

City of Malibu

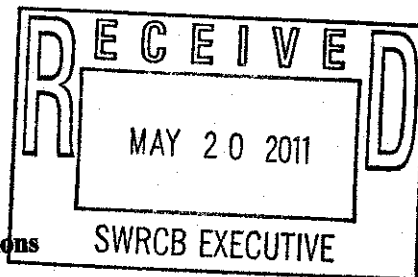
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Public Hearing (5/18/11)
ASBS Special Protections
Deadline: 5/20/11 by 12 noon

May 20, 2011

Sent via email to commentletters@waterboards.ca.gov

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



Subject: **City of Malibu's Comment Letter – ASBS Special Protections**

Dear Board Members:

The City of Malibu ("Malibu" or "City") greatly appreciates that the State Water Resources Control Board ("State Water Board") is considering the City's request for an exception from the Ocean Plan's prohibition of wastes into Areas of Special Biological Significance ("ASBS"). Malibu staff has been working with the staff of the State Water Board for several years in an attempt to assist in the creation of a workable exception program for itself and the other exception applicants that have been waiting for more than six (6) years to receive an exception.

In the meantime, some, like Malibu, have had to suffer from citizen group lawsuits to enforce this prohibition notwithstanding the fact that a complete and accepted exception package has been on file for years. Because of the unfortunate delay in implementing the exception process, the City of Malibu has had to spend hundreds of thousands of dollars defending itself in litigation instead of spending money on more environmentally beneficial programs. We therefore urge the State Water Board to act with all due haste to adopt a program that will remedy the situation by adopting a reasonable and feasible exception program. As such, Malibu has the following comments that it hopes the Board Members will consider when adopting a reasonable exception for Malibu and the other exception applicants.

I. The Exception Should Be Retroactive to the Date the Exception Application was Submitted

The Ocean Plan states "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 conditions in these areas." (Ocean Plan at 20, Section III. Implementation Program at E.1 and I.2.) The Program Draft Environmental Impact Report (PDEIR) classifies this statement as an "absolute discharge prohibition in the Ocean Plan stands, unless an 'exception' is granted."¹ (PDEIR at section S.1.) The only reasonable and feasible way to comply with

¹ The Ocean Plan's Waste Discharge Prohibition itself sets forth the requirements that: "Waste* shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from



this Ocean Plan requirement is for the City to obtain an exception from the general prohibition on waste discharges to the ASBS. (See accord PDEIR at 52 of 331.²)

To this end, Malibu filed a comprehensive exception package in 2007. Further, in order to improve local water quality citywide, the City proactively applied for grants, which helped to fund the design and construction of the Stormwater Treatment Facility in the Civic Center area of Malibu, and Paradise Cove, the latter of which is located in the ASBS. The County of Los Angeles also operates another stormwater treatment facility in the City at Marie Canyon, of which the City was a partner for development and construction of that State funded project. In addition, while waiting for its exception to be granted, the City has progressively installed Low Impact Development ("LID") and permeable pavement projects, and applied for additional grant funds under Proposition 84 to install bioinfiltration Best Management Practices ("BMPs") at all drains where the City has identified its likely control or ownership of the catch basins or other stormwater inlet structures near the Malibu ASBS. The City has an extensive public outreach program, commercial and construction inspections programs, and an illicit discharge inspection program to control inputs of pollutants to local storm drains and waterways, including the ASBS.

Notwithstanding the City's proactive approach to water quality improvement, Malibu has had to suffer through four years of extremely expensive and time consuming litigation brought by citizens groups to enforce the ASBS prohibition. These groups argued, and a federal judge agreed, that the ASBS prohibition is a water quality standard that is incorporated into the Los Angeles countywide municipal separate storm sewer system ("MS4") permit, notwithstanding testimony by MS4 Permit writer from the Regional Water Quality Control Board for the Los Angeles Region to the contrary (see attached **Exhibit B** - deposition transcript excerpt of Xavier Swamikannu).

Given the Court's determination, Malibu may face *millions of dollars* in penalties to the U.S. Treasury and in attorneys fees to the NRDC and counsel for the Santa Monica Baykeeper unless the State Water Board makes the exception granted to Malibu (and Los Angeles County, which is in a similar situation) retroactive back to at least the date of the exception application.

Since there was no possible way for Malibu to get an exception except through the current exception process, Malibu and its citizens should not be punished for having complied with the State Water Board's

such designated areas to assure maintenance of natural water quality conditions in these areas." (See Ocean Plan, at 20, Para. III.E.1. (emphasis added); see also *id.* at 23, Para. I.2 (requiring "Waste* shall not be discharged to designated Areas* of Special Biological Significance except as provided in Chapter III.E. Implementation Provisions For Areas of Special Biological Significance.")) Thus, contrary to State Water Board staff's position that all discharges of waste are prohibited, the language of the Ocean Plan clearly provides an *inherent exception* to this prohibition when the discharges are 1) at a sufficient distance; and 2) assure maintenance of natural water quality conditions. (*Id.*) It is not at all clear from the PDEIR that the discharges identified as being located within the ASBS are not of a "sufficient distance" from the ocean, or that these discharges alter "natural water quality conditions." If they are of sufficient distance and do not alter natural water quality, the prohibition would not apply and no exception would be necessary.

² See also **Exhibit A**: 11/5/09 Deposition Transcript for Dominic Gregorio at 161, lines 17-25 and 162, line 1

("Q. Would it be possible for ... a large city on the coast... to immediately cease discharges to the ASBS?

A. Of storm water?

Q. Yes.

A. Highly unlikely.)

exception procedure that has taken nearly 7 years since the first notification letters were sent in 2004.³ Malibu believes that its limited public funds would be put to better use for water quality improvement projects, instead of paying the U.S. Government and Plaintiffs' lawyers, and hopes that the State Water Board agrees. For this reason, Malibu respectfully requests that the exceptions are granted retroactive to the exception application date.

II. Exception Applicants Should Not Be Responsible for Sheet Flow and Private Pipes

An exception for Malibu should be limited to only the pipes and inlets that it controls (owns/operates),⁴ as the City cannot be responsible for sheet flow and private pipes over which it has not control.

Malibu is the model of low-impact development. The majority of the City is still in a natural undisturbed state that should not need additional regulation. (See PDEIR at 120 of 331 ("Vacant, undeveloped private land comprises 60.4% of all land in the City (7578.3 acres; 30.66 km²), most of which is in its natural state containing tree, brush, shrub, and grassland vegetation. With a majority of the land in Malibu still sitting as undeveloped open space, it is evident that the general character of the land has changed little since 1974, when the ASBS was first designated.") Therefore, the exception must be clear that it does not apply to sheet flow runoff and discharges from privately owned pipes/drains. (See PDEIR, Appendix 1)

A State Water Board funded study completed in 2003, (SCCWRP 2003) found 1658 discharges into ASBS and only four (4) of these were subject to Ocean Plan exceptions issued by the State Water Board. A large number of these discharges were permitted storm water outfalls that would be covered under an area-wide NPDES permit. Other sources were not regulated under any permit, including marina and boating activities, pipes draining private property, and bluff seepage most likely contaminated with anthropogenic waste from septic systems. (See PDEIR at 12 of 331.)

Municipalities should not be responsible for controlling discharges from private pipes or properties adjacent to the ASBS. For example, in Malibu, there are pipes owned and operated by Los Angeles County, Caltrans, and State Parks that do not connect with or drain to the City's MS4 system and all should be covered under their own ASBS exception. (See PDEIR at 119-120 of 331 ("State Parks administers many beaches and campgrounds in the northern and central sections along the coast, and Los Angeles County administers the beaches in the southern portion."))⁵ In addition, there are privately owned drains and pipes, many of which existed before Malibu incorporated as a City,⁶ and for which the

³ On October 18, 2004, the State Water Board notified applicants to either do the impossible (e.g., cease storm water and nonpoint source waste discharges into ASBS) or to request an exception under the Ocean Plan for which very little information or process existed. Nevertheless, the State Water Board received 27 applications from nonpoint source dischargers and National Pollutant Discharge Elimination System (NPDES) permitted storm water dischargers for an exception to the Ocean Plan prohibition against waste discharges to ASBS.

⁴ This is consistent with the findings in most MS4 permits that hold that municipalities may lack legal jurisdiction over these entities under the state and federal constitutions. Consequently, Regional Boards recognize that the Discharger should not be held responsible for facilities and/or discharges over which it has no ownership or control.

⁵ For the Laguna Point to Latigo Point ASBS, the Staff identified "120 municipal storm drains discharging directly to the ocean" from four (4) different public entity applicants. "The applicants are the City of Malibu, the County of Los Angeles, Caltrans, and State Parks." PDEIR at 187 of 331.

⁶ See PDEIR at 119 of 331 ("A large number of direct discharges in this area are from roads including Highway 1, and urban landscape runoff from homes and small businesses.")

City has no ownership or direct control. Many of these pipes do not discharge into the MS4, and discharge directly to the County-owned beach. The City should not be forced to be responsible for and control the discharge from these as these pipes discharge not into the MS4, but onto beaches not owned by the City.

Keep in mind that many of the pipes have been installed as safety measures, to prevent sheet flow from saturating the bluffs and causing landslides, or for flood control. The State should be responsible for either issuing individual NPDES permits to each of these pipes as "point sources" under a general NPDES permit under the Clean Water Act, and/or provide a separate exception from the general prohibition for these small, *de minimus* input sources.

III. Maintenance of the Outdated Ocean Plan ASBS Prohibition is Unnecessary

The Ocean Plan and all Basin Plans along the California coastline contain water quality standards designed to maintain designated and existing beneficial uses. The scientific information contained in the PDEIR demonstrates that *the water quality in the ASBS areas around the state is generally in good condition*. In fact, the evidence in the PDEIR shows that the Malibu area ASBS (Laguna Point to Latigo Point) has the third highest number of flora species (43), the second highest number of invertebrate species (613) and the highest diversity of fish species (86). (PDEIR at 124-125 of 331.) The information provided in the PDEIR shows that the areas in the Malibu area ASBS are doing well. (PDEIR at 153 of 331 ("General observations by Ambrose and Lee suggest that Paradise Cove historically supported and continues to support a relatively rich, rocky intertidal community compared to other intertidal reefs in the ASBS."); 181 of 331 ("Based on a review of the above information, functional biological communities are found in all ASBS with anthropogenic runoff influences" and "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."); 207 of 331 ("it appears that a majority of the ASBS waste discharges exhibited metal concentrations below instantaneous maximum objectives, and a majority of ASBS receiving waters had concentrations of ocean plan metals below the six-month median objective for the protection of marine aquatic life."); 214 of 331 ("The results for ASBS discharge sites as a whole were generally similar to reference sites (Figure 5.8.7.) Mean concentrations at ASBS discharge sites following storm events were not significantly different from mean reference site concentrations for all constituents."); 223 of 331 ("Most trace metals are either staying the same or showing significant decreases in mussel tissues.") (all emphasis added); *see also* Appendix 3, Appendices 7-8.)

Further, the evidence shows that even if discharges in the ASBS were controlled, water quality influences may still occur from other sources. (*See* PDEIR at 200 of 331 ("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."); 201 of 331 ("This again indicates the possibility that ASBS waters may have elevated zinc concentrations from sources other than direct discharges."); 202 of 331 ("This again indicates the possibility that ASBS waters may have elevated lead concentrations from sources other than direct discharges, such as developed watersheds, even those outside of the ASBS boundaries."); 203 of 331 (same regarding nickel levels); 212 of 331 ("Many of these constituents are common in urban stormwater, but also have natural sources.") (all emphasis added).) Therefore, it is unclear what added value the ASBS discharge prohibition brings to the regulatory arena.



In other words, the existing water quality standards are effectively protecting the beneficial uses in the ASBS. Recent scientific studies have shown that the State's ASBSs are healthy and their integrity is not being altered by urban and stormwater runoff. As such, the exception and its special protections should be fluid enough to reflect the current science and focus on an iterative approach of monitoring and assessment to maintain the ecological integrity in the ASBS.

IV. The NPDES Permit Protects the ASBS and the Board Should Consider Alternatives that Complement, Not Duplicate, the NPDES Activities

The NPDES program aggressively protects the beneficial uses in the ASBS and the two programs should compliment, not duplicate, one another. The Special Protections may be duplicative, resulting in insignificant water quality improvements at a substantial cost to the exception applicants. Instead of prescriptive and potentially duplicative Special Protections to implement an exception to the ASBS prohibition, the City requests that the State Water Board support Section S.5.2, PRESCRIPTIVE ALTERNATIVE: CHANGE OCEAN PLAN, which would amend the Ocean Plan, under which discharges currently authorized by an NPDES storm water permit will continue to be allowed (PDEIR at 12-14 of 331.) This would modify the discharge prohibition for point source storm water discharges into ASBS, and would allow discharges authorized by an NPDES storm water permit. The PDEIR proposes that permitted storm water discharges, regardless of the effective date of inclusion under or issuance of the permit, will be allowed under this alternative as long as their outlets were constructed prior to the effective date of these amendments. (PDEIR at 12 of 331.) Entities not covered by an MS4 or other stormwater NPDES permit would still be required to obtain an exception from the SWRCB.

Because Malibu is covered by an MS4 NPDES Permit with over eighty (80) pages of very prescriptive mandated requirements, programs and TMDL requirements, this same program should be adequate to cover discharges into the ASBS.⁷ Under this alternative, new or modified outfalls should be permitted, so long as those outfalls complied with the NPDES permit requirements.

Additionally, toxicity requirements should be deferred until a final state-wide policy on these requirements is finalized by the State Water Board.

The proposed approach of mandating additional Special Protections is not necessary and goes beyond federal requirements for stormwater and non-stormwater discharges. In addition, this approach may violate state law, which prohibits the State Water Board from issuing any requirement or order that specifies the design, location, type of construction, or particular manner in which compliance may be had with that requirement or order. (Water Code section 13360(a).) In addition, the monitoring requirements do not comply with state law requirements to weigh the burdens of the monitoring, including costs, and the benefits to be obtained. (Water Code §13267(b), (f).) The CHANGE OCEAN PLAN alternative would eliminate the potential for duplicative regulation.

⁷ Within the Laguna to Latigo ASBS, the City of Malibu waste discharge prevention and treatment activities include, but are not limited to, city ordinances, onsite wastewater treatment systems, illicit connection/illicit discharge elimination program, planning and construction of new development and redevelopment projects, street maintenance, public information through quarterly newsletters and other sources, and the Ocean Friendly Garden Program. PDEIR at 195 of 331.

In the event the Board rejects this alternative, the City submits the following additional comments on the Exception, the Special Protections and the EIR.

V. 85th Percentile – Use in Determination of Natural Water Quality, Not for Compliance

The 85th Percentile threshold should be used for analysis purposes, but not for an exception compliance threshold.

Malibu was an active participant and contributor in the Southern California Bight 2008 (Bight 08) ASBS Technical Committee with SCCWRP, State staff and other ASBS regulated dischargers. This group was established to provide additional information needed to evaluate the condition of ASBS and help inform the exception process. This collaborative approach was a necessary and useful step in this process that provided valuable insight, and helped to establish the groundwork for a potential ongoing partnership to monitor the ASBS as a whole. While the final February 2011 report⁸ noted that, “on average, the range of post-storm pollutant concentrations in receiving waters sampled near ASBS discharge sites were not significantly different from post-storm concentrations at reference drainage sites, which included stormwater inputs free of (or minimally influenced by) anthropogenic sources,” it also clarified that many data gaps still exist with respect to determining natural water quality. The limited amount of data limits the researchers’ ability to definitively assess water quality in ASBS. Data is still needed in areas such as: (1) a thorough analysis linking water quality to condition of the biota and habitat; (2) an analysis of natural sources of elevated pollutants in water; and (3) analysis of non-water quality threats such as trampling and poaching.

The City is concerned about the use of the 85th percentile in the DRAFT Resolution Approving Exceptions, Attachment B Special Protections. In the Bight 08 study, reference drainage sites were used as a proxy for establishing natural water quality thresholds. Despite the high quality of water at the reference sites in the study, the 85th percentile of the reference site distribution was selected as a primary threshold, wherein even the reference location would exceed the threshold 15% of the time. As the PEIR states, “the 85th percentile level was chosen to represent natural water quality to eliminate uncertainty associated with outliers, thereby being protective of water quality.” While the City agrees of the importance of being thoroughly protective, because of the similarities of discharge sites to the reference sites data, approximately 15 percent of the ASBS discharge data distribution will likely also exceed this threshold which was established for comparative purposes and not as a definitive compliance level. Use of this threshold should be limited to use as a tool to look closer at the conditions of the ASBS, and cause(s) of exceedance but not for enforcement purposes. Additionally, there is great concern that the extremely low levels of constituents established by the 85th percentile threshold are often just at or below laboratory analysis detection levels. This establishes a near impossible compliance level, especially when outside sources are also being shown to affect water quality in ASBS near discharges.

VI. Compliance Schedules Should Use an Iterative Approach

Malibu suggests that the Alternative B approach be adopted: to use an iterative compliance approach without fixed compliance deadlines. (PDEIR at 67 of 331.) Each ASBS entity is different and has different constraints. For example, Malibu has already been awarded Proposition 84 funding for

⁸ Schiff, K.C., B. Luk, D. Gregorio and S. Gruber. 2011. Southern California Bight 2008 Regional Monitoring Program: II. Areas of Special Biological Significance. Southern California Coastal Water Research Project. Costa Mesa, CA.

bioinfiltration projects at each of its identified ASBS inlet structures. Once the State releases this funding, the project will be implemented as soon as possible. The grant agreements are anticipated to be executed before the end of the month and under these agreements, work must be completed by 2015. If only the drains and inlets owned/operated by the City are covered by the prohibition/exception, then Malibu would be in compliance relatively quickly.

However, if the prohibition is considered to be more broad, covering sheet flows, private drains, and other non-stormwater flows from other pipes that happen to be located within the Malibu City limits, compliance will be much more challenging and slow, potentially taking years to accomplish, if entirely possible given the safety concerns with preventing bluff failure and landslides. Thus, the iterative approach would be a much more workable solution in either case.

The immediate prohibition of non-stormwater discharges (Special Protection I.A.3.a.) will be difficult to comply with as these are predominantly emanating from private property. Under the USEPA stormwater regulations, cities must have the legal authority to “effectively prohibit” non-stormwater. Although the Special Protections use this same term, the provisions fail to incorporate the concept of having legal authority to prohibit, which is not the same as actually being able to fully prohibit and prevent all non-storm flows. The history of these rules shows that Congress understood the limitations on non-stormwater controls:

“Under this provision, all such permits must assure that such discharges are prohibited. The provision does not specify the type of permit requirement be effective in achieving prohibition of non-stormwater discharges.”

P.L. 100-4, Water Quality Act of 1987, 1987 U.S.C.A.N. 5 (1987)(all emphasis added). Thus, this legislative language appears to require that the permits require that cities adopt, through ordinances or other regulatory mechanism, a means to effectively prohibit non-stormwater discharges. However, Congress clearly recognized in the above highlighted language that these means might not result in the ends of a total and complete achievement of the goal of prohibition. This is consistent with the preambles to and the contents of EPA regulations implementing the CWA municipal stormwater program.

“Under the existing NPDES program for storm water, permit applications for large and medium MS4s are to include a program description for effective prohibition against non-storm water discharges into their storm sewers (see 40 CFR 122.26(d)(1)(v)(B) and (d)(1)(iv)(B)). Further, EPA believes that in implementing municipal storm water management plans under these permits, large and medium MS4 operators found their illicit discharge detection and elimination programs to be cost-effective. Properly implemented programs also significantly improved water quality.” 64 Fed. Reg. 68721, 68756 (Dec. 8, 1999).

EPA regulations, therefore, require that cities demonstrate the legal authority to “control discharges to the municipal separate storm sewer system.” (40 C.F.R. §122.26(d)(1)(ii); 40 C.F.R. §122.34(b)(3)(ii)(B).) This includes a demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or a series of contracts which authorizes or enables the applicant at a minimum to:

- Control through ordinance or similar means contribution of pollutants to the MS4 from discharges associated with industrial activity.

- Prohibit illicit discharges to MS4.
- Control spills, dumping or disposal of materials other than storm water.
- Carry out inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance.

(40 C.F.R. §122.26(d)(2)(i).) For these reasons, the first section of the compliance schedule language should be modified to read:

3. Compliance Schedule

- a. On the effective date of the Exception, the applicant must have adequate legal authority to effectively prohibit all non-authorized non-storm water discharges (e.g., dry weather flow) are effectively prohibited.

While the City can obtain adequate legal authority to prohibit nonstormwater discharges under its Municipal Code; attaining compliance with those provisions for activities on private property is a time-consuming, legal process that can take years to accomplish. The City again requests that the Board acknowledge the City's jurisdictional limitations over activities on private property, and the judicial enforcement process necessary to achieve compliance, and amend the compliance schedule to reflect this limitation.

Additionally, monitoring activities should first be focused on conclusively determining the standard for natural water quality (which may require site/regional specific considerations), if exceedances of natural water quality exist and determination of the source. Then the focus should be on determining what BMPs are needed to rectify the situation. As such, the City would also support a two-phase Exception Approach with the first phase requiring more monitoring for defining natural water quality. Under the second phase, if monitoring indicates that there is a discharge impairment, then the responsible exception holder(s) would develop a local implementation plan.

VII. Compliance Monitoring is Not Appropriate

Malibu recommends adoption of Alternative B, which would require each discharger to comply by achieving natural ocean water quality as measured in the receiving water. Malibu agrees with the Staff's belief that compliance is best measured within the receiving water. (PDEIR at 68 of 331.) However, Malibu *disagrees* with Staff's recommendation that core monitoring include effluent monitoring so that the loading and water quality characteristics of the discharges are well understood. Such confirmatory monitoring should not be included unless there are consistent receiving water exceedances in the same ASBS location, and then only to potentially determine if the exception holder is a likely source.

Ambrose and Lee recommended that an intertidal marine life study be designed to encompass gradient transect sampling at the two representative storm water discharge sites (MUG 232 and MUG 430, SCCWRP discharge data ID points) and at the selected reference location. These discharge sites were selected to be representative of the City of Malibu's storm water flows. In addition, the reference location was selected at a site between MUG 375 and MUG 386." (PDEIR at 154 of 331.) [It is not clear that all these drains are even the City's drains and the PDEIR should be clarified to confirm drain ownership, as well as MUG 226].

Also, monitoring should focus on specific areas of concern where impairment of natural water quality has been demonstrated.

VIII. The State's Cost Estimates are Far Too Low

In addition, the PDEIR estimates the total costs of structural BMPs will range from \$43 to \$54 million statewide. (PDEIR at 303 of 331.) Malibu believes this cost estimate is far too low as Malibu itself has committed \$50 million to clean water and water quality improvements. For example, to install and operate its Civic Center stormwater treatment facility cost \$5.8 million. Another \$25 Million was needed just to purchase the land for Legacy Park, the City's state-of-the-art park that functions like an environmental cleaning machine to capture stormwater and reduce pollution impacts and improve water quality in Malibu Creek, Malibu Lagoon and the world-famous Surfrider Beach. In the ASBS alone, the City will spend over \$3 million on initial construction projects to comply - \$2.5 million on its Broad Beach Bioinfiltration project and \$600,000 on its Wildlife Road drainage treatment project (costs incorrectly cited in the analysis on pages 301-302 in the PEIR). The technology required and costs of the land are tremendously expensive and the cost estimates to comply with the Special Protections must accurately reflect that.

A great deal more will be required if the prohibition or Special Protections mandate the installation and operation of technologies needed to bring discharges into compliance with the metal standards in Table B or to ensure that temperature, bacteria, etc. are not changing "natural water quality" in the ASBS. Therefore, the State Water Board must more carefully calculate the actual estimated costs.

In addition, the cost estimates for the Malibu area ASBS equal \$54 million for "catch basin treatments" and "2 major storm drains" and \$2.25 million for "8 storm drains; 1 mile coastal highway LID," which would presumably be Caltrans projects. (PDEIR at 301-302.) The cost estimates do not include the 110 other pipes that the State Water Board estimates exist in this ASBS. Further, there is no guarantee that if these projects are completed, no others will be required. Therefore, all possible projects needed to meet the Special Protections as well as monitoring costs must be considered.

IX. Unfunded State Mandate

Unlike other state water quality regulations that are driven by federal laws and regulations, the ASBS discharge prohibition is solely a state law creation. No federal law requires this prohibition and it is more stringent than federal law, which requires scientifically established water quality criteria to be met in the receiving waters and the ocean, not an absolute prohibition on discharges. In addition, municipal stormwater regulation does not even mandate strict compliance with applicable water quality standards.⁹

⁹ See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999.) Further, the State Water Board has clearly held, when reviewing the stormwater permit language used for the municipal separate storm sewer ("MS4") NDPES Permits, that:

"... our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water quality management plans be designed to achieve water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs."

(See SWRCB WQ Order 2001-15 at 7 (emphasis added)(attached hereto as **Exhibit C**); see also Letter from then Chair Schneider, Regional Water Board, June 25, 2004 on meaning and interpretation of Stockton/San Joaquin County Receiving Water Limitation ("RWL") language(attached hereto as **Exhibit D**.)

Furthermore, this regulation is the protection of the beneficial use of marine life. There needs to be a linkage assessment to show that storm water discharges are even causing harm to the ASBS. For example, the 2011 SCCWRP Bight 08 Report found that ASBS were generally maintaining natural water quality and post-storm pollutant concentrations in receiving waters samples near ASBS discharge sites were not significantly different from post-storm concentrations at reference drainage sites, which included stormwater inputs free of anthropogenic sources.¹⁰ Biological assessments were conducted for the ASBS as part of the Bight 08 study, but not at the same time the water quality was assessed or necessarily at the same locations.

As such, the ASBS prohibition may constitute an unfunded state mandate since it is not required by and is more stringent than federal law. Recent determinations by the State Commission on Mandates have held as much. (See e.g., Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, *Municipal Stormwater and Urban Runoff Discharges*, STATEMENT OF DECISION available at <http://www.csm.ca.gov/sodscan/121.pdf>) The newly proposed Special Protection requirements are new, constitute a “new program,” and/or create a “higher level of service” over the previous stormwater and non-stormwater requirements that impose substantial additional costs, thereby implicating an unfunded state mandate. As such, these requirements could be considered to be unfunded mandates on many of the public entity ASBS dischargers and should be more narrowly tailored to directly protect the beneficial uses.

X. Language Regarding “Violation” of ASBS Provisions Should Be Revised

The State Water Board has not held any hearings to determine whether any of the exception applicants have actually violated the Ocean Plan prohibitions or requirements. The PDEIR contains several places where a “violation” determination appears to have been made, when none have been demonstrated. (See PDEIR at 28, 43, 208, and 235.) Therefore, the following sections of the PDEIR should be modified as follows:

- Pg. 28 - Chapter 2.0, “Project Description,” identifies existing Responsible Parties in potential violation of the ASBS waste discharge prohibition.
- Pg. 43 - All of these discharges are ~~current~~ potentially in violation of the Ocean Plan ASBS waste discharge prohibition because they lack an exception.
- Pg. 208 - Still, a number of discharges had elevated metals and PAH concentrations, and exhibited toxicity, and a few receiving water samples exceeded ~~were in violation of~~ Ocean Plan objectives.... some other waste discharges definitely do not have adequate BMPs to prevent ~~violation~~ exceedance of objectives all of the time, as displayed by some of the minority samples described above.
- Pg. 235 - In general, projects must not cause the pollutant standard to be ~~violated~~ exceeded and must not cause any increase in the number and severity of exceedances ~~violations~~. If a

¹⁰ Schiff, K.C., B. Luk, D. Gregorio and S. Gruber. 2011. Southern California Bight 2008 Regional Monitoring Program: II. Areas of Special Biological Significance. Southern California Coastal Water Research Project. Costa Mesa, CA, at page 5.

known ~~violation~~ water quality standards exceedance is located in the project vicinity, the project must include measures to reduce or eliminate the existing ~~violation~~ exceedance(s).

These changes reflect the more accurate language used on pg. 22 of the PDEIR that the "State Water Board's Ocean Unit, found 1,654 discharges to potentially be in violation"; and at pg. 269 regarding "the potential to violate the ASBS waste discharge prohibition of the Ocean Plan." The use of the word "exceedance" instead of "violation" is also more consistent with this term as used in the PDEIR at 13, 14, 68, 212, 269, 272-73, 310-11.

XI. CEQA Compliance

The City is very supportive of this Exception process. Accordingly the City provides these comments to ensure the Exception undergoes a legally adequate environmental review and that the EIR sufficiently discloses to the public and the decision makers the potential impacts of the Exception and the Special Protections (mitigation measures). The PDEIR only addresses issues related to impacts in the ASBS of the continued discharges in compliance with the Special Protections. However, the PDEIR fails to recognize that these discharges already exist and many have existed prior to the ASBS prohibition's adoption in 1972 and modification in 1983. The PDEIR defines "projects" too narrowly under CEQA as any project necessary for compliance must be addressed and analyzed including: 1) facilities constructed to allow cessation of discharges (e.g., retention basins, etc.); 2) construction of additional treatment facilities to meet the prohibition or "Special Protection" requirements; and, 3) construction in the coastal zone to divert the current discharges around the ASBS or to publicly owned treatment works.

The PDEIR erroneously concluded that there is no substantial evidence that approval of the exceptions will have a significant effect on the environment because the Special Protections will protect the ASBS. As stated in the draft resolution, the "Special Protections will not authorize a lowering of water quality, but rather will improve water quality conditions in the affected ASBS." (Draft State Water Board Resolution at para. 14.) While this statement may be true, the potential adverse impacts of filling the state's onshore ASBS areas with diversion pipes, pump stations, and treatment facilities have not been addressed at all. The State Water Board unlawfully defers this analysis to the potential individual projects that will be needed to address these requirements.¹¹ However, because the State Water Board is adopting this as a programmatic EIR, it must address the aggregate impacts of the projects required to implement this program.

The State Water Board also failed to adequately support the conclusions of no significant or potentially significant effects in its CEQA analysis included with the ASBS Exception Package. Because the State Water Board provided no evidence and documentation to show how these conclusions were reached, this action is contrary to law. (See 14 C.C.R. §15252(a)(2); see also *City of Arcadia v. State Water Resources Control Board*, 135 Cal.App.4th 1392, 1420 (2006)(The Regional Board's environmental checklist for the Trash TMDL was held to be deficient and there was determined to be sufficient evidence of a fair argument that the project may have a significant effect on the environment, thus necessitating an EIR or its functional equivalent.) Further, the CEQA analysis did not address any of the potential effects on the environment resulting from the prohibition or the Special Protections identified above. That failing may

¹¹ Further, in so doing, the State Water Board fails to add time to the compliance schedule to account for CEQA compliance activities, which can take years particularly if slowed by litigation as Malibu has experienced with two separate CEQA suits over what was generally considered to be beneficial water quality improvement projects.

violate CEQA. In this case, additional treatment technologies may well be required to implement these new programs and objectives, yet these foreseeable actions are not reflected in the CEQA checklist accompanying the State Water Board's proposal. This failure may also violate CEQA.

To the extent that the comments raised in the City's March 15, 2010 letter have not been addressed in the PDEIR or draft Special Protections, those comments are attached hereto as **Exhibit E** and incorporated herein by reference.

In conclusion, Malibu thanks the Board for its attention to this matter and urges the State Water Board to act at its first opportunity to take the actions requested herein.

Sincerely,



Jim Thorsen

Malibu City Manager

Enclosure: City of Malibu Comment Letter Reference Exhibits

cc: Robert L. Brager, Public Works Director
Jennifer Voccola, Senior Environmental Programs Coordinator
Christi Hogin, City Attorney

Exhibit A

City of Malibu

Comment Letter- ASBS Special Protections
May 19, 2011

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA

3
4 SANTA MONICA BAYKEEPER and
5 NATURAL RESOURCES DEFENSE
6 COUNCIL, INC.,

7 Plaintiff(s),

8 vs.

No. CV 08-01465 AHM (PLAx)

9 CITY OF MALIBU,

10 Defendant(s).

11
12
13 DEPOSITION OF DOMINIC E. GREGORIO

14 Sacramento, California

15 Thursday, November 5, 2009

16
17
18
19
20
21 Reported by:
22 STEPHANIE D. PLASKETT
23 CSR No. 9799

24 Job No. 123841
25

1 So was that a question?

2 Q. No.

3 A. I got lost in there.

4 Q. I'm framing my question.

5 A. Okay.

6 Q. Thanks.

7 Because we went from 15 to 11 and then back,
8 and so I'll start again from the beginning.

9 So is Malibu only responsible for those 11
10 drains that it's identified in its ASBS application for
11 the requirement or condition for the exception to have
12 no dry weather flows?

13 A. I don't know the answer to that yet. Well, I'm
14 gonna -- I'm gonna -- no, strike that.

15 For those 11 specifically, yes, absolutely, for
16 those 11. I'm sorry, I just got --

17 Q. That's fine.

18 And is that the same answer for the clean wet
19 weather flows, those 11 are the ones that Malibu would
20 be responsible for?

21 A. Well, according to the current draft, which,
22 again, the board has not approved yet, not necessarily.
23 The reason is because we are requiring compliance in the
24 receiving water, in other words, in the ocean water,
25 that natural water quality be maintained there. Several

1 drains are right near each other. And so once we
2 measure in the receiving water, there's really no
3 practical way to differentiate who contributed to what
4 amount in that receiving water.

5 So in that sense, it probably wouldn't be
6 limited to 11 drains in terms of compliance in the
7 receiving water. However, we do, in another part of the
8 draft special exception -- or special protections for
9 the exception, we do direct or propose directing the
10 responsible parties to address their priority
11 discharges, which would include those 11 to 15
12 discharges that we've been talking about the city
13 operates, and to use the Ocean Plan objectives as a
14 target level for control purposes. Those aren't
15 necessarily compliance points. They're targets to try
16 to improve the water quality that comes out of those
17 discharges, sort of end-of-pipe, as you described, but
18 end-of-pipe would not be a compliance point.

19 Q. For the exception?

20 A. For the exception, right.

21 Q. So just to clarify, for the requirement to have
22 clean wet weather flows, approximately how many
23 discharges would Malibu be responsible for in that
24 instance, understanding that the measurement for the
25 exception is in the wave wash?

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:


That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [] was [] was not requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: NOV 09 2009


STEPHANIE D. PLASKETT
CSR NO. 9799

INDEX

Exhibit B

City of Malibu

Comment Letter- ASBS Special Protections
May 19, 2011

CERTIFIED COPY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATIONAL RESOURCES DEFENSE COUNCIL
AND
MR. SANTA MONICA HAWKINS

PLAINTIFFS

vs.
CASE NO. 08-00000-AMK

JOHN J. AND ANNE M. WILSON

DEFENDERS



Reported by: Linda M. KleanBaker
CSR No. 12467

File No. 27719

4101 Birch Street - Suite 120
Newport Beach, California 92660
949-261-6666 • 949-412-3236

Thorne Declaration
Exhibit N
Page 395

1 I took on the responsibility for new
2 development. And we all drafted or wrote sections of
3 the Permit, and then I was responsible for overall
4 integration. And then Dan Radulescu was not with the
5 Board anymore. He was in charge of industrial
6 component. And he was the lead staff person. And I
7 had overall responsibility for releasing the Permit in
8 its final form.

09:47

9 Q Did you or your staff have any role in the
10 writing of the Staff Report and Fact Sheet that
11 accompanied the issuance of the Permit?

09:48

12 A Yes.

13 Q What was that role?

14 A Similar to the Permit writing, each staff
15 member had a responsibility to write the Staff Report
16 for their respective sections. I had the
17 responsibility for integrating it into a single
18 document and supervise the final report.

09:48

19 Q All right.

20 Dr. Swamikannu, do you understand that the
21 Regional Board has designated you to testify on its
22 behalf today?

09:49

23 A Yes.

24 Q Okay.

25 I'd like to show you if I could --

09:49

like it to be as short as possible.

03:03

(Brief recess.)

MS. KYLE: So let's go back on the record.

MR. GEST: Thank you for the accommodation.

BY MS. KYLE:

03:21

Q Dr. Swamikannu, does the Permit, as it stands today, incorporate the Ocean Plan's Prohibition on Discharges of waste to Areas of Special Biological Significance as a water quality standard and water quality objective?

03:21

MR. POTTER: I'll object as, again, as calling for a legal conclusion. And to the extent that it's calling for the Board's understanding. Calling for speculation.

MR. GEST: And I'll object on the grounds it's been asked and answered.

03:21

MS. KYLE: You can answer.

THE WITNESS: The specific Prohibition was not contemplated when this Permit was adopted. I asked you when the ruling, when the State Board ruling came about. To my recollection, it was in that time. The procedure of the State Board is to issue a draft ruling, seek comments. So I don't know whether it was in draft or final form.

03:22

That was not a matter that was before the

03:22

ABRAMS, MAH & KAHN

133 151

Exhibit C

City of Malibu

Comment Letter- ASBS Special Protections
May 19, 2011

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001-15

In the Matter of the Petitions of

**BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION**

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.¹

¹ NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.²

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).³ The petitions are legally and factually related, and have therefore been consolidated for purposes of review.⁴ None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

² For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

³ On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

⁴ Cal. Code of Regs., tit. 23, section 2054.

pollutants to the maximum extent practicable [MEP].” States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.⁵ We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.⁶

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.⁷ In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,⁸ and we will not reiterate our findings and conclusions from that decision.⁹

⁵ Board Order WQ 2000-11.

⁶ As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

⁷ The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

⁸ Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

⁹ BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.¹⁰ But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.¹¹

¹⁰ On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

¹¹ On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

II. CONTENTIONS AND FINDINGS¹²

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit is: Receiving

¹² This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.¹³

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.¹⁴ (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.¹⁵ The court determined that: "Instead, [the provision for municipal storm water permits] replaces the requirements of [section 301] with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

¹³ In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

¹⁴ "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

¹⁵ Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.¹⁶ The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.¹⁷

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

¹⁶ Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

¹⁷ While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.¹⁸

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."¹⁹ An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.²⁰ (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

¹⁸ The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

¹⁹ Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

²⁰ Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.²¹ It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

²¹ There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Water Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.²² Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

²² These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.²³ The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

²³ The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.²⁴ BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).²⁵ BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

²⁴ Water Code section 13389; see, e.g., Board Order WQ 2000-11.

²⁵ The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."²⁶

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

²⁶ Permit at F.1.b(2)(a)(x).

pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.²⁷ The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.²⁸ The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.²⁹ In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

²⁷ See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

²⁸ See 40 C.F.R. sections 124.6(e) and 124.8.

²⁹ U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.
2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.
3. The Regional Water Board inappropriately defined urban runoff as "waste."
4. The Regional Water Board did not violate the California Environmental Quality Act.
5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words "into and" are deleted.
2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."
3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.
4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

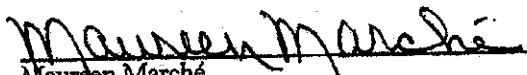

Maureen Marché
Clerk to the Board

Exhibit D

City of Malibu

Comment Letter- ASBS Special Protections
May 19, 2011



Terry Tamminen
Secretary for
Environmental
Protection

State Water Resources Control Board

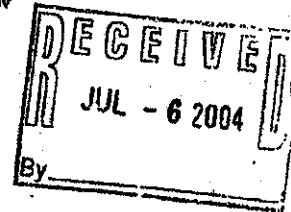
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Arnold Schwarzenegger
Governor

June 25, 2004



Mr. Bill Busath
City of Sacramento
Department of Utilities
1395 35th Avenue
Sacramento, CA 95822-2911

Mr. Richard J. Lorenz
City of Folsom
Department of Public Works
50 Natoma Street
Folsom, CA 95630

Ms. Kerry Schmitz
County of Sacramento
Department of Public Works
827 Seventh Street, Room 301
Sacramento, CA 95814

Mr. David Storer
City of Elk Grove
8400 Laguna Palms Way
Elk Grove, CA 95758-8045

Dear Messrs. Busath, Lorenz, Storer and Ms. Schmitz:

RECEIVING WATER LIMITATIONS IN ORDER R5-2002-0206

You have requested that the Central Valley Regional Water Quality Control Board ("Regional Board") clarify its intent with regard to interpretation and enforcement of Receiving Water Limitation B.2 of Order No. R5-2002-0206 ("the Sacramento MS4 Permit"). Receiving Water Limitation B.2 states:

"The Permittees shall comply with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SQIP (or SQIPs) and other requirements of this Order, including any modifications. The SQIP shall be designed to achieve compliance with Receiving Water Limitation B.1. If exceedance(s) of water quality objectives or water quality standards (collectively, WQS) persist notwithstanding implementation of the SQIP and other requirements of this Order, the Permittees shall assure compliance with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 by complying with the following [iterative] procedure:" (emphasis added.)

Receiving Water Limitation B.1 states that the discharge from municipal stormwater systems shall not cause or contribute to exceedances of listed water quality objectives.

California Environmental Protection Agency



Bill Busath, et al.

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June 25, 2004

Specifically, you have asked how compliance with the permit's receiving water limitations will be determined. On behalf of the Regional Board, I am providing the following clarification.

Receiving Water Limitation B:2 describes the process that the dischargers must follow to obtain compliance with water quality standards. Where the Permittee causes or contributes to violations of water quality standards, the Permittee must implement the iterative process specified. Specifically, where there are discharges of pollutants that cause or contribute to exceedances of water quality standards, the Permittee must submit a report that describes existing and additional best management practices that will be implemented to prevent or reduce any pollutants contributing to the exceedances of water quality standards. The Permittee must then incorporate new BMPs into its storm water management plan and implement the plan. The permit clarifies that if the Permittee complies with this procedure, the procedure does not have to be repeated for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

The Regional Board expects this iterative process to improve BMPs over time, and, therefore, the permit does not require strict compliance with WQS. If the Permittee complies with this iterative process, it would be considered to be in compliance with Discharge Prohibition A.1 and A.2 and Receiving Water Limitations B.1 and B.2. In the event that a Permittee has, in the judgment of the Regional Board, failed to properly implement the iterative process, the Regional Board may take appropriate enforcement action to address such failure and others. This letter is intended to clarify what constitutes compliance with Receiving Water Provision B.2. In the event of noncompliance with any provision of the permit, however, nothing stated in this letter is intended to limit the Regional Board's authority with respect to any regulatory or enforcement actions which it may undertake pursuant to its legal authority.

We trust that this clarification is helpful to you.

Sincerely,

~~Original~~ signed by

Robert Schneider, Chair
Central Valley Regional Water Quality Control Board

cc: See next page

Bill Busath, et al.

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June 25, 2004

cc: Ms. Roberta L. Larson
Somach, Simmons & Dunn
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813 Sixth Street, Third Floor
Sacramento, CA 95814-2403

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Exhibit E

City of Malibu

Comment Letter- ASBS Special Protections
May 19, 2011



City of Malibu

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Phone (310) 456-2489 ♦ Fax (310) 317-0950 ♦ www.ci.malibu.ca.us

March 15, 2010

Ms. Constance Anderson, Environmental Scientist
Ocean Unit
Division of Water Quality
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

RE: COMMENTS ON THE NOTICE OF PREPARATION OF A STATEWIDE PROGRAM ENVIRONMENTAL IMPACT REPORT FOR A GENERAL EXCEPTION TO THE CALIFORNIA OCEAN PLAN WASTE DISCHARGE PROHIBITION FOR SELECTED DISCHARGES INTO AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE (ASBS), INCLUDING SPECIAL PROTECTIONS FOR BENEFICIAL USES

Dear Ms. Anderson:

This letter is in response to the State Water Resources Control Board's ("Board") Notice of Preparation and invitation to comment on the scope and content of the program environmental impact report (EIR) for a general exception to discharges into ASBS.

The City is very supportive of this Exception process. Accordingly the City provides these comments to ensure the Exception undergoes a legally adequate environmental review and that the EIR sufficiently discloses to the public and the decision makers the potential impacts of the Exception and the Special Protections (mitigation measures).

Initial Study and Scope of the EIR

In general, this Initial Study ("IS") lacks sufficient explanations for identified impacts, and has a heavy reliance on deferred mitigation. CEQA requires the State to analyze reasonably foreseeable environmental impacts of the reasonably foreseeable methods of compliance with the Exception and Special Protections. Public Resources Code § 21159(a)(1). Deferral of substantive environmental analysis may be problematic and the level of analysis in both the IS and the ultimate EIR should be detailed enough such that the public and Board are fully informed of the environmental impacts associated with the Exception and how the Special Protections will mitigate identified impacts, to the extent that information is reasonably foreseeable.

The Environmental Checklist and accompanying discussion in the IS consist of many unsubstantiated conclusions that lack evidentiary support. The ultimate findings need to be supported by substantial evidence by citing to sources or the basis for which factual determinations made and conclusions reached. The findings in the IS and ultimately in the EIR should consider the reasonably foreseeable impacts from all of the twenty-seven applicants' discharges and mitigation measures.

The IS identifies impacts as either 'potentially significant' or 'less than significant' and then fails to explain why or how those determinations were made. It repeats over and over again, "...depending on what measures each applicant uses to comply with the proposed exception, there may be an impact on [X]". The IS doesn't list any sources (e.g., reports, studies, etc.) used in making these determinations. The IS also lacks any meaningful discussion of potential impacts from discharges from any of the twenty-seven specific project applicants; the EIR should consider the potential impacts from each location.

Regarding deferred analysis, the IS contemplates several potentially significant environmental impacts but provides no meaningful information as to the nature of the anticipated impacts or how they may be mitigated. To the extent that some impacts are reasonably foreseeable at this stage, meaningful analysis in a program-level EIR cannot be deferred. If such analysis cannot be completed at this time, the environmental documents should explain why. Throughout the document, Board staff says it "...believes that mitigation is available to reduce any potential impacts to [X] to less than significant levels... [and] the mitigation measures would be implemented at the project-specific level." Appendix A does provide limitations on point source storm water, dry weather discharges and nonpoint source discharges, but the document as a whole does not specify what mitigation measures (or elements of the special protections) are intended to mitigate particular impacts. This analysis is imperative and must be included in the EIR.

Water Board staff also states in descriptions of several environmental factors sections that the general exception project has the potential to violate the ASBS waste discharge prohibition of the Ocean Plan if existing inadequate controls currently in force are allowed to continue." It is not clear what inadequate controls Water Board staff is referring to. Please clarify whether this is reference to inadequate controls statewide that are necessitating this process or if it is a reference to any particular location. The City of Malibu takes great pride in its Clean Water Program and feels that very effective and protective controls have been put in place to manage water resources.

The following comments address more specific sections in the IS:

Introduction

This general exception is for applicants' discharges to the ASBS. Applicants have raised the issue of private drainage with Water Board staff at various workshops during this process; however, the IS and the Special Protections do not sufficiently address this issue. Many of these private drains do not connect to, and are therefore not a part of an applicants' MS4s. Therefore an applicant would have limited jurisdiction over those drains. Many were historically authorized by other entities many years ago. If this general exception is only for stormwater and nonpoint discharges by the applicants to the affected ASBS, how will this program account for private drains?



What does Water Board staff consider to be anthropogenic erosion? Please clarify.

The document states that a fundamental requirement includes, "maintenance of natural water quality within ASBS, including during precipitation (design storm) events" yet does not define what is considered a design storm. A design storm is not defined in the Ocean Plan under the Implementation Provisions for ASBS either, but one inch per day is included in the Special Protections. How will Water Board staff address a storm event greater than the design storm proposed, in particular if the conditions of a storm event greater than a design storm could potentially affect natural water quality?

Project Description

First, the project description lacks sufficient detail to inform the public and the decision makers of the Exception's vast geographic scope, covering a large portion of the California coast. The project description itself should include a more detailed description and a map, depicting the precise locations and boundaries of the project area and the scope of the discharges covered by the Exception. For example, the description does not specify the size and load of the covered discharges for the applicants, information that is imperative to a meaningful discussion on the impacts of allowing certain discharges subject to the Special Protections and the effectiveness of these Protections as mitigation measures.

The description also states that the wet weather runoff will not alter "natural water quality," but does not indicate how natural water quality is defined and where this natural water is found. Similarly, the project description should explain what the marine life beneficial uses are and how they will be protected. The project description also contains a conclusion, that "the Special Protections will assure protection of beneficial uses while allowing the continuation of essential public services;" such a conclusion is only appropriate after the requisite environmental analysis of the specific impacts from the Exception and it has been demonstrated that the Special Protections (mitigation measures) will successfully meet this goal.

The State first notified the City of the discharge prohibition and the opportunity to apply for an exception in October 2004. The City has been actively involved in the process since then. For example after submitting its application, the City, along with other applicants, also participated in a biological data assessment, undertaken by Professor Raimondi, at Board staff's request to assess all of the biological data submitted in the Exception applications and SCCWRP's Bight '08 study. Having taken many years to implement the Exception, the City respectfully requests that the project description be revised to clarify that the Exception will apply retroactively to 2004 when the State first initiated this procedure. While the City understands and appreciates the challenges and time required to implement a program of this scope and difficulty, the applicants could potentially be held liable for Ocean Plan violations while having actively participating in good faith in this application process. Having the Exception apply retroactively could prevent this unfair result.

Alternatively the State Board could insert a time schedule into the Ocean Plan to allow time for municipalities to comply with the Special Protections and expressly declare the period for which the Exception applies. For example, the Exception could expressly state that there is a 15-year compliance schedule (starting 2001) applying through 2016 when the exceptions are final and the applicants must be in compliance. Such a provision is a reasonable and would make clear that the Exception applies to discharges during the period that the applicants are working towards obtaining the Exception.



Lastly, the fifth paragraph on page 7 discusses stormwater runoff samples. It states, "data indicates that wastes are present in storm water runoff." This should explain and clarify whether these samples were taken as part of the applicants' requests for exception or some other program. In addition, many of these ASBS are in less developed areas with unique geological formations where it is likely that sediments with high metals or mineral content due to naturally occurring erosion could be carried in storm water runoff and could be detected in water quality samples. The drain may have been installed specifically to preserve coastal slope stability (a stated intent of this program) and only be carrying non-anthropogenic related discharge. Why would this material be considered "waste"? In these instances a water quality objective from the Ocean Plan's Table B could conceivably be exceeded with no anthropogenic influence. Will Water Board staff be considering a natural sources exclusion or site specific objective to address these issues when an applicant may not be able to control or account for natural background levels of constituents?

Environmental Impacts

The State is not considering some environmental factors that could potentially be affected by this project. They include Land use/Planning, Geology/soils, and utilities/service systems. The specific concerns will be addressed in the order that they are presented in the IS.

BIOLOGICAL RESOURCES

The findings for c) (relating to adverse effects on federally protected wetlands) is listed as "no impact". However, there could potentially be significant impacts that require mitigation. Some habitats have historically become dependent on storm water and even non-storm water to some extent. If these discharges are prohibited, a habitat could be negatively impacted. How does Water Board staff intend to address these potential impacts in the program EIR and Special Protections?

Furthermore, on page 11, Water Board staff discusses that the mitigating terms and conditions of the special protections will result in improved water quality conditions. At this time, it has not conclusively been determined that there are water quality conditions that are impacting the biota, "at these locations, the data was inadequate to attribute the variation to the impacts of the discharge." If water quality is determined not to be the cause of impacts or even that water quality observed is found to be the natural background level (even after all mitigation and/or projects have been implemented) as this program is implemented, how will Water Board staff account for other causes of impacts to biota including trampling of habitat and taking of wildlife by visitors? It is widely known that public access can have negative effects are to natural habitat. Also, the City respectfully requests that Water Board staff consider this fact and account for provisions in the Special Protections to re-evaluate the provisions and requirements if water quality is not the cause of impact. This would help to reduce the financial burden on applicants be able to focus those resources on other programs that might better protect the ASBS.

GEOLOGY and SOILS

The City completely supports Low Impact Development (LID) and has incorporated site design requirements to prevent runoff into the Local Coastal Plan (LCP) and Planning conditions on projects for years. Since 2005, the City has prohibited new discharges directly to and inland of the ASBS

during the Planning review process by increasing the requirements for permeable and disconnected [from drainage system] pervious areas. However, there are limitations to allowing infiltration and realize that there could be potential impacts to geological conditions that may prohibit these methods on a project.

In addition, many properties along the ASBS are located above the coastline on a bluff. Some private drains have been installed on these properties to prevent additional bluff loss due to sheet flow of storm water runoff. These properties will need to maintain these discharges, however it is not clear how the Water Board staff proposes to regulate these discharges since they are not a part of an MS4 but are necessary to coastal slope stability.

Findings a) iv. (relating to landslides), c) (relating to unstable soils, landslide, lateral spreading, subsidence, etc.), and d) (relating to expansive soils) are all listed as "no impact", when indeed there could be potentially significant impacts. The City of Malibu, for example, is located in an area where there are pockets of geologically unstable ground, prone to liquefaction and landslides, and other applicants may experience this same condition. The City is concerned that these areas may not be capable of accepting storm water or non-storm water and therefore any development or redevelopment in these areas would require special consideration to allow a new discharge. In addition, private properties located on a bluff would not have the option of an end of pipe solution, as the drain that may be already installed or need to be installed may not be conducive to an end of pipe treatment device. Hence, a determination of "No Impact" may not be accurate and there should be analysis of the potential geological impacts to the finite group of ASBS applicants. Will there be a process for variances or reasonable accommodations from the Special Protections in order to account for unique circumstances?

Finding e) (relating to soils and septic systems where sewers are not available) is also listed as "no impact". Again, the City finds that there could be significant impact if a mitigation project's only option was to infiltrate runoff. The City of Malibu relies primarily on onsite waste water treatment systems (OWTS), many with advanced treatment including disinfection, for its wastewater management needs. Consultant engineers to the City have prepared concept mitigation project designs demonstrating that infiltrating water in areas where OWTS are used is a significant concern and this may hinder implementation of mitigation solution options. Hence, a determination of "No Impact" may not be accurate and there should be analysis of the potential geological impacts to the finite group of ASBS applicants. How will Water Board staff account for these limitations in the program EIR and Special Protections?

HAZARDS and HAZARDOUS MATERIALS

Finding a) (relating to transport or disposal of hazardous materials) is listed as no impact. However, an applicant may be required to implement a project that involves treatment chemicals or processes that may generate or concentrate hazardous materials (such as if end of pipe treatment is the only option). Therefore, this finding should be changed to have less than significant impacts with mitigation. Water Board staff should consider and account for these impacts in the program EIR.



HYDROLOGY and WATER QUALITY

Finding d) (relating to altering a drainage pattern of a site and increasing rate of runoff) is listed as "no impact". However, the Special Protections require that "any proposed or new storm water discharges must be routed to existing storm water discharge outfalls." The City does not have an extensive MS4 system and the Los Angeles County Flood Control District has limited facilities in our limits, therefore much of the drainage system in the City involves natural canyons, creeks and gullies. Routing a new storm water discharge to one of these natural drainages could have significant impact. Further, constructing a conveyance to transport a proposed or new discharge to an existing manmade storm water discharge outfall if one is available (after all other options have been exhausted) may be the only option and could lead to significant impacts as well. These factors should be considered in the environmental review.

Finding e) (relating to runoff exceeding the capacity of a drainage system or provide additional sources of polluted runoff) is listed as "less than significant impact". Any proposed or new discharge would require substantial engineering to avoid impacts. Therefore, this finding should be changed to less than significant with mitigation incorporated. Also, the City, as a general policy, will pursue any and all solutions to protecting water quality when based on sound scientifically based information. Arbitrarily requiring an end of pipe solution may not be prudent if it is found that natural water quality will not be affected by the discharge and routing the discharge to another existing discharge is not feasible or could potentially create more significant impacts. How will Water Board staff account for these instances in the Special Protections? Will the Water Board consider a variance provision in the Special Protections for unique circumstances?

Finding h) (relating to structures being placed in the 100-year flood hazard area) is listed as "No Impact". However, if mitigation is required that involves end of pipe treatment, the mitigation device is likely to be located in a flood hazard area to impede or redirect flood flows. Alternatively, facilities would have to be located sufficiently out of the flood hazard area, construction of which would have its own potential significant impacts. Accordingly, a "No Impact" determination may not be accurate.

Finding i) (relating to risk of loss or injury involving flooding) is listed as "no impact". However, if a proposed or new discharge were required to be routed to an existing storm water discharge outfall, which is most likely a natural drainage as mentioned, there is no guarantee that under certain storm conditions there will not be a risk or impacts. Therefore, Water Board staff should reconsider this finding as having an impact and likely to need mitigation.

Finding j) (relating to inundation by mudflow) is listed as "no impact". However, as discussed in the *Geology* section, the City has special geologic conditions that could lead to landslide. In addition, any alterations that would route discharges to a canyon or other existing drainage outlet could have significant impacts. Therefore, Water Board staff should reconsider this finding as having an impact and likely to need mitigation. How will Water Board staff address these potential impacts in the program EIR and are these limitations being considered in the provisions of the Special Protections?



LAND USE and PLANNING

There could be a potential impact to an adopted land use plan. For example, the City's LCP which largely promotes the protection of sensitive resources (environmentally sensitive habitat area – ESHA) could be impacted. This project could create a potential impact to an adopted land use plan if it requires discharges into stream and/or riparian ESHA, or results in an indirect impact to those protected areas? Water Board staff should re-evaluate their findings on this issue. How does Water Board staff propose that these impacts be mitigated? What does Water Board staff propose for any impacts to a local land use plan that may be caused by the proposed Special Protections? Will the Water Board staff consider a variation from requirements provisions for special circumstances such as when there is an effective regulation and framework already in place that may be effective at protecting the ASBS, but conflicts with the State's requirements as proposed?

TRANSPORTATION/TRAFFIC

Finding a) (relating to exceeding the capacity of the existing circulation system) lists a "potentially significant impact" yet there is no discussion to what clarify the potential impacts to traffic may be. How wills the Water Board staff be clarifying or addressing this impact in the EIR?

UTILITIES and SERVICE SYSTEMS

Finding c) (relating to construction of a new storm water drainage facilities or expansion of existing facilities) is listed as "no impact", yet this has the potential to be a significant impact. The City therefore requests that the Water Board staff re-consider this finding and properly address it in the EIR. The Special Protections, as previously mentioned, provide that any proposed or new discharge must be routed to an existing storm water discharge outlet. Furthermore, not all discharges will be appropriate to install end of pipe treatment systems or devices, other solutions/BMPs proposed in the Special Protections may be necessary.

Attachment "A"- Special Protections for Areas of Special Biological Significance

The Special Protections, Attachment "A" to the IS, functions as the project's mitigation measures designed to reduce or eliminate potential environmental impacts associated with the Exception. In addition to the comments submitted above concerning the scope of the environmental review, the City finds it imperative to raise the following additional general comments and questions to ensure that the Protections are drafted as clearly and effectively as possible and are sufficiently analyzed in the EIR.

Permitted Point Source Discharges of Stormwater

The City requests that the "General Provisions for Permitted Point Source Discharges of Storm Water" be clarified with respect to application to point sources that are not owned or operated by the applicant (i.e. privately owned drains and drains owned by other public agencies) and any discharge size thresholds for permitted discharges.

On page B-2, provision I.d states that any new or proposed drain "shall not result in any new contribution of waste to an ASBS (i.e., no additional pollutant loading)." Please clarify if it is a mass based or volume base pollutant loading. It is feasible that natural water quality is not pure water and



some level of natural loading of sediment and minerals may be expected. Therefore, the Protections should include a definitions "natural water quality" and "waste" that take into account natural loading.

Please clarify the scope of the Storm Water Management Plans (SWMP) and Storm Water Pollution Prevention Plan (SWPPP) requirement, which presumably apply only to the portion of the relevant ASBS within the applicant's jurisdiction or control. Also the differentiation between the two plan types is not a uniform standard and it may be difficult for different applicants to determine which type of plan is required. Additionally, does the scope of the plan cover only direct discharges to ASBS, or must the plan cover inland conveyances that *may* drain to the ASBS during a severe rain event?

Please clarify the scope of the inspection requirements for construction, industrial and commercial facilities and stormwater outfall drains. The Protections do not specify how far inland the inspection requirements apply (i.e facilities immediately adjacent to the ASBS, within 200 feet of the ASBS or with direct drainage to the ASBS). Further, the requirements should clarify exactly what types of facilities are covered; as written, the requirements are unduly broad. The stormwater outfall inspection requirement should also include a limitation that it only applies where feasible and safe. For example, due to the terrain and topography in the City, some pipes (such as a roadway drain previously mentioned) discharge to a canyon or gully hillside where access would not only be unsafe, but could unintentionally harm environmentally sensitive habitat. Another example of an inaccessible pipe would be a pipe located up on a bluff to concentrate sheet flow and stormwater runoff to one location in an effort to prevent bluff erosion.

On Page B-3, Condition 2.d, points 1 and 2 discuss pollutant reductions in storm water runoff. However, in the Ocean Plan and in Special Protections Section A.1.b, the actual language of the requirement is to "not alter natural water quality," a different standard. The former standard presumes that storm water runoff is negatively altering natural water quality in the ASBS, which may not always be the case. These different standards should be reconciled.

Please clarify the "end of pipe" requirement for BMPs on page B-3. Is this specifying that BMPs shall be installed at all outfalls, or only under certain circumstances? Is this requirement applicable to certain size pipes (ex. 18 inches in diameter or greater), is it only applicable to new storm water discharges, or is it to be applied to all ASBS discharges owned or operated by the applicant? How are private drains affected by this requirement? Additionally, the requirement is to meet Table B Instantaneous maximum limits as targets. The Ocean Plan states in II.A.3 that "Compliance with the water quality objectives of this chapter shall be determined from samples collected at stations representative of the area within the waste field where initial dilution is completed." Accordingly, these targets are not intended as end of pipe effluent limitations, are not enforceable as such and should not be used as the design criteria. Also, Condition 2.d.(1) specifies "instantaneous maximum" as the applicable concentration, but 2.d.(2) does not specify which Table B limiting concentration shall apply. Since these are not intended in the Ocean Plan to be end of pipe measurements, please clarify if they are intended to be guidance numbers or action levels for the purpose compliance with the Special Protections.

Condition 2.d(2) requires a 90 percent reduction in pollutant loading from a baseline that is explained as the effective date of the exception. Instead, the baseline should be set as a date certain so the applicants have the ability to monitor and determine what the baseline shall be. There is also a danger



in using a date to set the baseline because there are differences in the water quality in different seasons of the year. One sample is not accurate enough to set a baseline, which should actually be determined from a series of samples taken over time. The City respectfully requests that the State consider a provision to allow a study to determine the baseline over the course of the first year past the granting of the exception to allow for an analysis and characterization of the storm water discharges.

Condition 2.f on page B-4 provides that “[e]ducation and outreach make it a recommendation that the public is adequately informed that direct waste discharges from private property not entering an MS4 are prohibited.” This statement is unclear, but more importantly, it suggests that private drains must connect to an MS4 to be covered by the Exception. Is that a correct interpretation? Is this intended to prohibit storm water discharges and non-storm water discharges from private drains? Many if not most private drains were installed to prevent soil erosion on bluffs and dunes and are essential for flood control or slope stability. These factors must be considered when drafting the Special Protections and in the environmental review. How does the State intend to address hundreds of privately owned drains throughout the State needing to be re-routed to an established MS4? Will this be studied further in the EIR? Rerouting all private drains to the MS4 may not be physically or economically feasible. As suggested above, the Protections should include a variance or reasonable accommodation procedure for unique or special circumstances.

Condition 2.h.3 on page B-4 discusses the process for reporting storm water sampling results that indicate a cause or contribution to alteration of natural water quality. There is a 30 day deadline in an iterative adaptive program for a discharger to revise its “plan” to incorporate modifications to the “plan.” This document fails to define, however, the time frame that the Regional Water Board should have to review the discharger’s submittal. It is highly recommended that there be a maximum 30 day period for Regional Board, after which the discharger may assume the modifications are automatically approved and proceed with implementing them. Any lost time of implementation while waiting for approval could result in further impact to the ASBS and additional liability for the discharger. The California Department of Fish and game follows a similar policy when an applicant submits a Streambed Alteration Agreement request.

Please clarify the application of the non-stormwater discharge prohibition on Page B-5, condition 3. Does this cover drains outside the MS4? Please also clarify how the report required under Condition 3.b relates to the SWMP/SWPPP “plan requirement.

Nonpoint Source Discharges

In the glossary, nonpoint sources are defined as “generally... sources that do not meet the definition of point source”, yet point source is not a defined term. Please provide a definition.

The previous draft Special Protections (dated March 2008) inferred that nonpoint sources are those that are not a part of the MS4. Is that still the intention? Overall the application of the requirements to drains that are part of and outside the MS4 (i.e. application to MS4, privately owned and operated, and owned and operated by other public agencies), must be clarified throughout the Protections. Please also clarify what constitutes prohibited nonpoint source discharges.

In condition B.1.a.1, is the State intending to individually permit all of such discharges? Is there a size threshold being proposed to limit the number of applicants to only those of greater threat? B.1.a.2 states that nonpoint source discharges must comply with all of the terms and conditions of these Special Protections. Without a size threshold, this may prove to be an onerous task for the Water Board to review and approve for all discharge locations.

The Planning and Reporting requirements for nonpoint source dischargers in Section B.2 on page B-7 need to be clarified. As mentioned above, the requirements should be clarified to explain what types of drains are covered under these requirements and who is considered the nonpoint source dischargers. The applicants are not always the dischargers and the Special Protections should account for these issues.

Please define or clarify a "parks and recreation facility." Further, how does the State intend to regulate or account for the national parks system which may be included in the boundaries of the ASBS?

Part IV on page B-12 discusses Monitoring Requirements for all dischargers. As previously expressed in these comments, applicability to discharges not a part of the MS4 is not clear. Please also clarify what is meant by "all dischargers".

Monitoring Requirements on page B-12 notably refer to Safety Concerns. Safety is always a high priority for the City and therefore, it is appreciated that the State has included this aspect. This condition should further clarify that some sampling locations may be infeasible due to terrain and topography, or protection of sensitive habitats. Will the State consider a waiver or some other alternative to sampling requirements for unique circumstances such as inaccessibility and consider the cost benefit of conducting such sampling in less feasible and unsafe locations.

Monitoring Requirements A.1 Core Discharge Monitoring on page B-13 states that runoff must be collected during "a storm" event. Please clarify if this does in fact mean only one storm?

Monitoring Requirements A.2 on page B-13 discusses flow monitoring. This requirement should clarify municipal "and/or" industrial storm water outfalls and also needs to specify if it is only one storm or more. A.2. b mentions a precipitation season. Is this the same as rainy season? Rainy season and or precipitation season should be defined in the glossary.

Monitoring Requirements A.3 on page B-13 discusses runoff samples from storm events. Condition 3.a.1 needs to clarify whether samples must be taken at end of pipe. Condition 3.a.2 discusses a five-year period and should clarify the starting date for the five-year period.

Monitoring Requirements B.1.a on page B-14 requires sampling storm water prior to and during or after a storm. This requirement should be clarified slightly such that only the receiving waters are sampled "prior to" the storm, as there will not be storm water runoff until during or after the storm.

Please clarify what is meant by "permit cycle" Monitoring Requirements B.1.c on page B-15.

Please clarify how the sediment monitoring on Page B-16 and the Waterfront and Marine Operations on page B-11 apply to standalone piers with no other facilities.



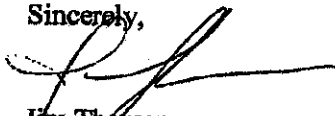
Regarding the Monitoring Requirements generally, will the State consider relaxation of monitoring for some constituents to less frequently if they are found to be lower than detection limits or Table B? Does the State expect dischargers to monitor for Mercury and other similarly expensive analyses indefinitely? This could be cost prohibitive and unnecessary if not detected in initial tests. Perhaps the State could evaluate the number of constituents and frequency of sampling so that dischargers could better use those funds for additional programs that are more protective of the ASBS. Also it is not clear how the State intends to incorporate "natural water quality" limits into these requirements. Dischargers, including Malibu participated in the Bight 08 Regional Monitoring Program. It is not clear how this effort will apply to providing comments to the EIR and Special Protections.

Again, these comments should be addressed and provisions clarified as necessary before the Special Protections can be analyzed as mitigation measures in the EIR.

Thank you for dedicating so much time to this process. As you are aware the City has been and continues to be actively involved in the early voluntary information gathering programs that are integral to this process, including Bight 08 and the biological assessment study, and is committed to the success of the ASBS Exception procedure. The City appreciates the opportunity to provide public comment and welcomes a continuing discussion with Board staff on the issues raised in this letter.

The City has placed and continues to view the environment and water quality as top priorities. We look forward to working with you and protecting this valuable resource. If you have any questions regarding this submittal, please contact Jennifer Voccola, Senior Environmental Programs Coordinator, at (310) 456-2489, extension 275 or jvoccola@ci.malibu.ca.us.

Sincerely,



Jim Thorsen
City Manager

cc: Christi Hogin, City Attorney
Bob Brager, Public Works Director
Jennifer Voccola, Environmental Programs Coordinator
Barbara Cameron, Grants Consultant