

LAW OFFICES OF
HORAN, LLOYD, KARACHALE, DYER, SCHWARTZ,
LAW & COOK
INCORPORATED

P.O. BOX 3350, MONTEREY, CALIFORNIA 93942-3350

JAMES J. COOK
DENNIS M. LAW

LAURENCE P. HORAN
FRANCIS P. LLOYD
ANTHONY T. KARACHALE
STEPHEN W. DYER
GARY D. SCHWARTZ
MARK A. BLUM
MARK A. O'CONNOR
ROBERT E. ARNOLD III
ELIZABETH C. GLANOLA
AENGUS L. JEFFERS
PAMELA H. SILKWOOD
MICHAEL BURNS
MARY E. CAIN

September 1, 2006

TELEPHONE: (831) 373-4131
FROM SALINAS: (831) 757-4131
FACSIMILE: (831) 373-8302

ASBS Special Protection
Deadline: 9/1/06 5pm



Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Via Facsimile and Regular Mail

RE: Comments to Working Draft of the Staff Proposal for Special Protections of Areas of Special Biological Significance (ASBS) to Address Storm Water and Nonpoint Source Discharges

Dear Ms. Her:

Thank you for this opportunity to submit comments on the working draft of the Staff Proposal (hereinafter the "Proposal") for the Special Protections of Areas of Special Biological Significance (hereinafter "ASBS") on behalf of clients of this firm.

A. Legislative History and Intent

The Proposal is prepared pursuant to the California Ocean Plan, which was adopted by the State Water Resources Control Board (hereinafter the "Board") on January 20, 2005. (Resolution No. 2005-0035.) The Board was granted the authority to prepare the California Ocean Plan under the California Water Code, Division 7, Section 13000. (Section A, California Ocean Plan.) In granting this authority, the state legislature expressly stated that there must be a balancing of interests, i.e., resource protection interest against social and economic interests, in implementing any regulations to protect the water resources of the state. This legislative finding and declaration provided in Section 13000 reads as follows:

"The Legislature ... finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social and tangible and intangible." (Cal. Wat. Code § 13000.)

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In following this legislative intent, the California Ocean Plan also acknowledges that nonpoint sources of waste discharges to the ocean are subject to beneficial uses of ocean water and that the objectives of regulating non-point source discharges is "to ensure the reasonable protection of beneficial uses and the prevention of nuisance." (Sections C.1.a, I.A, and II.A.1, California Ocean Plan.)

However, this Proposal fails to meet the legislature intent of the California Water Code. The Proposal requires cessation of non-storm water runoff to ASBS as Special Protections Condition 1, without any consideration to its social and economic impacts. The Proposal imposes strict monitoring and reporting requirements, without any consideration of their financial and administrative impacts to both public and private "responsible parties." The Proposal requires elimination of all discharges of irrigation wastes through seeps or springs to an ASBS within five years of its enactment, without making any determination as to whether this restriction would put an end to existing agricultural operations or other open space uses.

In following the legislative intent and declaration in granting this authority to the Board, we request that the Board carefully weigh water resources protection goals against economic and social impacts and make the appropriate revisions to the Proposal in order to properly balance the two interests.

B. Definition of "Pollutant" and Agriculture Exemption

Pages 4 and 5 of the Proposal, under the heading Nonpoint Sources, reads as follows:

"Nonpoint source waste discharges" are any sources of pollutants that are not point sources.... Allowable [existing] nonpoint source waste discharges into or adjacent to ASBS under this resolution must:

1. Be essential for flood control or slope stability, such as roof, landscape, road and parking lot drainage;
2. Occur only during wet weather;
3. Be composed of natural precipitation runoff; and
4. Be designed in such a way so as to prevent soil erosion." (*Emphasis added.*)

The term, "pollutants", is not defined in the Proposal nor is it defined in the California Ocean Plan. The definition of "pollutants" should be limited to the specific chemicals listed on Table B of the California Ocean Plan, entitled Water Quality Objectives, which provides limiting concentrations to protect marine aquatic life and human health for noncarcinogens and carcinogens. Rather than placing a sweeping restriction on all non-point source discharges to ASBS, by either not defining "pollutants" or deferring to the Clean Water Act's broad definition, "pollutants" should be more narrowly defined to sufficiently protect marine aquatic life and human health, while still balancing

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the social and economic interests of the "responsible parties," which would be consistent with the legislative intent.

It is important to point out that agricultural pesticide runoff is specifically excluded from the definition of "pollutant", "chemical waste" and "biological materials" as defined in the Federal Water Pollution Control Act (hereinafter the "Clean Water Act") in accordance with the United States Environmental Protection Agency's (hereinafter "USEPA") Interim Statement and Guidance (Docket ID No. OW-2003-0063). The rationale is that pesticides applied near waters do not constitute "wastes" if they are applied consistent with the label instructions pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (hereinafter "FIFRA"). Under FIFRA, "pesticide" is broadly defined as follows:

"The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer." (7 USCS § 136.)

We recommend that the Proposal include an exemption for all irrigation runoff, especially agricultural irrigation runoff in accordance with the USEPA's Interim Statement and Guidance. If irrigation on, or stormwater runoff from, agricultural lands is significantly limited or not allowed at all under certain circumstances pursuant to the Proposal, then existing agricultural operations adjacent to ASBS may be required to cease, which may result in regulatory taking claims. Moreover, the Proposal adds complications to the operations of agricultural lands under Williamson Act agreements, which further supports the position that agricultural irrigation runoffs and stormwater runoffs from agricultural and other open space lands be specifically exempted from the Proposal.

Respectfully submitted,



Pamela H. Silkwood