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October 24, 2005

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

Re: California Ocean Plan, Areas of Special Biological Significance (ASBS) Waste Discharge Prohibition

Dear Chair Doduc and Members of the Board:

The State Water Resources Control Board (State Board) is facing a crucial and far-reaching decision with respect to its management of California's Areas of Special Biological Significance (ASBSs). ASBSs are home to the State's most unique and sensitive marine communities, each one possessing complex yet fragile ecosystems. The Ocean Plan recognizes the importance of affording these areas the utmost protection: "Waste shall not be discharged to areas designated as being of special biological significance."[1]

Yet there are more than 1,650 illegal discharges into ASBSs, many of which are related to nonpoint source pollution and stormwater runoff.[2] Although the State Board has found stormwater runoff to be greatest source of coastal water pollution, the State Board has been considering a general statewide exception to the discharge prohibition for these polluters. On the heels of its discovery of the many violations to the Ocean Plan, a statewide exception would suggest that the State Board is not willing to take the waste discharge prohibition seriously. Equally important, a statewide exception establishes a bad precedent that weakens coastal protection in the face of pressure from dischargers. The statewide general exception would authorize the discharge of the worst category of pollution—stormwater runoff—into the State's most fragile ecosystems—ASBSs.

In this connection, at the last workshop in Monterey, we proposed a practical framework that would allow dischargers to come into compliance with the Ocean Plan while still providing the strong protection of ASBSs that California envisions. Below, we elaborate on the proposed framework in three sections: 1) Fundamental Principles Needed to Protect ASBSs; 2) Practical Framework for Protecting ASBSs; and 3) Effectiveness of Best Management Practices and Control Measures.

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[1] Ocean Plan at III.E.1.

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

Fundamental Principles

As the State Board moves forward in regulating ASBS, the Board must consider fundamental principles, such as, *inter alia,* the history of ASBSs and the need for their protection:

- The Ocean Plan was originally adopted by the State Board in 1972 and was amended in 1978, 1983, 1988, 1990, and 1997. The purpose of the Ocean Plan is to protect the beneficial uses of the State's ocean waters by identifying water quality objectives, setting general waste discharge requirements, and listing discharge prohibitions. The Ocean Plan also established the concept of ASBSs. The definition of an ASBS is stated in the Ocean Plan as "... those areas containing biological communities of such extraordinary value that no risk of change in their environment as the result of man's activities can be entertained." Finally, the 1997 Ocean Plan, within Chapter V, "Discharge Prohibitions" states that "Wastes shall not be discharged to areas designated as being of special biological significance."

- The process of establishing ASBSs took place between 1972 and 1974. The documentation produced by the State Board and Regional Board staffs during the ASBS designation process emphasizes that the highest level of protection must be afforded to ASBSs. This emphasis can be best demonstrated in a January 8, 1973 memorandum from Bill Dendy, the State Board Executive Officer, to Regional Board Executive Officers where he states that "While it is recognized that waste discharge requirements will provide adequate protection to the great bulk of state waters, those limited areas which warrant designation as areas of special biological significance can only be maintained, without risk of change resulting from discharge practices, by a discharge prohibition."

- Urban runoff discharges from MS4s are a leading cause of receiving water quality impairment throughout the United States. These impacts especially threaten environmentally sensitive areas such as ASBSs. ASBSs have a much lower capacity to withstand pollutant shocks that might be tolerable in other circumstances.

- The State Board in *In Re: California Department of Transportation* (State Board Order WQ 2001-08) determined that the discharge of stormwater is subject to the prohibition in the Ocean Plan against the discharge of wastes to an ASBS.

- The State Board in *In Re: The Cities of Bellflower, et. al.* (State Board Order WQ 2000-11) determined that the emphasis for preventing pollution from stormwater discharges should be on developing and implementing effective BMPs. Many BMPs are designed specifically to minimize the pollutants in stormwater runoff, by reducing flow through infiltration or treatment.

- Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control (or structural) BMPs remove pollutants from urban runoff. Where feasible, use of BMPs which utilize natural processes should be used. These types of BMPs, such as grassy swales and constructed wetlands, can frequently be as effective as less natural BMPs, while providing additional benefits such as aesthetics, habitat, and groundwater recharge.

Practical Framework for Protecting ASBSs

We recognize that complete compliance may not occur immediately in some circumstances. As such, we propose a practical framework that allows municipalities and the California Department of Transportation to submit a "Stewardship Remedy" that ensures compliance over a specific amount of time. The Stewardship Remedy should only be available to municipal stormwater dischargers and CalTrans because of the relative complexity in dealing with the existing stormwater runoff into ASBSs. Individual point source dischargers should be required to immediately stop discharging into ASBSs.

Under the Stewardship Remedy, cities could choose from a range of options to meet their obligations, and select those that are most appropriate and cost-effective in light of local circumstances. When approved by the State Board or by a Regional Water Board, a city or other discharger would receive a Time Schedule Order, which would serve to guide its efforts under a specific time frame and constitute a formal commitment to the public to protect the most sensitive coastal areas in the State.

Specifically, the framework would operate as follows:

State Board's Notification

1. The State Water Board should notify all dischargers who are not complying with the California Ocean Plan;
2. The State Board should, as its initial and preferred course of action, invite participation in a Stewardship Remedy in lieu of other approaches available to the Board to address violations of the Ocean Plan.

Stewardship Remedy

The Stewardship Remedy recognizes that cities have a responsibility to manage environmental resources, especially California's most sensitive coastal areas, in accordance with the law. Encompassed in the form of a Time Schedule Order to guide the process, the Stewardship Remedy will constitute a formal commitment to protecting ASBSs in compliance with the Ocean Plan.

As part of the Stewardship Remedy, the discharger must:

1. Identify the exact location of all discharges into the ASBS and a description of those ASBSs;
2. Provide monitoring data as to the quality of the discharges;
3. Provide natural water quality data using either natural background levels based on historic non-urbanized watersheds or a reference natural watershed representative;
4. Propose a plan for immediate and long-term corrective and preventative actions. The actions include, *inter alia*, capping illicit discharges and stopping discharges at the source;
5. Propose a BMP implementation program, which can include proven, off-the-shelf, BMPs that reduce pollution, provide green space that allows infiltration of water and at the same time revitalizes neighborhoods, and recharge ground water that is used for drinking water. The dischargers must utilize the most effective BMPs in terms of pollution removal and efficacy rates;
6. Propose a set of interim timelines with specific schedules to implement BMPs, other corrective and preventative actions by a date certain so as to comply with the Ocean Plan;
7. Propose a final completion date which is reasonable in light of the nature of the discharge, quality of receiving waters, and the remedial steps necessary to comply.

Stewardship Remedy Design

To guide dischargers in their Stewardship Remedy design and implement the Ocean Plan's discharge prohibition, we propose the following limits and timelines:

- Achieve no dry weather flows by the earliest possible date, but no longer than one year.[3]
- Achieve no non-stormwater flow (flows consisting of discharge that does not include rainwater during both dry weather and wet weather months) by the earliest possible date, but no longer than one year;
- Achieve water quality standards/protect beneficial uses by the earliest possible date, but no longer than one year;
- During wet weather, a discharger must achieve either:
    - No wet weather flows; or
    - No detection of human-generated pollutants;
    - Effluent flow water quality equivalent background in the ASBS.

[3] Dry weather flows are typically easily controllable by simple behavior modification. Alternatively, many cities already handle these flows using low-flow diverter systems.

State Approval

1. The State Board should review each Stewardship Remedy as submitted by dischargers and determine if violations are immediately correctable, and should require the correction of such violations;
2. After opportunity for public review and modification if necessary, the State Board should approve each Stewardship Remedy and incorporate it into the form of a Time Schedule Order to assure that compliance occurs at the earliest possible date consistent with the circumstances of each situation, not to exceed three years.

Additional Requirements

- Rigorous monitoring and reporting program. Such a program must include monitoring requirements adequate to demonstrate that discharge is consistent with background and applicable limits based on timelines set forth in the proposed Stewardship Remedy. Monitoring should include, at a minimum, biological and water quality monitoring. If monitoring is not being conducted, the water boards shall take immediate enforcement actions, including assessment of fines.
- Compliance with all applicable permits, waste discharge requirements or waivers. If permits are violated, the water boards shall take immediate enforcement actions, including assessment of fines.
- No new discharge or addition of waste into existing discharge into an ASBS. If new discharges or addition of waste is found, the water boards shall take immediate enforcement actions, including assessment of fines.

Effectiveness of BMPs and Control Measures

An issue that has arisen during the workshops is the effectiveness of Best Management Practices ("BMPs") and control measures for preventing stormwater pollution into ASBS. The debate, however, as to whether BMPs and control measures are effective has been over for many years. In fact, as the State Board recognizes, one of the best ways to protect ASBSs is to stop pollution at the source—through BMPs. Along with pollution prevention methods, information and knowledge about pollution control practices have increased dramatically over the past decade. Scores of studies show that certain BMPs, and combinations of BMPs, are particularly effective at controlling and stopping pollution. For example, one of many federal Environmental Protection Agency reports demonstrates the effectiveness of BMPs per pollutant for removal as well as effluent levels.[4] One recent study, the International Stormwater Best Management Practices (BMP) Database lists 204 BMPs that are proven effective in removing pollutants.[5] Other university studies conclude that a distributed approach to stormwater control, employing non-structural BMPs with a system of wetlands and infiltration

[4] Preliminary Data Summary of Urban Storm Water Best Management Practices EPA-821-R-99-012 August 1999 *available at* http://www.epa.gov/ost/stormwater/#Report.
[5] *Available at*: http://www.bmpdatabase.org/cgi-bin/bmpcount.asp.

systems will achieve stormwater quality compliance and will be far cheaper and equally effective than, for example, advanced water treatment plants.

In this connection, as discussed in Dr. Rich Horner's letter submitted separately to the Board, there are many cost-effective, practical solutions used throughout California to protect water quality. These tools along with other pollution control measures function to meet the ASBS protection outlined above in this letter. In other words, these proven technologies used in combination with other pollution control measures can stop pollution before it reaches the ASBSs.

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We are confident that with the continued leadership of your staff, including Dominic Gregorio, these precious areas can be maintained and restored, and that California can continue to proudly lead the nation in protecting coastal water quality. The waste discharge prohibition is the only effective means of ensuring comprehensive protection of ASBSs. It is this type of strong management that the Ocean Commission reports envision, and it is this type of strong action that the Ocean Plan requires.

Sincerely,

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