### 4.3.2 Non-storm water runoff

**Issue:** Should non-storm water runoff (e.g., dry-weather flows) be allowed under the Special Protections?

**Issue Description:** Generally, dry weather flow surface runoff accounts for a significant portion of the total mass of contaminants that enter the coastal ocean waters. Dry weather flows, which may occur during summer or winter dry seasons, often originate from multiple anthropogenic sources that may include groundwater from pumping and dewatering, swimming pool drainage, dehumidifier or HVAC condensates, and excess runoff from landscape irrigation [emphasis added].

State staff has verbally stated that wet weather flows are flows that occur during the rainy season, generally interpreted to be between October 15 and April 15. The definition provided on p. 58 thus conflicts with the definition given verbally by State staff. We are also having to assume that "non-storm water" is synonymous with "dry-weather"

The definition of "non-storm water runoff" given in the DEIR opens up concerns and questions that have a direct bearing on the environmental impacts that will be caused by the Special Protections. What does the State mean by "winter dry seasons"? Please define. How long would it have to stop raining for it to be considered to be a "winter dry season"? Please clarify. Significant antecedent flows from ground water can continue to occur for months after the last rainfall. As it is now in the Monterey region, there is little reserve capacity in the sewerage system to take on additional flows (an issue highlighted on DEIR p. 59, footnote 3). And these additional flows will result in additional pumping, increased energy usage, demand on the electrical generation and distribution systems, and additional air pollution.

A requirement of the Special Protections is the cessation of all non-storm water runoff (ref. Project Description, page 34, DEIR). The DEIR on pages 58 and 59 seems to waffle on the subject of dry weather diversions though. Despite the clear statement on page 34 that dry weather flows must be terminated, page 59 seems to be saying that this is true only if sanitary sewage facilities are reasonably close and the sanitary sewer authority is willing to accept the additional flows. These ambiguities and inconsistencies need to be clarified.

### VIII. FAILURE TO DEMONSTRATE ENVIRONMENTAL BENEFIT FROM PROPOSED PROJECT

The DEIR and its supporting documentation fail to demonstrate that any environmental benefits would result from the asserted current ASBS discharge prohibition, or from the proposed special protections. Indeed, the DEIR candidly admits that compliance with a discharge prohibition through re-routing of storm drains "would have harmful environmental effects." DEIR at page 303. The NWQC Report concurs: "In fact, stopping and re-routing storm runoff potentially harms the ecosystem by altering the hydrologic cycle." NWQC Report page 13.

Likewise, there is no indication that current discharges are harming the environment. Instead, the NWQC Report concluded that there were no significant differences between discharge and reference areas in most respects. NWQC Report page 6. The NWQC Report further indicated that: "Intriguingly, the ASBS discharge sites behaved very similarly to reference sites. In fact, average chromium and PAH concentrations at ASBS discharge sites following storm events were not significantly different from average reference site concentrations for all constituents." NWQC Report page 9.

Other statements in the DEIR indicating a lack of environmental benefit include:

"Baseline biological information indicates that functioning marine communities persist in ASBS, but there is some inconclusive evidence that shows biota near discharges has a different species composition than areas away from discharges. Baseline water quality data indicates that wastes are present in storm water runoff into ASBS, but that waste concentrations vary considerably." DEIR at page 7.

"Five sites surveyed in the State Water Board 1979 Reconnaissance Survey Report (SWRCB 1979) were revisited in July 2002. One of the five sites was located at Point Pinos and the other four sites were situated along the shoreline between Point Pinos and Hopkins Marine Station. The total number of algal and invertebrate species found at the Point Pinos site was similar between the 1977 and 2002 surveys. In contrast, more species were found at each of the four other sites in the 2002 survey compared to the 1977 survey, but all of the sites also had species that were unique to one or the other survey." DEIR at page 148. "Tenera concludes that, from their observations, overall diversity has not changed at the Point Pinos site since the survey in 1977." DEIR at page 149.

"Based on a review of the above information, functional biological communities are found in all ASBS with anthropogenic runoff influences. While functioning biological communities do persist at ASBS, some of the initial data indicates that there were some differences identified between those ASBS survey sites influenced by runoff and survey "reference" sites. While impacts may not be overtly conspicuous, there may be some effects from anthropogenic runoff. For three out of four data sets tested by Dr. Raimondi using Bray-Curtis multivariate analysis, there was a difference (p value significance levels < 5%) in community composition between runoff sites vs. reference sites with no direct waste discharges. Still, these differences are not conclusive because of the inconsistencies and inadequacies of survey designs. There is probably not enough reliable data yet to say that it is definitely the runoff causing differences, or if it is due to some other coincidental perturbation. Additional biological monitoring must be performed in order to insure protection of marine aquatic life." DEIR at page 181.

"Trends for historical data (1986 – 2009) at several mussel watch sites at or near ASBS were assessed. Most organic pollutants are either staying the same or showing significant decreases in mussel tissues. Most trace metals are either staying the same or showing significant decreases in mussel tissues." DEIR at page 223.

Further, the sampling figures presented in Chapter 5.8 of the DEIR do not support the State Board's conclusion that storm water discharges are adversely affecting water quality in ASBSs. In fact, for most constituents, the concentrations in the discharge and/or in the ocean receiving water generally are less than those in ocean background water. E.g., Figures 5.8.2 (copper), 5.8.4 (zinc). The relatively higher background levels as compared to discharge and receiving water levels means that there is no clear basis for assuming that discharges are harming water quality, and resulting beneficial uses, in the ASBSs. The DEIR's attempt to explain this is similarly unavailing: "This indicates the possibility that ASBS waters may have elevated copper concentrations from sources other than direct discharges such as developed watersheds, even those outside of the ASBS boundaries." DEIR at page 200. Similar conclusions are offered for zinc, lead and nickel. DEIR at pages 201, 202 and 203. See also DEIR at page 208 ("Another possibility is that these elevated [background] levels are real and

represent pollution from indirect and possibly distant watershed sources.") In other words, this explanation suggests that the water quality problem that has been identified is not one resulting from storm water discharges to the ASBSs, which are the discharges that would be regulated under the State Board's action, but instead may result from discharges outside of the ASBSs that the State Board is not proposing to regulate.

Similarly, sampling results presented in the DEIR comparing measured concentrations closer than 500 meters from a discharge to those greater than 500 meters from a discharge indicate that for two out of the three constituents (copper and PAH) for which the comparison was made, the discharge-proximate levels were actually lower. DEIR at pages 212-213, Table 5.8.7. A similar comparison of measured concentration levels near "reference" locations to those near "discharge" locations shows that for 8 of the 13 constituents compared, the "discharge" results were lower as well. DEIR at page 215, Figure 5.8.7.

The DEIR recognizes that regulated MS4 discharges are already subject to pollution reductions to the "maximum extent practicable." DEIR at page 57. Without direct explanation or support, the DEIR then claims that "reduction of pollutants to MEP is not adequately protective of natural water quality in ASBS." DEIR at page 57. Likewise, without explanation or support, a comparable conclusion is reached regarding nonpoint source discharges.

In sum, the DEIR fails to demonstrate that an environmental benefit will result from either a discharge prohibition or the proposed Special Protections. The State Board should evaluate, rather than disregard, the scientific information that has been developed in this regard and consider alternative approaches to the project that factor in the NWQC findings, results and recommendations, and the factual and substantive environmental information mentioned herein and otherwise.

#### IX. VIOLATIONS OF THE PORTER COLOGNE ACT

The ASBS discharge prohibition and draft Special Protections violate the Porter Cologne Act by adopting plan amendments and water quality standards without addressing key statutory requirements, particularly by failing to evaluate the relative costs and benefits of the proposal. Contrary to the attempted characterization in the DEIR, the present proposal is the first time that storm water is expressly being included within the scope of the Ocean Plan's ASBS "waste" prohibition. As a result, the proposed Ocean Plan revisions have failed to comply with applicable requirements of the Porter Cologne Act, or with SB 512, and the DEIR further fails to fully evaluate the environmental impacts of the proposed Ocean Plan revisions and the subsequent assumption that storm water is a "waste".

Storm water runoff is not waste per se, as it is presented and proposed to be regulated in this DEIR; rather, it is the pollutants that may be in runoff that are waste (SWRCB, 2001, Water Quality Order 2001-15). The proposed project is based on a categorical approach that would regulate storm water runoff as waste. Entities in the Monterey Region contend that this foundation is fundamentally flawed and is not a legal mandate that the SWRCB must apply to storm water and other forms of runoff to ASBS.

On this topic, we suggest the SWRCB consider the peer-reviewed, legal review article, *When Water Becomes Waste: A Call for a Practical Approach to Regulating Stormwater Discharges*, by Singerella and Richardson published in *Environ. Environmental Law and Policy Journal* (Spring 2008), as a DEIR Chapter 9.0 Reference item. Per Singerella and Richardson (2008), the Porter-Cologne Act focuses on the subset of discharges that adversely affect ASBS, and requires such discharges to be eliminated or improved. The language of these provisions

confirms that the focus of Porter-Cologne with respect to the coastal zone is identifying and addressing discharges that adversely impact coastal water, and protecting beneficial uses from degradation. "We do not argue that runoff should be allowed where it harms beneficial uses of the ASBS. The analysis is not complete, however, upon a determination that runoff contains detectable concentrations of chemicals. Instead, it is necessary to take the additional step of determining whether the runoff may adversely affect the receiving ASBS. Applying a categorical approach regardless of the potential impact (or lack thereof) on beneficial uses would be inconsistent with Porter-Cologne because it ignores the probability that in many cases runoff may have little or no effect on the ASBS. It also disregards the important economic and social values subverted by requiring coastal entities to comply with such an extreme standard. Clearly, a categorical approach is not only not legally mandated, but also contradicts numerous Porter-Cologne requirements that are expressly incorporated into ASBS governance."

Furthermore, categorizing all runoff discharges from urban areas as "waste" may have serious unintended and undesirable consequences. For example, our region is currently working, at the request of our Regional Water Quality Control Board, to develop what is known as a Low Impact Development (LID) program. One of the basic tenets of LID is to slow, sink and spread storm water within new developments. This will include impoundments and wetlands. Calling essentially all storm drain flows "waste" will put us in the predicament of discharging "wastes" to surface impoundments, and along with this a whole host of additional regulatory issues that were never intended to be applied to urban runoff.

The draft Special Protections include at least two new water quality standards that do not appear in the current Ocean Plan. First, is the required maintenance of "natural water quality". Next is the requirement that discharges either meet the Table B levels, or those dischargers achieve a 90% reduction from the baseline level within four years. The application of Table B water quality objectives/concentrations to end-of-pipe concentrations is not a valid comparison, and represents a change to Ocean Plan Chapter II.A.3 and Chapter III.C.3 since it would measure compliance at the end-of-pipe rather than after completion of initial dilution.

The DEIR recites the history of the ASBS provisions in the Ocean Plan, recognizing that when the ASBS provisions were adopted in 1978, and then amended in 1983, storm water discharges were not considered point sources subject to the prohibition. In a key step, the DEIR then retrospectively argues that the 1978 and 1983 amendments should be deemed to have covered storm water in light of the 1987 amendments to the Clean Water Act which set out a schedule for establishment of a regulatory program for storm water. The fundamental problem is that at none of these steps was the Porter Cologne Act's required consideration of costs in relation to protection of beneficial uses undertaken under Water Code Section 13241. Moreover, SB 512, which became effective in 2005, reaffirms application of the Porter Cologne Act to the establishment of a prohibition or special conditions relating to ASBSs.

The 2001 Ocean Plan does not clearly make a discharge prohibition applicable to storm water. Instead, it simply defines "Areas of Special Biological Significance" as being "those areas designated by the SWRCB as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable." Ocean Plan Appendix I (definitions). The 2001 Ocean Plan then cryptically states in Item III.E.1 that: "Waste shall not be discharged to areas designated as being of special biological significance." Storm water is not mentioned, and in fact nowhere does the Ocean Plan explicitly establish a storm water discharge prohibition into ASBSs.

The DEIR cites to Order No. 2001-08, relating to discharges by CalTrans to the Irvine Coast ASBS. *In Re California Department of Transportation, State Water Resources Control Board Order 2001-08*, as support for the argument that the current Ocean Plan prohibits storm water discharges to ASBSs. But as described in that decision, the discharge in that case consisted of both storm water and non-storm water. Order No. 2001-08 at 2. It therefore does not establish effective precedent for a discharge composed exclusively of storm water.

Assuming that the 1978 and 1983 Ocean Plans relied upon in Order No. 2001-08 effectively expanded the discharge prohibition to include non-point sources of pollution, they were overridden by Assembly Bill 2800, passed in 2000, which stated that:

In state water quality protection areas, point source waste and thermal discharges shall be prohibited or limited by special conditions. **Non-point source pollution shall be controlled to the extent practicable.**

Public Resources Code Section 36710(f) (Emphasis Added). This language was clear that only point sources would potentially be the subject of a discharge prohibition. For non-point sources, only controls to the maximum extent practicable were required. To the extent the Ocean Plan at the time provided otherwise, it was repealed by the Legislature, which clearly had the authority to do so. Any interpretation of the 2001 Ocean Plan to include such a prohibition conflicts with the State law in effect when it was adopted (Section 36710(f)) and is correspondingly flawed. Likewise, Order No. 2001-08 did not purport to modify the Ocean Plan, and cannot reasonably be interpreted to have done so, as formal rulemaking did not occur.

Senate Bill 512, which became effective in 2005, provides that:

[i]n a state water quality protection area [defined to include ASBSs], waste discharges shall be prohibited or limited by the imposition of special conditions in accordance with the [Porter Cologne Act] and implementing regulations.

Public Resources Code Section 36710(f) (as amended effective January 1, 2005). First of all, by recognizing that a prohibition is just one alternative (the other being the imposition of "special conditions"), SB 512 implicitly recognizes that a prohibition was not yet in effect, but would need to be the subject of future action by the State Board.

Moreover, pursuant to SB 512, any outright prohibition on storm water into an ASBS is made subject to all pertinent provisions of the Porter Cologne Act. These include Water Code Section 13263's requirement that the limitations "take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." Section 13241 in turn requires consideration, inter alia, of the following factors:

- (a) Past, present, and probable future beneficial uses of water,
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto,
- (c) Water quality conditions that could reasonably be achieved, and,
- (d) Economic considerations.

Since the Ocean Plan and basin plans are being amended, these provisions of the Porter Cologne Act clearly apply to both the adoption of an ASBS discharge prohibition, as well as to the proposed Special Protections in all of their aspects.

"As previously discussed in Section S.0 Executive Summary, the Special Protections policy would also be incorporated into the water quality control plans (basin plans) of six (6) coastal Regional Water Boards and into each Responsible Parties discharge permit." DEIR at page 227.

"The proposed General Exception would be adopted into the Ocean Plan . . . ." DEIR at page 6 (summary). "These Special Protections are proposed for adoption by the State Water Board in an Ocean Plan Exception." DEIR at page 7. "The requirements in the proposed Special Protections may be summarized generally to eliminate dry weather runoff, ensure that wet weather runoff does not alter natural water quality in the ASBS, and that adequate monitoring be conducted to determine if natural water quality and the marine life beneficial use is protected." DEIR at page 7.

As explained in Sections IV. and IX. above, a discharge prohibition and/or the Special Protections would result in significant economic and environmental costs, without a demonstrated environmental benefit. As a result, the State Board's proposal fails to comply with these key provisions of the Porter Cologne Act.

The proposed monitoring program also fails the applicable Porter Cologne Act test. Water Code Section 13267(b)(1) requires that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." The State Board must address these issues when monitoring and reporting requirements are established, but has not done so with respect to the monitoring program that would be adopted as part of the proposed action.



## ALTERNATE APPROACHES

### Alternative Special Protections:

**Step 1:** State-funded Panel would gather the necessary scientific data to define natural water quality in each ASBS and determine whether or not any of the ASBSs are experiencing degradation of natural water quality (Degradation). Panel would be chosen by a group of ASBS stakeholders from southern, central, and northern California, working with SWB staff, and would be completely independent from both ASBS stakeholders and SWB. Panel's studies could initially be done on a rough-cut basis using a series of sampling transects within each ASBS.

**Step 2:** If it is shown that there is statistically significant water quality Degradation occurring within an ASBS such that it is harming beneficial uses, the location(s) and cause(s) of such Degradation would be mapped. A determination would be made by the Panel as to whether the Degradation was occurring due to the discharge of pollution into the ASBS, and, if so, what is the pollutant(s) of concern. If the Degradation is not being caused by the discharge of pollutants, no restrictions or requirements would be imposed on the dischargers for purposes of mitigating the Degradation.

**Step 3:** If Degradation is determined to be caused by the discharge of pollutants, the location(s) of Degradation would be compared by the Panel to the location(s) of existing discharges (e.g. storm drains and natural conveyances like rivers) to determine possible sources of the pollutants.

**Step 4:** If the location(s) of Degradation that is determined to be caused by the discharge of pollutants is in reasonable proximity to an existing storm drain discharge, then the entity responsible for that storm drain would be directed to perform end-of-pipe sampling to determine whether or not the pollutant(s) of the type determined to be causing the Degradation are being discharged at that location.

**Step 5:** If this sampling finds that the storm drain discharge does not contain appreciable amounts of the pollutant(s), then the discharge would be deemed not to be causing the Degradation. No restrictions or requirements would be imposed on the discharger for purposes of mitigating the Degradation.

If the sampling finds that a discharge is a significant contributor of the pollutant(s) associated with the Degradation, then requirements to mitigate those impacts would be imposed on the discharger via new discharge permitting requirements issued by the SWB. The permitting requirements would apply to only those discharges that are found by the Panel to be causing the Degradation. The requirements would include a monitoring plan for ASBS receiving water and end-of-pipe sampling to assess the performance of mitigation measures taken by the discharger. Those mitigations could take a variety of forms such as structural/treatment Best Management Practices (BMPs) and/or enhanced source-control measures. Compliance with the requirements would be limited to receiving water quality beyond the zone-of-initial-dilution, not at end-of-pipe. The discharger would be required to continue implementing more and more stringent BMPs until the point that additional monitoring after the BMPs were implemented show that the BMPs have effectively reduced the discharge of the pollutant(s) of concern to a less-than-appreciable level. Once that has been achieved, the discharger would be allowed to reduce or stop monitoring. Possible permitting vehicles could come in the form of either: (1) additional requirements in MS4 Stormwater Discharge Permits or (2) waste discharge requirements.

**Alternative Laws and Regulations**

A basic tenet of storm water regulations is to control pollution at its source(s). For many of the pollutants found in the urban environment, it would probably be considerably less costly to simply eliminate the pollutants and not allow them to enter into the storm drain systems in the first place. Once pollutants are mixed with water, especially when they are in solution, it can become very difficult to remove them. If the pollutants are banned or heavily regulated, it would not only benefit ASBSs, but it would benefit all water bodies including the entire oceans and the inland waterways. If there was a reasonable legislative/regulatory path, coordinated with the existing regulatory agencies, perhaps a more comprehensive solution would come forth that would obviate the need for municipalities to construct heavy engineered solutions which, in the end, would not be needed because of the ultimate elimination of the pollutants for which they were designed to treat.



May 25, 2006

Mayor:  
AN ALBERTCouncilmembers:  
HUCK DELLA SALA  
IBBY DOWNEY  
EFF HAERMAN  
LYDE ROBERSONCity Manager:  
RED MEURERTam M. Doduc, Chair  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Subject: Prohibition of Waste Discharges into the Pacific Grove ASBS

Dear Chair Doduc:

We are in receipt of a letter dated December 5, 2005 and received by us on December 12, 2005 from Mr. Martinson who was formerly a member of your staff (copy attached). It pertains to the discharge of City of Monterey storm water into the Pacific Grove ASBS.

The City of Monterey does not border the Pacific Grove ASBS and does not directly discharge storm water into the ASBS. The City of Pacific Grove borders the ASBS and directly discharges into the ASBS. It is our understanding that Pacific Grove is seeking an exception to the discharge prohibition. Accordingly, it is not clear what more there is for the City of Monterey to do under the current "approach" identified by your staff. As you know, workshops have been held throughout the State and many of the affected entities believe that the State Board will engage in formal rulemaking so that our responsibilities would be clarified and due process would be accomplished.

Your staff has elected to proceed without rulemaking by the State Board. As a result, we cannot adequately respond to the letter requesting us to notify the Board if we intend to seek an exception to the discharge prohibition, we can merely seek clarifications. The City of Monterey is disappointed that State staff is continuing with a "proposed approach" that the State Water Resources Control Board has not validated by official rulemaking. We are being placed in a position that we are very unaccustomed to being in. We are known for our high environmental stewardship ethic and for complying with environmental regulations. The current ASBS regulatory approach is broken and it requires a comprehensive rethinking. We must also be prudent stewards of the public's resources. We cannot in good and clear conscience proceed with spending untold sums of money gathering data for an ill-defined program that is purported to address those ill-defined problems.

Monterey discharges a small amount of storm water into the Pacific Grove storm drain system. That makes Monterey an "indirect discharger" into the ASBS. To our knowledge, your Department has not addressed all 1600+ direct dischargers into ASBS's throughout the State and has not sent letters to any other indirect discharger. We are perplexed as to why the City of Monterey is being singled out as an indirect discharger. This is not just a matter of being treated unfairly and differently; it is also a legal issue, as well as an issue of practicality. If the theory is that indirect dischargers are contributing to receiving water quality issues related to storm water then, as a matter of practicality, all indirect dischargers need to be called on simultaneously within a given drainage basin to cooperate with one another and collaborate on all legitimate State ASBS related impositions.

Although the letter does not make this clear, we have also received information from your staff that the City is violating the ASBS discharge prohibition due to our Hovden Way outfall which is proximate to the Pacific Grove ASBS. This discharge amounts to less than 3,000 cubic feet of storm water per average year. It is our contention that the Ocean Plan is legally vague regarding this issue. Once again, if you intend to start regulating storm water discharges located at an inadequate distance from the designated areas, you will be opening up enforcement under your Department's scheme to hundreds, if not thousands, of dischargers of storm water into the ocean near, or with the potential of drifting into an ASBS. Again, it would appear that Monterey is being singled out, to our knowledge there is no other indirect discharger near an ASBS that has been subjected to your scrutiny.

We can understand the need to work cooperatively with Pacific Grove to address environmental impacts that are attributable to storm water that originates in Monterey. But the letter doesn't mention working together with Pacific Grove. If the letter is asking us to investigate water quality within Pacific Grove, we can't comply. We have no police or legislative powers in Pacific Grove. So if the logic for sending both Monterey and Pacific Grove letters that are substantively the same so that Monterey would fill any voids left by Pacific Grove or visa versa, that logic appears to be legally flawed.

We received this letter on December 12, 2005. The letter to Monterey is essentially the same as a letter received by Pacific Grove on August 18, 2005. Yet your agency is imposing exactly the same deadline for compiling the required information. This gives us four months less time than Pacific Grove. We took extraordinary steps to gather samples this winter without having any clear idea what we were to be sampling for or a clear understanding of the regulatory process. The sampling we have done has cost us an extraordinary amount of money and we have yet to have the results analyzed and a report prepared. We would need additional direction from the State Board and time to accomplish this work.

There appears to be a lack of sound science that has pervaded the ASBS regulatory regimen. Some examples are:

- We are being asked to stop discharging to an ASBS when in fact we do not directly discharge to an ASBS.
- We are being required to gather water quality data without gathering flow rates.
- We are being told that our discharges of storm water are detrimental to the ASBS, yet the State has shown no site-specific evidence. (This is key since Monterey and Pacific Grove are located on a peninsula and free of much of the heavy urban pollution that contributes to storm water pollution).
- There is no stated goal other than "... discharge will not compromise protection of the ocean waters for beneficial uses and the public interest will be served." This is the goal stated in your letter for an exception.
- The method being followed by the State appears to run counter to some of the most important tenants of the basic "Scientific Method". First, where are the observations from which the hypotheses are being formed? We can understand and agree that there are some limited observable impacts in our ASBS that may be caused or exacerbated by storm water contaminants. Why go on a wide-ranging data gathering exercise when the universe of observable impacts is very limited?

A key standard is what constitutes a "waste". There have been differing standards that State staff has proposed. These range from the ill defined "no impact" to the beneficial uses of the receiving waters to the absolutely impossible "zero molecule" standard to the essentially impossible application of Ocean Plan Standard "Table B" to end-of-pipe. If treating storm water to purity standards that exceed drinking water standards was practicable, this would solve a real problem for the Monterey Peninsula, that lacks reliable sources of potable water. This is not a physically or fiscally feasible approach.

Finally, the required implementation of staff's "proposed approach" is unconstitutional without a subvention of funding. California Constitution, Art. XIII B § 6, which requires the legislature to provide a subvention of funds to reimburse local governments whenever the Legislature or any state agency mandates a new program or a higher level of service. Since a new program is being mandated in the December 5, 2005 letter, your Department is required to provide funding from the legislature. There is no mention of funding in the letter. We realize that there are some opportunities for using grant funding. However, grant funds are not a constant source of funding. This is going to be especially important if this process causes communities to expend more funds for operations and maintenance of treatment systems.

For the reasons stated above, we are requesting the State to hold in abeyance the ASBS enforcement program until after the State Water Resources Control Board can deliberate over this matter, adhere to the tenants of legal rulemaking and due process and the provisions of the Porter Cologne Act; identify funding; provide clarification and well thought out guidance.

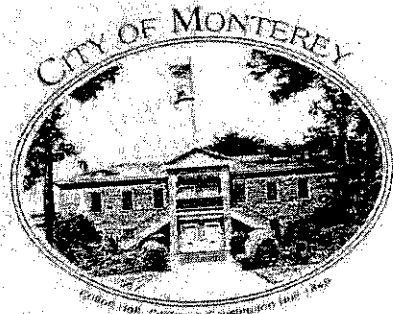
Please treat all requests for information in this letter as Public Record Act requests.

Thank you in advance for your response.



Dan Albert  
Mayor

- c:
- City Attorney
  - City Engineer
  - The Honorable John Laird, 27<sup>th</sup> District, State Assembly, 99 Pacific St. Ste. 555-D,  
Monterey, CA 93940
  - The Honorable Abel Maldonado, 15<sup>th</sup> District, State Senate, 590 Calle Principal, Monterey,  
CA 93940
  - Julie Packard, Director, Monterey Bay Aquarium, 886 Cannery Row, Monterey, CA 93940
  - Mayor and City Council, City of Pacific Grove, 300 Forest Ave., Pacific Grove, CA 93950
  - Mayor and City Council, Carmel-By-The-Sea, P.O. Box CC, Carmel, CA 93921
  - Mark Stilwell, Pebble Beach Company, P.O. Box 1767, Pebble Beach, CA 93953
  - George Somero, Director, Hopkins Marine Station, Pacific Grove, CA 93950
  - Elizabeth Krafft, MCRWA, 893 Blanco Cir., P.O. Box 930, Salinas, CA 93902
  - League of CA Cities, Attn: Deanna Sessums, 121 Fairmont Ave., Santa Cruz, CA 95062
  - National Association of Counties



August 8, 2006

Ms. Tam Doduc, Chair  
 California State Water Resources Control Board  
 State Water Resources Control Board  
 1001 I Street  
 Sacramento, CA 95814

Mayor  
 JIM ALBERT

Councilmembers:  
 CHUCK DELLA SALA  
 LIBBY DOWNEY  
 EFF HAFERMAN  
 CLYDE ROBERSON

City Manager:  
 TERRY MEURER

Subject: Comments About the Working Draft of Special Protections-Areas of Special Biological Significance

Dear Chairperson Doduc:

Before I begin making my comments about the working draft of the "Special Protections-Areas of Biological Significance Storm Water and Nonpoint Source Discharges, June 14, 2006" (Working Draft), I'd like to provide you with some background about the City of Monterey and the surrounding area. I'm sure you are aware of the beautiful environment we have here. Our City leaders understand that we rely upon this environment to support our largest "industry", tourism. Moreover, the City's leaders have not merely paid lip service to their commitment to environmental quality.

Long before having a Phase II storm water permit, our City has implemented many of the elements of what will be required by that permit. We currently spend approximately \$1.5 million per year on storm water related matters.

As you know, the first designation of ASBSs occurred in 1974. At that time, there was a sewage treatment plant located in Pacific Grove with its discharge terminus adjacent to what was to become the Pacific Grove ASBS. There were hulks of canneries undoubtedly containing toxic materials. There was a lead slag site located along the shores of Monterey adjacent to Wharf I. There was a lumber yard located within the Pacific Grove ASBS drainage area. All of these sources of pollution have had remedial action taken by local government at local expense. The sewage treatment plant was decommissioned; the large cannery bordering the eastern boundary of the Pacific Grove ASBS is now the Monterey Bay Aquarium; the slag site cleaned up and the lumber yard has been replaced. In addition, the City of Pacific Grove has already begun to divert dry weather flows from the storm drain system to the sanitary sewer system. The diversion project is scheduled to include all outfalls within a year.

The Cities of Monterey and Pacific Grove have been leaders in our state when it comes to small community storm drain pollution prevention. We have had robust programs such as "First Flush" and "Urban Watch" to detect pollutants in our storm drains. Monterey has pursued polluters. We have been providing public education and outreach. In partnership with the City of Santa Cruz, we prepared the storm water manual used by the Coastal Commission. We have done all of this and more, long before we even had a Phase II storm water permit. This City has demonstrated a strong clean water ethic.

We recognize that there are areas such as the Pacific Grove ASBS that deserve additional "special" protections. We appreciate and welcome this idea. Although the quality of the waters within the Pacific Grove ASBS has undoubtedly improved since its formation, we believe that the waters in this area deserve to be further protected.

We have been following the ASBS issue ever since we received a draft cease and desist order in December of 2004. City staff attended a hearing at the Board's offices in April of 2005 when the Board directed their staff to hold a series of workshops to gather input and that the Board would consider making revisions to the way that the State approaches regulating ASBSs. We applaud this move, as we believe the road that the Board was going down is a wasteful and divisive one.

The waters off of Pacific Grove are amazingly beautiful and healthy. We have had conversations with numerous staff from Hopkins Marine Station and the Monterey Bay Aquarium about the health of the marine ecosystems in this area and about the impacts of storm water on the health of the biota. What we hear consistently is that, at the most, there is anecdotal evidence and no statistically significant data that shows that storm water and non-storm water flows are negatively impacting the beneficial uses of the ocean.

- 1) The regulatory system does not allow for local variables. For example, the City of Monterey is lumped together with other ASBS communities, as though we have outfalls to an ASBS; however, we do not. Our storm water reaches the Pacific Grove ASBS via the Pacific Grove storm drain system. We can not regulate what goes on in Pacific Grove; therefore, we should not be regulated in the same manner as Pacific Grove. Perhaps we could be required to monitor our water quality at our borders with Pacific Grove; it seems duplicative for all of us to be monitoring the same ocean area.
- 2) There is the presumption that all storm water is causing harm to the ASBS. This has become known as the "one molecule rule" since the current staff interpretation is that all runoff is "waste" since it contains anthropogenic materials. We believe that this definition of waste is undermining the credibility of the Board and the process. Nobody would claim that storm water runoff is gold just because there are a few stray molecules of gold in some storm water. Under the current regulatory approach and the Working Draft, we will be required to conduct very expensive testing and monitoring of storm water and ocean water. Locally, we are talking about an area that has obviously undergone numerous positive changes since the formation of the ASBS. Local experts are telling us that there is not anything indicating to them that there are negative impacts from storm water. Therefore, conducting more tests and studies will not help water quality. We would rather apply scarce local funds towards tangible projects that would really improve water quality.
- 3) We recognize that there are contaminants in the storm water of both Pacific Grove and Monterey that has the potential for causing harm to the ocean biota. Rather than spending scarce resources conducting science, we would rather concentrate on reducing or eliminating these contaminants by implementing accelerated BMPs. This approach would be in line with the recommendations that came from the report that your Board commissioned and recently received entitled "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities". This report basically concludes that, for municipal discharges, a rigorous BMP selection and maintenance program is the most effective approach; we would agree.
- 4) While I am not speaking for the City of Carmel, I would like to use their situation to illustrate another basic flaw in the current and the proposed approaches. The Carmel River discharges many orders of magnitude more water into the Carmel Bay ASBS than the City of Carmel-by-the-Sea. Yet under the proposed regulatory approach, Carmel would have to conduct the same ocean science as a community far away from the influence of a river. While I'm not a scientist, I think that the pollutant loading and signature from the river will far outweigh and make indistinguishable any impact from the City.

If the state is going to pursue an approach that exceeds the requirements of the federal government as we believe the current regulatory approach and the Working Draft do, then this is an unfunded state mandate. Therefore, the state needs to provide funding for the implementation of these regulations. Much has been said about the use of grant funds to finance this effort.

However, grants are not a reliable source of funding and they are especially problematic when one is facing a deadline.

Another irony is that, currently, we are investigating eliminating or severely curtailing storm water outflows to the Pacific Grove ASBS. The report has not been finalized; however, there is some possibility that ceasing most flows and reusing storm water may be economically feasible. The irony is that this study is being financed with state Proposition 50 funds. I think that a majority of people would recognize a huge waste of taxpayer money if we were to conduct storm and receiving water monitoring along with studies of the ocean biota using public funds, while at the same time using taxpayer money to divert and reuse the storm water, essentially negating the need to answer questions about the impact of storm water on the ASBS.

We will be making specific comments about the Working Draft in a future correspondence.

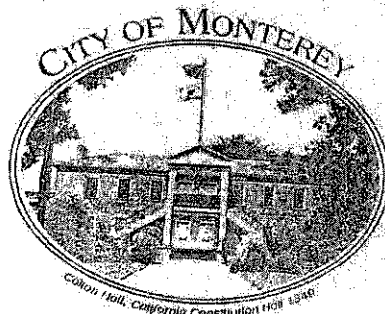
Sincerely,

*Dan Albert*

Dan Albert  
Mayor

- RECEIVED  
AUG 10 2006  
PUBLIC WORKS DEPT.
- c: City Council  
Director of Plans Engineering and Environmental Compliance  
City Engineer  
The Honorable Jeff Denham, 12<sup>th</sup> District State Senate, State Capitol Bldg Room 3076,  
Sacramento, CA 95814  
The Honorable Abel Maldonado, 15<sup>th</sup> District State Senate, State Capitol Bldg, Room 4082,  
Sacramento, CA 95814  
The Honorable John Laird, 27<sup>th</sup> District State Assembly, P.O. Box 942849, Sacramento,  
CA 94249  
The Honorable Simon Salinas, 28<sup>th</sup> District State Assembly, P.O. Box 942849,  
Sacramento, CA 94249-0028  
Jim Colangelo, City Manager, Pacific Grove  
Rich Guillen, City Manager, Carmel-By-The-Sea  
Mark Stilwell, Pebble Beach Company  
Yvonne Hunter, Policy Development/Legislative Representative, League of CA Cities,  
1400 K Street, Ste. 400, Sacramento, CA 95814





## DEPARTMENT OF PUBLIC WORKS

January 26, 2007

Bruce A. Fujimoto, Supervisor  
Storm Water Section  
Division of Water Quality  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Subject: Public Records Act Request – Areas of Special Biological Significance

Dear Mr. Fujimoto:

This letter is in further continuance of my request for information dated December 1, 2006 and as further clarified by my letter of December 15, 2006. Your response letter dated January 16, 2007 states that *"To date, the Board has not corresponded with any dischargers regarding our ASBS regulatory program where the discharge in question was not either into or immediately adjacent to an ASBS"*. This would appear to be an inaccurate statement though since the City of Monterey does not discharge into or immediately adjacent to an ASBS and you didn't report that the State has corresponded with Monterey on these matters. Attached is one piece of correspondence received on July 27, 2006 that states the reason for the City of Monterey being included in the ASBS regulatory process is that a portion of our storm drain system is connected to the City of Pacific Grove's storm drain system. The portion of the Pacific Grove system that conveys Monterey's storm waters does discharge into an ASBS.

Could you please redouble your efforts to find the names of those that fit the criteria that we have specified or explain why it is that you didn't include the City of Monterey.

Sincerely,

Tom Reeves, PE LS  
City Engineer



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

ATTACHMENT C



Arnold Schwarzenegger  
Governor

## Executive Office

Tam M. Doduc, Board Chair  
1001 I Street • Sacramento, California 95814 • (916) 341-5615  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5621 • <http://www.waterboards.ca.gov>

July 27, 2006

The Honorable Dan Albert  
Mayor of City of Monterey  
Monterey, CA 93940

Dear Mayor Albert:

### PROHIBITION OF WASTE DISCHARGES INTO THE PACIFIC GROVE ASBS

Thank you for your recent letter regarding the prohibition of waste discharges into the Pacific Grove Area of Special Biological Significance (ASBS). We appreciate your concerns and comments on this issue.

The State Water Board made a policy decision years ago to prohibit all discharges to ASBS because it determined that these areas warranted special protection. Staff's current effort is to implement this policy directive. This effort is not based on any particular observations from which hypotheses were formed. Rather, the data-gathering effort is intended to address the current legal requirements for obtaining an exception to the discharge prohibition. For example, alteration of natural water quality is not permitted in an ASBS; consequently, ambient data must be gathered.

With regard to your concern about State Water Board staff proceeding without rulemaking, the waste discharge prohibition has been in effect since 1983. The California Ocean Plan (Ocean Plan) Section III.E.1, requires that: "Waste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality condition in these areas."

Monterey is considered a "direct" discharger in that the city discharges directly to the Pacific Grove storm drain, which flows into the Pacific Grove ASBS. Wastes carried by storm water into the ASBS via the City of Monterey's storm drainage system are prohibited.

Waste is broadly defined in the Water Code (section 13050d) as sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin. We agree that cooperation and collaboration among stakeholders within a watershed adjacent to an ASBS is the key to success in addressing environmental issues. The State Water Board's Division of Financial Assistance provides funding for projects such as the Clean Beaches Initiative.

*California Environmental Protection Agency*

Mayor Dan Albert

-2-

ATTACHMENT

Mayor 1

July 27, 2006

through which funding was provided to the City of Pacific Grove for an extensive urban runoff diversion project at the Pacific Grove ASBS. Information about our various funding programs can be found at [www.waterboards.ca.gov/funding/index.html](http://www.waterboards.ca.gov/funding/index.html).

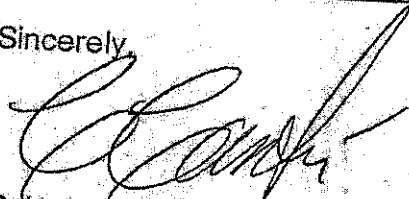
We disagree that the "proposed approach" is unconstitutional. The ASBS discharge prohibition has been in place with full legal standing for decades. Staff's proposed approach is intended to assist current dischargers who wish to continue discharging into an ASBS while concurrently protecting these special areas.

Staff's proposed Special Protections will be presented at an upcoming public scoping meeting in Monterey, scheduled for August 15, 2006. The State Water Board will seek input on the scope and content of the environmental information, which should be included in the draft mitigated declaration that will be prepared for the proposed ASBS Special Protections to address storm water and nonpoint source discharges. An Agenda is posted at <http://www.waterboards.ca.gov/plnspols/asbs.html>

Our letter to you dated December 5, 2005 notified you of the Ocean Plan waste discharge prohibition and provided specific information on how the City of Monterey may apply for an exception to this prohibition. We recognize and appreciate your need for additional time to collect the necessary information for this application package. Although we are not changing the May 31, 2006 application deadline, we are willing to allow you to submit a complete application that includes a justification for the delay.

If you have any questions, please feel free to contact Bruce Fujimoto, Chief of the Storm Water Section, at (916) 341-5523, [bfujimoto@waterboards.ca.gov](mailto:bfujimoto@waterboards.ca.gov), or Dominic Gregorio, Chief of the Ocean Unit, at (916) 341-5488, [dgregorio@waterboards.ca.gov](mailto:dgregorio@waterboards.ca.gov).

Sincerely,



Celeste Cantú  
Executive Director

cc: (See next page.)

July 27, 2006

2006  
2  
-3-  
Mayor Dan Albert

cc: (Continuation page)

Ms. Deborah Mall, City Attorney  
City of Monterey  
399 Madison Street  
Monterey, CA 93940

Mr. Tom Reeves, City Engineer  
City of Monterey  
City Hall, Room 7  
Monterey, CA 93940

The Honorable John Laird  
27<sup>th</sup> District, State Assembly  
99 Pacific St. Ste. 555-D  
Monterey, CA 93940

The Honorable Abel Maldonado  
15<sup>th</sup> District, State Senate  
590 Calle Principal  
Monterey, CA 93940

Ms. Julie Packard, Director  
Monterey Bay Aquarium  
886 Cannery Row  
Monterey, CA 93940

Mayor and City Council  
City of Pacific Grove  
300 Forest Avenue  
Pacific Grove, CA 93950

Mayor and City Council  
Carmel-By-The-Sea  
P.O. Box CC  
Carmel, CA 93921

cc: (see next page)

Mayor Dan Albert

-4-

July 27, 2006

cc: (continuation page)

Mr. Mark Stilwell  
Pebble Beach Company  
P.O. Box 1767  
Pebble Beach, CA 93953

Mr. George Somero, Director  
Hopkins Marine Station  
Pacific Grove, CA 93950

Ms. Elizabeth Krafft  
MCRWA  
893 Blanco Circle, P.O. Box 930  
Salinas, CA 93902

League of CA Cities  
Attn: Ms. Deanna Sessums  
121 Fairmont Avenue  
Santa Cruz, CA 95062

National Association of Counties  
440 First St. NW  
Washington, D.C. 20001

# State Water Resources Control Board

ATTACHMENT C



## Division of Water Quality

1001 I Street • Sacramento, California 95814 • (916) 341-5455  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
FAX (916) 341-5463 • <http://www.waterboards.ca.gov>

Arnold Schwarzenegger  
Governor

3/23/07



Linda S. Adams  
Secretary for  
Environmental Protection

March 20, 2007

23  
MAR 23 2007

PUBLIC

Tom Reeves, PE L'S  
City Engineer  
Department of Public Works  
City of Monterey  
City Hall  
Monterey, CA 93940

Dear Mr. Reeves:

This is in response to your letter of January 26, 2007. The City of Monterey has been contacted regarding discharges to Areas of Special Biological Significance (ASBS) because the City discharges directly into the ASBS. This belief is based upon our information that the City of Monterey discharges from its storm sewer system to a storm sewer system owned by the City of Pacific Grove that then discharge into the ASBS. The fact that the City of Monterey does not own the Pacific Grove outfall does not relieve the City of its obligation pursuant to the Ocean Plan prohibition against discharges to ASBS. However, if the information we have that the City of Monterey discharges to the City of Pacific Grove's storm sewer system is in error, please submit documentation so we may correct our records.

If you have any questions, please contact Dominic Gregorio (916) 341-5488 or myself at (916) 341-5523.

Sincerely,

Bruce A. Fujimoto, Supervisor  
Stormwater Section  
Division of Water Quality

California Environmental Protection Agency



May 18, 2007

Mayor:  
CHUCK DELLA SALA

Councilmembers:  
LIBBY DOWNEY  
JEFF HAFERMAN  
NANCY SELFRIDGE  
FRANK SOLLECITO

City Manager:  
FRED MEURER

Darrin Polhemus, Deputy Director  
Division of Water Quality  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**VIOLATION OF THE CALIFORNIA OCEAN PLAN WASTE DISCHARGE  
PROHIBITION INTO AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE**

Dear Mr. Polhemus:

We are in receipt of your letter date stamped April 23, 2007, by the same title as above (attached). On December 12, 2005, the City of Monterey received a letter from Mr. Martinson requesting the City apply for an exception or cease discharge. On May 25, 2006, we replied that we couldn't understand the legal or practical reasoning behind the request (attached). We asked what is the reasoning behind requiring the City of Monterey, a community with approximately 90 acres that drain through the City of Pacific Grove's storm drain system, to conform to the same requirements regarding ASBS discharges as Pacific Grove. In response, we received a letter from Celeste Cantú, Executive Director, which did not answer our question or provide us with any substantive information. Instead, Ms. Cantú said the City may still apply for an exception. We have attended the Regional Board's hearings on the issue and provided input but we still have not received any reasonable or substantive answers to our questions. We still await the Board's reaction to the input from the forums they held. The staff has essentially kept reiterating that we must make an "exception" decision without any detail as to the next course of action. The letter we recently received subtly threatens us rather than provides us the information that we seek. To make a reasoned decision we must analyze our options and responsibly take to the City Council a recommendation so that they can make a rationale policy decision that has significant budget implications.

There will surely be a substantial cost associated with the exception process. A recent Second Appellant Court decision in Los Angeles points out that the Regional Water Board is not exempt from having to bear the costs of unfunded State mandates such as being imposed here. Any expenditure required of a city, beyond the requirement of the Clean Water Act, are entitled to subvention by the State. We obviously will be asking for a subvention of funds to pay for any cost that we are mandated by the State Board to pay.

The simple fact is that the City of Monterey does not directly discharge into an ASBS. We recognize that a small portion of our city (approximately 90 acres) does drain into the storm drain system of our neighboring city, Pacific Grove. Pacific Grove does have outfalls that directly discharge into the Pacific Grove ASBS. They have signed up for an exception. We will cooperate with them as they go through the exception process. You

have appropriately targeted the outfalls into this ASBS and the public entity that controls those outfalls has responded.

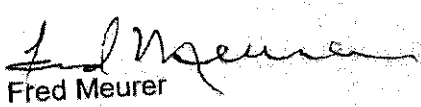
The City of Monterey asks again - what is it that you want us to do as part and parcel of the exception you intend for the City? We have no outfalls into an ASBS and the Pacific Grove ASBS is not on the boundary of our City, so we have no control over it.

The City has made numerous Public Records Act (PRA) requests to your staff as to whether any other community that is discharging storm water into another community's system has been similarly regulated. These requests have not been acted upon in accordance with the Public Records Act. It appears as though Monterey is being singled out since the information we have is that Monterey is the only community that does not drain directly into an ASBS that is being asked to apply for an exception.

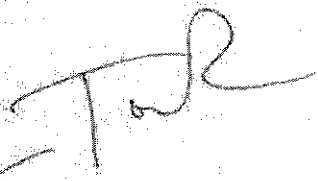
I hope that as a new person in this process, that we can work together to come up with a more reasonable approach that takes into account the unique nature of Monterey's case and our very aggressive Regional Storm Water Management Plan. It isn't that we don't want to protect the ocean. Indeed we do. We just need to know what you want us to do, how much it costs, and where the funding is going to come from before we sign up to do it.

I would be happy to host a visit by you and members of your staff to see what we are doing in the way of storm water management to protect the ASBS as well as the sensitive areas we actually drain into. We are quite proud of our storm water planning effort and our execution of the plan. I look forward to meeting you in person. I will call in the near future to see if we can arrange a site visit. My number is 831-646-3760.

Sincerely,

  
Fred Meurer  
City Manager

Attachments

c:   
City Attorney  
Director of Plans Engineering and Environmental Compliance  
✓ City Engineer  
Associate Civil Engineer, Ried  
Pacific Grove City Manager, Jim Colangelo  
Mr. Roger Briggs  
Mr. Reed Sato  
Carmel City Manager, Rich Guillen

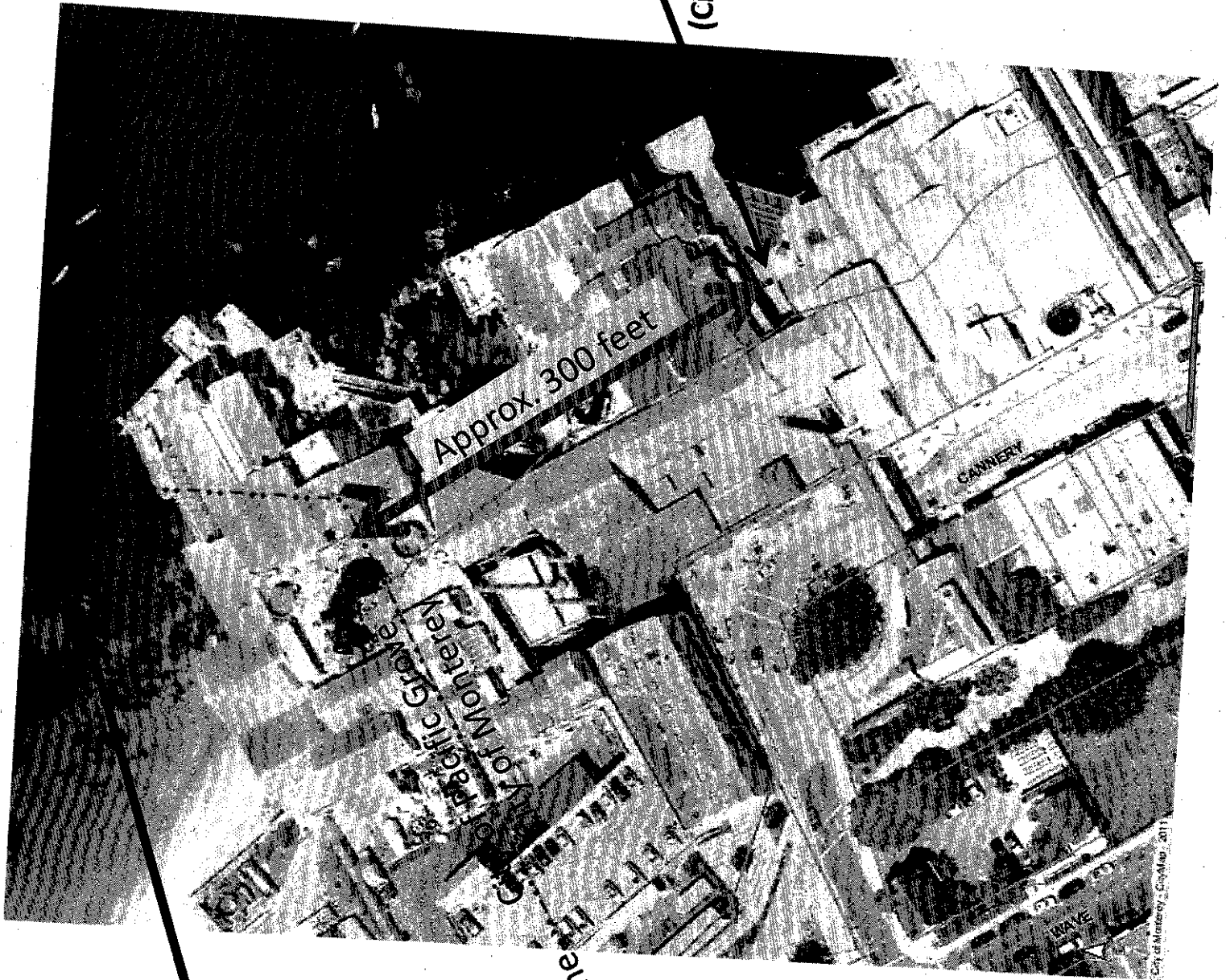


Attachment D



Hovden Way  
Outfall  
(City of Monterey)

Attachment D



Pacific  
Grove  
ASBS

City Limit Line

