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August 30, 2006

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



Re: Comment Letter – ASBS Draft Special Protections Policy

Dear Chair Doduc and Members of the Board:

We appreciate the opportunity to comment on the working draft of the Special Protections Policy for Areas of Special Biological Significance. Our detailed comments are included as attachment A to this cover letter.

A method to deal with and eliminate illegal discharges into ASBSs is essential and long overdue. However, although we recognize that State Board staff is well-intentioned, a general exception for illegal dischargers is fundamentally inconsistent with the waste discharge prohibition in the Ocean Plan. As the Board and its staff consider our detailed comments and suggestions—as well as information on the ASBSs themselves included as attachments to this letter—we believe three overarching points should be kept prominently in mind.

- At a time when a national consensus has formed that our oceans need greater protection—as reflected in the reports of two national, bipartisan commissions—the State Board should not rollback existing Ocean Plan provisions that protect the most fragile and rich parts of California's coastal marine ecosystem. The draft policy is significantly out of step with the best thinking and analysis of experts on coastal protection.
- The draft policy, as currently proposed, cannot fairly be considered to implement the Ocean Plan. Instead, it would carve broad exceptions that substantially exceed the very limited and short-term exceptions contemplated in some circumstances for discharges to ASBSs. Accordingly, the State Board should reject the draft policy, and specifically its provision of a "general exception," because this approach is clearly unlawful in light of the Ocean Plan.

- The general exception appears to reflect an unwillingness by the State Board to simply enforce long-standing regulatory provisions that protect the few dozen areas along the California coast that the State Board itself has determined are California's coastal "ecogems." This approach reinforces the worst perceptions of the State Board institutionally. The draft policy would reward decades of non-compliance, and even encourage future non-compliance with other State Board directives.

Sincerely,

David Beckman
Anjali Jaiswal
Michelle Mehta
Natural Resources Defense Council

Tim Eichenberg
The Ocean Conservancy

Linda Sheehan, Executive Director
California Coastkeeper Alliance

Steve Shimek, Executive Director
The Otter Project

Cynthia Elkins
Center for Biological Diversity

Zeke Grader, Executive Director
Pacific Coast Federation of
Fishermen's Associations

Jim Curland
Defenders of Wildlife

Bruce Reznik, Executive Director
San Diego Coastkeeper

Morgan Rafferty
Environmental Center of
San Luis Obispo

Gordon Hensley
San Luis Obispo Coastkeeper

Sarah Abramson
Heal the Bay

Paul Mason, Legislative Representative
Sierra Club California

Hillary Hauser, Executive Director
Priya Verma
Heal the Ocean

Bob Strickland, President
United Anglers of California, Inc.

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COMMENT LETTER: DRAFT ASBS SPECIAL PROTECTIONS POLICY

INTRODUCTION

The State Water Resources Control Board (State Board) faces 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 a complex yet fragile ecosystem.¹ 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."² Since the adoption of this waste discharge prohibition, California has frequently demonstrated its commitment to its ocean resources through initiatives such as the Marine Life Protection Act, California Ocean Protection Act, Marine Life Management Act, and the Ocean Protection Council. For example, guidance for the Marine Life Protection Act recognizes that, "The state has a responsibility to act now to protect the health of our oceans for future generations."³ And the current passage of the California Ocean Protection Act recognizes that a healthy ocean is "critical" to the state's environmental and economic security.⁴ Full implementation of the ASBS protections are essential to move this larger goal of ocean protection forward. Yet currently there are

¹ In connection with this letter, we have included copies of NRDC and The Ocean Conservancy's report titled *California's Aqua Gems: Areas of Special Biological Significance*, which further discusses the unique nature of these marine areas.

² Ocean Plan, at p. 20.

³ See <http://www.dfg.ca.gov/MRD/mlpa/highlights.html>. In a recent meeting for the MLPA, Zeke Grader, executive director of the Pacific Coast Federation of Fishermen's Associations, noted that even the areas under the MLPA where fishing will be banned will still be vulnerable to another major assault on coastal marine life: coastal pollution. "State Creates Marine Havens," *Los Angeles Times* (Aug. 16, 2006); see also "Sanctuaries for Fish," *San Francisco Chronicle* (Aug. 16, 2006) (citing Mr. Grader as formally commenting that "state regulators should focus on cutting ocean pollution caused by cities"). Through the MLPA, the Fish and Game Commission will set forth a network of marine protected areas and marine reserves that in many cases overlap ASBSs, making protection of these areas from pollution even more important. See <http://www.dfg.ca.gov/MRD/mlpa/commissiondocs.html>.

⁴ See http://resources.ca.gov/copc/3-21-05_meeting/cal_ocean_protection_act.pdf.

more than 1,650 illegal discharges into ASBSs—the majority of which are commercial, municipal, residential, and industrial storm drains.⁵ The consequences of these discharges are coming into focus. One ASBS itself is already listed as “impaired” under the federal Clean Water Act, portions of another ASBS are listed as impaired, and several ASBSs are threatened by regular inputs from impaired waterways directly upstream.⁶ And in a UCLA/Stanford study released just last month, researchers found that bacteria pollution along the Southern California coastline, which includes several ASBSs,⁷ is responsible for illnesses in up to 1.5 million swimmers and bathers annually. The researchers also estimated that healthcare costs for beach pollution illnesses ranged from \$21 million to \$414 million.⁸

The large-scale and ongoing violations of the Ocean Plan’s ASBS provisions reflect broader threats to our oceans that are increasingly well-recognized. As stated by the Pew Oceans Commission: “America’s oceans are in crisis and the stakes could not be higher.”⁹ The Final Report of the U.S. Commission on Ocean Policy emphasized that “[a]long our coasts, habitats that are essential to fish and wildlife and provide valuable services to humanity continue to suffer significant losses.”¹⁰

Although the State Board recognizes that stormwater runoff is indeed the greatest source of coastal water pollution, and although the threats facing the oceans are not debatable, the draft Special Protections Policy provides a general statewide exception to the discharge prohibition for these polluters. This exception appears to reflect an unwillingness to simply enforce long-standing regulatory provisions that protect the few

⁵ See Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003).

⁶ See <http://www.waterboards.ca.gov/tmdl/docs/2002reg2303dlist.pdf>; attached photo of the Fitzgerald Marine Reserve ASBS.” See also <http://www.waterboards.ca.gov/tmdl/docs/2002reg4303list.pdf> (listing Leo Carrillo, Point Dume, and Zuma Beach—located within the Mugu Lagoon to Latigo Point ASBS—as impaired).

⁷ See http://www.swrcb.ca.gov/plnspols/asbs_info.html.

⁸ See Suzan Given, Linwood H. Pendleton, and Alexandria B. Boehm, *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches* (2006), *Environ. Sci. Technol.*, 40 (16), 4851-4858.

⁹ Pew Oceans Commission, *America’s Living Oceans: Charting a Course for Sea Change* (2003), Executive Summary, at p. 1.

¹⁰ U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century: Final Report of the U.S. Commission on Ocean Policy* (2004), Executive Summary, at p. 1.

dozen areas along the California coast that the State Board itself has determined are California's coastal "ecogems." Equally important, a statewide exception establishes a troubling precedent, given that it is being explored in response to pressure from dischargers, many of whom are currently breaking the law. The statewide general exception would authorize the discharge of the worst category of pollution—stormwater runoff—into the State's most fragile ecosystems—ASBSs. It would set California back over 30 years to before the discharge prohibition was in place.

Notwithstanding the national recognition that better ocean protection is imperative, the State Board is considering a general exception approach that would take California in the opposite direction than it needs to go, at a critical moment. By delaying and excusing rampant noncompliance, by carving out exceptions that swallow the rule, and by authorizing discharges in some circumstances, the draft policy would weaken the Ocean Plan and is inconsistent with the Plan's basic terms. While we do indeed recognize that State Board staff is well-intentioned, it cannot be ignored that the effect of the general exception is to weaken the waste discharge prohibition that has been in place for over 30 years.

FUNDAMENTAL PRINCIPLES

As the State Board moves forward in implementing the waste discharge prohibition to ASBSs, 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 California'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 as stated in the 2005 Ocean Plan is "...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." Finally, the Ocean Plan states that "Waste 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 is 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 ASBS waste discharge prohibition in the Ocean Plan.
- The State Board has consistently taken the position that 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. Use of BMPs which utilize natural processes should be implemented wherever possible. 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.

**THE DRAFT POLICY IS INCONSISTENT WITH AND FAILS TO
EFFECTUATE THE PURPOSE OF THE OCEAN PLAN**

The Draft Policy is Inconsistent with the Ocean Plan’s Implementation Provisions
for the Discharge Prohibition

Any policy implementing the Ocean Plan must effectuate the Plan’s purpose, be consistent with the Plan’s language, and cannot alter or amend its scope.¹¹ Here, however, the general exception is patently inconsistent with the plain meaning and intent of the waste discharge prohibition in the Ocean Plan. The Ocean Plan’s Implementation Provisions For Areas of Special Biological Significance state in full:¹²

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.

2. Regional Boards may approve waste discharge requirements or recommend certification for limited-term (i.e. weeks or months) activities in ASBS. Limited-term activities include, but are not limited to, activities such as maintenance/repair of existing boat facilities, restoration of sea walls, repair of existing storm water pipes, and replacement/repair of existing bridges. Limited-term activities may result in temporary and short-term changes in existing water quality. Water quality degradation shall be limited to the shortest possible time. The activities must not permanently degrade water quality or result in water quality lower than that necessary to protect existing uses, and all practical means of minimizing such degradation shall be implemented.

The proposed statewide general exception strays far from the plain meaning of these requirements. The first part of the provision creates an “unambiguous

¹¹ 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.

¹² Ocean Plan, at pp. 20-21.

prohibition”¹³—“waste shall not be discharged” to ASBSs. The draft policy, however, provides that, “Discharges into ASBSs are *authorized*” under a set of terms and conditions.¹⁴ It further states: “Existing nonpoint source waste discharges, including storm water discharges not subject to regulation under an NPDES permit, are *allowed to drain into an ASBS...*”¹⁵ Thus, the proposed general exception undermines the fundamental purpose of the discharge prohibition—to provide the utmost protection for ASBSs. The exception authorizing and allowing discharges into ASBSs is not just inconsistent with the Ocean Plan, it eviscerates the prohibition entirely. Accordingly, the State Board’s proposed “interpretation” of the Ocean Plan is unreasonable and inconsistent with the Plan’s plain language.¹⁶ Indeed, it is hard to see how any statewide general exception is a reasonable interpretation of a “prohibition.”¹⁷

The general exception is also violative of the Clean Water Act because it fails to implement the Ocean Plan. Like other discharge requirements, the “Ocean Plan discharge prohibition is a water quality standard.”¹⁸ In violation of the Clean Water Act, however, the State Board has essentially taken no action to implement this water quality standard.¹⁹ And 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.²⁰

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

¹⁴ Draft Special Protections Policy, at p. 2 (emphasis added).

¹⁵ *Id.* at p. 4 (emphasis added).

¹⁶ *See Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195.

¹⁷ Section one of the Implementation Provisions also provides that discharges must be located a sufficient distance away from ASBSs to maintain natural water quality. The general exception is clearly inconsistent with this requirement because it allows discharges into ASBSs. Notably, the State Board previously acknowledged, in a precedential decision, that discharges to bluffs above an ASBS was not a sufficient distance away from the ASBS. (*In Re: California Department of Transportation* (State Board Order WQ 2001-08).) Certainly, it is impossible to make an opposite conclusion about discharges directly into ASBSs.

¹⁸ *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

¹⁹ *See State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 734.

²⁰ *Id.* at p. 731.

Section two of the Implementation Provisions above does indeed allow the State Board to recommend certification for certain limited-term discharges into ASBSs. However, the discharges that would be allowed by the draft policy are impermissibly broader than the limited circumstances the Ocean Plan might allow.

First, the Ocean Plan allows the Regional Boards to only approve discharges into ASBSs for a limited term, i.e., “weeks or months.” The draft policy, however, approves non-stormwater runoff for a period of two years. Even worse, the policy also approves discharges of stormwater runoff into ASBSs for five years, and does not bar the continued approval of stormwater runoff after the initial five-year term. Even one year would not be a “limited term” under the Ocean Plan, let alone five years or more.

Second, the Ocean Plan lists the types of activities that might be acceptable for a limited term. These include specific, one-time activities such as repairing boat facilities, sea walls, storm water pipes, or bridges. The largest and worst continuous category of pollution—stormwater runoff—absolutely does not fit into the Ocean Plan’s contemplation of “limited-term activities.”

Third, limited-term activities may only result in “temporary or short-term changes” in existing water quality. Although the general exception is geared toward gradual improvement of water quality in ASBSs, it essentially permits runoff for at least another five years.

Finally, the Ocean Plan requires that “all practical means” of minimizing degradation of water quality “shall be implemented.” After discovering over 1600 illegal discharges, the State Board’s first proposed plan of action has been to exempt dischargers from the waste discharge prohibition. By no stretch of the imagination can this be considered “all practical means” of minimizing degradation of water quality. In fact, NRDC and The Ocean Conservancy proffered a detailed alternative plan by letter dated October 24, 2005. This plan called for compliance with the Ocean Plan at the earliest time possible, not to exceed three years. Moreover, the Central Coast Regional Board initially required through cease and desist orders that Pacific Grove, Monterey, and

Carmel cease all wet weather discharges into ASBSs within three years.²¹ The State Board has given no reason why it did not attempt either of these alternatives, which adhere more closely to the requirement in the Ocean Plan that water quality degradation be limited “to the shortest possible time.”

The Draft Policy is Inconsistent with the Exception Provisions to Ocean Plan Requirements

The draft policy is also inconsistent with the exception provisions in the Ocean Plan. The State Board has the authority to grant an exception to the Ocean Plan, but only under the following conditions:

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.

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.²²

First, there is no 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. Indeed, in a precedential decision, the State Board already concluded that any waste discharge to an ASBS constitutes a

²¹ Central Coast Regional Board, CDO R3-2005-0008, at p. 5; CDO R3-2005-0020, at p. 5; and CDO R3-2005-0022, at p. 5.

²² Ocean Plan, at p. 23.

violation of the Ocean Plan.²³ 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.²⁴ The State Board does not possess any information that would permit it to conclude that illegal discharges into ASBSs are in any meaningful way different in nature or kind from other storm water discharges that cause well-documented degradation of water quality.²⁵

Second, the Water Board has not, and cannot, find that the general exception serves the public interest. Other exceptions have been granted only in very narrow situations where important research and educational institutions 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."²⁶ 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.²⁷ 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."²⁸ 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

²³ *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).

²⁴ See General NPDES Permit for Phase II Municipal Separate Storm Sewer Systems, at p. 1; see also NRDC, *Testing the Waters* (2006), at p. CA-25.

²⁵ Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at p. 1.

²⁶ *Ocean Plan ASBS Exceptions*, based on 2005 presentation made by Sheila Vassey, State Board staff attorney, at p. 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf. See also State Water Resources Control Board Resolution No. 2004-0052, at p. 2.

²⁷ State Water Board Resolution No. 2004-0052, at p. 2.

²⁸ State Water Board Resolution No. 2006-0013, at p. 2.

shut down its open seawater system.”²⁹ Finally, other relevant factors that “might arguably be justified as in the public interest” are whether moving a discharge would cause greater environmental damage than would occur if the discharge remained, or whether the discharge is associated with defense activities.³⁰

There is no similar special situation that would justify blanket exceptions to more than one thousand illegal discharges, as proposed by the draft policy. Among other things, there are no “invaluable” research and education benefits associated with the discharges addressed by the general exception. Moreover, guidance on granting exceptions contemplates 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 general exception. Rather, the general exception would impermissibly circumvent the requirement of having to find that an exception as applied to each discharger serves the public interest (i.e., the draft policy states that anyone discharging waste into ASBS who submitted complete application by May 31, 2006 is covered). In this connection, the general exception strips ASBSs of their special protection mandated by the Legislature. By eliminating the waste discharge prohibition, the draft policy proposes to treat ASBSs like any other water of the United States, despite their status as “intrinsically valuable.”³¹

COMMENTS ON DRAFT POLICY

With this context in mind, we recognize that the State Board is seeking specific comments on the draft policy, and have taken the opportunity to comment below. We do so with the understanding that the comments are preliminary in light of the fact the policy is a draft, this process is in its beginning stages, and State Board staff is slated to soon release an update to the 2003 report on discharges into ASBSs.

²⁹ *Id.*

³⁰ *Ocean Plan ASBS Exceptions*, based on 2005 presentation made by Sheila Vassey, State Board staff attorney, at p. 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf.

³¹ California Ocean Plan, at p. 36.

Time Schedule Order

Of primary importance is prompt elimination of discharges into ASBSs. This is a legal requirement which, as discussed above, is well-supported by national policy goals. However, the draft policy could delay compliance for years, and perhaps indefinitely, by setting goals instead of requirements and by providing for the collection of data regarding natural water quality conditions. Sufficient information exists now, over 30 years after these areas were designated, to begin protections immediately—as explicitly required by the prohibition. Indeed, the assessment and definition of “natural water quality” is only relevant to one aspect of the prohibition.

Central to elimination of discharges into ASBSs is the need to strongly enforce the Ocean Plan so that non-compliance is rectified as soon as possible and no later than three years after the issuance of the first NPDES permit, WDR, or waiver, whichever is applicable. This deadline in all instances should be no later than four years after the adoption of a policy. In this connection, a restoration of natural background levels in ASBSs within five years should not be merely a “goal,”³² but a requirement, since this is an explicit term of the Ocean Plan. This requirement, moreover, should be met within three years. Further, the assessment and definition of “natural water quality” is only relevant to one aspect of the prohibition and cannot function as a tactic to further delay protection of ASBSs.

Next, the draft policy fails to explain why dischargers have two years to eliminate non-stormwater point source discharges, including dry weather flows, which are already prohibited in many instances by generally applicable provisions of the Clean Water Act.³³ Illegal dischargers have been on notice of their violations for three years, since 2003 when the State Board released its inventory of illegal discharges into ASBSs. This provision highlights a general reluctance of the State Board to adequately enforce its own rules and regulations; in the context of California’s richest marine ecosystems, this reluctance should be unacceptable to Board members. The policy should not grant an extra two years for dischargers to comply with laws they have failed to abide by for

³² Draft Special Protections Policy, at p. 9.

³³ 33 U.S.C. § 1342(p)(3)(ii).

years. Rather, non-stormwater point source discharges should be eliminated as soon as possible, but in no longer than one year. Strong enforcement action should be taken against any discharger who fails to comply.

Similarly, the draft policy includes no explanation for why dischargers have a full five years to eliminate waste discharges from irrigation activities, on-site sewage or graywater disposal systems, or other anthropogenic activities to an ASBS via seeps or springs. These discharges emanate from human activity that can be, and should be, controlled in less than five years. Equally important, this prohibition must be included in a Time Schedule Order to dischargers. Currently the draft policy provides that a Time Schedule Order will address only storm water effluent.

Finally, the Time Schedule Order fails to address nonpoint source pollution aside from seeps and springs. The policy would need to include a separate section to address nonpoint source pollution, including agricultural and silvicultural runoff, with specific time frames to eliminate pollution, not to exceed five years from the date of adoption of the policy. For those regions that do not have waivers or WDRs in place for categories of nonpoint pollution (such as agricultural runoff),³⁴ one additional year may be added, for a limit of six years from the adoption of the policy where it is shown that this represents the soonest possible period to terminate discharges from these areas to ASBSs.

Reference Stations

The draft policy requires sampling from only one reference stream (at two locations) per Region to establish natural water quality. Such a small sample size gives no assurance that the reference points will actually represent natural water quality in any given ASBS. In comparison, the Scripps exception provides that a committee evaluate data from seven sample locations to determine if and how natural water quality is being

³⁴ Those dischargers operating under Regional Boards without agricultural runoff programs are in violation of Water Code Sections 13260 *et seq.* We urge the State Water Board to work with the Regional Boards to adopt agricultural runoff programs statewide as soon as possible. The impacts of the failure to have strong programs statewide is clear: for example, in June agricultural operations discharging into Ano Nuevo sought legislation (AB 1679) to move them from Region 3, which has a waiver program, to Region 2, which has none. See http://info.sen.ca.gov/pub/bill/asm/ab_1651-1700/ab_1679_bill_20060621_amended_sen.html.

impacted.³⁵ We suggest sampling to determine natural water quality should be conducted at a minimum of four reference locations per Region.

“Natural Precipitation Runoff”

The draft policy allows for stormwater point sources and nonpoint sources if they are, among other things, composed of “natural precipitation runoff.” This term is in turn defined as discharges that do not create a “statistically significant increase” in pollutant concentrations. This definition is highly objectionable and constitutes one of the ways in which the draft policy, if implemented, would compromise the effectiveness of ASBS protection. When defined in this way, the draft policy effectively allows degradation of the State’s richest marine areas. At best, it is unclear what “statistically significant” means in this context and, in fact, the meaning may change depending on the pollutant. Thus, the policy should either eliminate the term “statistically significant” or state that precipitation runoff will be presumed to alter natural water quality unless the discharger shows with clear and convincing evidence that it will not.

Monitoring Program

Discharge of waste into ASBSs is not a right; the Porter-Cologne Act has long provided that all waste discharges to the State’s waters are a privilege. Any allowance of a discharge that could affect an ASBS must take precautions to ensure protection of water quality. Thus, we support a strong monitoring program such as the one set out in the draft policy, with some caveats.

For many monitoring requirements,³⁶ the draft policy only requires sampling at outfalls that are .5 meters or wider. Similarly, one monitoring requirement only applies to a responsible party with more than 10 outfalls in an ASBS, where the single largest outfall is equal to or greater than one meter in diameter or width.³⁷

³⁵ Fact Sheet for Order No. R9-2005-0008, at p. 5.

³⁶ At least .5 meters: runoff flows for municipal/industrial stormwater outfalls (draft policy, at p. 6, ¶ 2); stormwater runoff effluent (*id.* at p. 7, ¶¶ 6.a, 6.b). At least one meter: representative agricultural runoff, representative industrial stormwater outfalls, and municipal stormwater outfalls. *Id.* at p. 7, ¶ 6.c.

³⁷ Draft Special Protections Policy, at p. 7, ¶ 6.d.

The draft policy fails to explain how these limitations were derived. Thus, it is unclear whether these cut-offs are appropriate to adequately monitor the most relevant discharges. For example, the 2003 Final Report states that 41 percent of discharges were caused by small storm drains from individual or small clusters of residential or commercial properties.³⁸ The report does not define the size of a so-called “small storm drain,” but if it is smaller than .5 meters, than the draft policy 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 requirements should be redefined to provide meaningful results that better assess waste in flows.

Impaired ASBSs

The draft policy contains no specific provisions for ASBSs that are impaired, perhaps on the presumption that their listing alone will ensure their prompt cleanup apart from the policy. However, at least one impaired ASBS (Fitzgerald) was identified as a “low” priority for Region 2,³⁹ which means cleanup may not occur for decades. In this connection, there are a number of impaired streams and creeks that flow directly into ASBSs that also are not specifically addressed.⁴⁰ This system creates the risk of a paradox where discharges into non-impaired ASBSs must be eliminated within a shorter timeframe than those discharges from impaired waters that flow into ASBSs.

Accordingly, the policy should include a specific section on addressing impaired ASBSs and impaired creeks or streams that discharge directly into an ASBS (more of

³⁸ Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at p. 7.

³⁹ See <http://www.waterboards.ca.gov/tmdl/docs/2002reg2303dlist.pdf>.

⁴⁰ To cite just a few examples, Lower Newport Bay and Buck Gully Creek are impaired waters that flow into Robert E. Badham ASBS (formerly Newport Beach Marine Life Refuge), <http://www.waterboards.ca.gov/tmdl/docs/2002reg8303dlist.pdf>; http://www.coastal.ca.gov/nps/Web/cca_pdf/socoastpdf/CCA70NewportBeachMLR.pdf; Los Trancos Creek, an impaired water body, flows into the Irvine Coast Marine Life Refuge ASBS, http://www.coastal.ca.gov/nps/Web/cca_pdf/socoastpdf/CCA71IrvineCoastMLR.pdf; and the impaired Mattole River flows into Kings Range National Conservation Area (State Board admits the river “may” impact the ASBS), http://www.swrcb.ca.gov/plnspols/docs/asbs/swqpa_finalsurveyreport_wlayouts.pdf.

which may be identified as monitoring progresses). The policy should specify that these impaired ASBSs, and impaired water bodies that drain directly to ASBSs, are a “high” priority for both purposes of compliance with Section 303(d) and with the Ocean Plan, and that schedules for eliminating discharges should be tightened as needed to ensure the swift restoration of these threatened, fragile areas.

Enforcement

The draft policy directs Regional Boards to issue appropriate enforcement orders to implement the Special Protections Policy. However, the draft policy does not address situations where Regional Boards fail to implement the policy—a present day reality considering the decades of inaction in protecting ASBSs. For instance, as noted above, four of the six coastal Regional Boards do not have agricultural runoff programs at all, let alone the ability to enforce them (even though at least one ASBS has known agricultural runoff problems).⁴¹ Similar variations are seen among the regions with respect to other programs for discharges that threaten ASBSs. To ensure that this statewide policy actually protects ASBSs statewide, we urge the State Board to include in any final policy a backstop enforcement provision, or a “Plan B,” in the event a Regional Board fails to act. Specifically, we would suggest that if the appropriate Regional Board does not take action to implement or enforce the policy against a class of discharges within one year of its adoption by the State Board, then the State Board must step in and ensure enforcement. This “Plan B” would avoid the certain months to years of delay that would result if citizens had to rely only on the current petition process to ensure Regional Board enforcement.

Similarly, the draft policy does not cover upstream discharges to streams tributary to ASBS. Rather, the policy directs the appropriate Regional Board to regulate these discharges in order to maintain natural water quality conditions in each ASBS. This is a huge loophole which has the potential to significantly weaken ASBS protection. It is unclear what resources will be used to fulfill this requirement; how soon it will be accomplished; or whether all Regional Boards possess the technical capacity to

⁴¹ See Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at p.13 (discussing Ano Nuevo).

adequately implement this requirement. As such, we strongly suggest—as other groups have, including the regulated community at the Santa Rosa workshop⁴²—that any policy include regulation of these upstream discharges. And we would suggest that the policy state that if a Regional Board fails to implement the policy upstream, or enforce any noncompliance upstream that occurs for at least one year after adoption of the policy by the State Board, the policy should state that in that case that the State Board shall ensure enforcement.

Finally, we support the approach in the draft policy that each municipality be responsible for inspecting and ceasing discharges from small storm drains within their geographical jurisdiction, as opposed to a suggested alternative that responsibility lie with the Regional Boards. As noted by State Board staff, the City of Newport Beach has successfully begun such a program, which could be used as a model for other municipalities.

Application for an Exception from Deadline—New Sources

The application cut-off for a discharge exception was May 31, 2006, but the draft policy states that the State Board may approve other dischargers if they include a “justification” for not submitting a timely application. It is our understanding that the policy is specifically meant to refer to those dischargers who have already submitted only partial applications because, for monetary or other reasons, they have not completed the requisite monitoring data. The policy should specify that only those dischargers who have already submitted partial applications and already communicated with the State Board about the specific reasons for the delay, and the plan for resolving those roadblocks, may subsequently be approved. We would oppose any application for any new source or any application that is submitted for the first time after May 31, 2006. Of course, any exception that is granted also would have to cure the many substantive deficiencies we have identified in this letter.

⁴² Mike Flake, CalTrans, Statement Made at Santa Rosa Workshop on Areas of Special Biological Significance, Santa Rosa, CA (Aug. 1, 2006) (“make it clear that upgradient discharges be covered by these Special Protections”).

Not only should new sources be absolutely prohibited, but the State Board should take a hard look at current exceptions—including from point sources—to the waste discharge prohibition. For example, there are at least six sewer outfalls currently discharging secondary-treated wastewater directly into or near an ASBS - Shelter Cove (CA0023027), Half Moon Bay (CA0038598), Monterey Regional (CA0048551), Carmel/Pebble Beach (CA0049417), Ragged Point Inn (CA0049417), and San Simeon (CA0047961).

Most of the sewer outfalls presently discharging into an ASBS deposit wastewater into extraordinarily shallow depths of water, the most sensitive zone of an ASBS, and in some cases (i.e. Monterey), the volume is considerable:

Discharger	Depth	Distance from Shore	Volume
Shelter Cove	(0')	Into Waves	.17 mgd*
Half Moon Bay	37'	1,900 ft.	6.8 mgd
Monterey Regional	100	8,400 ft.	30 mgd
Carmel/Pebble Beach	35'	600 ft.	1.6 mgd
Ragged Point Inn	(0')	Cliff discharge	.013 mgd
San Simeon	20'	600 ft.	.05-1 mgd

The idea that these discharges do not affect natural water quality (or otherwise have been appropriately exempted from ASBS provisions) appears, on this ground alone, highly questionable. At minimum, since the discharge points do not accord in many instances with modern standards, examples like this raise legitimate questions about whether the State Board and its Regional Boards are adequately reviewing existing ASBS exceptions.

In order to actually restore natural water quality to ASBSs, current point source discharges into or near ASBSs should be reviewed, either through the normal NPDES permit review process or as a condition in the ASBS Special Protections Policy. Any exception granted for a wastewater treatment plant to discharge into an ASBS or in close proximity to an ASBS should be rescinded, or at a minimum, where an exception can be

* million gallons per day.

lawfully supported based on the specific facts of the situation, any exception must be conditioned on the implementation of modern, best available technology (such, as for example, tertiary treatment). In the case of Carmel, for example, the State Board granted its wastewater facility an exception in 1984. This wastewater is being discharged into the ocean 600 feet (only 200 yards) from shore. It is now 22 years later, and the State Board is long overdue to rescind this exception, or at a minimum require the Carmel Sanitary District to upgrade its sewage treatment to tertiary levels.⁴³

Exceptions from Discharge Prohibition

The policy prohibits the discharge of non-stormwater runoff to an ASBS unless it is associated with “emergency fire fighting operations,” among other exceptions. In the past, some dischargers have interpreted the word “emergency” too loosely. For example, as noted by Region 1 staff at the Santa Rosa hearing, their experience has been that some in the regulated community have failed to perform regular maintenance, with the result that during a storm event an alleged “emergency” was created, which would have been avoided had the proper maintenance been performed. In that case, staff articulated, “emergency” allowances were not provided to the dischargers. Similarly, we recommend that the word “emergency” be clarified to include only those activities which are immediately necessary for health or safety purposes, and specifically not include situations that could have been avoided with regular, preventative maintenance. Moreover, there should be no further exceptions to the prohibitions other than those specifically listed in the draft policy.

CONCLUSION

Certainly a method to deal with and eliminate illegal discharges into ASBSs is essential and long overdue. And to be successful and meaningful, any proposed method must have firm time limits and strong enforcement mechanisms. Although we appreciate that the draft Special Protections Policy is well-intentioned toward these means and ends, a general exception to illegal dischargers is fundamentally problematic and sets an

⁴³ We note that in the case of Monterey, 52% of its wastewater is recycled. It would not financially punitive to require of Monterey that it increase its level of tertiary treatment to 100%.

unacceptable precedent. The policy in its current iteration does not implement the Ocean Plan but weakens it. The implications of the policy as proposed are already making themselves clear, with the regulated community pushing in workshops and meetings for provisions that weaken the Ocean Plan even further, with the potential result being the evisceration of the ASBS protections before they can ever be implemented and after they have been repeatedly ignored and violated. The State Board accordingly should reject this approach on policy grounds or, if for no other reason, because the policy would be clearly unlawful if written in this manner.

The State Board has the authority to enforce the waste discharge prohibition, and has the tools at its disposal to carry out enforcement. In fact, last fall we proposed a specific plan for the State Board to do just this.⁴⁴ As we did then, we urge the State Board to take a hard look at the draft policy and consider whether it constitutes the best means to maintain and restore the unique and fragile ASBSs, consistent with California's long and proud tradition of protecting its world-renowned coast and ocean. We respectfully believe that, as currently formulated, it is not equal to that task.

⁴⁴ See Letter from NRDC et al. to State Board (October 24, 2005).