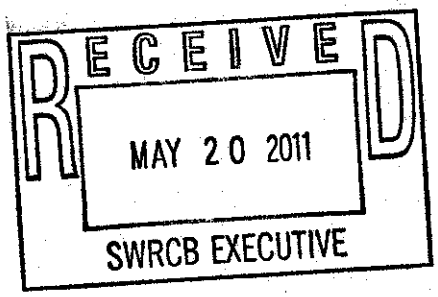
May 20, 2011



Charlie Hoppin, Chair and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95812-0100
c/o Jeanine Townsend, Clerk to the Board
Via electronic mail: commentletters@waterboards.ca.gov

Re: Comment Letter – ASBS Special Protections

Dear Chair Hoppin and Board Members:

We are writing to comment on the "Program Draft Environmental Impact Report for an Exception to the California Ocean Plan for Areas of Special Biological Significance Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections" ("DEIR" or "Exception"), and on the associated Resolution No. 2011-__, "Approving Exception to the California Ocean Plan for Selected Discharges into Areas of Special Biological Significance, Including Special Protections for Beneficial Uses, and Approving a Mitigated Negative Declaration" (Resolution). Our organizations have advocated for the implementation of the decades-old Ocean Plan discharge prohibition for years, and have been similarly active in the process to address the ongoing discharges to ASBSs. ASBSs are home to the state's most unique and sensitive marine communities, each one possessing a complex and fragile ecosystem.[1] To protect these communities, the State Water Resources Control Board (SWRCB) deliberately adopted in the Ocean Plan a prohibition on waste being discharged into ASBSs, thereby recognizing that the discharge of waste affects the maintenance of natural water quality.

After a significant investment of staff time by our organizations as well as by the SWRCB, we are disappointed and concerned to review the DEIR and the Resolution. The documents appear to have ignored all of the detailed comments we made one year ago to the Notice of Preparation, Initial Study, and Exception (attached and incorporated by reference). Thus, we must still strongly contest the proposed Exception's legality, as well as its consistency with science and the ability to achieve natural water quality in ASBSs. Our primary comments are as follows:

[1] *See, e.g.*, DEIR sections 5.1 and 5.5.

- The proposed Exception fails each and every test for obtaining a Section III.J. exception from the discharge prohibition in the Ocean Plan.[2] It does not ensure attainment or maintenance of natural water quality, and therefore the Board cannot legitimately find that the exception will not compromise protection of the ASBSs for beneficial uses. Further, given that the proposed Exception applies to virtually everyone who asked, representing over two dozen applications for discharges into 26 of the 34 ASBSs, and including private corporations' stormwater and golf course runoff, the Board cannot legitimately find that the proposed Exception will serve the public interest.[3] Its sheer size and breadth also sets a disconcerting precedent for future applicants seeking to use the Ocean Plan Section III.J. exception process to avoid the dictates of other Ocean Plan provisions. This tortured exercise is unnecessary and makes no sense, when the Board has existing enforcement mechanisms at its disposal. For these reasons alone, the proposed Exception must be rejected by the Board as a feasible, effective, or lawful approach to regulating illegal discharges in the ASBS.

- The proposed Exception fails to comply with the Clean Water Act in a number of ways. Because the waste discharge prohibition is a water quality standard, any deviation must meet the legal requirements for a variance in 40 C.F.R. § 131.10. Yet the proposed Exception has failed to even address these applicable regulations, let alone perform the necessary analysis. Moreover, as a downward departure from the strict waste discharge prohibition, the proposed Exception must comply with Clean Water Act's antidegradation requirements. Again, the proposed Exception fails to conduct this necessary analysis.

- The DEIR also violates CEQA requirements in a number of ways. For example, DEIR does not contain a clear project description or clear statement of objectives, it contains a misleading and self-serving environmental setting/baseline that skews much of the CEQA analysis, it fails to include a clearly-defined "no-project" alternative, it fails to adequately analyze alternatives, and it fails to adequately analyze cumulative impacts. Thus, the DEIR cannot be adopted as a final EIR because it fails to comply with CEQA legal requirements.

- The proposed Exception acknowledges the need under the Ocean Plan to ensure natural water quality, while at the same time acknowledging that "it is uncertain what constitutes natural water quality."[4] A key element of effective enforcement of the discharge ban is a clear understanding of "natural water quality." Natural water quality should be defined by science-based reference sites for each ASBS, and should not be equated with Table B objectives or some permutation thereof as suggested by staff.

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[2] SWRCB, "Water Quality Control Plan: Ocean Waters of California," (2009), available at: http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/2009_cop_adoptedeffective_usepa.pdf.

[3] *See* Ocean Plan, Section III.J., at p. 23.

[4] DEIR at p. 287.

- The monitoring requirements fail to ensure protection of the ASBS in large part because they have little or no connection with how compliance with the proposed Exception must be measured and ensured.

- The proposed, lengthy compliance schedules ignore the fact that applicant dischargers have known of the ASBS discharge ban for decades, have been aware of its direct applicability to stormwater for at least ten years, and have specifically known of these requirements to achieve natural water quality since 2004, when the SWRCB issued them orders to cease discharging or apply for an exception. There is simply no justification for granting four or more additional years of delay to comply with a relatively straightforward mandate.

Accordingly, we request that the SWRCB abandon this overly broad proposed Exception, and instead issue enforcement orders in the form of ASBS- and discharger-specific cease and desist orders (CDOs) or cleanup and abatement orders (CAOs) with compliance schedules for reaching a total prohibition on discharges that include interim milestones and a final deadline. These orders could be issued in a matter of months, can contain some of the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now. The enforcement orders then should provide for expedited compliance schedules for reaching natural water quality in the affected ASBS, where such schedules again include interim milestones and a final deadline.

Finally, as part of this overall effort to protect the ASBS beneficial use, the SWRCB must also define natural water quality for each ASBS. This should be done through a science-based process using reference sites. The resulting information can then be built into the discharge ban enforcement orders as needed, to identify milestones, track progress and ensure continued compliance.

A. THE OCEAN PLAN AND PUBLIC RESOURCES CODE CURRENTLY *PROHIBIT* THE DISCHARGE OF WASTE INTO ASBSs TO PROTECT THE ASBS BENEFICIAL USE, WHICH REQUIRE *NO* ALTERATION OF NATURAL WATER QUALITY

The Ocean Plan defines ASBSs as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."[5] In order to protect "natural" – i.e., non-anthropogenically altered – water quality, the Ocean Plan further provides, "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."[6]

In other words, the Ocean Plan mandates no alteration of natural water quality, and specifically recognizes that *any* pollution discharges into ASBSs alter natural water quality and

[5] Ocean Plan, Appendix I, at 24.

[6] Ocean Plan, Sec. III.E.1., at p. 20.

so must be banned. This ban may be modified only pursuant to the narrow exception provisions under Ocean Plan Section III.J. Moreover, even under those circumstances, the Ocean Plan itself mandates that allowance of such discharges *must* be reviewed at least every three years.[7] Assertions made by dischargers in the May 18, 2011 hearing claiming that the Ocean Plan goal for ASBS is "based on actual impact to marine life" are plainly inconsistent with this straightforward language in the Ocean Plan and illegally flip the burden of proof onto the state and the public. Rather than assume that impacts must be shown before action must be taken to control discharges, the Ocean Plan *presumes* impacts in ASBSs if there is *any* alteration of natural water quality. That is the reason that the Ocean Plan imposes a ban on pollution discharges; a ban properly ensures that there is no alteration in natural water quality

The Public Resources Code was revised (SB 512, Figueroa 2004) to reinforce the discharge prohibition in statute. Defining an ASBS as a subset of a State Water Quality Protection Area, SB 512 noted that ASBSs "require special protection as determined by the State Water Resources Control Board pursuant to the California Ocean Plan," and that "waste discharges shall be prohibited or limited [in state water quality protection areas] by the imposition of special conditions in accordance with" Porter-Cologne and the Ocean Plan.[8] The legislative history of SB 512 further reinforces the Legislature's support for the ASBS discharge prohibition while providing for additional, future categories of water quality protected areas, stating that:

> Requirements in the Ocean Plan address discharges into marine "areas of special biological significance," which are defined in the Ocean Plan as marine waters that house biological communities so unique and sensitive that they cannot tolerate any degradation of natural water quality. This bill is intended to clarify that areas of special biological significance are a subset of SWQPAs, and that other categories of SWQPAs may also be designated as MMAs . . . This bill refers to existing requirements in the Porter-Cologne Act and its regulations as the appropriate authority over pollution discharges into sensitive marine waters.[9]

Consistent with the Legislature's language and intent, a 2005 State Board Resolution amending the Ocean Plan made clear that, "The classification of ASBS as a subset of SWQPAs does not change the ASBS designated use for these areas. Waste discharges to ASBS are still prohibited under the Ocean Plan unless an exception is granted."[10]

Accordingly, the requirements in the Ocean Plan—that waste not be discharged to an ASBS, and that the Ocean Plan must assure maintenance of natural water quality in ASBSs—remain operative requirements under State Board regulation, the Water Code, and the Public

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[7] Ocean Plan, Sec. III.I.2., at p. 23.

[8] Pub. Res. Code §§ 36700(f), 36701(f).

[9] http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0501-0550/sb_512_cfa_20040811_173227_asm_floor.html.

[10] Adoption of the Proposed Amendments to the California Ocean Plan (State Board Resolution No. 2005-0035).

Resources Code. This is particularly true for dry weather (i.e., non-stormwater) runoff, for which a ban is essential. As the DEIR notes, "dry weather flow surface runoff accounts for a significant portion of the total mass of contaminants that enter the coastal ocean waters."[11]

B. THE STATE BOARD'S PROPOSAL FAILS ALL OF THE OCEAN PLAN SECTION III.J. REQUIREMENTS FOR AN EXCEPTION

Any policy implementing the Ocean Plan must effectuate the Plan's purpose and be consistent with the Plan's language, and it cannot alter or amend the Plan's scope.[12] The Ocean Plan creates an "unambiguous prohibition"[13] – "waste shall not be discharged." It allows exceptions only in certain limited situations, discussed below. No reasonable interpretation of the Ocean Plan could lead to allowing the statewide proposed Exception for the major source of pollution in California's coastal waters in areas that are supposed to be afforded the utmost protection under law.

The Ocean Plan at Section III.J. only allows the State Board to grant an exception to Ocean Plan requirements, including the ASBS discharge prohibition, as follows:[14]

> 1. The State Water Board may, in compliance with the California Environmental Quality Act, subsequent to a public hearing, and with the concurrence of the Environmental Protection Agency, grant exceptions where the Board determines:
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> a. The exception will not compromise protection of ocean waters for beneficial uses, and,
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> b. The public interest will be served.

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[11] DEIR at p. 58. Dry weather discharges (i.e., non-stormwater runoff) should in all circumstances be banned. The Resolution and DEIR currently ban the discharge of non-stormwater runoff with certain exceptions "essential for emergency response purposes, structural stability, or slope stability, and discharge(s) associated with incidental groundwater seepage." DEIR at pp. 59-60. ASBSs are limited in number and scope, and call for tighter protections than those provided by only a limited ban on dry weather dischargers. *See, e.g.*, Los Angeles Regional Water Quality Control Board, Order No. 01-182, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the County Of Los Angeles, and the Incorporated Cities Therein, Except the City Of Long Beach December 13, 2001 (Amended On September 14, 2006 by Order R4-2006-0074 and on August 9, 2007 by Order R4-2007-0042), p. 22, available at: http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ms4_permits/los_angeles/2001-2007/LA_MS4_Permit2001-2007.pdf (banning dry weather runoff completely in the context of the bacteria TMDL).

[12] *See, e.g., Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969, 974; *Family Planning Associates Medical Group, Inc. v. Belshe* (1998) 62 Cal.App.4th 999, 1004.

[13] *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

[14] The Ocean Plan does allow the State Board to recommend certification for certain limited-term ("weeks or months") discharges into ASBSs. Ocean Plan, Sec. III.E.2., at 20-21. However, the discharges that would be allowed by the Exception are impermissibly broader and longer in time than the very limited and specific circumstances the Ocean Plan might allow. As just one example, the most significant, continuous category of pollution—stormwater runoff—cannot be made to fit into the Ocean Plan's contemplated, specific list of "limited-term activities," particularly as the Exception allows it to continue for at least four years and possibly longer.

2. All exceptions issued by the State Water Board and in effect at the time of the Triennial Review will be reviewed at that time. If there is sufficient cause to re-open or revoke any exception, the State Water Board may direct staff to prepare a report and to schedule a public hearing. If after the public hearing the State Water Board decides to re-open, revoke, or re-issue a particular exception, it may do so at that time.[15]

As described in more detail below, the proposed Exception fails each of these tests because:

- the State Board cannot legitimately find that the proposed, broad general Exception to the waste discharge prohibition would not compromise the protection of the many ocean waters impacted for beneficial uses, because the proposed Exception does not ensure that natural water quality will be protected;
- the State Board has not, and cannot, reasonably find that a general Exception serves the public interest; and
- the compliance and monitoring timeframes set in the proposed Exception prevent the meaningful, *required* examination of the Exception's effectiveness at each successive Triennial Review of the Ocean Plan.

1. The Proposed Exception Will Compromise the ASBS Beneficial Use.

First, the State Board cannot legitimately find that a general exception to the waste discharge prohibition would not compromise the protection of ocean waters for beneficial uses. Protection of natural water quality in ASBSs is specifically identified as a beneficial use that must be protected. Yet, the proposed Exception defines compliance in a way that exceeds natural water quality, thus failing to protect the beneficial use.

Contrary to assertions made at the May 18, 2011 hearing, significant data indicate that ASBSs up and down the state are already impacted by pollution, and that stormwater discharges in particular create ongoing alterations of natural water quality in direct violation of the Ocean Plan. Despite one nod to the need to ensure natural water quality, the proposed Exception would in practice delay for years - and on its face indefinitely - the mandated achievement of natural water quality in ASBSs.

a. Stormwater Pollution Impacts Coastal and Marine Ecosystems and Life.

Stormwater pollution – the focus of the proposed Exception – is in fact the largest threat of pollution to California's coastal waters, resulting in impairments, beach closings and advisories, and economic loss.[16] Stormwater has been proven to have numerous harmful effects

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[15] Ocean Plan, Sec. III.J., at 23 (emphasis added).

[16] *See, e.g.*, General NPDES Permit for Phase II Municipal Separate Storm Sewer Systems, at 1; see also NRDC, Testing the Waters (2006), at CA-25. NRDC also has released a number of reports on the pervasive problem of stormwater runoff, its impacts, and strategies for developing effective stormwater programs. For example, *see* NRDC reports titled: *Keeping Our Waters Clean: How Smaller Communities Can Prevent Toxic Runoff* (2007), at http://www.nrdc.org/water/pollution/fmonterey.pdf; *Rooftops to Rivers: Green Strategies for Controlling Stormwater and Combined Sewer Overflows* (2006), at http://www.nrdc.org/water/pollution/rooftops/rooftops.pdf; *A*

on the marine environment. The Southern California Coastal Watershed Research Program (SCCWRP), for instance, has conducted a number of studies demonstrating these impacts. In a 1999 study, SCCWRP researchers summarized that stormwater samples from Ballona Creek "were always toxic to sea urchins. Concentrations higher than 10% stormwater usually produced adverse effects in laboratory tests....Surface water in most concentrated portion of plume was often toxic to sea urchins. Toxicity was detected in receiving waters up to 2 miles from discharge."[17] The researchers further found that:

> Undiluted samples of urban stormwater collected from drainage channels (before discharge into the ocean) usually contained toxic concentrations of constituents. Toxicity was detected in virtually every sample obtained from Ballona Creek and this toxicity was often present even after the sample was diluted 10-fold in the laboratory. The results indicated that even though a large portion of the constituents present in stormwater may be bound to particles, the dissolved concentrations of some materials are high enough to cause toxicity. Prior research by SCCWRP and others has detected toxicity in stormwater from other watersheds in Los Angeles, Orange, and San Diego Counties.... Toxicity was frequently detected in surface water within the stormwater plume offshore of Ballona Creek, indicating that the initial dilution of stormwater discharge from this watershed was not sufficient to reduce the concentrations of stormwater toxicants below levels that are harmful to marine organisms.[18]

Stormwater that settles in sediment on the ocean floor is also a source of harmful pollutants, demonstrating the importance of sediment monitoring:

> Much of the natural diversity and many of the commercially important species in the ocean occur on the seafloor. Clams and shrimp live in this environment, as well as worms and starfish, all of which serve as food for fish. This is also the location where stormwater particles, and associated contaminants, eventually settle. Unlike the water column, where a stormwater plume eventually mixes and disperses, the sediments on the seafloor can accumulate runoff inputs over an entire storm, over several storms, or over several seasons. These inputs can alter the seafloor biology by either changing the habitat, such as altering sediment grain size, or by the build-up of pollutants. The potential for impacts to seafloor organisms is great because they are not mobile and are therefore subjected to the accumulated stormwater inputs for long periods of time. Typically, these seafloor organisms are relatively sensitive and changes to the number or types of organisms may result in changes to fish populations.... [S]eafloor sediments were

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Practical Plan for Pollution Prevention: Urban Runoff Solutions for the Monterey Region (2005), at http://www.nrdc.org/media/docs/water_05102401A.pdf; *Swimming in Sewage* (2004), at http://www.nrdc.org/water/pollution/sewage/sewage.pdf; and *Storm Water Strategies* (1999), at http://www.nrdc.org/water/pollution/storm/stoinx.asp.

[17] Bay, S., Jones, B.H., and Schiff, K., "Study of the Impact of Stormwater Discharge on the Beneficial Uses of Santa Monica Bay," Executive Summary (July 8, 1999), available at: http://ladpw.org/wmd/npdes/Int_report/Appendices/App_C.pdf .

[18] *Id.*

> found to be a potential source of contaminants that bioaccumulate in seafloor organisms such as adult sea urchins. Concentrations of lead, DDTs, and PCBs were three to ten times higher in sea urchins exposed to sediments collected offshore of Ballona Creek than in sea urchins living on sediments from our reference location.[19]

Further research has demonstrated similar findings. For instance, in another SCCWRP study, researchers found that:

> Organophosphate pesticides in stormwater runoff from Chollas Creek were responsible for the toxicity observed in the freshwater species *Ceriodaphnia*. Concentrations of diazinon and chlorpyrifos, both organophosphate pesticides, were found in the stormwater samples in sufficient amounts to induce toxicity. Trace metals in stormwater runoff from Chollas Creek were responsible for the toxicity observed to the sea urchin. Concentrations of zinc, and to a lesser extent copper, were of sufficient quantity in the stormwater samples to induce toxicity.[20]

These toxic pollutants are common in stormwater samples all over California:

> The identification of zinc and diazinon as important toxicants is not uncharacteristic of the findings of large urban watersheds. Both zinc and other trace metals are commonly found in runoff from urbanized watersheds in southern California (Schiff 1997) and around the country (U.S. EPA 1983b). Organophosphate pesticides such as diazinon and chlorpyrifos are also widespread in runoff (Bailey *et al.* 1999). Diazinon has been identified as the probable toxicant in studies of stormwater from the San Francisco Bay region (Katznelson and Mumley 1997) as well as in stormwater studies in Los Angeles and Orange counties (Lee *et al.* 1999). Metals, primarily copper and zinc, have been identified as significant toxicants in stormwater samples from Los Angeles County (Bay et al. 1997) and the San Francisco Bay area (Cooke and Lee 1995).[21]

Collectively, such research demonstrates conclusively that stormwater runoff contains pollutants that negatively impact coastal water quality and marine life.[22]

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[19] *Id.*

[20] Schiff, K., S. Bay, and C. Stransky, "Characterization of stormwater toxicants from an urban watershed to freshwater and marine organisms," pp. 71-84 *in:* S. Weisberg and D. Hallock (eds.), *Southern California Coastal Water Research Project 1999-2000 Annual Report* (2001), available at: ftp://ftp.sccwrp.org/pub/download/DOCUMENTS/AnnualReports/1999AnnualReport/06_ar05.pdf.

[21] *Id.*

[22] For more research detailing the negative impacts of stormwater on humans and aquatic life, *see* http://www.sccwrp.org/ResearchAreas/RelatedPublications.aspx?id=4d9e0121-e8a5-41b8-8207-279f6c104286.

b. Stormwater Specifically Impacts ASBSs.

Stormwater specifically impacts ASBSs on a regular basis. For example, the DEIR itself admits that current stormwater discharges only "tend to meet Ocean Plan objectives" just "some of the time," and that at least a quarter of ASBS waters were found to contain copper at levels above the six-month median objective.[23] Figure 5.8.9. of the DEIR further illustrates that nutrients, total and dissolved metals, and "generals" exceed natural water quality in examined Southern California ASBSs approximately 19-25% of the time (as noted below, this figure depends on a definition of "natural water quality" that we have expressed significant concerns with, and so exceedences may well be notably higher).[24] The DEIR additionally contains numerous summary statements regarding pollution in ASBSs, such as the fact that the proposed Exception applications "show runoff to contain toxic levels of constituents," and that data indicate that identified ASBS receiving waters do not even meet water quality objectives for the protection of marine life – let alone the much stricter "no discharge" mandate of the Ocean Plan.[25] As one other example among many, the SWRCB's Draft Data Report further finds that, "[f]or copper, zinc and lead the means for discharges and ocean receiving water were substantially higher than for streams and background ocean levels."[26] This is true of nickel, silver, and PAHs as well.[27]

In addition, Santa Monica Baykeeper has taken many samples in both dry and wet weather in recent years in order to determine whether Ocean Plan objectives were being met in ASBS 24. Their sampling results, which are attached, reveal systemic exceedances of Ocean Plan limits for total coliform, fecal coliform, and Enterococcus, as well as large number of exceedances of Ocean Plan objectives for copper and zinc.

c. Numerous ASBSs Already Are or Should Be Listed as Impaired under Section 303(d) of the Clean Water Act.

Moreover, one-third of all ASBSs have been formally listed in whole or part as "impaired" under Clean Water Act Section 303(d).[28] These are just the ASBSs that have been deemed impaired for other beneficial uses of the ASBS, standards much less conservative than the "no alteration of water quality" standard that is required to protect the ASBS beneficial use. Indeed, if the SWRCB and Regional Water Boards were to fully implement Section 303(d) as it applies to ASBSs, most if not all of them should be identified as "impaired," as any alteration of natural water quality in those regions is a violation of the water quality standards necessary to

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[23] DEIR at p. 57.

[24] *Id.* at p. 217.

[25] DEIR at section S.7.

[26] SWRCB, "Draft Data Report," p. 96 (April 2008), available at: http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/asbs/draft_data_report.pdf.

[27] *Id.* at p. 92.

[28] *Id.* at Appendix A. These include: Redwood National Park, Trinidad Head, King's Range, Bodega Marine Life Refuge, Bird Rock, Pacific Grove, James V. Fitzgerald, Mugu Lagoon to Latigo Point, Robert E. Badham, Irvine Coast, and La Jolla.

protect the ASBS beneficial use.[29] In that case, pollution load reductions to meet the standards are essential and should begin immediately.

d. The Natural Water Quality Committee's Assessment of the Compliance of Southern California ASBSs with Ocean Plan Standards Is Flawed.

CCKA and NRDC have significant concerns with the process and conclusions drawn by the Natural Water Quality Committee and staff with regard to the reference site exercise in Southern California.[30] First, even assuming that the process accurately reflected "natural water quality" for the ASBSs at issue, we disagree with the conclusion drawn that "[e]xceedances of natural water quality were relatively infrequent at ASBS discharge sites."[31] *Every* ASBS examined reported exceedances of natural water quality, with general constituents (e.g. suspended solids), nutrients and trace metals the most frequent groups to exceed. The DEIR minimizes these results as "relatively infrequent" because the exceedance rates generally are "less than 25% for all constituents" (though higher rates were recorded). However, the Ocean Plan does *not* say that ASBSs are protected by *some* alteration of natural water quality. The Ocean Plan instead says that ASBSs are only protected by *no* alteration of natural water quality – hence the required discharge ban. Thus, by definition, any exceedance of natural water quality in the ASBSs is a violation of the Ocean Plan water quality standard to protect the ASBS beneficial use. Moreover, the results of this study certainly cannot be characterized as "good" water quality, as was interpreted by numerous discharger representatives testifying at the May 18, 2011 hearing.

In addition to our concerns regarding the legality of the conclusions drawn from this data, we have significant concerns with the foundation of and process for developing these reference sites. First, the definition of "natural water quality" adopted by the Natural Water Quality Committee fails to meet the mandates of the Ocean Plan. Specifically, the Committee defined "natural water quality" as

> "[t]hat water quality . . . that is required to *sustain* marine ecosystems, and which is without apparent human influence, i.e., an absence of *significant* amounts of [various anthropogenically introduced constituents]"[32] (emphasis added).

As discussed at length, the Ocean Plan's ASBS beneficial use must be protected by a level of water quality that *does not exceed* water quality unimpeded by human uses. A baseline of water quality that "sustains" marine ecosystems is insufficient to meet this mandate; marine

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[29] *See, e.g.*, Center for Watershed Protection, "Impacts of Impervious Cover on Aquatic Systems." P. 16 (March 2003) ("[t]he aquatic resources of small tidal estuaries, creeks and coves are often highly impacted by watershed development and associated activities, such as boating/marinas, wastewater discharge, septic systems, alterations in freshwater flow and wetland degradation and loss").

[30] DEIR at pp. 213-217; Southern California Coastal Water Research Project, "Summation of Findings: Natural Water Quality Committee," Technical Report 625 (September 2010) (Natural Water Quality Committee Findings), available at: http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs/asbspeir_apx08_2011jan.pdf (DEIR Appendix 8).

[31] DEIR at p. 215.

[32] Natural Water Quality Committee Findings at Preface.

ecosystems can survive at some reduced capacity with elevated pollution, which is not the same as *no* pollution. Similar arguments apply to the flawed use of the word "significant." Natural water quality for purposes of protecting the ASBS beneficial use allows for no pollution; measurable pollution that is not "significant" violates this basic standard. If the Committee's Southern California natural water quality study was premised on this definition, its conclusions with regard to whether the ASBS beneficial uses are being protected must be seriously questioned.

Second, we have concerns with the methodology employed by the study, some of which we raised at the May 18, 2011 hearing. For example, as staff confirmed at the hearing, the definition of "open space" for purposes of determining reference sites included adjacent grazing and timber land uses. No human land uses should be considered "open space," including grazing and timber, which already impact a number of ASBSs[33] as well as adjacent coastal waterways.[34]

Moreover, the Southern California study utilized a 10% developed space criteria for identifying reference sites.[35] This is well beyond the threshold for injury or impairment of the adjacent water bodies. For example, the results of a 2007-08 SWRCB reference sampling study of surf zone at the mouth of a watershed with limited anthropogenic influences, defined as a minimum of 95% open space, showed chromium and lead levels above Ocean Plan six-month median objectives and mean concentrations of PAHs approximately an order of magnitude greater than the Table B 30-day objectives.[36] As noted by Dr. Richard Horner,

> [t]he literature shows that adverse impacts to the physical habitat and biological integrity of receiving waters occur as a result of the conversion of natural areas to impervious cover. These effects are observed at the lowest levels of impervious cover in associated catchments (two to three percent) and are pronounced by the point that impervious cover reaches five percent. To protect biological productivity, physical habitat, and other beneficial uses, effective impervious area should be capped at no more than three percent.[37]

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[33] A quick review of ASBS data since the hearing indicates that, at a minimum, grazing impacts the health of ASBSs 14 and 17, and that timber activities impact the health of ASBSs 1, 6, 8 and 20. These activities should not be equated with unaltered land use for purposes of determining reference sites.

[34] *See* SWRCB, "2010 Integrated Report (Clean Water Act Section 303(d) List / 305(b) Report," available at: http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml.

[35] DEIR at p. 213. *See also* Center for Watershed Protection, "Impacts of Impervious Cover on Aquatic Systems." P. 16 (March 2003) ("if current or future development is expected to exceed 10% IC [impervious cover] in the contributing watershed, we recommend that a very aggressive watershed protection strategy be implemented"); Southern California Coastal Water Research Project, "Managing Runoff to Protect Natural Streams: The Latest Developments on Investigation and Management of Hydromodification in California," at i (December 2005) ("Physical degradation of stream channels . . . in the semi-arid portions of California appears to occur between 3% and 5% impervious cover.").

[36] *Id. See also* Tiefenthaler, Liesl L., Stein, Eric, Lyon, Greg, "Fecal indicator bacteria (FIB) levels during dry weather from Southern California reference streams," Published online: *Springer Science + Business Media B.V.* (Aug. 14, 2008).

[37] Dr. Richard Horner, "Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for Ventura County," p. A-1 (2007), available at: http://docs.nrdc.org/water/files/wat_09081001b.pdf.

Given the compaction, infrastructure and other related impacts associated with other human land uses, three percent should be considered the maximum for "open space" to prevent ASBS *degradation*. Again, any alteration in natural water quality in the ASBS violates the water quality standard in the Ocean Plan for protecting the ASBS beneficial use, so three percent would still allow excessive contamination of ASBSs. To ensure compliance with the Ocean Plan water quality standard for the ASBS beneficial use, reference sites should be chosen based on *no* developed space in the adjacent watershed, rather than the excessive and harmful 10% developed space criterion that was chosen by the Natural Water Quality Committee. If no such watersheds are available in the region of the ASBS at issue, then modeling should be utilized to approximate natural water quality based on the nearest applicable watersheds meeting this standard as closely as possible.

The study also does not define where the development would be located in the watershed; development immediately adjacent to the ASBS, for example, would obviously have far greater negative impacts on reference site selection than more distant development. Another concern is that only samples following storms were collected; for purposes of finding the cleanest reference sites, samples should have also been taken during dry weather, since pollutant concentrations can vary in wet versus dry weather runoff depending on the pollutant. These issues raise questions about whether the reference sites chosen truly reflect "natural water quality." Accordingly, the criteria must be modified as discussed herein to reflect natural water quality more accurately, in order to fully protect the ASBS beneficial use as required by the Ocean Plan.

e. <u>The Proposed Use of Table B Objectives and Loading Reductions Does Not Equate to "No Discharge," or Even to "Natural Water Quality, and Fails to Protect the ASBS Beneficial Use.</u>

Despite the known, significant impacts stormwater pollution creates, staff's proposed approach would permit continued stormwater pollution in concentrations that exceed natural water quality, perpetuating decades of impacts in these sensitive habitats. This illegal end-run around the discharge prohibition continues with the Resolution's proposal to allow for compliance to be defined as either meeting Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan, or a 90 percent reduction in pollutant loading for the Table B parameters during storm events, for the applicant's total discharges.[38] Yet <u>in most instances, Table B objectives notably exceed natural background levels (or are completely unavailable for pollutants of concern)</u>, and so provide a significantly inaccurate representation of "natural water quality." CCKA specifically commented on this point in our March 2010 comments[39] and provided the table below detailing discharge information versus Table B objectives based on the SWRCB's Draft Data Report. In this report, SWRCB staff provided the results of water quality sampling at reference sites, discharge sites, and ocean receiving water.

[38] Resolution Attachment B, "Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Stormwater and Nonpoint Source Waste Discharges," Section 2.d.

[39] *See* March 10, 2010 Letter to State Board from California Coastkeeper Alliance, at p. 15 (Table 1) (attached).

Table 1. Derived from Draft Data Report, at 91-92.

Constituent	Stream	Ocean background water	Discharges	Ocean receiving water	Table B instantaneous max.objective
Copper	15	13	151	139	30
Lead	11	12	125	96	20
Nickel	11	13	116	95	50
Silver	11	9	96	83	7
Zinc	11	13	131	92	200
PAHs	4	3	37	12	N/A

f. Summary.

The Ocean Plan Section III.J. exception process requires the SWRCB to find that "[t]he exception will not compromise protection of ocean waters for beneficial uses." Again, to ensure protection of the ASBS beneficial use, the proposed Exception cannot allow or justify *any* alteration in natural water quality for *any* ASBS. The DEIR attempts but fails to rationalize the proposed, flawed Exception as meeting this standard through incomplete analysis of the broad extent of existing impairment of the ASBS beneficial use, paired with an overoptimistic analysis of the ability of the limited Exception to achieve natural water quality. Further, even though the proposed Exception calls for compliance with natural water quality through (inaccurate and illegal) proxies as discussed above, at the same time it acknowledges that "it is uncertain what constitutes natural water quality."[40] The proposed Exception thereby fails to draw the required linkages between the effectiveness of the recommended compliance actions and the Section III.J. mandate that an exception "not compromise protection of ocean waters for beneficial uses." Accordingly, the State Board cannot legitimately find that the proposed Exception will not compromise protection of natural water quality consistent with protecting the ASBS beneficial use, because the proposed Exception on its face fails to ensure such protection. This tortured exercise to avoid enforcement of the straightforward ban on discharges further demonstrates the need to reject this fatally flawed proposed Exception and enforce the ban.

2. The Proposed Exception Fails to Serve the Public Interest.

Second, the State Board has not, and cannot, reasonably find that the proposed Exception serves the public interest. Other Ocean Plan Section III.J. exceptions have been granted only in very narrow situations where important and unique research and educational activities were at stake. For example, the State Board concluded that the Scripps exception would serve the public interest because Scripps' activities had "invaluable education and research benefits."[41] Scripps

[40] DEIR at p. 287.

[41] Ocean Plan ASBS Exceptions, based on 2005 presentation made by Sheila Vassey, SWRCB Staff Attorney, at 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf. *See also* "Approving an

and Birch Aquarium's open seawater system depend on the ability to discharge waste seawater, and if the exception was not granted, the State Board concluded that Scripps and Birch Aquarium would be forced to shut down the open seawater system.[42] Similarly, the State Board found that the public interest was served by granting an exception for USC because USC "occupies a prominent role in marine science research and education, providing programs and facilities to USC and non-USC scientists and students and visitors from many other institutions."[43] Critically, the Board stated, "There are no viable alternatives to ocean disposed of waste seawater [sic] due to the remote location of the facility. If the exception is not granted, USC/WMSC will be forced to shut down its open seawater system."[44]

There is no similar special situation that would justify blanket exceptions to more than 1,000 illegal discharges, as proposed by the current Exception. Among other things, there are no unique or "invaluable" research and education benefits associated with the discharges addressed by the proposed Exception. On the contrary, the proposed Exception would permit discharges such as golf course runoff from not only municipalities, but also private corporations such as the Irvine Company and the Pebble Beach Company, and private homeowners.

Moreover, Ocean Plan Section III.J.'s specific provisions on granting exceptions call for data and other justifications that contemplate assessing each potential exception on a *case-by-case basis*. Here, however, the State Board has made no such individualized findings in connection with the proposed Exception. Rather, the draft Resolution lumps all discharges together, rationalizing that they are in the public interest because the "various discharges are essential for flood control, slope stability, erosion prevention, maintenance of the natural hydrologic cycle between terrestrial and marine ecosystems, public health and safety, the public recreation and coastal access, commercial and recreational fishing, navigation, and essential military operations (national security)."[45] These rationales are so broad as to allow essentially every discharger to argue that at least one of these reasons covers any proposed discharge. Further, in this way, the proposed Exception impermissibly circumvents the requirement of having to find that an exception, as applied to each discharger, serves the public interest, as the proposed Exception covers wholesale a range of 27 different discharger-applicants spanning the entire coast. The proposed Exception thereby strips the ASBSs of their "special" protection as mandated by the Ocean Plan and reaffirmed by the Legislature. By essentially eliminating the waste discharge prohibition, the Exception proposes to treat ASBSs like any other water of the United States, despite their special status as "intrinsically valuable."[46]

Exception to the CA Ocean Plan for the University of California Scripps Institute of Oceanography" (State Board Resolution No. 2004-0052), at p. 2.

[42] "Approving an Exception to the CA Ocean Plan for the University of California Scripps Institute of Oceanography" (State Board Resolution No. 2004-0052), at p. 2.

[43] "Approving an Exception to the CA Ocean Plan for the University of Southern California Wrigley Marine Science Center" (State Water Board Resolution No. 2006-0013), at p. 2.

[44] *Id.*

[45] DEIR, Appendix 1, at p. 2.

[46] California Ocean Plan, Appendix IV, at p. 37.

3. The Proposed Exception Cannot Be Effectively Reviewed Triennially, As Is Required by Ocean Plan Section III.J.

Section III.J. of the Ocean Plan requires the effectiveness of any exception to be reviewed every three years, at the triennial review ("All exceptions issued by the State Water Board and in effect at the time of the Triennial Review *will be reviewed at that time*" (emphasis added)). Yet the proposed Exception requires certain monitoring studies to be conducted only once every 5 years, and compliance points to be measured after 4 years. These timeframes essentially preclude effective assessment of the proposed Exception at a triennial review. Moreover, given the SWRCB's concerns regarding a lack of resources, it is hard to imagine how the Board will conduct meaningful reviews of dozens of exceptions into 26 distinct ASBSs at every single Triennial Review, as is *mandated* by Ocean Plan Section III.J. Again, the proposed Exception fails another required element of the Ocean Plan Section III.J, exception process.

* * *

In summary, the proposed Exception fails *all three* of the required Ocean Plan Section III.J. tests for an exception to the discharge prohibition. It therefore cannot legally be approved under the Ocean Plan, and instead must be rejected. There is also no legally adequate opportunity for the SWRCB to use the Exception on even a short-term basis as a so-called "trial run," an option put forth by staff at the May 18, 2011 hearing. The Ocean Plan simply does not allow for exceptions to the Section III.J. exception process – either its requirements are met, or they are not. In this case, they are not, and the proposed Exception must be rejected.

C. THE STATE BOARD'S PROPOSAL FAILS TO COMPLY WITH THE CLEAN WATER ACT

The "Ocean Plan discharge prohibition is a water quality standard."[47] Like other water quality standards, the waste discharge prohibition is incorporated into, and is an enforceable requirement of, all NPDES permits coastwide. In violation of the Clean Water Act (CWA), however, the State Board not only has taken no action to enforce this water quality standard, but it also now proposes to reverse the standard by taking specific action to allow, rather than prohibit, most of the illegal discharges into ASBSs indefinitely.[48] As the California Appellate Court has stated, the State Board cannot make a *de facto* amendment to a water quality objective in a water quality control plan by simply refusing to take the action that it has identified as necessary to achieve that objective,[49] or by affirmatively choosing to avoid enforcement of the prohibition. Rather, any such changes to the ASBS Prohibition Water Quality Standard ("ASBS WQS") must follow the requirements of the CWA and its implementing regulations. Despite recognizing that it must comply with the requirements of the Clean Water Act,[50] the proposed Exception fails to do so and is therefore unlawful.

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[47] *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

[48] *See State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 734.

[49] *Id.* at 731.

[50] DEIR at p. 40.

1. The Proposed Exception Fails to Meet the Requirements of 40 C.F.R. § 131.10(g) and (h).

EPA has only accepted WQS variances where specific criteria are met.[51] Variance procedures involve the same substantive and procedural requirements as removing a designated beneficial use.[52] These requirements are as follows:

1. Is the use existing? If the use actually existed on or after 1975, whether or not they are included in WQS (40 CFR 131.3(e)), the existing use cannot be removed unless a more stringent criteria is added.
2. Is the use specified in section 101(a)(2) of the CWA? If so, removal of a use requires a use attainability analysis.
3. Is the use attainable?
4. Is a factor from 40 CFR 131.10(g) met? Even where steps one through three are demonstrated, the state must demonstrate that attaining the designated use is not feasible because:
   a. naturally occurring pollutants prevent attainment of the use;
   b. natural, ephemeral, intermittent, or low flow conditions or water levels prevent attainment of the use;
   c. human caused conditions or sources of pollution prevent attainment, and cannot be remedied or would cause more environmental to correct;
   d. dams, diversions, or other types of hydrological modifications preclude attainment, and it is not feasible to restore the water body to its natural condition;
   e. physical conditions related to natural features unrelated to water quality preclude attainment; or
   f. controls more stringent than those required by sections 301(b)(1)(A) and (B) and 306 of the CWA would result in substantial and widespread economic and social impact.
5. Has public notice and comment been provided for?[53]

The proposed Exception fails to follow this required analysis and therefore fails to meet the requirements of federal law.

2. The Proposed Exception Fails to Provide Analysis Required for Variances, Which Must Be Pollutant Specific, for a Limited Period of No More Than Three Years, and Supported by Proof of Progress Toward WQS Compliance.

In addition to meeting the requirements of a use attainability analysis as set out at 40 C.F.R. § 131.10(g), variances must be discharger- and pollutant-specific and time-limited, must

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[51] *Water Quality Standards Handbook, Second Edition* (US EPA, 1994, updated 2007) ("WQS Handbook") at section 2.7 (citing 40 C.F.R. § 131.10(g) and (h), available at http://www.epa.gov/waterscience/standards/handbook/.

[52] *Id.*

[53] *Id.* at section 2-7 – 2-8; *see also* 40 C.F.R. §§ 131.10(g), (h).

demonstrate reasonable progress towards attainment, and either must meet the water quality standard upon expiration of the variance or make a new, complete demonstration of "unattainability."[54]

EPA has approved variances from WQS where:

1. the State demonstrates a variance is justified after conducting the use attainability analysis described above;
2. the justification submitted by the State includes documentation that treatment more advanced than that required by sections 303(c)(2)(A) and (B) has been carefully considered, as well as alternative control strategies;
3. the more stringent State criterion is maintained and is binding upon all other dischargers;
4. the discharger given a variance for one particular constituent is required to meet the applicable criteria for other constituents;
5. the variance is granted for a specific period of time and must be rejustified upon expiration but at least every 3 years;
6. the discharger either must meet the standard upon the expiration of this time period or must make a new demonstration or "unattainability;"
7. reasonable progress is being made towards meeting the standards; and
8. the variance is subject to public review and comment.[55]

The proposed Exception fails to meet these requirements, including requirements to provide a termination date for the variance, address specific parameters (instead providing a blanket exception for "waste"), require compliance within three years, provide criteria for determining compliance, or even provide criteria for determining *progress* towards compliance. Accordingly, the proposed Exception fails to meet the requirements of federal law.

3. The Proposed Exception Fails to Comply with the Clean Water Act Anti-Degradation Requirements.

Water quality standards adopted or revised by States must comply with the anti-degradation requirements of the CWA.[56] The anti-degradation analysis requirement is specifically required for exceptions to Ocean Plan requirements.[57]

The DEIR attempts to circumvent this requirement by asserting that: "Granting the general exception will not violate federal antidegradation requirements because water quality will not be lowered, but rather, will be improved within the ASBS affected."[58] However, the

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[54] WQS Handbook at p. 5-12.

[55] 40 C.F.R. §§ 131.10(g), (h).

[56] 40 CFR § 131.12; 33 USC § 303(c)(4).

[57] *Letter from William Attwater, Chief Counsel, State Water Resources Control Board to Regional Board Executive Officers* (Oct. 7, 1987) ("Attwater Letter"), at 10.

[58] *See, e.g.*, DEIR at p. 272.

proposed Exception is by definition *less* stringent than the current, flat prohibition on discharges of waste in the Ocean Plan. Therefore, the inherently contradictory assertion in the DEIR that water quality will improve with weaker requirements must be grounded in an improper baseline of the virtually total failure of the State and Regional Boards to enforce the ASBS Prohibition to date. In other words, the DEIR appears to assume that *any* level of compliance with a relaxed standard, no matter how tenuous, is an improvement that should be embraced. This extraordinary argument violates federal and state (Resolution 68-16) anti-degradation requirements and California case law (see *infra*), and is extremely problematic public policy. Instead, the appropriate baseline for the overall review and anti-degradation analysis of the proposed Exception is ASBS water quality with *effective* implementation of the existing water quality standard (*i.e.*, the discharge prohibition).

a. The Proposed Exception Fails to Comply with Tier 3 Anti-Degradation Requirements.

40 C.F.R § 131.12(a)(3) requires "Tier 3" anti-degradation analysis for Outstanding National Resource Waters ("ONRW"). These waters are defined as "waters of exceptional recreational or ecological significance."[59] While California ASBSs have not been officially designated as ONRW, the State Board's Chief Counsel noted that the protections provided in the Ocean Plan are equally stringent as for ONRWs, and that permits for discharges to ASBS are required to meet Tier 3 standards.[60]

40 C.F.R § 131.12(a)(3) further prohibits any discharges that would lower water quality in ONRWs, other than temporary and short-term discharges such as those associated with construction or repairs. Thus, the discharges allowed under the proposed Exception similarly would violate Tier 3 anti-degradation requirements.

b. The Proposed Exception Fails to Comply with the Minimally-Required Tier 2 Anti-Degradation Analysis.

To ensure that water quality in "high quality" waters is "maintained and protected," 40 CFR § 131.12(a)(2) requires "Tier 2" anti-degradation analysis for such "high quality" waters, which are defined as waters "[w]here the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." ASBSs are "high quality waters" under this definition. Therefore, at a minimum the Board must conduct a review consisting of:

1. a finding that it is necessary to accommodate important economical or social development in the area in which the waters are located;
2. full satisfaction of all intergovernmental coordination and public participation provisions;

[59] 48 Fed. Reg. 51402 (Nov. 8, 1983).

[60] Attwater Letter at p. 15.

3. assurance that the highest statutory and regulatory requirements for point sources, including new source performance standards, and best management practices for non-point source pollutants are achieved.[61]

The proposed Exception does not include this analysis and therefore fails to comply with federal law.

D. THE DEIR FAILS TO ACHIEVE BOTH THE LETTER AND INTENT OF CEQA

1. The DEIR Does Not Contain a Clear Project Description.

Under CEQA, the DEIR must contain a clear and comprehensive project description.[62] The project description must contain a clearly written "statement of objectives sought by the proposed project"[63] that "include the underlying purposes of the project."[64] The proposed Exception fails to meet these requirements because it fails to set forth an objective compliance measure.

First, the proposed Exception requires that wet weather discharges shall not alter natural water quality in an ASBS, but fails to establish what "natural water quality" is,[65] rendering the project description impermissibly vague. This type of subjective standard is also difficult to enforce, and therefore inconsistent with the State Board's express policy to issue readily enforceable, transparent permits.[66]

Moreover, the requirement that dischargers ensure maintenance of natural water quality is entirely inconsistent with the actual language of the proposed Exception.[67] Attachment B, section A.2.d. of the Resolution allows the discharger the flexibility to pollute ASBSs well beyond natural water quality, stating that:

> BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm shall be designed to achieve the following target levels:
>
> (1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan, or
> (2) A 90 percent reduction in pollutant loading for the Table B parameters during storm events, for the applicant's total discharges. The baseline for the

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[61] WQS Handbook at p. 4-7.

[62] *See* 14 Cal. Code Regs. § 15124.

[63] *Id.*

[64] *Id.*

[65] *See, e.g.*, DEIR at p. 287 ("First, it is uncertain what constitutes natural water quality").

[66] Memorandum from Terry Tamminen, Cal/EPA to Cal/EPA BDOs, "Enforcement Initiative" (Nov. 30, 2004) ("one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits...").

[67] DEIR, Appendix 1, Attachment B.

reduction is the effective date of the exception. The baseline for these determinations is the effective date of the exception, and the reductions must be achieved and documented within four (4) years of the effective date.[68]

Thus, the proposed Exception violates the CEQA requirement that the DEIR must contain a clear project description and statement of objectives, because the DEIR describes on one hand the objective to be the attainment of natural water quality, and on the other hand describes the "target levels" not as natural water quality, but as either Table B objectives or a 90% reduction in pollutant loading for Table B parameters during storm events. It also sets the baseline dates as the effective date of the proposed Exception, rewarding dischargers who continue to contaminate ASBSs (and giving them a strong incentive to actually *increase* discharges so as to create a higher baseline when the proposed Exception is eventually adopted).

In addition to creating confusion over the nature of the "project," Resolution Attachment B, section A.2.d. is illegal under the Ocean Plan, which requires that waste not alter natural water quality. As stated in the DEIR, one of the main components the proposed Exception is to "ensure that wet weather runoff does not alter natural water quality in the ASBS...."[69] Yet Resolution Attachment B, section 2.d. is not designed to meet natural water quality. Table B levels are demonstrably higher than natural water quality, as seen in Table 1 of the March 10, 2010 letter from California Coastkeeper Alliance to the State Board. If the end goal is simply to meet Table B objectives or a percent reduction in loading of Table B parameters, what is the purpose of the Natural Water Quality Committee?[70] Section 2.d bears no relationship to the stated mandate of the proposed Exception that natural water quality be attained in ASBSs.

In sum, the project description is inadequate in that it fails to set forth clear, consistent compliance objectives that drive the core definition of the "project." The requirements set forth in Section 2.d bear no relationship to the stated purpose of achieving "natural water quality," and in fact violate the Ocean Plan mandate to protect the ASBS beneficial use. Accordingly, the DEIR fails to comply with CEQA.

2. The Description of the Environmental Setting/Baseline Fails to Comply with CEQA and Skews the CEQA Analysis.

Under CEQA, the DEIR must describe the environmental setting/baseline.[71] The agency then compares impacts to the environment based upon this baseline. By including in the baseline the over 1,600 illegal discharges into the ASBSs, the DEIR inappropriately finds, again and again, that the proposed Exception will generally improve water quality by attempting to remediate those discharges.

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[68] *See* also DEIR at p. 66.

[69] DEIR at section S.1.

[70] Resolution Attachment B, section 2.d also appears to be inconsistent with Resolution Attachment B, section 3(e) regarding compliance schedule and the maintenance of natural water quality.

[71] 14 Cal. Code Regs. § 15125(a).

This analysis is fundamentally flawed. "An agency may not escape its duty by ignoring that duty and then presenting the result as a *fait accompli* incorporated into an environmental baseline."[72] The SWRCB's pervasive non-enforcement is in fact an agency "action" that cannot be incorporated into the baseline.[73] Instead, the baseline must acknowledge that the action the SWRCB proposes to take would un-do the waste discharge prohibition, thereby reducing water quality compared to the baseline of the discharge prohibition.

Further, as is currently written, the status quo for the CEQA analysis appears to be "no enforcement" of the Ocean Plan, rather than the actual "no discharge" prohibition.[74] This clearly and significantly skews the CEQA analysis. For example, the water quality impacts of the proposed Exception should be recognized in the CEQA analysis to be "greater" than, rather than "less" than, the status quo, in light of the major, long-term steps backwards from the existing discharge prohibition.[75] Indeed, where a similarly inappropriate baseline was used in the *League to Save Lake Tahoe*, the court found that the EIS's subsequent analysis of air quality, water quality, and noise was therefore invalid.[76]

The purpose of environmental review under CEQA is "'to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment' and, more generally, 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'"[77] By failing to acknowledge that the proposed Exception would weaken the current standard and essentially reward dischargers for decades of illegal discharges, the DEIR does not provide the public with an accurate picture of the impacts of its proposed action, and so fails to comply with CEQA.

3. The DEIR Fails to Include a Clearly Defined "No Project" Alternative.

CEQA requires an evaluation of the "no project" alternative along with its impacts.[78] The purpose behind analyzing a no project alternative is to allow decision makers to compare the proposed project's impacts with the impacts of not approving the proposed project.[79] When the project is a revised regulatory plan, like the Ocean Plan, the no project alternative is the existing regulatory framework.[80] Therefore, the DEIR should compare the environmental impacts of the proposed Exception to the no project alternative the existing regulatory structure of the Ocean Plan, which prohibits the discharge of waste into ASBSs.

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[72] *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 739 F.Supp.2d 1260, 1276 (E.D. Cal. 2010).

[73] "[S]*ub silentio* approval of existing unauthorized activity is in an important sense an agency action." *Id.* at 1275.

[74] *See, e.g.*, DEIR at section S.5 (Table S.1).

[75] DEIR at Table S.1.

[76] *League to Save Lake Tahoe*, 739 F.Supp.2d at 1277.

[77] *Id.* at 1274-75 (citations omitted).

[78] *See* 14 Cal. Code Regs. § 15126.6(e).

[79] 14 Cal. Code Regs. § 15126.6(e)(1).

[80] 14 Cal. Code Regs. § 15126.6(e)(3)(A).

The DEIR violates this requirement by articulating not one but two entirely inconsistent "no project" alternatives. In section S.5.1., the DEIR describes the no project alternative as: "The State Water Board would ***not*** regulate the discharge of waste into Areas of Special Biological Significance."[81] Conversely, the "no project" alternative is described elsewhere in the DEIR as one where the Board does enforce the current waste discharge prohibition.[82] This confusion was reinforced by staff at the May 18, 2011 SWRCB hearing; specifically, staff stated in respond to a Board question that there are "two different ways of looking at the No Action" alternative; to not enforce the ban, and to enforce the ban. CEQA mandates that *one* No Action alternative be chosen; this is essential to ensure that the required analysis of the proposed Project and Alternatives is performed correctly.

Thus, at a minimum, the DEIR fails to clearly define the no project alternative by including two completely opposing definitions at various points in the DEIR, and failing to make clear which was the driving alternative for analysis purposes.[83]

4. The DEIR Fails to Adequately Analyze a Reasonable Range of Alternatives.

Under CEQA, an EIR must analyze a reasonable range of alternatives to the project, or to the location of the project, that would feasibly attain most of the basic objectives while avoiding or substantially lessening the project's significant impacts.[84] A public agency must consider a "reasonable range" of alternatives, which is determined by a "rule of reason."[85] While there is no set number that constitutes a "reasonable range," the range should be sufficient to permit a reasonable choice of potentially feasible alternatives that present possible environmental advantages.[86] The rule of reason requires that the environmental documents set forth the alternatives necessary to permit this reasoned choice. The key issue is whether the selection and discussion of alternatives fosters informed decision-making, as well as informed public participation.[87]

Regardless of whether the Board intends to define the "no project" alternative as one where it does or does not enforce the waste discharge prohibition, the DEIR fails to comply with

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[81] DEIR at section S.5.1 (emphasis added).

[82] *Id.* at section 4.2 (Alternative A), which reads: "Under this No-Project alternative, the Ocean Plan prohibition against waste discharges into ASBS would continue to apply to all discharges into ASBS. The discharger could comply by terminating the discharge or by relocating the discharge so that the receiving water quality is unaffected."

[83] The SWRCB does recognize that it "cannot abdicate" its regulatory authority. DEIR at section S.5.1. This appears to mean that an alternative premised on such abdication is not a legitimate alternative. However, the DEIR does not draw this final conclusion, and given its other inconsistencies and deficiencies, the correlation cannot be presumed.

[84] *See* Pub. Res. Code § 21100(b)(4); 14 Cal. Code Regs. § 15126.6(a); *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal.App.3d 433, 443-45 (1988).

[85] Guidelines § 15126.6(a); *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* 134 Cal. App.3d 1022, 1028 (1982); *Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco,* 106 Cal.App.3d 893, 910 (1980).

[86] *San Bernardino Valley Audubon Soc'y v. County of San Bernardino*, 155 Cal.App.3d 738, 750 (1984).

[87] *Mann v. Cmty. Redevelopment Agency*, 233 Cal. App. 3d 1143, 1150 (1991).

this CEQA "range of alternatives" requirement. If the "no project" alternative is defined as the situation in which the Board does not enforce the discharge prohibition, then the DEIR violates CEQA by failing to include a reasonable range of feasible alternatives – that is, by failing to include an alternative whereby the Board enforces the waste discharge prohibition.

If, on the other hand, the Board intends the "no project" alternative to be one where it does enforce the discharge prohibition, then it violates CEQA for rejecting this alternative without evidence. An EIR must include "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project."[88] Yet the DEIR summarily rejects the alternative without any evidence, upon conclusory and faulty reasoning. For instance, the DEIR states that this alternative—which would implement the no discharge prohibition that the Legislature intended for ASBSs—"would not result in better water quality protection,"[89] a statement that is simply illogical. Similarly, the DEIR bases a very summary costs projection for eliminating discharges into ASBSs on "initial calculations" by CalTrans, a regulated entity with numerous illegal discharges up and down the coast.[90] Indeed, such calculations highlight the problem with attempting to lump all discharges into a single EIR, because one discharger's cost considerations will not necessarily be the same for any other discharger – or the same as an independent, objective analysis by a non-regulated entity. Accordingly, there is no evidence in the DEIR upon which to reject the option of enforcing the discharge prohibition, and the CEQA alternatives analysis requirement has not been met.

5. The Cumulative Impacts Analysis Is Legally Inadequate.

CEQA requires that environmental documents address cumulative impacts "when the project's incremental effect is cumulatively considerable."[91] Cumulative impacts refer to two or more individual effects that, when considered together, are considerable or compound the environmental impacts.[92] The individual effects may be changes resulting from a single project.[93] Often, Program EIRs result in cumulative impacts resulting from single projects, and analyzing those cumulative impacts is one advantage of Program EIRs.[94]

The proposed Exception's Program DEIR inadequately discusses the cumulative impacts of the project. The only attempt the Board makes to analyze cumulative impacts is to discuss the intersection of ASBSs and 303(d)-listed impaired waters.[95] This is grossly inadequate. The proposed Exception provides 27 separate dischargers with an exemption from the Ocean Plan's

[88] 14 Cal. Code Regs. § 15126.6(d).

[89] DEIR at pp. 52-53.

[90] *Id.* at p. 294.

[91] CEQA Guidelines § 15130; *see also* CEQA Guidelines § 15355.

[92] CEQA Guidelines § 15355.

[93] CEQA Guidelines § 15355(a).

[94] "The Program EIR can: . . . (2) ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis." CEQA Guidelines § 15168(b)(2).

[95] "Many of the 303[d] listed water bodies draining to ASBS are impaired for sediments and bacteria (i.e. Redwoods ASBS and James V. Fitzgerald ASBS);" DEIR at section 8.1, p. 304.

prohibition against waste discharges into ASBSs.[96] Does the Board believe these 27 separate discharge exemptions will not have a cumulative impact? Moreover, the Board glosses over the fact that many of these 27 dischargers are discharging into multiple ASBSs, and multiple times within each ASBS. For instance, Caltrans is only considered 1 of the 27 dischargers under the proposed Exception. Yet, Caltrans' exemption will cover discharges in ten separate ASBSs.[97] Moreover, the Board's own survey discovered over 1,600 outfalls discharging into ASBSs.[98] Where is the analysis of the cumulative impacts from all these outfalls? Since the Board essentially ignores the cumulative impact of all 27 dischargers being exempt from the Ocean Plan's prohibition against waste discharges, the DEIR analysis is inadequate under CEQA.

6. Use of a Program DEIR/S Does Not Excuse Inadequate Analysis.

The DEIR is described as a "program EIR intended to provide information at a more general level of detail on the potential impacts of implementing the proposed project."[99] Yet this cannot provide justification to defer critical analysis.[100] Program EIRs can cover all activities within the scope of the EIR, so long as no new effects not examined in the EIR will occur, and no new mitigation measures are required.[101] However, without examining the potential effects specific to each ASBS (again, as required by the Ocean Plan Section III.J.), there will be no way to tell whether there will be new effects requiring mitigation.

Given that the DEIR fails to propose conducting any project specific environmental review, the DEIR must evaluate the impacts of granting an exception *for each ASBS and each applicant*. The pollutant loading, compliance efforts, volume, etc. will be distinct for each exception applicant. Similarly, the receiving waters in each individual ASBS are unique in each area. The DEIR fails to evaluate in detail the specific impacts for each proposed Exception request at each ASBS resulting from backsliding on the flat prohibition on discharges of waste to the ASBS, and instead allowing discharges of waste for an indeterminate period of time. Again, as discussed above, such an evaluation is mandated by the Ocean Plan Section III.J. exception requirements, as well as by CEQA regulations.

In addition, given that the DEIR asserts without support that impacts to water quality will be mitigated to insignificance by the BMPs implemented under the proposed Exception, the DEIR should have evaluated in detail the effectiveness of the BMP programs proposed by each applicant, including the effectiveness in addressing pollutant loadings unique to each applicant. Further, the DEIR should have evaluated the effectiveness of monitoring programs to be implemented in evaluating impacts to the ASBS. Yet the DEIR and proposed Exception as currently drafted do not provide adequate information as to what BMPs will be implemented by

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[96] DEIR at section S.1., p. 7.

[97] DEIR at p. 32, *see* Table 2.

[98] DEIR at section S.1., p. 7.

[99] DEIR at section S.2.

[100] An agency "must use its best efforts to find out and disclose all that it reasonably can." 14 Cal. Code Regs. § 15144.

[101] 14 Cal. Code Regs. §15168(c)(1)-(2).

dischargers, what the monitoring programs will consist of, and most importantly, how compliance will be determined, in order to conduct an adequate environmental review.

To comply with CEQA, the proposed Exception cannot defer the core of the program to the future, to be developed primarily by the dischargers. Instead it must set forth these requirements so that meaningful environmental review can be undertaken by the public and decisionmakers.[102] One of the overarching goals of CEQA is to ensure that the public has a "meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement."[103] Without an adequate presentation of essential information such as the specific nature of the natural water quality goal, the public has been deprived of the meaningful opportunity to comment, and the DEIR is inadequate under CEQA.

E. ALMOST FOUR DECADES AFTER DESIGNATION OF THE ASBSs, "NATURAL WATER QUALITY" HAS YET TO BE DEFINED

As noted above, the proposed Exception confusedly requires compliance with natural water quality, while at the same time acknowledging that "it is uncertain what constitutes natural water quality."[104] This gap should be closed not by the proposed Exception, but by enforcing the current discharge ban completely.

A key element of effective enforcement of the discharge ban is a clear understanding of "natural water quality." As noted above, the Ocean Plan defines ASBSs as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."[105] In order to protect "natural" – i.e., non-anthropogenically altered – water quality, the Ocean Plan further provides, "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."[106] "Assuring maintenance of natural water quality" in ASBSs facing both direct and indirect discharges requires definitions of "natural water quality" for each ASBS – definitions that must be based on science. Contrary to the DEIR and Resolution, "natural water quality" should *not* be equated with Table B objectives or some permutation thereof, but on the defined background water quality of each ASBS, based on reference site evaluation.

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[102] *See, e.g.* Pub. Res Code Sec. 21003(b) ("Documents prepared pursuant to this division be organized and written in a manner that will be meaningful and useful to decision makers and to the public").

[103] CEQA Guidelines Sec. 15088.5; see also Public Resources Code Sec. 21092.1.

[104] DEIR at p. 287.

[105] Ocean Plan, Appendix I, at 24.

[106] Ocean Plan, Sec. III.E.1., at p. 20.

Five years ago, a Natural Water Quality Committee of expert scientists was convened to address the issue of determining "natural water quality" for ASBS protection.[107] It was expected at the time that, decades after the designation of the ASBSs, the Committee would finally recommend specific standards and reference sites that could be incorporated into discharge permits in order comply with the current standards of the Ocean Plan for specific ASBSs and dischargers. Unfortunately, the Natural Water Quality Committee did not complete this task.

Thus, for the reasons described below, we urge the Board to determine what constitutes natural water quality, and to do so only after it has abandoned the flawed, proposed Exception approach currently under consideration. We specifically recommend adoption of a reference system approach that provides information on natural water quality through an averaging of the pollutant measurements of three selected reference sites in and around the ASBS, consistent with the criteria below:

> For the purposes of determining natural water quality for each ASBS, three open water reference sites shall be established for each ASBS, in order of priority as follows:
>
> *(1)* Those sites in and/or adjacent to the ASBS with no watershed influence of pollutants (e.g., sites should be located well away from watershed influences such as storm drains, creeks, ocean outfalls, etc.).
> *(2)* If no sites are available that have no watershed influence, then sites should be picked with no measurable anthropogenic influence, where anthropogenic influence is defined to include all human land uses, including urbanization, agriculture (crop and/or pasture), grazing, and timber harvesting.
>
> In the event that no site in a region meets either of the above two criteria, the reference sites shall be the nearest to the ASBS that meet the first or second criterion. Sampling for purposes of determining natural water quality shall be based on both dry weather and wet weather sampling, to ensure that the most protective figures are utilized.

1. Natural Water Quality Must Be Maintained in ASBSs.

The Ocean Plan defines ASBSs as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."[108] The ban on discharges is intended to protect natural water quality, as required by the fact that ASBSs are a specific beneficial use in the Ocean Plan.

Other reasons for protecting natural water quality in ASBSs through a discharge ban abound. For example, the maintenance of natural water quality in ASBS is also important to the parallel regulatory regime to protect marine life under the Marine Life Protection Act (MLPA). The MLPA Science Advisory Team Water Quality Work Group (MLPA Science Advisory Team), tasked with identifying strategies to protect and restore water quality, found that many of the types of discharges that would be permissible under the proposed Exception cause serious

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[107] http://www.waterboards.ca.gov/water_issues/programs/ocean/asbs_nwqcommittee.shtml.

[108] Ocean Plan, Appendix I, at 24.

impacts to marine ecosystems.[109] Storm drain effluents are known to be toxic to larvae, and wastewater effluents can cause elevated contaminant concentrations in the sediment near outfalls.[110] In order to avoid these impacts to marine life in ASBS, it is critical that the Board create a workable monitoring and enforcement system to attain and maintain natural water quality.

Water quality protection was contemplated, and to some extent relied upon, by the MLPA Science Advisory Team, who recommended that regional stakeholders co-locate marine protected areas with ASBS in order to "provide a more complete package of protection."[111] Over 30 of the adopted or proposed marine protected areas (MPAs) within California's state waters are co-located with an ASBS.[112] It is particularly important that the natural water quality requirements of ASBSs be highly protective to provide the biologically important MPAs holistic ecosystem protection.

2. It Is Feasible to Define and Identify Necessary Reference Sites.

The establishment of reference levels is recognized as a "critical element" of ensuring compliance with water quality management plans.[113] Several other regulatory agencies have successfully identified reference sites and utilized them to monitor water quality.[114] In 2003, Los Angeles County selected reference sites for monitoring TMDLs based on three criteria: 1) percentage of undeveloped land in the watershed, 2) presence of a freshwater outlet to the beach, and 3) availability of historical monitoring data.[115] In 2008, the San Diego Water Quality Control Board drafted changes to its Basin Plan to include a reference system; its criteria included the requirement that reference sites consist of "at least 95 percent open space and be represented by data that does not indicate human fecal contamination in the watershed."[116] The San Diego Basin Plan specified that reference and target sites should be as similar as possible in terms of climate, biology, geography, and factors that influence indicator bacteria densities.[117]

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[109] California MLPA Master Plan Science Advisory Team, Draft Recommendations for Considering Water Quality and Marine Protected Areas in the MLPA South Coast Study Region (MLPA Science Advisory Team Recommendations) (Draft revised February 9, 2009), available at: http://www.dfg.ca.gov/mlpa/pdfs/agenda_022409b1.pdf

[110] *Id.* at pp. 2-3.

[111] *See id.* at p. 2.

[112] *See* California Coastkeeper Alliance, Areas of Special Biological Significance Map Overlay with Marine Protected Areas Map, available at: http://www.cacoastkeeper.org/programs/healthy-marine-habitats/ASBS.

[113] Tiefenthaler, Liesl, Stein, Eric, Lyon, Greg, "Fecal indicator bacteria (FIB) levels during dry weather from Southern California reference streams," Published online: *Springer Science + Business Media B.V.* (Aug. 14, 2008).

[114] *See* San Diego Regional Water Quality Control Board, Water Quality Control Plan for the San Diego Basin, Appendix 3, Peer Review Comments and Responses (May 14, 2008); Los Angeles Regional Water Quality Control Board, Santa Monica Bay Bacterial TMDL Monitoring Plan (June 2003).

[115] Los Angeles Regional Water Quality Control Board, "Santa Monica Bay Bacterial TMDL Monitoring Plan" (June 2003), available at: www.dpw.lacounty.gov/wmd/NPDES/beachplan/Ch2.pdf.

[116] Water Quality Control Plan for the San Diego Basin, Appendix 3, Peer Review Comments and Responses, p. 7 (May 14, 2008).

[117] *Id.*

A reference system has also been recognized as a feasible in the context of preserving ASBS water quality by a scientific panel of experts. The Natural Water Quality Committee (Committee)[118] was convened in 2006 with the express mandate of developing a functional definition of natural water quality.[119] The Committee found that although "it is not practical to identify a unique seawater composition as exhibiting natural water quality":

> it is practical to define an operational natural water quality for an ASBS, and that such a definition must satisfy the following criteria:
>
> - it should be possible to define a reference area or areas for each ASBS that currently approximate natural water quality and that are expected to exhibit the likely natural variability that would be found in that ASBS,
> - any detectable human influence on the water quality must not hinder the ability of marine life to respond to natural cycles and processes."[120]

The Committee specifically noted the feasibility of a reference site approach, stating that it was "practical to approximate what ambient marine water quality would be like in the absence of (or minimally influenced by) waste discharges by comparing water quality parameters in ASBS to water quality parameters at reference sites."[121]

However, at the conclusion of a three-year study period, the Committee did not identify reference sites for each ASBS, or make a definitive recommendation for reference site criteria.[122] Rather, the Committee reported a remaining "need to select appropriate regional or statewide reference conditions, which by definition excludes areas with discharges."[123]

3. Ocean Plan Standards and Clean Water Act Anti-Degradation Requirements Mandate Strict Adherence to Maintaining the ASBS Beneficial Use.

Water quality standards adopted or revised by States must comply with the anti-degradation requirements of the Clean Water Act.[124] The anti-degradation analysis requirement is specifically required for exceptions to Ocean Plan requirements.[125] Without a quantitatively

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[118] http://www.waterboards.ca.gov/water_issues/programs/ocean/asbs_nwqcommittee.shtml.

[119] Natural Water Quality Committee Findings at i.

[120] *Id.* at p. 4.

[121] *Id.* at i.

[122] *See id.* at p. 2.

[123] *Id.* at p. 2.

[124] 40 CFR § 131.12; 33 USC § 303(c)(4).

[125] *Letter from William Attwater, Chief Counsel, State Water Resources Control Board to Regional Board Executive Officers* (Oct. 7, 1987) at 10 (Attwater Letter). While the Attwater Letter also states that anti-degradation may not apply to the relaxation of water quality standards where the preceding standard has not been achieved, the only example provided posits a new water quality standard equal to the highest level of water quality achieved since 1975. To the extent that staff intends to avoid anti-degradation analysis, it must demonstrate that the measures set

measurable natural water quality definition, operational definitions of natural water quality may continue to backslide so that the definition years from now may be significantly weaker than today's standard. In order to combat this, the Natural Water Quality Committee urged regulatory agencies to identify strategies to account for shifting baselines and prevent a steady decline in overall water quality as future development occurs.[126] Reference sites should be picked with these considerations in mind.

4. The Board Should Identify Reference Sites That Reflect Natural Water Quality.

In March 2008, the Committee defined natural water quality as "... that water quality (based on selected physical, chemical and biological characteristics) that is required to sustain marine ecosystems, and which is without apparent human influence."[127] This definition fails to provide a clear threshold or standard against which dischargers, SWRCB staff and the public can measure whether discharges meet the requirements associated with protection of the specific ASBS beneficial use in the Ocean Plan.

In the proposed Exception, the SWRCB suggests that "open space in a watershed" should serve as the determinant for where to site reference areas, stating that:

> this regional approach shall characterize natural water quality in ocean reference areas near the mouths of identified open space watersheds and the effects of the discharges on natural water quality (physical, chemical, and toxicity) in the ASBS receiving waters, and should include benthic marine aquatic life and bioaccumulation components.[128]

However, the SWRCB similarly does not provide further guidance in the Order on the appropriateness of specific sites as potential reference areas.

In the absence of additional, specific guidance, there is a significant danger that reference site criteria will fail to meet Ocean Plan objectives. For example, Regional Water Quality Control Boards and regulated dischargers working on a regional monitoring program in the Southern California Bight agreed on reference site criteria that simulated discharge sites in contributing catchments with less than 10% watershed development.[129] However, those reference site concentrations exceeded Ocean Plan objectives for 8 out of 10 parameters.[130]

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out in the proposed Exception ensure that water quality in ASBS will be better than the best water quality achieved since 1975.

[126] *Id.*

[127] Human influence was further defined as "an absence of significant amounts of: a) man-made constituents (*e.g.*, DDT), b) other chemical (*e.g.*, trace metals), physical (temperature/thermal pollution, sediment burial) and biological (*e.g.*, bacteria) constituents at concentrations that have been elevated due to man's activities above those resulting from the naturally occurring processes that affect the area in question, and c) non-indigenous biota (*e.g.*, invasive algal bloom species) that have been introduced either deliberately or accidentally by man." Natural Water Quality Committee Findings, at Preface.

[128] Resolution Attachment B, section B.2.

[129] Natural Water Quality Committee Findings at p. 9.

[130] *Id.*

Ocean Plan objectives for arsenic, cadmium, copper, lead, nickel, and zinc were exceeded in more than 15% of ASBS shoreline areas.[131] Chromium and polycyclic aromatic hydrocarbons exceeded Ocean Plan objectives over relatively large proportions of ASBS shoreline, 50% and 87% respectively.[132]

The Natural Water Quality Committee proposed reference sampling that included surf zone samples at the mouth of a watershed with limited anthropogenic influences, defined as a minimum of 90-95% open space.[133] However, even 5-10% developed can lead to significant contamination problems. For example, the results of a 2007-08 SWRCB reference sampling study of surf zone at the mouth of a watershed with limited anthropogenic influences, defined as a minimum of 95% open space, showed chromium and lead levels above Ocean Plan six-month median objectives and mean concentrations of PAHs approximately an order of magnitude greater than the Table B 30-day objectives.[134] Identifying reference sites appropriately is critical to ensuring natural water quality is attained.

It is similarly important to accurately characterize the range of uses of an "undeveloped" watershed. An inappropriate definition of an "undeveloped" watershed could include grazing and other types of agricultural activities, or could encompass sparsely developed areas that housed leaking septic tanks. Accordingly, *all* human-related development must be considered.

In light of the considerations for developing reference sites that truly reflect "natural water quality," we respectfully request that the Board adopt the following description for a reference system to determine natural water quality, as is called for in the Ocean Plan for the protection of ASBS health generally:

> For the purposes of determining natural water quality for each ASBS, three open water reference sites shall be established for each ASBS in order of priority as follows:
>
> *(1)* Those sites in and/or adjacent to the ASBS with no watershed influence of pollutants (e.g., sites should be located well away from watershed influences such as storm drains, creeks, ocean outfalls, etc.).
> *(2)* If no sites are available that have no watershed influence, then sites should be picked with no measurable anthropogenic influence, where anthropogenic influence is defined to include all human land uses, including urbanization, agriculture (crop and/or pasture), grazing, and timber harvesting.

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[131] *Id.* at p. 8.

[132] *Id., see* Table 2; *see also* DEIR p. 213 (90% open space for the Southern California study) and State Water Resources Control Board, ASBS Monitoring Stakeholders Meeting Monterey, CA (December 19, 2007) (citing reference site criteria of 90% for Southern California and 95% for Central and Northern California).

[133] *Id.* at p. 7.

[134] *Id. See also* Tiefenthaler, Liesl L., Stein, Eric, Lyon, Greg, "Fecal indicator bacteria (FIB) levels during dry weather from Southern California reference streams," Published online: *Springer Science + Business Media B.V.* (Aug. 14, 2008).

In the event that no site in a region meets either of the above two criteria, the reference sites shall be the nearest to the ASBS that meets the first or second criterion. Sampling for purposes of determining natural water quality shall be based on both dry weather and wet weather sampling, to ensure that the most protective figures are utilized.

The SWRCB should also identify additional strategies to deal with already-degraded water quality in ASBS, such as monitoring for tracers of waste discharge, using reference condition normalizers, and biological monitoring in addition to chemical or toxicological monitoring.

5. The Process for Determining Natural Water Quality Must Be Independent and Science-Driven.

The process for determining "natural water quality" for each ASBS needs to be completed by state regulators with input from independent scientists. A proposed strategy to develop "natural water quality standards" via stakeholder processes around the state[135] will – in our experience – simply result in haggling over how much the dischargers are willing to pay for improvements, rather than the science of what the ASBSs require. Moreover, given that the Natural Water Quality Committee itself failed to complete this task in four years of discussion, it is extremely optimistic to assume that discharger-driven stakeholder processes will complete the task in mere months, as was estimated by staff. The SWRCB must elevate this task in priority and complete as soon as possible, with the input of the Natural Water Quality Committee members, so that the resulting figures can be incorporated into discharger permits. In the meantime, to ensure that the process does not again bog down, dischargers should be placed under enforcement orders with specific requirements for reducing pollution into ASBSs, which will be necessary at a minimum regardless of the precise findings of the Committee and the SWRCB on natural water quality.

6. Discharger Permits Must Include Numeric Effluent Limits Necessary to Ensure Maintenance of Natural Water Quality.

Determination of natural water quality via reference sites is only the first step to finally protecting the health of ASBSs. Discharger permits must then be amended to include requirements that swiftly implement controls that will achieve natural water quality as expeditiously as possible. While the DEIR discusses use of structural BMPs,[136] it fails to also discuss imposition of numeric effluent limits (NELs) in stormwater permits as an appropriate and accountable tool. We ask that NELs be specifically incorporated into stormwater permits to ensure expeditious achievement of natural water quality in all ASBSs. Now is a particularly appropriate time to take that action, as many of the applicable permits are in the process of renewal.

[135] Resolution at Attachment B, section B.2.; also telephone with SWRCB staff, Feb. 2011.

[136] DEIR at pp. 65-66.

F. THE PROPOSED EXCEPTION'S MONITORING REQUIREMENTS FAIL TO ENSURE PROTECTION OF ASBSs

Water quality monitoring must be sufficient to determine whether the conditions of water quality regulations are being followed and progress made toward eliminating anthropogenic pollution.[137] Moreover, monitoring of discharges in ASBSs must be "based on the range of natural water quality conditions at approved reference stations."[138] Yet here, the discharge monitoring program seems to have little or no connection to how compliance with the main provisions of the proposed Exception, let alone the achievement of no pollution, will be measured and ensured.

For instance, although the proposed Exception appears to require compliance with natural background levels within four years after adoption of the proposed Exception, a number of monitoring protocols are required only once every five years, which is *longer* than the full compliance term and longer than necessary to comply with the mandatory triennial review of the exceptions.[139]

Further, outfall sampling is required only from pipes 18 inches or larger,[140] despite the fact that the 2003 Final Report states that 41% of discharges were caused by small storm drains.[141] The Final Report does not define the size of a so-called "small storm drain," but if it is smaller than 18 inches, then the proposed Exception provides for no monitoring at almost half of the discharges in the State. Importantly, the size of a storm drain also may not be indicative or representative of the concentration of the waste discharged; a very small drain may discharge high concentrations of harmful waste.

Finally, the proposed Exception inexplicably allows applicants to elect to participate in a regional integrated monitoring program in lieu of an individual monitoring program, contrary to the fundamental nature of ASBSs as "special" places to be protected uniquely. The proposed Exception fails to give any details about what this regional approach will entail, or how it will protect the unique ASBS ecosystems, which do not lend themselves by definition to an "averaging out" of impacts or assessments. Moreover, the proposed Exception states that the regional monitoring approach "shall characterize natural water quality in ocean reference areas...."[142] This should have been (and was thought to be) the task of the Natural Water Quality Committee, which conducted research on natural water quality for years but failed to recommend

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[137] *See* 33 USC §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), 122.48(b).

[138] Southern California Coastal Water Research Project, "Final Report: Discharges into State Water Quality Protection Areas" at Table 3, p. 8 (July 2003), available at http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/asbs/swqpa_finalsurveyreport_wlayouts.pdf.

[139] *See, e.g*, Resolution, Attachment B, at pp. B-13 – B-15 (chronic toxicity monitoring, sediment sampling, and bioaccumulation studies required once per 5 years).

[140] *Id.* at p. B-13.

[141] Southern California Coastal Water Research Project, "Final Report: Discharges into State Water Quality Protection Areas," p. 7 (July 2003).

[142] Resolution, Attachment B, at p. B-15.

clear standards that could be applied to this process. In light of this experience, the optimistic assumption that the dischargers will, on their own, create a meaningful program to assess progress towards natural water quality in each and every ASBS through an undefined group monitoring program is unfounded.

Accordingly, fundamental aspects of the monitoring discharge program bear little or no relationship to ensuring *compliance* with the discharge prohibition and compliance natural water quality in each of the ASBSs, which is the mandate of the Ocean Plan. It therefore fails to meet federal Clean Water Act requirements to provide information necessary to carry out the purposes of the Act.

G. UNNECESSARILY LENGTHY COMPLIANCE SCHEDULES DELAY MUCH-NEEDED CONTROLS ON POLLUTION INTO ASBSS

The proposed, lengthy compliance schedules ignore the fact that dischargers have known of the ASBS discharge ban for decades, have been aware of its direct applicability to stormwater for at least ten years, and have specifically known of these requirements to achieve natural water quality since 2004, when the SWRCB issued them orders to cease discharging or apply for an exception.[143] There is simply no justification for granting four or more additional years of delay to comply with a relatively straightforward mandate.

As proposed, the proposed Exception represents an unfortunate detour and a continuation of delays in protecting ASBS in California. Eight years after the SWRCB broadly announced that over 1600 illegal discharges to the ASBS were daily adding waste to the ecological gems of California's coast, the SWRCB has undertaken no meaningful enforcement to abate these discharges. Now, rather than finally beginning this enforcement effort, SWRCB staff instead proposes a broad Exception for wet weather discharges along with a series of confusing and contradictory requirements that likely will not result in Ocean Plan compliance. Further, while straightforward enforcement in the form of a CDO or CAO with compliance schedules could begin progress towards compliance and the protection of ASBS immediately (and could have started a decade ago), SWRCB staff instead proposes to delay the application of existing water quality standards for years more. Indeed, under the DEIR and Resolution, it remains unclear whether and when completion of the administrative process proposed by SWRCB staff would occur—if ever.

For the reasons discussed in this letter and in our 2010 comments, we urge that the SWRCB redirect its focus to enforcement of the existing prohibition on the discharge of waste to the ASBS, rather than expending staff time on a process that ultimately only delays meaningful progress on improvements in water quality in ASBS across the state.

[143] DEIR at p. 22.

H. SPECIFIC ATTENTION SHOULD BE GIVEN TO IMPAIRED ASBSS

Despite our raising this issue in our detailed comments last year, the proposed Exception still fails to address the critical issue of those ASBSs that are so polluted that they have been identified as impaired under CWA Section 303(d). According to the SWRCB's Draft Data Report, at least a portion of 11 ASBSs are listed as impaired.[144] The State Board should set direction to staff to immediately prioritize use of their enforcement authority to ensure enhanced controls that drastically reduce and then eliminate discharge of waste into impaired ASBSs. This includes enhanced controls into impaired creeks or streams that then discharge into the impaired ASBS.

I. THE OCEAN PLAN'S PROVISIONS SHOULD BE IMPLEMENTED THROUGH ENFORCEMENT ORDERS

For the reasons discussed at length above, the proposed Exception is legally inadequate and cannot be approved. In addition, its provisions fail to protect the health of ASBS, which require *no* alteration of natural water quality (hence the Ocean Plan's *ban* on, not moderation of, pollution discharges in to ASBSs).

We urge the SWRCB to abandon this overly broad proposed Exception approach, and instead issue ASBS- and discharger-specific CDOs or CAOs with compliance schedules for reaching a total prohibition on discharges, where such orders include enforceable, specific interim milestones and a final deadline. These orders could be issued in a matter of months, can contain some of the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now. Where a determination of ASBS "natural water quality" needs to be made to provide information on progress towards compliance, this determination can be ongoing while the enforcement order and its interim milestones are being implemented – there is no reason to wait any longer to begin action to reduce pollutants loads into these sensitive, unique marine ecosystems,

In response to Board questioning at the May 18, 2011 hearing about the practical difference between the application of the proposed Exception and the use of enforcement orders, SWRCB staff responded that the same type of provisions could generally be applied to both, but that the enforcement orders would have to be "more immediate" and "stricter." We see no reason to embrace an approach that is slower and more lax over one that will achieve compliance in each ASBS more quickly, especially given the many years' notice that each and every applicant has had over these straightforward Ocean Plan requirements. We accordingly urge the Board to adopt an enforcement order approach that begins pollutant loading reductions immediately.

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[144] Draft Data Report at Appendix A; available at: http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/asbs/draft_data_report.pdf. Given the SWRCB's lack of attention to the natural water quality mandate in the Ocean Plan to date, it is likely that number is far higher. Every ASBS that exceeds natural water quality is *by definition* "impaired" under Section 303(d) and should receive swift pollutant load reductions.

J. RESPONSE TO SWRCB'S REQUEST FOR COMMENTS ON AN AMENDMENT OF THE OCEAN PLAN

At the May 18, 2011 hearing on the proposed Exception, the Board requested those attending and observing the hearing, including NRDC and CCKA, to provide comments on an approach of amending the Ocean Plan specifically to address stormwater (*i.e.*, wet weather) discharges into ASBSs. CCKA and NRDC both commented in strong opposition to the prior, sweeping effort by the SWRCB to amend the Ocean Plan with regard to discharges to ASBSs. Any potential, new amendment addressing (wet weather) stormwater discharges (dry weather discharges and the discharge of trash must be completely banned regardless) would necessarily need to ensure that there was no alteration of natural water quality in any ASBS. Accordingly, CCKA and NRDC would not support any proposed amendment that would provide less protection than the following:

E. Implementation Provisions For Areas* of Special Biological Significance (ASBS)

1. 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.
    a. Notwithstanding this discharge prohibition, the State Water Board or Regional Water Boards may approve waste discharge requirements for discharges of stormwater (i.e. wet weather) runoff in existence and regulated by an NPDES permit prior to January 1, 2005 to areas designated as being of special biological significance, if the stormwater discharges: (1)(i) are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage, or (ii) are designed to prevent soil erosion; (2) occur only during wet weather; (3) are composed of only storm water runoff; and (4) only if the discharger demonstrates that full implementation of the waste discharge prohibition is technically infeasible. Alternative controls shall be mandated to ensure that such applicable discharges do not alter natural water quality in the ASBS, and to ensure that natural water quality is attained within 3 years from the approval. The discharge of trash shall continue to be prohibited.

We continue, however, to support as the first course of action a program of immediate issuance of enforcement orders to bring dischargers into swift compliance.[145] Enforcement of the Ocean Plan's ban on pollution discharges is the most straightforward way to ensure protection of the ASBS beneficial use, which requires no alteration in natural water quality.

K. CONCLUSIONS

We have spent many years advocating for enforcement of what has been law for decades – a straightforward discharge prohibition into the state's most special marine habitats. Disappointingly, rather than celebrating the renewed health of ASBSs in the face of enforcement of this prohibition, we find ourselves continuing to fight regular attempts to circumvent or delay

[145] This enforcement program should also include those dischargers releasing contaminants into ASBSs who have not yet applied for the proposed Exception or received their own exception in the past. This is important both to protect the ASBSs and to streamline the enforcement process by avoiding finger-pointing over blame and recourse.

enforcement of this prohibition by both the regulated community and the state agency charged with protecting the ASBSs.

We again request that the SWRCB abandon this overly broad, proposed Exception, and instead issue enforcement orders in the form of ASBS- and discharger-specific CDOs or CAOs with compliance schedules for reaching a total prohibition on discharges that include interim milestones and a final deadline. These orders could be issued in a matter of months, can contain some of the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now.

As part of this overall effort to protect the ASBS beneficial use by ensuring "maintenance of natural water quality conditions" in ASBSs, the SWRCB will need to define natural water quality for each ASBS. This should be done through a science-based process using reference sites, as discussed above, a process that should be completed as soon as possible. The resulting information can then be built into the discharge ban enforcement orders as needed, to identify milestones, track progress and ensure continued compliance.

The state's ASBSs are special places that deserve full implementation of the law. We urge you to take swift action to provide them with the protection that they need. Thank you for your careful attention to these comments.

Sincerely,

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Attachments: Santa Monica Baykeeper, Monitoring Data in ASBS 24, Mugu Lagoon to Latigo Point (2003-2011)
Letter from CCKA to SWRCB, "Notice of Preparation of a Statewide Program EIR for a General Exception to the California Ocean Plan for Discharges into ASBSs" (March 15, 2010)
Letter from NRDC and Santa Monica Baykeeper to SWRCB, "Notice of Preparation of a Statewide Program EIR for a General Exception to the California Ocean Plan for Discharges into ASBSs" (March 15, 2010)

ATTACHMENT 1:

SANTA MONICA BAYKEEPER, MONITORING DATA IN ASBS 24, MUGU LAGOON TO LATIGO POINT (2003-2011)

Santa Monica Baykeeper Storm Drain Data: ASBS 24

Drain ID	Date of Sample	Constituent	Measurement	Unit	Ocean Plan Limits
SAD620					
Dry Weather Sample					
SAD620	8/2/2003	Fecal Coliforms	4160	MPN/100mL	400.00
		Total Coliforms	>241920	MPN/100mL	10000.00
		Enterococcus	27550	MPN/100mL	104.00
		Arsenic (As)	1	ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	4	ug/L	30.00
		Mercury (Hg)	0	ug/L	0.40
		Nickel (Ni)	2	ug/L	50.00
		Lead (Pb)	0	ug/L	20.00
		Selenium (Se)	1	ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	19	ug/L	200.00
		Aluminum (Al)	21	ug/L	
		Barium (Ba)	110	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	0	ug/L	
		Calcium (Ca)	15621	ug/L	
		Cobalt (Co)	0	ug/L	
		Chromium (Cr)	0	ug/L	
		Iron (Fe)	72	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)	4868	ug/L	
		Magnesium (Mg)	13722	ug/L	
		Manganese (Mn)	37	ug/L	
		Molybdenum (Mo)	2	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	0	ug/L	
		Sodium (Na)	-555	ug/L	
		Strontium(Sr)	271	ug/L	
		Thallium (Ti)	0	ug/L	

Santa Monica Baykeeper Storm Drain Data: ASBS 24

		Tin (Sn)	0	ug/L	
		Titanium (Ti)	1	ug/L	
		Vanadium(V)	2	ug/L	
SAD620					
Dry Weather Sample					
		Fecal Coliforms	8600	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	19863	MPN/100mL	104.00
		Arsenic (As)	4	ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	23	ug/L	30.00
		Mercury (Hg)	0	ug/L	0.40
		Nickel (Ni)	6	ug/L	50.00
		Lead (Pb)	0	ug/L	20.00
		Selenium (Se)	0	ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	30	ug/L	200.00
		Aluminum (Al)	108	ug/L	
		Barium (Ba)	192	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	0	ug/L	
SAD620	10/20/2004	Calcium (Ca)	59647	ug/L	
		Cobalt (Co)	1	ug/L	
		Chromium (Cr)	2	ug/L	
		Iron (Fe)	390	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)	6490	ug/L	
		Magnesium (Mg)	24738	ug/L	
		Manganese (Mn)	36	ug/L	
		Molybdenum (Mo)	5	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	0	ug/L	
		Sodium (Na)	0	ug/L	

Santa Monica Baykeeper Storm Drain Data: ASBS 24

		Strontium(Sr)	602	ug/L	
		Thallium (Ti)	0	ug/L	
		Tin (Sn)	0	ug/L	
		Titanium (Ti)	8	ug/L	
		Vanadium(V)	6	ug/L	
SAD620					
Dry Weather Sample					
SAD620	4/18/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.1	ug/L	10.00
		Copper (Cu)	4.6	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	7	ug/L	50.00
		Lead (Pb)	0	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	23.2	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	4/20/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	6.6	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	11.4	ug/L	50.00
		Lead (Pb)	0.1	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	1.4	ug/L	7.00

Santa Monica Baykeeper Storm Drain Data: ASBS 24

		Zinc(Zn)	19.3	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	4/24/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.1	ug/L	10.00
		Copper (Cu)	9.7	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	6.2	ug/L	50.00
		Lead (Pb)	0.3	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.2	ug/L	7.00
		Zinc(Zn)	41.7	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	4/25/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.1	ug/L	10.00
		Copper (Cu)	5.6	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	9.6	ug/L	50.00
		Lead (Pb)	0.1	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	73.4	ug/L	200.00
SAD620					
Dry Weather Sample					
		Fecal Coliforms	ns	MPN/100mL	400.00

Santa Monica Baykeeper Storm Drain Data: ASBS 24

SAD620	5/3/2006	Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	28.1	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	2.2	ug/L	50.00
		Lead (Pb)	0.4	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	53.9	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	5/4/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.1	ug/L	10.00
		Copper (Cu)	112.2	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	5	ug/L	50.00
		Lead (Pb)	1.2	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	1.2	ug/L	7.00
		Zinc(Zn)	47	ug/L	200.00
SAD620					
Dry Weather Sample					
		Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.3	ug/L	10.00

Santa Monica Baykeeper Storm Drain Data: ASBS 24

SAD620	5/9/2006	Copper (Cu)	38.8	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	6.5	ug/L	50.00
		Lead (Pb)	2.8	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.2	ug/L	7.00
		Zinc(Zn)	339.4	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	5/10/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.10	ug/L	10.00
		Copper (Cu)	14.60	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	4.90	ug/L	50.00
		Lead (Pb)	0.50	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	76.10	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	5/24/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.10	ug/L	10.00
		Copper (Cu)	18.20	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	4.30	ug/L	50.00
		Lead (Pb)	0.30	ug/L	20.00

Santa Monica Baykeeper Storm Drain Data: ASBS 24

		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	55.90	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	5/25/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.2	ug/L	10.00
		Copper (Cu)	45.40	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	4.50	ug/L	50.00
		Lead (Pb)	1.3	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.4	ug/L	7.00
		Zinc(Zn)	71.70	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	6/1/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	40.23	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	7.30	ug/L	50.00
		Lead (Pb)	1.54	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.97	ug/L	7.00
		Zinc(Zn)	64.48	ug/L	200.00
SAD620					

Santa Monica Baykeeper Storm Drain Data: ASBS 24

Dry Weather Sample					
SAD620	6/2/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.24	ug/L	10.00
		Copper (Cu)	87.19	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	3.81	ug/L	50.00
		Lead (Pb)	0.73	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.54	ug/L	7.00
		Zinc(Zn)	91.99	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	6/7/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	41.08	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	6.07	ug/L	50.00
		Lead (Pb)	0.26	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	2.51	ug/L	7.00
		Zinc(Zn)	57.72	ug/L	200.00
SAD620					
Dry Weather Sample					
		Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00

Santa Monica Baykeeper Storm Drain Data: ASBS 24

SAD620	6/8/2006	Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.04	ug/L	10.00
		Copper (Cu)	53.71	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	29.67	ug/L	50.00
		Lead (Pb)	2.86	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	2.81	ug/L	7.00
		Zinc(Zn)	563.00	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	6/14/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	9.22	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	3.37	ug/L	50.00
		Lead (Pb)	0.15	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.05	ug/L	7.00
		Zinc(Zn)	38.08	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	6/15/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	18.76	ug/L	30.00
		Mercury (Hg)		ug/L	0.40

Santa Monica Baykeeper Storm Drain Data: ASBS 24

		Nickel (Ni)	4.89	ug/L	50.00
		Lead (Pb)	0.49	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.99	ug/L	7.00
		Zinc(Zn)	63.21	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	6/21/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	16.80	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	3.77	ug/L	50.00
		Lead (Pb)	0.14	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.07	ug/L	7.00
		Zinc(Zn)	101.80	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620	6/22/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	11.74	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	4.83	ug/L	50.00
		Lead (Pb)	0.2	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.08	ug/L	7.00

Santa Monica Baykeeper Storm Drain Data: ASBS 24

		Zinc(Zn)	56.22	ug/L	200.00
SAD620					
Dry Weather Sample					
SAD620**	4/24/2006	Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0.2	ug/L	10.00
		Copper (Cu)	80	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	2.4	ug/L	50.00
		Lead (Pb)	0.3	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0.2	ug/L	7.00
		Zinc(Zn)	24.8	ug/L	200.00
SAD620					
Wet Weather Sample					
		Fecal Coliforms	387	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	3873	MPN/100mL	104.00
		Arsenic (As)	2.7	ug/L	80.00
		Cadmium (Cd)	0.3	ug/L	10.00
		Copper (Cu)	236.6	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	11.3	ug/L	50.00
		Lead (Pb)	3.61	ug/L	20.00
		Selenium (Se)	0.7	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	321.3	ug/L	200.00
		Aluminum (Al)	101	ug/L	
		Barium (Ba)	74.5	ug/L	
		Boron(B)		ug/L	

Santa Monica Baykeeper Storm Drain Data: ASBS 24

SAD620	10/13/2009	Beryllium (Be)	ND	ug/L	
		Calcium (Ca)		ug/L	
		Cobalt (Co)	1.7	ug/L	
		Chromium (Cr)	1.2	ug/L	
		Iron (Fe)	329	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	296.4	ug/L	
		Molybdenum (Mo)	3.4	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	2.2	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	460	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	0.2	ug/L	
		Titanium (Ti)	1.8	ug/L	
		Vanadium(V)	9.6	ug/L	
SAD790					
Dry Weather Sample					
		Fecal Coliforms	740	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	11199	MPN/100mL	104.00
		Arsenic (As)	3	ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	16	ug/L	30.00
		Mercury (Hg)	0	ug/L	0.40
		Nickel (Ni)	3	ug/L	50.00
		Lead (Pb)	1	ug/L	20.00
		Selenium (Se)	1	ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	44	ug/L	200.00
		Aluminum (Al)	348	ug/L	

Santa Monica Baykeeper Storm Drain Data: ASBS 24

SAD790	10/20/2004	Barium (Ba)	116	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	0	ug/L	
		Calcium (Ca)	8309	ug/L	
		Cobalt (Co)	0	ug/L	
		Chromium (Cr)	2	ug/L	
		Iron (Fe)	393	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)	2712	ug/L	
		Magnesium (Mg)	5220	ug/L	
		Manganese (Mn)	21	ug/L	
		Molybdenum (Mo)	3	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	0	ug/L	
		Sodium (Na)	0	ug/L	
		Strontium(Sr)	79	ug/L	
		Thallium (Ti)	0	ug/L	
		Tin (Sn)	0	ug/L	
		Titanium (Ti)	28	ug/L	
		Vanadium(V)	4	ug/L	
SAD800					
Dry Weather Sample					
		Fecal Coliforms	950	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	1313	MPN/100mL	104.00
		Arsenic (As)	1	ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	4	ug/L	30.00
		Mercury (Hg)	0	ug/L	0.40
		Nickel (Ni)	3	ug/L	50.00
		Lead (Pb)	0	ug/L	20.00
		Selenium (Se)	0	ug/L	150.00
		Silver (Ag)	0	ug/L	7.00

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SAD800	6/5/2004	Zinc(Zn)	36	ug/L	200.00
		Aluminum (Al)	148	ug/L	
		Barium (Ba)	162	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	0	ug/L	
		Calcium (Ca)	23279	ug/L	
		Cobalt (Co)	0	ug/L	
		Chromium (Cr)	4	ug/L	
		Iron (Fe)	271	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)	6995	ug/L	
		Magnesium (Mg)	22745	ug/L	
		Manganese (Mn)	7	ug/L	
		Molybdenum (Mo)	6	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	0	ug/L	
		Sodium (Na)	0	ug/L	
		Strontium(Sr)	208	ug/L	
		Thallium (Ti)	0	ug/L	
		Tin (Sn)	0	ug/L	
		Titanium (Ti)	15	ug/L	
		Vanadium(V)	4	ug/L	
SAD800					
Dry Weather Sample					
		Fecal Coliforms	11870	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	24196	MPN/100mL	104.00
		Arsenic (As)	3	ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	9	ug/L	30.00
		Mercury (Hg)	0	ug/L	0.40
		Nickel (Ni)	4	ug/L	50.00
		Lead (Pb)	1	ug/L	20.00

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SAD800	10/20/2004	Selenium (Se)	0	ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	75	ug/L	200.00
		Aluminum (Al)	462	ug/L	
		Barium (Ba)	90	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	0	ug/L	
		Calcium (Ca)	16917	ug/L	
		Cobalt (Co)	1	ug/L	
		Chromium (Cr)	2	ug/L	
		Iron (Fe)	470	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)	4816	ug/L	
		Magnesium (Mg)	11718	ug/L	
		Manganese (Mn)	25	ug/L	
		Molybdenum (Mo)	2	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	1	ug/L	
		Sodium (Na)	0	ug/L	
		Strontium(Sr)	155	ug/L	
		Thallium (Ti)	0	ug/L	
		Tin (Sn)	0	ug/L	
		Titanium (Ti)	29	ug/L	
		Vanadium(V)	5	ug/L	
SAD800					
Dry Weather Sample					
		Fecal Coliforms	ns	MPN/100mL	400.00
		Total Coliforms	ns	MPN/100mL	10000.00
		Enterococcus	ns	MPN/100mL	104.00
		Arsenic (As)		ug/L	80.00
		Cadmium (Cd)	0	ug/L	10.00
		Copper (Cu)	3.92	ug/L	30.00
		Mercury (Hg)		ug/L	0.40

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SAD800	6/7/2006	Nickel (Ni)	2.19	ug/L	50.00
		Lead (Pb)	0.20	ug/L	20.00
		Selenium (Se)		ug/L	150.00
		Silver (Ag)	0	ug/L	7.00
		Zinc(Zn)	50.19	ug/L	200.00
		Aluminum (Al)		ug/L	
		Barium (Ba)		ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)		ug/L	
		Calcium (Ca)		ug/L	
		Cobalt (Co)		ug/L	
		Chromium (Cr)		ug/L	
		Iron (Fe)		ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)		ug/L	
		Molybdenum (Mo)		ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)		ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)		ug/L	
		Thallium (Ti)		ug/L	
		Tin (Sn)		ug/L	
		Titanium (Ti)		ug/L	
		Vanadium(V)		ug/L	
SAD800					
Wet Weather Sample					
		Fecal Coliforms	6488	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	2014	MPN/100mL	104.00
		Arsenic (As)	7.4	ug/L	80.00
		Cadmium (Cd)	ND	ug/L	10.00

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		Copper (Cu)	15.3	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	2.2	ug/L	50.00
		Lead (Pb)	0.55	ug/L	20.00
		Selenium (Se)	ND	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	37.1	ug/L	200.00
		Aluminum (Al)	143	ug/L	
		Barium (Ba)	6.5	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
SAD800	10/14/2009	Calcium (Ca)		ug/L	
		Cobalt (Co)	ND	ug/L	
		Chromium (Cr)	0.8	ug/L	
		Iron (Fe)	131	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	12.8	ug/L	
		Molybdenum (Mo)	0.8	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	0.5	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	25.9	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	ND	ug/L	
		Titanium (Ti)	6.5	ug/L	
		Vanadium(V)	3.2	ug/L	
SAD800					
Wet Weather Sample					
		Fecal Coliforms		MPN/100mL	400.00
		Total Coliforms		MPN/100mL	10000.00
		Enterococcus		MPN/100mL	104.00

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		Arsenic (As)	7.1	ug/L	80.00
		Cadmium (Cd)	ND	ug/L	10.00
		Copper (Cu)	14.8	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	2.1	ug/L	50.00
		Lead (Pb)	0.6	ug/L	20.00
		Selenium (Se)	ND	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	37.2	ug/L	200.00
		Aluminum (Al)	144	ug/L	
		Barium (Ba)	6.5	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
SAD800	10/14/2009	Calcium (Ca)		ug/L	
		Cobalt (Co)	ND	ug/L	
		Chromium (Cr)	0.8	ug/L	
		Iron (Fe)	128	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	13	ug/L	
		Molybdenum (Mo)	0.7	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	0.5	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	26	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	ND	ug/L	
		Titanium (Ti)	5.4	ug/L	
		Vanadium(V)	3.1	ug/L	
SAD840					
Wet Weather Sample					
		Fecal Coliforms	4352	MPN/100mL	400.00

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		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	1674	MPN/100mL	104.00
		Arsenic (As)	2.8	ug/L	80.00
		Cadmium (Cd)	0.3	ug/L	10.00
		Copper (Cu)	199.8	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	13.2	ug/L	50.00
		Lead (Pb)	5.24	ug/L	20.00
		Selenium (Se)	1.2	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	375	ug/L	200.00
		Aluminum (Al)	157	ug/L	
		Barium (Ba)	44.8	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
SAD840	10/13/2009	Calcium (Ca)		ug/L	
		Cobalt (Co)	1.9	ug/L	
		Chromium (Cr)	2.7	ug/L	
		Iron (Fe)	276	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	145.5	ug/L	
		Molybdenum (Mo)	3.7	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	1.5	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	273.3	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	0.1	ug/L	
		Titanium (Ti)	4.1	ug/L	
		Vanadium(V)	10.1	ug/L	
SAD840					

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Wet Weather Sample					
SAD840	10/13/2009	Fecal Coliforms	2014	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	2755	MPN/100mL	104.00
		Arsenic (As)	1.6	ug/L	80.00
		Cadmium (Cd)	0.3	ug/L	10.00
		Copper (Cu)	44.2	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	12.8	ug/L	50.00
		Lead (Pb)	2.16	ug/L	20.00
		Selenium (Se)	1.7	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	190.7	ug/L	200.00
		Aluminum (Al)	186	ug/L	
		Barium (Ba)	21.9	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
		Calcium (Ca)		ug/L	
		Cobalt (Co)	1.5	ug/L	
		Chromium (Cr)	1.8	ug/L	
		Iron (Fe)	244	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	96.8	ug/L	
		Molybdenum (Mo)	3.1	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	1.3	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	118	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	ND	ug/L	
		Titanium (Ti)	4.2	ug/L	

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		Vanadium(V)	11.9	ug/L	
SAD852					
Wet Weather Sample					
		Fecal Coliforms	3076	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	932	MPN/100mL	104.00
		Arsenic (As)	12.9	ug/L	80.00
		Cadmium (Cd)	ND	ug/L	10.00
		Copper (Cu)	27	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	2.6	ug/L	50.00
		Lead (Pb)	0.59	ug/L	20.00
		Selenium (Se)	ND	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	74.3	ug/L	200.00
		Aluminum (Al)	29	ug/L	
		Barium (Ba)	14.2	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
SAD852	10/14/2009	Calcium (Ca)		ug/L	
		Cobalt (Co)	ND	ug/L	
		Chromium (Cr)	2.5	ug/L	
		Iron (Fe)	71	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	6.7	ug/L	
		Molybdenum (Mo)	1.6	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	1.2	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	49.5	ug/L	
		Thallium (Ti)	ND	ug/L	

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		Tin (Sn)	ND	ug/L	
		Titanium (Ti)	1.6	ug/L	
		Vanadium(V)	4	ug/L	
SAD853					
Dry Weather Sample					
		Fecal Coliforms	1460	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	2247	MPN/100mL	104.00
		Arsenic (As)	14.1	ug/L	80.00
		Cadmium (Cd)	0.0	ug/L	10.00
		Copper (Cu)	65.0	ug/L	30.00
		Mercury (Hg)	0.0	ug/L	0.40
		Nickel (Ni)	3.0	ug/L	50.00
		Lead (Pb)	1.0	ug/L	20.00
		Selenium (Se)	4.4	ug/L	150.00
		Silver (Ag)	0.0	ug/L	7.00
		Zinc(Zn)	671.0	ug/L	200.00
		Aluminum (Al)	19.0	ug/L	
		Barium (Ba)	102.0	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	0.0	ug/L	
SAD853	10/20/2004	Calcium (Ca)	40137.0	ug/L	
		Cobalt (Co)	0.0	ug/L	
		Chromium (Cr)	6.0	ug/L	
		Iron (Fe)	1258.0	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)	23467.0	ug/L	
		Magnesium (Mg)	44918.0	ug/L	
		Manganese (Mn)	167.0	ug/L	
		Molybdenum (Mo)	3.0	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	3.0	ug/L	
		Sodium (Na)	0.0	ug/L	

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		Strontium(Sr)	682.0	ug/L	
		Thallium (Ti)	0.0	ug/L	
		Tin (Sn)	0.0	ug/L	
		Titanium (Ti)	5.0	ug/L	
		Vanadium(V)	7.0	ug/L	
SAD853					
Wet Weather Sample					
		Fecal Coliforms	3090	MPN/100mL	400.00
		Total Coliforms	6488	MPN/100mL	10000.00
		Enterococcus	798	MPN/100mL	104.00
		Arsenic (As)	6.5	ug/L	80.00
		Cadmium (Cd)	0.4	ug/L	10.00
		Copper (Cu)	430.1	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	12.5	ug/L	50.00
		Lead (Pb)	3.2	ug/L	20.00
		Selenium (Se)	0.3	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	738.6	ug/L	200.00
		Aluminum (Al)	38.0	ug/L	
		Barium (Ba)	66.0	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
SAD853	10/13/2009	Calcium (Ca)		ug/L	
		Cobalt (Co)	1.1	ug/L	
		Chromium (Cr)	4.0	ug/L	
		Iron (Fe)	330.0	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	30.7	ug/L	
		Molybdenum (Mo)	5.3	ug/L	
		Phosphorus(P)		ug/L	

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		Antimony(Sb)	5.1	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	682.6	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	1.0	ug/L	
		Titanium (Ti)	5.2	ug/L	
		Vanadium(V)	10.1	ug/L	
SAD910					
Wet Weather Sample					
		Fecal Coliforms	448	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	275	MPN/100mL	104.00
		Arsenic (As)	8.1	ug/L	80.00
		Cadmium (Cd)	ND	ug/L	10.00
		Copper (Cu)	89.7	ug/L	30.00
		Mercury (Hg)		ug/L	0.40
		Nickel (Ni)	3.1	ug/L	50.00
		Lead (Pb)	6.54	ug/L	20.00
		Selenium (Se)	ND	ug/L	150.00
		Silver (Ag)	ND	ug/L	7.00
		Zinc(Zn)	109.3	ug/L	200.00
		Aluminum (Al)	87	ug/L	
		Barium (Ba)	19.1	ug/L	
		Boron(B)		ug/L	
		Beryllium (Be)	ND	ug/L	
SAD910	10/14/2009	Calcium (Ca)		ug/L	
		Cobalt (Co)	0.1	ug/L	
		Chromium (Cr)	2.2	ug/L	
		Iron (Fe)	107	ug/L	
		Lanthanum (La)		ug/L	
		Potassium (K)		ug/L	
		Magnesium (Mg)		ug/L	
		Manganese (Mn)	28.4	ug/L	

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		Molybdenum (Mo)	1.3	ug/L	
		Phosphorus(P)		ug/L	
		Antimony(Sb)	1.1	ug/L	
		Sodium (Na)		ug/L	
		Strontium(Sr)	42.7	ug/L	
		Thallium (Ti)	ND	ug/L	
		Tin (Sn)	ND	ug/L	
		Titanium (Ti)	4.7	ug/L	
		Vanadium(V)	4.1	ug/L	
SAD910					
Wet Weather Sample					
SAD910	10/14/2009	Fecal Coliforms	359	MPN/100mL	400.00
		Total Coliforms	>241960	MPN/100mL	10000.00
		Enterococcus	309	MPN/100mL	104.00
S1D20 (South Point Dume)					
Wet Weather Sample					
S1D20	9/27/2010	Fecal Coliforms/ E. col	3080	MPN/100mL	400.00
		Total Coliforms	29100	MPN/100mL	10000.00
		Enterococcus	15500	MPN/100mL	104.00
S1D20 (South Point Dume)					
Wet Weather Sample					
S1D20	11/21/2010	Fecal Coliforms/E.Coli	300	MPN/100mL	400.00
		Total Coliforms	≥1600	MPN/100mL	10000.00
		Enterococcus	300	MPN/100mL	104.00
S1D30 (Zumirez Canyon)					
Wet Weather Sample					
S1D30	9/27/2010	Fecal Coliforms/E.Coli	20	MPN/100mL	400.00
		Total Coliforms	5170	MPN/100mL	10000.00
		Enterococcus	74	MPN/100mL	104.00
S1D30 (Zumirez Canyon)					
Wet Weather Sample					
		Fecal Coliforms/E.Coli	≥1600	MPN/100mL	400.00

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S1D30	11/21/2010	Total Coliforms	≥1600	MPN/100mL	10000.00
		Enterococcus	2900	MPN/100mL	104.00
BB2 (Trancas)					
Wet Weather Sample					
BB2 - Trancas	11/21/2010	Fecal Coliforms/E.Coli	≥1600	MPN/100mL	400.00
		Total Coliforms	≥1600	MPN/100mL	10000.00
		Enterococcus	17000	MPN/100mL	104.00
BB3 (Trancas)					
Wet Weather Sample					
BB3 - Trancas	11/21/2010	Fecal Coliforms/E.Coli	≥1600	MPN/100mL	400.00
		Total Coliforms	≥1600	MPN/100mL	10000.00
		Enterococcus	14000	MPN/100mL	104.00
ZB2 (Zuma Beach)					
Wet Weather Sample					
ZB2 Zuma Beach	2/16/2011	Fecal Coliforms	1600	MPN/100mL	400.00
		Total Coliforms	480000	MPN/100mL	10000.00
		Enterococcus	6500	MPN/100mL	104.00
BB1 (Trancas Canyon)					
Wet Weather Sample					
BB1 (Trancas Canyon)	2/16/2011	Fecal Coliforms	3400	MPN/100mL	400.00
		Total Coliforms	4200	MPN/100mL	10000.00
		Enterococcus	5800	MPN/100mL	104.00
BB2 (Trancas Canyon)					
Wet Weather Sample					
BB2 (Trancas Canyon)	2/16/2011	Fecal Coliforms	4800	MPN/100mL	400.00
		Total Coliforms	100000	MPN/100mL	10000.00
		Enterococcus	12000	MPN/100mL	104.00
PD-2324 (Trancas Canyon)					
Wet Weather Sample					
PD-2324 (Trancas Canyon)	2/16/2011	Fecal Coliforms	280	MPN/100mL	400.00
		Total Coliforms	180000	MPN/100mL	10000.00
		Enterococcus	1800	MPN/100mL	104.00

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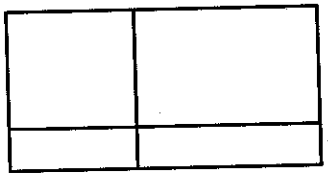
S1D50 (Paradise Cove)					
Wet Weather Sample					
S1D50 (Paradise Cove)	2/16/2011	Fecal Coliforms	4800	MPN/100mL	400.00
		Total Coliforms	32000	MPN/100mL	10000.00
		Enterococcus	9200	MPN/100mL	104.00
S1D147 (Escondido Beach)					
Wet Weather Sample					
S1D147 (Escondido Beach)	2/16/2011	Fecal Coliforms	6000	MPN/100mL	400.00
		Total Coliforms	18000	MPN/100mL	10000.00
		Enterococcus	4600	MPN/100mL	104.00
ZB1 (Zuma Beach)					
Wet Weather Sample					
ZB1 Zuma Beach	3/20/2011	Fecal Coliforms	34000	MPN/100mL	400.00
		Total Coliforms	34000	MPN/100mL	10000.00
		Enterococcus	1600	MPN/100mL	104.00
ZB2 (Zuma Beach)					
Wet Weather Sample					
ZB2 Zuma Beach	3/20/2011	Fecal Coliforms	2600	MPN/100mL	400.00
		Total Coliforms	16000	MPN/100mL	10000.00
		Enterococcus	12000	MPN/100mL	104.00
BB1 (Trancas Canyon)					
Wet Weather Sample					
BB1 (Trancas Canyon)	3/20/2011	Fecal Coliforms	22000	MPN/100mL	400.00
		Total Coliforms	22000	MPN/100mL	10000.00
		Enterococcus	2600	MPN/100mL	104.00
BB2 (Trancas Canyon)					
Wet Weather Sample					
BB2 (Trancas Canyon)	3/20/2011	Fecal Coliforms	6000	MPN/100mL	400.00
		Total Coliforms	10000	MPN/100mL	10000.00
		Enterococcus	9800	MPN/100mL	104.00
PD-2324 (Trancas Canyon)					
Wet Weather Sample					



Santa Monica Baykeeper Storm Drain Data: ASBS 24

PD-2324 (Trancas Canyon)	3/20/2011	Fecal Coliforms	28000	MPN/100mL	400.00
		Total Coliforms	28000	MPN/100mL	10000.00
		Enterococcus	6100	MPN/100mL	104.00
S1D50 (Paradise Cove)					
Wet Weather Sample					
S1D50 (Paradise Cove)	3/20/2011	Fecal Coliforms	10000	MPN/100mL	400.00
		Total Coliforms	100000	MPN/100mL	10000.00
		Enterococcus	17000	MPN/100mL	104.00
S1D40					
Wet Weather Sample					
S1D40	3/20/2011	Fecal Coliforms	1600	MPN/100mL	400.00
		Total Coliforms	10000	MPN/100mL	10000.00
		Enterococcus	7700	MPN/100mL	104.00
S1D147 (Escondido Beach)					
Wet Weather Sample					
S1D147 (Escondido Beach)	3/20/2011	Fecal Coliforms	6000	MPN/100mL	400.00
		Total Coliforms	6000	MPN/100mL	10000.00
		Enterococcus	8200	MPN/100mL	104.00

ATTACHMENT 2:

LETTER FROM CCKA TO SWRCB, "NOTICE OF PREPARATION OF A STATEWIDE PROGRAM EIR FOR A GENERAL EXCEPTION TO THE CALIFORNIA OCEAN PLAN FOR DISCHARGES INTO ASBSs" (MARCH 15, 2010)

CALIFORNIA
COASTKEEPER.
ALLIANCE

PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

March 15, 2010

Constance Anderson
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
csanderson@waterboards.ca.gov
Via electronic mail

Re: Notice of Preparation of a Statewide Program EIR for a General Exception to the California Ocean Plan for Discharges into ASBSs

Dear Ms. Anderson:

We are writing to comment on the Notice of Preparation ("NOP") of an Environmental Impact Report ("EIR") and attached Initial Study ("IS") for a General Exception to the California Ocean Plan Waste Discharge Prohibition for Selected Discharges (the Exception) into Areas of Special Biological Significance ("ASBS"). We have advocated for the implementation of the decades-old Ocean Plan discharge prohibition for years, and were active in the process to address the ongoing discharges to ASBSs.

After a significant investment of staff time by our organization as well as by the State Water Resources Control Board, we are disappointed and concerned to review the NOP, its attached IS, and the revised Exception. Rather than implement the discharge prohibition, or at least ensure its implementation within a fixed time frame, the proposed Exception instead renders the Ocean Plan's clear and readily enforceable discharge prohibition opaque and internally inconsistent, and makes enforcement far more resource intensive for Regional Boards or the public. Moreover, this extremely broad Exception addresses 28 varying applications for a myriad of discharges into 26 of the 34 ASBSs, sweeping the majority of existing discharges into its provisions.[1] This makes public review of its provisions and of the data supporting the proposed Exception, as intended by the language of the Ocean Plan Exception process (Section III.J.), virtually impossible. Furthermore, the Exception fails to include clear interim or final deadlines, or other assurances that the affected discharges will be eliminated as first required by the State Board over 35 years ago.

[1] This raises the question of what the State Board intends the legal status of the remaining eight ASBSs to be—is it the State Board's intention that the discharge prohibition in the Ocean Plan remain in place for those ASBSs? Past experience with almost zero enforcement begs the additional question of how the prohibition will be enforced for these eight areas (as well as dry weather discharges still subject to the discharge prohibition).

Seven years after publicly identifying over 1,600 illegal discharges going into ASBSs, the State Board's proposed plan of action, rather than to finally begin enforcement, is to formally excuse most of these ongoing discharges from the waste discharge prohibition for at least four years more, and possibly an indeterminate period of time beyond that. The State Board has given no reason for failing to choose to enforce the discharge prohibition within the Ocean Plan's time frame for review of the Exception, or at least adopt a time schedule order for discharges to come into compliance with the Ocean Plan. Instead, after formally informing dischargers in 2004 that their releases were illegal, and after years of subsequent stakeholder meetings (and many more years by the undersigned in advocating for strong enforcement against illegal discharges, as illustrated in Attachment A), the Board now proposes again another excessively long delay.

By affirmatively allowing discharges to continue for at least four more years, and perhaps an indeterminate time following that, the Exception violates existing Ocean Plan standards protecting the ASBS beneficial use. Further, given that issuing the Exception as written would constitute a variance to a water quality standard for Exception applicants, the State Board at a minimum would need to prepare, in addition to an EIR, a Use Attainability Analysis, additional variance analysis pursuant to Federal Regulations, and a detailed Anti-Degradation Analysis. The current proposal to prepare merely an EIR is legally inadequate; adoption of an Exception under simply an EIR would require substantial changes to the proposed Exception to be legal. In either case, an intensive analysis consuming considerable staff resources will be required to move forward with the proposal to formally and broadly exempt the ongoing discharges from the Ocean Plan.

Accordingly, we request that staff abandon this particular, overly broad Exception process, and instead either develop discharge/applicant/ASBS-specific Exceptions as intended by the Ocean Plan, along with Time Schedule Orders for compliance that include interim milestones and a final deadline consistent with the review called for in the Ocean Plan; or issue enforcement orders in the form of cease and desist orders (CDOs) or cleanup and abatement orders (CAOs) providing for compliance schedules. These orders could be issued in a matter of months, can contain some of the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now.

If staff persists with the proposed, excessively broad Exception, then it must comply with state and federal law. The following comments address these legal requirements, as well as the proposed Exception's other current legal inadequacies and inconsistencies.

A. The Ocean Plan and Public Resources Code Currently Prohibit the Discharge of Waste into ASBSs.

The Ocean Plan defines ASBSs as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."[2] In order to protect "natural" – i.e., non-anthropogenically altered – water quality, the Ocean Plan further provides, "Waste shall not be

[2] Ocean Plan, Appendix I, at 24.

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."[3] In other words, the Ocean Plan recognizes that pollution discharges into ASBSs alter natural water quality and impact the sensitive communities and species that are the basis for the ASBS designation. Therefore, the Ocean Plan bans pollution discharges unless the State Board complies with the exception provisions under Section III.J. Moreover, even under those circumstances the allowance of such discharges *must* be reviewed at least every three years.[4]

The Public Resources Code was recently revised (SB 512, Figueroa 2004) to reinforce the discharge prohibition in statute. Defining an ASBS as a subset of a State Water Quality Protection Area, SB 512 noted that ASBSs "require special protection as determined by the State Water Resources Control Board pursuant to the California Ocean Plan," and that "waste discharges shall be prohibited or limited [in state water quality protection areas] by the imposition of special conditions in accordance with" Porter-Cologne and the Ocean Plan.[5] The legislative history of SB 512 further reinforces the Legislature's support for the ASBS discharge prohibition while providing for additional, future categories of water quality protected areas, stating that:

> Requirements in the Ocean Plan address discharges into marine "areas of special biological significance," which are defined in the Ocean Plan as marine waters that house biological communities so unique and sensitive that they cannot tolerate any degradation of natural water quality. This bill is intended to clarify that areas of special biological significance are a subset of SWQPAs, and that other categories of SWQPAs may also be designated as MMAs . . . This bill refers to existing requirements in the Porter-Cologne Act and its regulations as the appropriate authority over pollution discharges into sensitive marine waters.[6]

Consistent with the Legislature's language and intent, a 2005 State Board Resolution amending the Ocean Plan made clear that, "The classification of ASBS as a subset of SWQPAs does not change the ASBS designated use for these areas. Waste discharges to ASBS are still prohibited under the Ocean Plan unless an exception is granted."[7]

Accordingly, the requirements in the Ocean Plan—that waste not be discharged to an ASBS, and that the Ocean Plan must assure maintenance of natural water quality in ASBSs—remain operative requirements under State Board regulation, the Water Code, and the Public Resources Code.

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[3] Ocean Plan, Sec. III.E.1., at 20.

[4] Ocean Plan, Sec. III.I.2., at 23.

[5] Pub. Res. Code §§ 36700(f), 36701(f).

[6] http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0501-0550/sb_512_cfa_20040811_173227_asm_floor.html.

[7] Adoption of the Proposed Amendments to the California Ocean Plan (State Board Resolution No. 2005-0035).

B. The State Board's Proposal Fails All of the Ocean Plan's Requirements for an Exception.

Any policy implementing the Ocean Plan must effectuate the Plan's purpose and be consistent with the Plan's language, and it cannot alter or amend the Plan's scope.[8] Here, however, the proposed Exception is patently inconsistent with the plain meaning and intent of the waste discharge prohibition in the Ocean Plan, a requirement put in place to ensure maintenance of natural water quality.

The Ocean Plan creates an "unambiguous prohibition"[9]—"waste shall not be discharged"—to ASBSs except under very specific circumstances that are designed to protect natural water quality and so do not apply to the proposed Exception. This is because the Exception authorizes many of the existing discharges into the majority of ASBSs under a set of terms and conditions that generally fail to provide the clear requirements and firm deadlines that are absolutely necessary – particularly after almost four decades of delay – to achieving the required discharge prohibition. By affirmatively allowing many of the existing discharges statewide to continue in this manner, the proposed Exception is inconsistent with the discharge prohibition and undermines its fundamental purpose to provide the utmost protection for the sensitive species and communities in ASBSs. Accordingly, the State Board's proposed "interpretation" of the Ocean Plan is unreasonable and inconsistent with the Plan's plain language.[10]

Indeed, in light of the very specific Ocean Plan process required to obtain an exception to the discharge prohibition, it is difficult to see how *any* statewide general exception could reasonably meet its requirements. The Ocean Plan only allows the State Board to grant an exception to Ocean Plan requirements, including the discharge prohibition, as follows:[11]

> 1. The State Water Board may, in compliance with the California Environmental Quality Act, subsequent to a public hearing, and with the concurrence of the Environmental Protection Agency, grant exceptions where the Board determines:
>
> a. The exception will not compromise protection of ocean waters for beneficial uses, and,
>
> b. The public interest will be served.

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[8] See, e.g., *Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969, 974; *Family Planning Associates Medical Group, Inc. v. Belshe* (1998) 62 CalApp.4th 999, 1004.

[9] *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

[10] See *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195.

[11] The Ocean Plan does allow the State Board to recommend certification for certain limited-term ("weeks or months") discharges into ASBSs. (Ocean Plan, Sec. III.E.2., at 20-21). However, the discharges that would be allowed by the Exception are impermissibly broader and longer in time than the very limited and specific circumstances the Ocean Plan might allow. As just one example, the most significant, continuous category of pollution—stormwater runoff—cannot be made to fit into the Ocean Plan's contemplated, specific list of "limited-term activities," particularly as the Exception allows it to continue for at least four years and possibly longer.

2. All exceptions issued by the State Water Board and in effect at the time of the Triennial Review will be reviewed at that time. If there is sufficient cause to re-open or revoke any exception, the State Water Board may direct staff to prepare a report and to schedule a public hearing. If after the public hearing the State Water Board decides to re-open, revoke, or re-issue a particular exception, it may do so at that time.[12]

As noted below, the proposed Exception fails these tests because:

- there is no evidence upon which the State Board could legitimately find that the proposed, broad general Exception to the waste discharge prohibition would not compromise the protection of the many ocean waters impacted for beneficial uses;
- the State Board has not, and cannot, find that a general Exception serves the public interest; and
- the timeframes set in the proposed Exception (at least four years, and possibly longer) prevent the meaningful, *required* examination of the Exception's effectiveness at each successive Triennial Review of the Ocean Plan.

First, there is no site- and discharge-specific data or evidence upon which the State Board could legitimately find that a general exception to the waste discharge prohibition would not compromise the protection of ocean waters for beneficial uses (see also Section D.4. below for further discussion on data). Indeed, in a precedential decision, the State Board already concluded that any waste discharge to an ASBS constitutes a violation of the Ocean Plan.[13] Moreover, these are not small amounts of waste. Rather, the State Board generally has found that that stormwater pollution is the largest threat of pollution to California's waters—including to ASBSs—which results in impairment, beach closings and advisories, and economic loss.[14] The State Board does not possess, and has not provided to the public for its careful consideration, information that would permit it to conclude that illegal discharges into ASBSs are in any meaningful way different in nature or kind from other stormwater discharges that cause well-documented degradation of water quality.[15]

This situation becomes even more troubling in the absence of evaluation by the applicants and the State Board of the impacts of granting an exception *for each ASBS and for each applicant.* The pollutant loading, compliance efforts, volume, etc. will be *distinct* for each exception applicant. Similarly, the receiving waters in each individual ASBS are unique in each area. These ASBSs were designated as "special" places, with discharge prohibitions to protect them. Reversal through the Exception process of these ASBS discharge prohibition protections

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[12] Ocean Plan, Sec. III.J., at 23 (emphasis added).

[13] *In Re: California Department of Transportation* (State Board Order WQ 2001-08) (stormwater discharges from Pacific Coast Highway into Crystal Cove ASBS violated Ocean Plan).

[14] See General NPDES Permit for Phase II Municipal Separate Storm Sewer Systems, at 1; see also NRDC, *Testing the Waters* (2006), at CA-25.

[15] Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at 1.

requires the same level of site-specific analysis that their original protection warranted. The EIR would need to evaluate in detail the specific impacts at each ASBS resulting from backsliding on the flat prohibition on discharges of waste to the ASBS.

Second, the State Board has not, and cannot, find that a general exception serves the public interest. Other exceptions have been granted only in very narrow situations where important and unique research and educational activities were at stake. For example, the State Board concluded that the Scripps exception would serve the public interest because Scripps' activities had "invaluable education and research benefits."[16] Scripps and Birch Aquarium's open seawater system depend on the ability to discharge waste seawater, and if the exception was not granted, the State Board concluded that Scripps and Birch Aquarium would be forced to shut down the open seawater system.[17] Similarly, the State Board found that the public interest was served by granting an exception for USC because USC "occupies a prominent role in marine science research and education, providing programs and facilities to USC and non-USC scientists and students and visitors from many other institutions."[18] Critically, the Board stated, "There are no viable alternatives to ocean disposed of waste seawater [sic] due to the remote location of the facility. If the exception is not granted, USC/WMSC will be forced to shut down its open seawater system."[19] Other relevant factors that "might arguably be justified as in the public interest" include situations in which moving or altering a discharge would cause greater environmental damage than would occur if the discharge remained.[20]

There is no similar special situation that would justify blanket exceptions to more than 1,000 illegal discharges, as proposed by the Exception. Among other things, there are no unique or "invaluable" research and education benefits associated with the discharges addressed by the proposed Exception. Moreover, Ocean Plan Section III.J.'s specific provisions on granting exceptions call for data and other justifications that contemplate assessing each potential exception on a case-by-case basis. Here, however, the State Board has made no such individualized findings in connection with the Exception. Rather, the Exception would impermissibly circumvent the requirement of having to find that an exception, as applied to each discharger, serves the public interest, as the Exception covers wholesale a range of 28 different discharger-applicants spanning the entire coast. The Exception thereby strips the ASBSs of their "special" protection as mandated by the Ocean Plan and reaffirmed by the Legislature. By

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[16] *Ocean Plan ASBS Exceptions*, based on 2005 presentation made by Sheila Vassey, State Board staff attorney, at 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf. See also Approving an Exception to the CA Ocean Plan for the University of California Scripps Institute of Oceanography (State Board Resolution No. 2004-0052), at 2.

[17] Approving an Exception to the CA Ocean Plan for the University of California Scripps Institute of Oceanography (State Board Resolution No. 2004-0052), at 2.

[18] Approving an Exception to the CA Ocean Plan for the University of Southern California Wrigley Marine Science Center (State Water Board Resolution No. 2006-0013), at 2.

[19] *Id.*

[20] *Ocean Plan ASBS Exceptions*, based on 2005 presentation made by Sheila Vassey, State Board staff attorney, at 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf.

essentially eliminating the waste discharge prohibition, the Exception proposes to treat ASBSs like any other water of the United States, despite their status as "intrinsically valuable."[21]

Finally, the timeframes set in the proposed Exception (at least four years, and possibly longer) prevent the meaningful, *required* examination of the Exception's effectiveness at each successive Triennial Review of the Ocean Plan, as is provided for in Section III.J of the Ocean Plan ("All exceptions issued by the State Water Board and in effect at the time of the Triennial Review *will be reviewed at that time*." (Emphasis added)).

Accordingly, the proposed Exception fails *all* of the required Ocean Plan tests for an exception to the discharge prohibition.

C. The State Board's Proposal Fails to Comply with the Clean Water Act.

The "Ocean Plan discharge prohibition is a water quality standard."[22] Like other water quality standards, the waste discharge prohibition is incorporated into, and is an enforceable requirement of, all NPDES permits coastwide. In violation of the Clean Water Act (CWA), however, the State Board not only has taken no action to enforce this water quality standard, but it also now proposes to reverse the standard by taking specific action to allow, rather than prohibit, numerous discharges indefinitely into most of the ASBSs.[23] As the California Appellate Court has stated, the State Board cannot make a *de facto* amendment to a water quality objective in a water quality control plan by simply refusing to take the action that it has identified as necessary to achieve that objective.[24] Here the Board goes even further than inaction, by affirmatively choosing to avoid enforcement of the prohibition. However, any such changes to the ASBS Prohibition Water Quality Standard ("ASBS WQS") must follow the requirements of the CWA and its implementing regulations.[25]

1. Variances from Water Quality Standards Require Compliance with the Same Substantive and Procedural Requirements as Removing a Designated Use.

EPA has accepted WQS variances, but only where specific criteria are met.[26] Variance procedures involve the same substantive and procedural requirements as removing a designated beneficial use.[27] These requirements are as follows:

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[21] California Ocean Plan, Appendix IV, at 37.

[22] *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

[23] See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 734.

[24] *Id.* at 731.

[25] The CWA requirements for relaxing or issuing variances to WQSs are, consistent with the ambitious goals of the CWA, onerous. A more straightforward means towards providing time for compliance to entities discharging to the ASBS are compliance schedules, in the form of CDOs or CAOs. Thus to the extent that the State Board genuinely seeks to more efficiently mitigate impacts of discharges to the ASBS, issuance of enforcement orders again recommends itself.

[26] *Water Quality Standards Handbook, Second Edition* (US EPA, 1994, updated 2007) ("WQS Handbook") at 5-12, available at http://www.epa.gov/waterscience/standards/handbook/ .

1. Is the use existing? If the use actually existed on or after 1975, whether or not they are included in WQS (40 CFR 131.3(e)), the existing use cannot be removed unless a more stringent criteria is added.
2. Is the use specified in section 101(a)(2) of the CWA? If so, removal of a use requires a use attainability analysis.
3. Is the use attainable?
4. Is a factor from 40 CFR 131.10(g) met? Even where steps one through three are demonstrated, the state must demonstrate that attaining the designated use is not feasible because:
   a. naturally occurring pollutants prevent attainment of the use;
   b. natural, ephemeral, intermittent, or low flow conditions or water levels prevent attainment of the use;
   c. human caused conditions or sources of pollution prevent attainment, and cannot be remedied or would cause more environmental to correct;
   d. dams, diversions, or other types of hydrological modifications preclude attainment, and it is not feasible to restore the water body to its natural condition;
   e. physical conditions related to natural features unrelated to water quality preclude attainment; or
   f. controls more stringent than those required by sections 301(b)(1)(A) and (B) and 306 of the CWA would result in substantial and widespread economic and social impact.
5. Has public notice and comment been provided for?[28]

Staff's analysis, and the substance of the proposed Exception, must meet these minimum standards. However, neither the NOP, its attached IS, nor the proposed Exception do so.

2. Variances Must Be Pollutant Specific, for a Limited Period of No More Than Three Years, and Provide Proof of Progress Towards WQS Compliance.

In addition to meeting the requirements of a use attainability analysis as set out at 40 CFR 131.10(g), variances must be discharger and pollutant specific, must be time-limited, must demonstrate reasonable progress towards attainment, and must either meet the water quality standard upon expiration of the variance or make a new, complete demonstration of "unattainability."[29]

EPA has approved variances from WQS where:

1. the State demonstrates a variance is justified after conducting the use attainability analysis described above;

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[27] *Id.*

[28] *Id.* at 2-7 – 2-8.

[29] *Id.* at 5-12.

2. the justification submitted by the State includes documentation that treatment more advanced than that required by sections 303(c)(2)(A) and (B) has been carefully considered, as well as alternative control strategies;
3. the more stringent State criterion is maintained and is binding upon all other dischargers;
4. the discharger given a variance for one particular constituent is required to meet the applicable criteria for other constituents;
5. the variance is granted for a specific period of time and must be rejustified upon expiration but at least every 3 years;
6. the discharger either must meet the standard upon the expiration of this time period or must make a new demonstration or "unattainability;"
7. reasonable progress is being made towards meeting the standards; and
8. the variance is subject to public review and comment.[30]

The proposed Exception as drafted fails to meet all of these requirements, including: providing a termination date for the variance, addressing specific parameters (instead providing a blanket exception for "waste"), requiring compliance within three years, providing criteria for determining compliance, or even providing criteria for determining *progress* towards compliance. The proposed Exception must meet all of the above standards to comply with the CWA.

3. CWA Anti-Degradation Analysis Is Required but Missing.

Water quality standards adopted or revised by States must comply with the anti-degradation requirements of the CWA.[31] The anti-degradation analysis requirement is specifically required for exceptions to Ocean Plan requirements.[32] Thus if the State Board intends to modify the ASBS WQS, it must undertake an anti-degradation analysis.

The IS attempts to circumvent this requirement by asserting that: "Granting the general exception will not violate federal anti-degradation requirements because water quality will not be lowered, but rather, will be improved within the ASBS affected."[33] However, the proposed Exception is by definition less stringent than the current, flat prohibition on discharges of waste in the Ocean Plan. Therefore, the inherently contradictory IS assertion that water quality will

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[30] *Id.* at 5-12.

[31] 40 CFR § 131.12; 33 USC § 303(c)(4).

[32] *Letter from William Attwater, Chief Counsel, State Water Resources Control Board to Regional Board Executive Officers* (Oct. 7, 1987) ("Attwater Letter"), at 10. While the Attwater Letter also states that anti-degradation may not apply to the relaxation of water quality standards where the preceding standard has not been achieved, the only example provided posits a new water quality standard equal to the highest level of water quality achieved since 1975. The NOP, IS, and Exception provide no data indicating what level of water quality has been achieved in any of the ASBSs in question, or whether the Exception will ensure achievement of that level in those waters. To the extent that staff intends to make efforts to avoid antidegradation analysis, it must demonstrate that the measures set out in the proposed Exception ensure that water quality in the ASBS will be better than the best water quality achieved since 1975.

[33] Initial Study, at 14.

improve with weaker requirements must be grounded in a baseline of the virtually total failure of the State and Regional Boards to enforce the ASBS Prohibition to date. In other words, the IS appears to assume that *any* level of compliance with a relaxed standard, no matter how tenuous, is an improvement that should be embraced. This extraordinary argument violates federal and state (Resolution 68-16) anti-degradation requirements, and is extremely problematic public policy. Rather, the appropriate baseline for the overall review and anti-degradation analysis of the proposed Exception is ASBS water quality with *effective* implementation of the existing water quality standard (*i.e.*, the discharge prohibition).

a. Tier 3 Anti-Degradation Analysis Is Required but Missing.

40 CFR 131.12(a)(3) requires "Tier 3" anti-degradation analysis for Outstanding National Resource Waters ("ONRW"). These waters are defined as "waters of exceptional recreational or ecological significance."[34] While California ASBSs have not been officially designated as ONRW, the State Board's Chief Counsel noted that the protections provided in the Ocean Plan are equally stringent as for ONRWs, and that permits for discharges to ASBS are required to meet Tier 3 standards.[35]

40 CFR 131.12(a)(3) further prohibits any discharges that would lower water quality, other than temporary and short-term discharges such as those associated with construction or repairs, in ONRWs. Thus, the discharges allowed under the proposed Exception similarly would violate Tier 3 anti-degradation requirements. Before any exception can be adopted, a Tier 3 anti-degradation analysis must be conducted, and modifications incorporated to assure compliance with federal law.

b. At a Minimum, Tier 2 Anti-Degradation Analysis Is Required.

To ensure that water quality in "high quality" waters is "maintained and protected," 40 CFR 131.12(a)(2) requires "Tier 2" anti-degradation analysis for such "high quality" waters, which are defined as waters "[w]here the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." ASBSs are "high quality waters" under this definition. Therefore, before allowing a lowering of water quality as would occur under the proposed Exception, at a minimum the Board must conduct a review consisting of:

1. a finding that it is necessary to accommodate important economical or social development in the area in which the waters are located;
2. full satisfaction of all intergovernmental coordination and public participation provisions;
3. assurance that the highest statutory and regulatory requirements for point sources, including new source performance standards, and best management practices for non-point source pollutants are achieved.[36]

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[34] 48 Fed. Reg. 51402 (Nov. 8, 1983).

[35] Attwater Letter, at 15.

[36] WQS Handbook, at 4-7.

The NOP, IS, and Exception do not currently include this analysis and must do so to comply with federal law.

4. SWMPs, SWPPPs or Other Permit Modifications Must Be Subject to Public Review and Comment.

The proposed Exception requires that the SWMP or SWPPP in the permit currently held by the exception applicants "...specifically address the prohibition of non-storm water runoff and the requirement to maintain natural water quality for storm water discharges to an ASBS..."[37] The proposed Exception nowhere explains how or when this SWPPP or SWMP modification is to occur, however, or whether any opportunity for comment from the public or US EPA would be provided. Because the SWPPP or SWMP are where all substantive pollution control measures are set forth, modification of the SWMP or SWPPP must include opportunities for a public hearing. Further, to the extent that any permit modifications reflect a weaker water quality standard set out in the Exception, an anti-backsliding analysis, including public notice and comment, must be conducted. This lack of public process and missing anti-backsliding analysis violates the requirements of the Clean Water Act and controlling legal precedent.

The Clean Water Act requires the opportunity for public hearing and comment—at the same level as for NPDES permitting—for WQS standard variances and for anti-degradation analysis.[38] The CWA requires agency review of any modification of the substantive terms of the permit designed to control pollutant discharge.[39] In cases where the substantive terms of the permit include the development and implementation of BMPs to prevent pollutant discharges, it is incumbent that the agency issuing permit coverage have the opportunity to review the BMPs selected prior to permit coverage to ensure that they will have the required effect of achieving the applicable pollutant reduction standards.[40] Agency review is appropriate even where the terms of the general permit identify detailed management practices, since absent review "nothing requires that the combination of [BMPs] that the operator [of the construction project] selects from this 'menu' will have the combined effect of reducing discharges to [the applicable pollution reduction standards.]"[41] In sum, the Ninth Circuit in *Environmental Defense Center* requires that:

> Stormwater management plans that are designed by the regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program [meets applicable pollutant reduction standards].[42]

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[37] Proposed Exception, at B-2.

[38] 40 CFR 131.20.

[39] See 33 U.S.C. §§ 1342(a), (b); 40 CFR § 122.62; *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832, 841, 854-856, and 855 n.32.

[40] *EDC*, 344 F.3d at 854-856.

[41] *Id.* at 855 n.32.

[42] *Id.* at 856.

Finally, *EDC* provides that "technical issues relating to issuance of NPDES permit issuance should be decided … at a stage where the [permitting agency] has the greatest flexibility to make appropriate changes."[43]

The proposed Exception fails to meet these requirements. The proposed Exception provides for no review of the SWPPP or SWMP that will set forth the substantive pollution control measures chosen by the Exception applicants to prevent pollution of the ASBS. The proposed Exception appears to indicate that the SWPPP or SWMP will modified consistent with the terms of the underlying permits, but no deadline is set out for completing the modifications, and there is no indication which, if any, of those permits provide for public hearing and comment for this major modification. This scheme is inconsistent with the requirements of the Clean Water Act and controlling Ninth Circuit precedent. Evaluation of the effectiveness of the BMP scheme, progress towards compliance with WQS, or evaluation of compliance with the requirements of WQS variances and/or anti-degradation analysis are impossible when the substantive pollution control measures are deferred until some unknown future date. A detailed analysis of the BMPs to be put in place by each exception applicant, their effectiveness and appropriateness for the ASBS in question, and pollution reduction performance, must be part of the proposed Exception, and subject to public review and comment.

5. U.S. EPA Approval Is Required.

Finally, the NOP, IS and Exception do not state whether U.S. EPA review and approval will be sought. Pursuant to 40 CFR 131.20, all revisions of water quality standards must be submitted to the EPA, including supporting analyses for the use attainability analysis, for EPA's approval.

D. The NOP/IS and Exception Fail to Achieve Both the Letter and Intent of CEQA.

1. As Currently Drafted, the Proposed Exception Fails to Provide Sufficient Information to Meet the Requirements of a Programmatic EIR.

The NOP characterizes the EIR to be prepared as a "Statewide Program Environmental Impact Report for a General Exception." The Initial Study lists each of the dozens of exception applicants, from San Diego to Trinidad, but that is the extent of the detail provided. There is no information specific to the discharges or ASBSs, nor any indication that any other environmental review would be conducted (e.g., project specific EIRs) for each of the dischargers. Program EIRs can cover all activities within the scope of the EIR, so long as no new effects not examined in the EIR will occur, and no new mitigation measures are required.[44] However, without examining the potential effects specific to each ASBS (again, as required by the Ocean Plan Section III.J.), there will be no way to tell whether there will be new effects requiring mitigation.

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[43] *Id.* at 857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

[44] 14 Cal. Code Regs. §15168(c)(1)-(2).

Given that the NOP/IS fails to propose conducting any project specific environmental review, the EIR must evaluate the impacts of granting an exception *for each ASBS and each applicant.* The pollutant loading, compliance efforts, volume, etc. will be distinct for each exception applicant. Similarly, the receiving waters in each individual ASBS are unique in each area. The EIR will have to evaluate in detail the specific impacts at each ASBS resulting from backsliding on the flat prohibition on discharges of waste to the ASBS, and instead allowing discharges of waste for an indeterminate period of time. Again, as discussed above, this is mandated by the Ocean Plan exception requirements, as well as by CEQA regulations.

In addition, given that the IS asserts without support that impacts to water quality will be mitigated to insignificance by the BMPs implemented under the proposed Exception, the EIR must evaluate in detail the effectiveness of the BMP programs proposed by each applicant, including the effectiveness in addressing pollutant loadings unique to each applicant. Further, the EIR must evaluate the effectiveness of monitoring programs to be implemented in evaluating impacts to the ASBS. Yet the NOP, IS and proposed Exception as currently drafted do not provide adequate information as to what BMPs will be implemented by dischargers, what monitoring programs will consist of, and most importantly, how compliance will be determined, to conduct an adequate environmental review. To comply with CEQA, the proposed Exception cannot defer the core of the program to the future, to be developed by the dischargers. Instead it must set forth these requirements so environmental review can be undertaken.

2. The Environmental Setting Skews the CEQA Analysis.

It is unclear from the NOP/IS whether the State Board is properly assessing the environmental baseline. A proper baseline is essential, as it constitutes the set of environmental conditions against which the agency will compare the proposed action's predicted impacts.

The EIR must describe the environmental setting, which includes not only the present physical environment, but also the current regulatory scheme in place. By the State Board's suggestion that an exception to the ASBS waste discharge prohibition (i.e., a reversal that allows the discharge of waste for an undefined time) will actually *improve* water quality, it appears that the State Board is ignoring the current environmental setting of an absolute prohibition against the discharge of waste into an ASBS.[45] Further, though the baseline for assessing impacts will "normally" be the "environmental setting" defined as "the physical environmental conditions in the vicinity of the project" at the time of the NOP,[46] CEQA clearly recognizes that there may be situations where the "past" or "future" baseline should be considered. This is such a scenario.

The Board proposes to *relax* the current regulatory regime to allow discharges of pollutants into biologically significant areas that need natural water quality, where those same discharges are now prohibited. By contrast, the *existing* regulation would actually incur future benefit on the environment once compliance is achieved, not harm. To be consistent with the underlying principles of CEQA, the current environmental setting should consider *both* the existing physical environment *and* the prospective future environment, which would be better without the proposed action than with it. This approach would also allow the decision-maker

[45] Ocean Plan, Sec. III.E.1., at 20.

[46] 14 Cal. Code Regs. § 15125(a).

and the public to more fully understand the eventual environmental consequences of the proposed action. This more accurate analysis is required.

As is currently written, the status quo for the CEQA analysis appears to be "no enforcement" of the Ocean Plan, rather than the actual "no discharge" prohibition. This clearly and significantly skews the CEQA analysis. For example, the water quality impacts of the Exception should be checked off as "potentially significant" on page 13 rather than "less than significant" in light of the major, long-term steps backwards from the existing discharge prohibition. A more accurate analysis, one that recognizes that there is a discharge prohibition in place, will impact the lens through which the EIR must be written.

3. The EIR Must Address Other Requirements, Including Local and Regional Impacts and Alternatives.

Just as the environmental baseline must address the local as well as the regional context, CEQA also requires that the EIR analyze the local and regional environmental impacts of a proposed project. "The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the *full* environmental context."[47] Accordingly, the State Board cannot simply prepare an EIR that analyzes discharges across the State as a whole. In order to comply with CEQA, the State Board must analyze each individual discharger's impact on a local level, as well as the cumulative impacts on a regional level.

Moreover, the EIR must address a reasonable range of alternatives.[48] The most obvious alternative, which is not mentioned in the IS, is enforcement of the current discharge prohibition, which would "feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project."[49] As to this alternative, along with others, the EIR must analyze this alternative and evaluate its comparative merits with the proposed Exception.[50]

Of course, the EIR must comply with all CEQA and other applicable regulations; the above two are examples of particularly important requirements that not mentioned in the IS.

4. There Are Numerous Contradictions Between the Initial Study Discussion and the Monitoring Data.

The IS discusses "baseline biological information" about the ASBSs, but does not attach this evidence or reference where it can be found. The evidence may (it is not clear in the Exception or the IS) come in part from the State Board's Draft Data Report released in April

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[47] 14 Cal. Code Regs. § 15125(c) (emphasis added).

[48] 14 Cal. Code Regs. § 15126.6.

[49] *Id.*

[50] *Id.*

2008[51] that summarized data submitted by the exception applicants in 2006, although the Draft Data Report acknowledged that "not all of that data has yet been assimilated into this report."[52] This lack of clear data in support of the Exception proposal simply fails to meet the requirements of the Ocean Plan Section III.J. exception process.

Further, it does not appear that the statements in the IS are supported by the evidence in the Draft Data Report. The IS states that, "Baseline biological information indicates that functioning marine communities persist in ASBS...."[53] Yet a report by Dr. Peter Raimondi evaluating these biological assessments concluded that many of the assessments made unsupported assumptions, and there was no way to determine whether the conclusions in the reports were in fact supported.[54] Dr. Raimondi further concluded that "the methods used in the assessments differ dramatically", "all the assessments were done either by the discharger or consultants to the discharger", "the basis for determining if a discharge is causing an impact differed dramatically among assessments", and "most dischargers are not clear about what the basis for determination of impact should be."[55] Accordingly, the assessments upon which the IS apparently bases its statement that "functioning marine communities persist in ASBS" are unreliable studies upon which to base such a statement.

As opposed to torturing the data to artificially support the Exception, we suggest that the EIR/IS let the data speak for itself. In the Draft Data Report, State Board staff provided the results of water quality sampling at reference sites, discharge sites, and of ocean receiving water. It noted that, "For copper, zinc and lead the means for discharges and ocean receiving water were substantially higher than for streams and background ocean levels."[56] This is true of nickel, silver, and PAHs as well.[57]

Constituent	**Stream**	**Ocean background water**	**Discharges**	**Ocean receiving water**	**Table B instantaneous max.objective**
Copper	15	13	151	139	30
Lead	11	12	125	96	20
Nickel	11	13	116	95	50
Silver	11	9	96	83	7
Zinc	11	13	131	92	200
PAHs	4	3	37	12	N/A

Table 1. Derived from Draft Data Report, at 91-92.

[51] http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/asbs/draft_data_report.pdf.

[52] Draft Data Report, at 3.

[53] IS, at 7.

[54] Dr. Peter Raimondi, *Evaluation of ASBS assessments in rocky intertidal communities for the State Water Board*, March 6, 2009.

[55] Raimondi, at Summary.

[56] Draft Data Report, at 96.

[57] Draft Data Report, at 92.

As seen in the Table, in all instances, pollutant loads were far higher in the samples from discharge sites and of ocean receiving water than from the reference points. The Natural Water Quality Committee is undertaking a similar study to compare the water quality at discharge sites to reference sites. However, there is more than enough information now to demonstrate that there is no basis in law or science for the proposed, broad, lengthy Exception.

E. The Provisions of the Proposed Exception Are Also Critically Flawed

As discussed in detail above, we strongly contest the proposed Exception's legality, as well as its consistency with the science and its ability to achieve natural water quality in ASBSs. ASBSs are home to the State's most unique and sensitive marine communities, each one possessing a complex and fragile ecosystem.[58] To protect these communities, the State Board deliberately adopted in the Ocean Plan a prohibition on waste being discharged into ASBSs, thereby recognizing that the discharge of waste is inconsistent with natural water quality. Accordingly, as envisioned in the Ocean Plan, the most effective way to achieve natural water quality is to enforce the discharge prohibition as was originally intended and commanded. If, however, the Board chooses to continue this staff-intensive process that avoids the required elimination of anthropogenic pollution discharges into ASBSs for at a minimum of four, and likely more, years, significant modifications need to be made (in addition to compliance with the legal mandates above).

The defects in the Exception's provisions only further support the assertions above with regard to the Exception's deficiencies in law, science and practice. As an initial matter, the core objective of the proposed Exception is substantially flawed in that it fails to set forth an objective compliance measure. The Exception requires that wet weather discharges shall not alter natural water quality in an ASBS, but fails to establish what "natural water quality" is. This type of subjective standard is difficult to enforce, and therefore inconsistent with the State Board's express policy to issue readily enforceable, transparent permits.

Moreover, for the reasons explained in Section B.2 herein, a blanket exception approach is illegal. The proposed Exception must be discharger- and pollutant-specific, and include an expiration date for the individual dischargers at the end of three years. This would ensure meaningful, required Ocean Plan review every three years, consistent with Section III.J, and the Clean Water Act's variance requirement.

Additional, specific examples of problematic language in the Exception are provided below.

1. The Exception Is Vague and Too Limiting on Its Control of Permitted Point Source Discharges of Storm Water (pages B-1 – B-2).

On page B-1, the language is unclear whether discharges are allowed only under *all* of the conditions listed in 1.a.(3)(i)-(iv), or under *any one* of the conditions listed.

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[58] See generally Draft Data Report.

On page B-2, the Exception authorizes non-stormwater discharges from "naturally occurring groundwater seepage via a storm drain." This can provide a significant loophole for seepages from septic systems, a major source of ASBS pollution, since septic waste may leak into the groundwater and discharge into an ASBS via "naturally occurring groundwater seepage."

2. Provisions Regarding Storm Water Management Plans (SWMP) and Storm Water Pollution Prevention Plans (SWPPP) Are Inconsistent and Fail to Ensure Compliance with the Law (pages B-2 – B-5).

For sections 2.a. and 2.b., the Exception lacks a deadline by which dischargers must meet these requirements. As written, the proposed Exception nowhere explains how or when this SWPPP or SWMP modification is to occur, or whether any opportunity for comment from the public or US EPA would be provided.

Section 2.c. should be eliminated. This provision is unnecessary because MS4s are already covered by other stormwater permits, and may lead to inconsistencies between the Exception and stormwater permits.

Section 2.d. is entirely inconsistent with the proposed Compliance Schedule, which requires compliance with natural water quality within four years.[59] Section 2.d. requires that "BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm shall be designed to achieve the following target levels:

(1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan, or

(2) A 90 percent reduction in pollutant loading for the Table B parameters during storm events, for the applicant's total discharges. The baseline for the reduction is the effective date of the exception. The baseline for these determinations is the effective date of the exception, and the reductions must be achieved and documented within four (4) years of the effective date."

Section 2.d. is illegal under the Ocean Plan, which requires that waste not alter natural water quality. And indeed, as stated in the IS, one of the main components the Exception is to "ensure that wet weather runoff does not alter natural water quality in the ASBS...."[60] Yet section 2.d. is not designed to meet natural water quality. Table B levels are demonstrably higher than natural water quality, as seen in Table 1, above. If the end goal is simply to meet Table B objectives or a reduction in Table B objectives, what is the purpose of the Natural Water

[59] As discussed in Section B.2 and Section D of this comment letter, we believe that dischargers should achieve natural water quality within three years, consistent with the variance provisions of the Clean Water Act, the review provisions of the Ocean Plan, and for public policy reasons, as dischargers were first told by the State Board to cease their discharges into ASBSs in October 2004, five-and-a-half years ago.

[60] IS, at 7.

Quality Committee?[61] Accordingly, section 2.d. must be omitted from the Exception. Or, in the alternative, section 2.d. may be re-written so that the Table B instantaneous maximum objectives are target levels for dischargers to achieve between adoption of the Exception and achievement of natural water quality. But as written, section 2.d bears no relationship to the requirement that natural water quality be attained in ASBSs.

Next, any baseline for compliance should be the water quality levels when dischargers submitted their application for an exception, along with water quality samples from their areas. Or, in the alternative, the baseline should be defined by the Natural Water Quality Committee. But a baseline date that is set in the future, as in section 2.d.(2), will only encourage further pollution into ASBSs in order to artificially inflate the starting levels, thereby decreasing polluters' responsibilities to reduce loads under this provision.

"Design storm" in section 2.d. is defined as "one inch of precipitation per day." State Board staff has articulated to CCKA that provision is supposed to mean that BMPs must control pollution up to a storm of one inch per day, but that is not how the provision is actually worded. To reflect the stated intent, the provision instead should be "up to and including a design storm," rather than the current "during a design storm."

The following underlined phrase should be added to section 2.f. to ensure consistency with the Compliance Schedule:

> "The SWMP or SWPPP shall describe the non-structural BMPs currently employed and planned in the future (including those for construction activities), and include an implementation schedule <u>consistent with the requirements in the Compliance Schedule at section 3.</u>"

Sections 2.h. and 2.i. are confusing at best, and illegally extend the life of the Exception at worst. These sections appear to be imported directly from MS4 permits. Case law makes clear that water quality standards must be complied with in all NPDES permits and that the iterative process as reflected in 2.h and 2.i. is not a "safe harbor" from this core requirement.[62] However, in the context of the proposed Exception, the language of 2.h and 2.i could create confusion as to the dischargers' obligations to comply with water quality standards and maintain natural water quality. At a minimum, these sections should acknowledge that compliance with natural water quality is required, period; a discharger cannot fail to maintain natural water quality and then attempt to be shielded by the requirement to submit a RWL report. Moreover, the sections are flawed in that there is no end date to the approach in Sections 2.h. and 2.i, and it is unclear how the approach interacts with the Compliance Schedule and its associated deadline in Section 3(e).

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[61] Section 2.d also appears to be inconsistent with provision 3(e) regarding compliance schedule and the maintenance of natural water quality.

[62] See *Building Industry Ass'n of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 885-86; *County of Los Angeles v. California State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985.

3. The Proposed Compliance Schedule Exceeds Ocean Plan Requirements and Ignores the Existing Discharge Prohibition (page B-5).

We generally support the concept of a Compliance Schedule, although it must be changed to a firm three years, rather than the indeterminate four-plus years currently proposed.

The Compliance Schedule also must be characterized as a Time Schedule Order to come into compliance with the discharge prohibition, rather than an ongoing allowance of discharges. Again, in this regard, the Exception's deadlines must allow for review consistent with the Ocean Plan's Section III.J. ("All exceptions issued by the State Water Board and in effect at the time of the Triennial Review will be reviewed at that time").

We do support acknowledging that dry weather discharges are prohibited. However, dry weather discharges are prohibited *currently*, not just as of the effective date of an Exception. It is again disappointing to have to remind the Board of the existence of the discharge prohibition, and to again request details on its implementation. Enforcement mechanisms for the dry weather discharge prohibition should be specified, to avoid the continued enforcement problems of the existing, decades-old, overarching discharge prohibition. Finally, given that dischargers that are the subject of the Exception acknowledged their own noncompliance with the discharge prohibition in 2004 by filing 28 exception applications for ongoing, illegal discharges, we believe that three years to comply with natural water quality from the effective date of the Exception is more than enough time.

4. The Exception Is Vague and Too Limiting on Its Control of Nonpoint Source Discharges (pages B-6 – B-7).

As is the case for point source discharges, the Exception is vague on whether discharges are allowed only under *all* of the conditions listed in 1.a.(3)(i)-(iv), or under *any one* of the conditions listed.

On page B-7, the Exception authorizes non-stormwater discharges from "naturally occurring groundwater seepage via a storm drain." This appears to provide another loophole for seepages from septic systems, since septic waste may leak into the groundwater and discharge into an ASBS via "naturally occurring groundwater seepage." Further, because page B-7 refers to nonpoint source discharges, the provision allowing "naturally occurring groundwater seepage via a storm drain" makes no sense, because a discharge via a storm drain is by definition a point source discharge.

On page B-7, sections 1.f. and 1.g. appear to overstate the law with regard to Navy activities. Without the following edits to sections 1.f. and 1.g. (deletions in strikeout; additions underlined), the Exception again appears inconsistent with the requirements of other environmental agencies and regulations:

> "At the San Clemente Island ASBS, the Navy conducts activities that include the discharge of military ordinance and explosives ~~is allowed~~ in accordance with the law as detailed in the Southern California Range Complex Environmental Impact

Statement, except in the two military closure areas in the vicinity of Wilson Cove and Castle Rock."

"At the San Nicolas Island and Begg Rock ASBS, the Navy conducts activities that include the discharge of missiles in accordance with the law as detailed in the Southern California Range Complex Environmental Impact Statement ~~is allowed~~."

5. The Nonpoint Discharge Planning and Reporting Requirements Are Inconsistent and Fail to Ensure Compliance with the Law (pages B-7 – B-9).

The Exception again fails to specify a necessary deadline by which dischargers must meet requirements, here the planning and reporting requirements in sections 2.a. and 2.b. on page B-7. Such requirements should be met within one year, as part of the requirement in the Compliance Schedule that dischargers describe their strategy to comply with the Exception.

Moreover, related to our comment about section 2.d. on page B-3, any requirement to achieve Table B levels is fundamentally inconsistent with the core goal of the Exception, which is to achieve natural water quality[63] from the adoption of the Exception. Accordingly, at a minimum the portion of section 2.b. below in strikethrough text must be deleted:

"The Pollution Prevention Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff that are necessary to comply with these special conditions, will be achieved through Management Measures and associated Management Practices (Management Measures/Practices). ~~Management measures to control storm water runoff during a design storm shall achieve the following target levels:~~

~~(1) Set as the Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or~~
~~(2) By reducing pollutant loading for Table B parameters during storm events, for the applicant's total discharges, by 90 percent.~~

~~The baseline for these determinations is the effective date of the exception, and the reductions must be achieved and documented within four (4) years of the effective date."~~

Finally, similar to our comments above on Sections 2.h. and 2.i. (in the point source portion of the Exception), Sections 2.c. and 2.d. on page B-8 (in the nonpoint portion) are confusing at best, and illegally extend the life of the Exception at worst.

[63] As explained above, we believe the Compliance Schedule should require the attainment of natural water quality in no longer than three years, rather than the cited four years.

6. The Exception's Monitoring Requirements Fail to Provide the Information Needed to Track Compliance and Ensure Protection of ASBSs (page B-12 – B-16).

a. Core Discharge Monitoring Program

Water quality monitoring must be sufficient to determine whether the conditions of the Exception are being followed and progress made toward eliminating anthropogenic pollution.[64] Yet here, the core discharge monitoring program seems to have little or no connection with how compliance with the main provisions of the Exception, let alone the achievement of no anthropogenic pollution, will be measured and ensured.

For instance, although the Exception requires compliance with natural background levels within four years after adoption of the Exception, there is no monitoring requirement to actually test the water for progress towards compliance with natural background levels. In fact, one of the requirements—to analyze stormwater runoff for Table B objectives—only applies once every five years, which is *longer* than the full compliance term. If the intent of the Exception is to require Table B objectives to be met at some interim period between adoption of the policy and full compliance four years later as an interim target, then the monitoring requirement should reflect that fact. As written, the requirement to test water samples against Table B levels bears no rational relationship to what the IS says the Exception intends to achieve—natural water quality (*i.e.*, no anthropogenic pollution) within four years after adoption of the Exception.[65]

Further, section 2.a. on page B-13 requires sampling only from pipes 18 inches or larger, despite the fact that the 2003 Final Report states that 41% of discharges were caused by small storm drains.[66] The Final Report does not define the size of a so-called "small storm drain," but if it is smaller than 18 inches, than the Exception provides for no monitoring at almost half of the discharges in the State. Importantly, the size of a storm drain may not be indicative or representative of the concentration of the waste discharged; a very small drain may discharge high concentrations of harmful waste. As such, the storm drain monitoring requirement must be redefined to provide meaningful results that better assess waste in flows.

b. Ocean Receiving Water Monitoring Program

Inexplicably, the Exception allows applicants to elect to participate in a regional integrated monitoring program in lieu of an individual monitoring program, contrary to the fundamental nature of ASBSs as "special" places to be protected uniquely. The Exception fails to give any details about what this regional approach will entail, or how it will protect the unique ASBS ecosystems, which do not lend themselves by definition to an "averaging out" of impacts or assessments. Moreover, the Exception states that the regional approach "shall characterize

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[64] See 33 USC §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), 122.48(b).

[65] IS, at 7.

[66] Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at 7.

natural water quality in ocean reference areas...."[67] This is in fact the task of the Natural Water Quality Committee, which has been conducting this research for over four years and which should be encouraged and supported to complete this decades-delayed project expeditiously.[68] Accordingly, like the core monitoring discharge program, the regional approach bears little or no relationship to ensuring *compliance* with the discharge prohibition and compliance natural water quality in each of the ASBSs, which is the mandate of the Ocean Plan.

7. Specific Attention Should Be Given to Impaired ASBSs.

Neither the Exception nor the IS address the issue of those ASBSs that have been identified as impaired under CWA Section 303(d). According to the Draft Data Report, at least a portion of 11 ASBSs (almost one-third of the total) are listed as impaired.[69] The Exception at a minimum should include a specific section on addressing impaired ASBSs, and impaired creeks or streams that discharge directly into an ASBS, specifying that these impaired ASBSs are a high priority both for purposes of compliance with section 303(d) and the Ocean Plan. We recommend in the alternative, however, that staff seriously reconsider the appropriateness of any exception allowing further discharges into impaired ASBSs. These discharges should be eliminated as soon as possible (certainly sooner than four years) under a Time Schedule Order.

E. Conclusion

We have spent many years advocating for enforcement what has been law for decades – a straightforward discharge prohibition into the state's most special marine habitats. Disappointingly, rather than celebrating the renewed health of ASBSs in the face of enforcement of this prohibition, we find ourselves, as illustrated in this letter and in Attachment A, continuing to fight regular attempts to circumvent or delay enforcement of this prohibition by both the regulated community and the state agency charged with protecting the ASBSs.

We again request that staff abandon this overly broad Exception process, and instead either develop discharge/applicant/ASBS-specific Exceptions as intended by the Ocean Plan, along with Time Schedule Orders for compliance that include interim milestones and a final deadline consistent with the review called for in the Ocean Plan; or issue enforcement orders in the form of cease and desist orders (CDOs) or cleanup and abatement orders (CAOs) providing for compliance schedules. As noted above, these orders could be issued in a matter of months, can contain the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now.

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[67] Proposed Exception, at B-15.

[68] Again, by mandating a discharge prohibition, the Ocean Plan envisions "natural" water quality as the equivalent of water quality with no anthropogenic pollution discharges. So while the Natural Water Quality Committee's work may provide some useful insight into coastal health, it is not necessary in order to move forward with the decades-old discharge ban through CDOs and/or CAOs.

[69] Draft Data Report, at Appendix A.

The state's ASBSs are special places that deserve full implementation of the law. We urge you to take swift action to provide them with the protection that they need. Thank you for your careful attention to these comments.

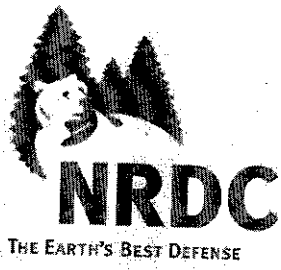
Sincerely,

Linda Sheehan
Executive Director

Attachment

ATTACHMENT 3:

LETTER FROM NRDC AND SANTA MONICA BAYKEEPER TO SWRCB, "NOTICE OF PREPARATION OF A STATEWIDE PROGRAM EIR FOR A GENERAL EXCEPTION TO THE CALIFORNIA OCEAN PLAN FOR DISCHARGES INTO ASBSs" (MARCH 15, 2010)



March 15, 2010

Constance Anderson
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
csanderson@waterboards.ca.gov

Via email

Re: Notice of Preparation of a Statewide Program EIR for a General Exception to the California Ocean Plan for Discharges into ASBSs

Dear Ms. Anderson,

Santa Monica Baykeeper ("Baykeeper") and Natural Resources Defense Council ("NRDC") write to comment on the Notice of Preparation ("NOP") of an Environmental Impact Report ("EIR") and attached Initial Study ("IS") for a General Exception to the California Ocean Plan Waste Discharge Prohibition for Selected Discharges (the "Exception") into Areas of Special Biological Significance ("ASBS").

The proposed Exception represents an unfortunate detour and a continuation of delays by the State Water Resources Control Board ("SWRCB") in protecting ASBS in California. Seven years after the SWRCB determined that over 1600 illegal discharges to the ASBS were daily adding waste to the ecological gems of California's coast, the SWRCB has undertaken no meaningful enforcement to abate these discharges. Now, rather than finally beginning this enforcement effort, SWRCB staff instead proposes a conditional exemption for wet weather discharges, and imposes a series of confusing and contradictory requirements. Further, while straightforward enforcement in the form of a Cease and Desist Order or Clean Up and Abatement Order could begin progress towards compliance and the protection of ASBS immediately (and could have started a decade ago), SWRCB staff instead proposes to delay the application of existing Water Quality Standards in wet weather—a process that requires compliance with EPA-mandated variance requirements, including a Use Attainability Analysis, an anti-degradation analysis, and an Environmental Impact Statement. The current draft does not meet these requirements, and the process to meet these requirements will be resource intensive and time consuming. Indeed, for reasons including these, it remains unclear whether and when completion of the administrative process proposed by SWRCB staff would occur—if ever.

For these reasons, Baykeeper and NRDC request that the SWRCB redirect its focus to enforcement of the existing prohibition on the discharge of waste to the ASBS, rather than

expending staff time on a process that ultimately only delays meaningful progress on improvements of water quality in ASBS across the state.

Sincerely,

Michelle Mehta
Attorney, Water Program
Natural Resources Defense Council

Tom Ford
Baykeeper
Santa Monica Baykeeper