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September 1, 2006

California State Water Resources Control Board
Executive Office
Attn: Song Her, Clerk to the Board
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Re: CEQA Scoping Comment Letter – ASBS Special Protections

Dear Ms. Her:



California
Business
Properties
Association

The State Water Resources Control Board (“State Board”) is proposing to adopt “Special Protections” to address storm water and nonpoint source discharges to California’s designated Areas of Special Biological Significance (“ASBS”). The State Board has requested public comment on the appropriate level and scope of environmental review under the California Environmental Quality Act (“CEQA”) for the adoption of such Special Protections. Herein, we provide our initial comments regarding CEQA compliance for this rulemaking.¹



The proposed Special Protections represent a very significant expansion of the ASBS program, and an apparent endorsement of an exceedingly stringent interpretation of ASBS water quality protection being espoused for some time by State Board staff. That interpretation holds that ASBS must be protected from any detectable concentrations traceable to man, and is referred to herein as the “detection based approach” or “detection approach.” The proposed Special Protections require that only “natural precipitation runoff” enter ASBS, and limit any new runoff to zero waste. In effect, staff appears to redefine the term “waste” to include runoff with any concentrations traceable to man, including any alterations in the concentration of naturally occurring substances, such as sediment, in addition to the detectable presence of constituents associated with human activities. This re-interpretation of the Ocean Plan would result in a prohibition on the discharge of any water with a “detectable” difference from natural water quality.



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¹ These comments do not constitute an inclusive statement of our comments on the agency’s CEQA process for the proposed Amendment. We will expand on these comments and raise additional issues, as appropriate, at the future administrative proceedings that the State Board has indicated it will undertake. These comments are submitted without any waiver of our right and/or opportunity to make additional comments in the future, and with a specific reservation with respect to such comments. Given the magnitude of the State Board’s proposal, and the short time frame provided by the State Board for these comments, this reservation is of particular importance.



Even with an “exception” to these requirements, dischargers will be required to eliminate essentially all non-storm runoff within two years and to reduce concentrations of a long list of constituents in storm flows to “natural background” within five years. Accomplishing these goals will likely require extensive engineered solutions, including retention and treatment. These actions are being proposed even though the State Board has not provided evidence that these measures are necessary to the water quality integrity of the ASBS. Under these circumstances, where the State Board is proposing to pursue the more extreme of the alternatives available to it, rigorous CEQA review is essential.

In this case, the State Board must complete an environmental impact report (“EIR”) to comply with CEQA.² A Mitigated Negative Declaration (“MND”) is inadequate for a proposal that necessarily will result in physical change to the environment with the potential for attendant adverse impacts at and around ASBS throughout the State. The State Board should extend the scoping process and consult directly with affected parties, including the cities, counties, and major landowners adjacent to ASBS that will be disproportionately affected by this action. Adequate CEQA review requires the State Board to supply a thorough project description that describes fully the alleged problem the Special Protections intend to cure, and describes how this alleged problem will be redressed by the Special Protections. After developing a detailed project description, the State Board should analyze the existing environmental conditions in the ASBS, develop meaningful project alternatives, and analyze potential environmental impacts and mitigation measures. Section 21159 of the California Public Resources Code requires the State Board to consider the environmental and economic impacts of the reasonably foreseeable methods of compliance with the performance standards proposed by the Special Protections. We discuss these points in greater detail below.

² Under the CEQA guidelines (14 Cal. Code Regs. § 15251(g)), State Board and Regional Water Quality Control Board basin planning has been designated a “Certified State Regulatory Program.” As such, the State or Regional Board must prepare an environmental document that is “functionally equivalent” to an EIR when adopting or amending basin plans. Historically, the State Board has treated the Ocean Plan amendment process as equivalent to the basin plan process, and has prepared “functionally equivalent” environmental documents to comply with CEQA. Here, it is not clear, and the State Board has not indicated, that the adoption of the proposed Special Protections is an amendment of the Ocean Plan or that the action otherwise falls under the State Board’s Certified State Regulatory Program. We therefore assume that the action is a project subject to the traditional requirements of CEQA, including the requirement to prepare an EIR when a project is likely to have a significant impact on the environment.



I. CEQA Requires A Comprehensive Environmental Review.

When a public agency intends to carry out a project that may have a significant effect on the environment, the agency must prepare an EIR.³ An MND is an adequate substitute for an EIR only where the agency conducts an initial study and identifies potentially significant effects on the environment but can modify the project to mitigate its effects “to a point where clearly no significant effect on the environment would occur.”⁴ Before even conducting its scoping meetings for the adoption of the Special Conditions, the State Board indicated its intention to comply with CEQA through the preparation of an MND, rather than an EIR.⁵ The State Board first must conduct a thorough scoping process and an initial study, and then make its determination as to the appropriate CEQA document for this project.⁶ The State Board should make the initial study available to the public. In light of the numerous environmental consequences described herein that could result from compliance with the Special Protections, there likely will be substantial evidence of potentially significant environmental impacts. This compels the preparation of an EIR, not an MND.⁷

A. The Scoping Process Has Been Inadequate.

CEQA requires the State Board to consult with all responsible agencies and trustee agencies “[p]rior to determining whether a negative declaration or environmental impact report is required for a project.”⁸ Trustee agencies include any state agency with jurisdiction over the natural resources affected by a project, and responsible agencies include all agencies that will have responsibility for carrying out the project.⁹ There is no indication that the State Board has consulted with the appropriate trustee and responsible agencies as part of the scoping process, let alone all of them as required by Section 21080.3(a). The State Board should confer with the California Department of Fish and Game and the State Lands Commission regarding potential impacts to biological resources and state-owned land. The State Board also must consult with each of the cities and counties that are adjacent to the State’s ASBS (and arguably inland cities and counties within the ASBS watersheds). The State Board should consult with major landowners adjacent to ASBS. These are

³ See Cal. Pub. Res. Code §§ 21080(d), 21100(a).

⁴ *Id.* § 21080(c)(2).

⁵ See State Board, Notice of Public Scoping Meetings (June 30, 2006).

⁶ See 14 Cal. Code Regs. §§ 15063, 15064, 15081.

⁷ See Cal. Pub. Res. Code § 21080(c)(2).

⁸ *Id.* § 21080.3(a) (emphasis added). See also *Envtl. Prot. Info. Ctr. v. Johnson*, 170 Cal. App. 3d 604, 626 (1985).

⁹ See Cal. Pub. Res. Code §§ 21069, 21070.



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the public and private parties that ultimately may be asked to carry out the proposed Special Protections.

The State Board also has not provided sufficient detail regarding the proposed Special Protections. The June 14 working draft does not address the actions responsible parties would have to take to comply with the proposed standards, nor does it discuss the cost of such actions or the potential sources of funding to take the required actions. There is no discussion regarding the current environmental health of the ASBS and no indication of the State Board's scientific basis for its proposal.

The CEQA Guidelines describe the scoping process as "helpful to public agencies in identifying the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and in eliminating from detailed study issues found not to be important."¹⁰ But here, the State Board has provided almost no information with which to consider the range of actions, alternatives, mitigation measures, and significant effects associated with the adoption of the Special Protections, effectively foreclosing the public's opportunity to provide relevant, helpful comments. The CEQA Guidelines assume that the scoping process will be broader than the environmental review in the EIR and that, through scoping, the lead agency will eliminate unimportant issues and focus on the relevant impacts.¹¹ The scoping process cannot be used to narrow the issues slated for in-depth environmental review when, as here, the lead agency fails to first identify the range of potential issues.

CEQA requires the State Board to provide enough information to the public about the Special Protections so that the public can provide relevant, concrete comments and suggestions to the State Board to inform the agency's environmental review. To date, the scoping process has not met this standard. The State Board must provide adequate information about the Special Protections and the range of issues it is considering, and extend the scoping process from the date that information becomes available, so that the public can make meaningful comments on the scope of the environmental review. The State Board also should satisfy its legal obligation to consult with all relevant trustee agencies and responsible agencies before deciding whether to prepare an EIR or an MND. In light of the many environmental and economic consequences likely to result from the Special Provisions, the State Board should undertake an inventory of the health of the State's ASBS so that it can make an informed determination as to what course of action is warranted to address potential water quality risks to ASBS.

II. Substantive Requirements Under CEQA.

¹⁰ 14 Cal. Code Regs. § 15083(a).

¹¹ *See id.*

After the State Board conducts an adequate scoping procedure, it must prepare an EIR that meets the requirements of CEQA. Key among these requirements, the State Board must (1) provide an adequate project description and analyze baseline conditions, (2) analyze project alternatives, and (3) analyze potential environmental impacts and mitigation measures.¹²

In addition, when the State Board proposes to promulgate performance standards like those contained in the proposed Special Protections, Section 21159 of the Public Resources Code applies and requires the State Board to consider the environmental and economic impacts of the reasonably foreseeable methods of compliance with adopted performance standards. The State Board acknowledges the obligation to consider economic impacts when establishing performance standards in connection with the basin planning process, an acknowledgment that binds it during these proceedings.¹³

A. Project Description.

CEQA requires the State Board to include both a description of the proposed activity and a characterization of existing baseline conditions.¹⁴ At present, the State Board has merely given its interpretation of the regulatory underpinnings of the Special Conditions,¹⁵ and has not met its obligation to describe this project. According to the CEQA guidelines, the project description must identify the precise locations of the project.¹⁶ For the proposed Special Conditions, this is an important first step, for it will demonstrate the geographic extent of the impacts of the proposed project and the measures that must be taken to implement it (i.e., the “scope” of the impacts). Potential environmental impact would not be limited to the areas immediately adjacent to the ASBS, but could in many cases occur anywhere in the watersheds tributary to the ASBS. The State Board also must describe the geographic scope of its analysis and the rationale for choosing the boundaries of the study area.

¹² See *id.* §§ 15124, 15125; Cal. Pub. Res. Code § 21100.

¹³ See State Board Office of Chief Counsel Memorandum, “Economic Considerations in TMDL Development and Basin Planning,” at 2 (not dated) (“CEQA requires that the Boards analyze the reasonably foreseeable methods of compliance with proposed performance standards and treatment requirements. This analysis must include economic factors.”). The State Board and Regional Boards historically have treated ocean plan and basin plan proceedings equivalently with respect to CEQA compliance.

¹⁴ See 14 Cal. Code Regs. §§ 15124, 15125.

¹⁵ We reserve our right to make additional comments on the State Board’s interpretation of the legal framework, during the scoping phase or at later stages of these proceedings.

¹⁶ See *id.* § 15124(a).

Then, the degree, or significance, of the impacts must be measured in light of the massive geographic scope of the draft rule.

The project description must include a statement of objectives.¹⁷ The scoping documents include no such statement. The State Board's articulation of its statement of objectives is the critical first step that must drive the environmental and economic analysis to be conducted by the State Board. What is the State Board's objective in adopting the Special Protections? To what problem are the Special Protections addressed? How will the Special Protections be successful in addressing that problem? It is incumbent upon the State Board to explain to the public the necessity for a program that (i) may place significant constraints on human activity and new development in the coastal areas adjacent to the ASBS; (ii) would require extensive and costly monitoring; (iii) would be an economic burden on the municipalities and other stakeholders near the ASBS; and (iv) would result in significant environmental impacts, as discussed more fully below.

B. Baseline Conditions

The State Board is under a similar, but legally distinct, obligation to describe adequately "the baseline physical conditions by which a Lead Agency determines whether an impact is significant."¹⁸ For the proposed Special Protections, that requires a description of conditions at each of the State's ASBS. The description of baseline conditions is important for at least two reasons. First, the characterization of baseline conditions is connected closely to the aforementioned statement of objectives. The State Board needs to identify the legitimate concerns respecting the environmental conditions of the ASBS. Is there a legitimate concern about the health of the State's ASBS? Are environmental conditions declining or improving since the ASBS were designated in the mid-1970s? Have anthropogenic influences on ASBS improved or declined during that same time period? Are non-anthropogenic forces (e.g., periods of upwelling, El Nino, etc.) a bigger determinant and predictor of the health of ASBS than storm water runoff? Are agricultural, industrial, and residential land uses far from the ASBS determinants of ASBS health? Do freshwater recharge and runoff have certain positive impacts on the health of ASBS? What are the beneficial uses of the ASBS that are compromised under existing conditions?

Second, the description of baseline conditions is necessary to understand the impacts from the activities that will be required to comply with the Special Protections. Will Caltrans, local municipalities, and/or other stakeholders have to tunnel through unstable cliffs or eliminate sensitive environmental areas in order to develop treatment or diversion systems to satisfy the Special Protections? Will picturesque environmental and cultural resources, including coastal parks, golf

¹⁷ See *id.* § 15124.

¹⁸ *Id.* § 15125.

courses, and marina areas, be marred by the costly construction of treatment systems or storm water barriers? Do baseline environmental conditions at certain ASBS render such treatment measures impossible or so costly that municipalities and other stakeholders should not be asked to bear that burden? Will the measures required by the Special Protections adversely impact housing goals or other land use goals and policies in the vicinity of ASBS? Will the absolute ban on seeps and springs create flooding and safety issues associated with coastal seawalls or other existing development?

The State Board needs to develop an understanding of the existing environmental conditions and describe them to the public before it can proceed with the analysis of impacts and alternatives required under CEQA. We expect that, at a minimum, this would include a description of existing aesthetic resources, agricultural resources, biological resources, cultural/archaeology/paleontology resources, geology and soils, hydrology and water quality, land use planning, population and housing, public services, parks, utilities, recreation, and transportation. The precise scope of the baseline conditions analysis will become clear once the State Board develops an adequate project description and statement of objectives.

C. Alternatives Analysis.

CEQA requires the State Board to analyze alternatives to the proposed activity, including the no-action alternative.¹⁹ Yet here, the State Board has not identified any of the measures likely required to implement the Special Protections, let alone any alternatives to the Special Protections or alternative methods of compliance. The State Board cannot present the project that it plans to approve and treat CEQA compliance as an afterthought. It is axiomatic that CEQA review must be completed before a lead agency decides on a project. The California Supreme Court has warned: “An EIR is an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”²⁰

The State Board must present a reasonable range of alternatives to the proposed Special Protections, and conduct an environmental analysis of those alternatives before committing to the project. As a starting point, the State Board needs to recognize it is not under a legal obligation to prevent all waste from entering ASBS. When setting water quality objectives under Section 13241 of the Water Code, the State Board cannot put an untoward emphasis on the environmental characteristics of the receiving body; it is obligated to consider the other factors of

¹⁹ See Cal. Pub. Res. Code § 21100(b)(4); 14 Cal. Code Regs. § 15126.6.

²⁰ *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1998).

Section 13241 such as economic considerations and housing needs. More affordable and cost-effective alternatives that would protect ASBS water quality appear to be available, and should be explored, especially if such alternatives result in less environmental impact. Although “[i]t is the project proponent’s responsibility to provide an adequate discussion of alternatives,”²¹ we offer for the State Board’s consideration the following potential alternatives to the Special Protections:

- Require Special Conditions to Maintain Desirable Conditions: The State Board could adopt a program applicable to those ASBS where there has not been any undesirable change in natural water quality, requiring that any new significant discharges that otherwise would effect undesirable change in an ASBS meet “Special Conditions” that are protective of existing conditions.
- Assessment and Monitoring: The State Board may embark on a project to assess and monitor the health of the ASBS to determine whether additional action must be taken to preserve or restore conditions.
- Assessment and Monitoring with Specific, Localized Action: The State Board could complete the ecological assessment and monitoring described above, and then take action on an individualized basis only at the ASBS (or portions of the ASBS) where the science justified the need for action.
- No Alteration of Natural Water Quality: The State Board could take an approach that focused on the prevention of any alterations to natural water quality in the ASBS. Such an approach would not include the outright prohibitions on discharge suggested by the Special Protections. By definition, this approach would not impact the water quality of the ASBS, but would have fewer negative environmental impacts in the area and cost markedly less than the current proposal.
- No Undesirable Alterations of Natural Water Quality: The State Board could devise a program that focused on preventing undesirable alterations of water quality from anthropogenic sources. The characterization of “undesirable” would be based on scientific results, but also would take into account all factors (i.e. economics, social goals, etc.). Consistent with the principles underlying both the Porter-Cologne Water Quality Control Act and the Public Resources Code, this approach would balance all of the impacts associated with the regulation of discharges to ASBS and

²¹ *Id.* at 405.

adopt a reasonable program aimed at avoiding an alteration of natural water quality that is undesirable considering all relevant factors.

- Change the Reference Sample: At present, the State Board is proposing to use a yet-to-be-identified, pristine-state, freshwater stream sample as the benchmark for determining whether discharges to the ASBS exceed natural conditions and constitute waste. Alternatives to this approach should be considered, especially since the proposed approach entails comparing freshwater to freshwater, when the goal is to protect the saltwaters of the ASBS. How will the reference streams be selected, and why would differences between them and ASBS discharges necessarily indicate threat? An alternative focus would be on the ASBS receiving waters themselves. Conditions of the ASBS near discharges could be compared with natural conditions of the ASBS at other locations within the ASBS.
- Focus on Biological Resources: All of the ASBS were designated due to the presence of unique biological characteristics. The State Board could review those specific biological resources for which the ASBS were originally designated, and then require targeted action to be taken based on that review. This approach for regulating ASBS would be consistent with the roots of, and basis for, the original program.
- Account for Unique Circumstances: The State Board could devise an approach that accounted for the unique characteristics of each ASBS, such as where the imposition of the Special Protections would force the closure or degradation of treasured public resources such as scenic roads, bluffs, golf courses, or parks. In many cases, these resources were considered part and parcel of the ASBS when the ASBS were designated in the 1970s; the State Board's proposed approach would render these amenities to be sources of pollution, rather than cultural or environmental resources recognized at the time of ASBS designation (and still so recognized today). In these cases, the State or Regional Boards could provide a different approach depending on the unique circumstances present.

Of course, in addition to a reasonable range of alternatives, CEQA also requires consideration of the no-project alternative:

- No Project: The State Board is required to consider a “no project” alternative.²² The State Board needs to consider the option of taking no new regulatory action with respect to ASBS. The State Board has yet to provide the public with any explanation of the scientific need to take the proposed actions (i.e., injury to benthic communities in ASBS, loss or deterioration of beneficial uses, etc.). Until it establishes the need for a costly, statewide approach such as the one proposed, the State Board must give meaningful consideration to the “no project” alternative. The “no project” alternative is also critical to the analysis of other alternatives, as it should describe to the public whether baseline conditions in ASBS are expected to decline, improve, or remain the same if the State Board continues to operate under the existing regulatory regime.

Once the State Board provides an adequate project description and assessment of baseline conditions, we may suggest other alternatives and/or provide additional detail on the suggestions proposed above. Given the enormous cost and resource burden that would accompany the proposed Special Protections, the State Board must give serious consideration to other alternatives.

C. Impacts Analysis.

CEQA requires the State Board to include a discussion of any significant or potentially significant adverse effects on the environment, as well as mitigation measures proposed to avoid or reduce such effects.²³ Appendix G of the CEQA Guidelines provides a listing of the range of impacts that must be considered by the State Board when preparing its environmental analysis. The State Board has not yet provided an adequate description of the proposed Special Protections, the baseline ASBS conditions, or alternative approaches so as to allow for a meaningful analysis of the potential impacts from the project. However, based on the discharge prohibitions and the stringent monitoring goals proposed, it is reasonable to assume that one or more of the following implementing actions will be required in order to comply with the Special Protections: (1) constraints on new development in areas in ASBS watersheds resulting from the prohibition on adding any new waste to ASBS; (2) changes in management of agricultural lands; (3) restrictions or prohibitions on recreational uses such as boating/marina operations; (4) restrictions or prohibitions on traditional fishing practices; (5) alterations to existing private and public drainage systems; (6) construction activities and new storm water infrastructure in sensitive and pristine coastal areas; (7) changes in Regional Board regulation of upstream areas to meet the stringent downstream ASBS water quality standards; (8) modifications to activities producing non-storm water runoff to ASBS (i.e., landscaping, irrigation,

²² See 14 Cal. Code Regs. § 15126.6(e).

²³ See, e.g., Cal. Pub. Res. Code § 21100; 14 Cal. Code Regs. § 15126.

boat cleaning, washing of cars, etc.) so as to meet the proposed prohibition on non-storm water discharges; and (9) potential road closures and traffic impacts resulting from the construction of facilities necessary to comply with the Special Protections. These measures will result in physical changes to the environment with potentially significant adverse effects, including, without limitation:

- Aesthetics: ASBS are situated in some of the most scenic areas of the State. Compliance with the Special Protections could cause impacts to the visual character of these areas as well as to trees, outcroppings, historic structures, or areas of cultural significance. For example, Caltrans presented diagrams at prior ASBS workshops that show piping and treatment systems for runoff that would mar the face of cliffs adjacent to ASBS and potentially harm sensitive environmental areas such as redwood forests if Caltrans were required to meet the type of conditions described in the Special Protections.²⁴ Due to the significant aesthetic effects, it is questionable whether entities would be able to obtain required approvals, including those from the Coastal Commission, to undertake the work required by the Special Protections. The EIR must analyze these impacts.
- Agricultural/Silvicultural Resources: The ban on all non-storm water discharges and the ASBS water quality objectives could impact significantly agricultural and silvicultural activities near, or upstream of, ASBS, including those occurring in places like the Salinas Valley and the North Coast. The EIR must analyze potential impacts to agriculture and silviculture, and whether it would even be feasible to continue those operations with the proposed restrictions.
- Air Quality: If cities, counties, and landowners are forced to construct elaborate water diversion, detention, and treatment structures, there will potentially be air quality impacts including diesel emissions from the operation of equipment and trucks, and airborne dust particles from construction activities.
- Biological Resources: ASBS were given their special designation in large part because of their unique biological resources. In most cases, human activity existed near the ASBS long before they were given the special designation. The EIR must examine the risk of

²⁴ See State Board, Workshop: California Ocean Plan, ASBS Waste Discharge Prohibition, at 62-65 (Aug. 31, 2005) (transcript available at <http://www.waterboards.ca.gov/plnspols/docs/asbs/wrkshp083105/transcript083105.pdf>) (“Workshop Transcript”).

altering the existing environmental conditions that give rise to the robust biological environments found at ASBS. Direct impacts to biological resources from implementation measures, including impacts to endangered species or sensitive biological areas, must be analyzed.

- Cultural/Archaeological/Paleontology Resources: The measures to comply with the Special Protections could have an impact on numerous cultural resources. Many of the communities adjacent to ASBS such as the City of Carmel-by-the-Sea are considered culturally significant resources in and of themselves. There are also historic structures, world-class golf courses, scenic vistas, and historic fishing villages near ASBS, which could be impacted by the need to construct elaborate storm water management systems to comply with the Special Protections. Known or unknown archaeological or paleontology resources could be disturbed by the construction of flood control and/or treatment facilities.
- Geology and Soils: The construction of treatment/diversion systems could trigger landslides, decrease slope stability, or increase erosion and sediment impacts. The State Board must analyze these and other geotechnical impacts that could arise from measures taken to comply with the Special Protections.
- Hydrology/Water Quality: The proposed implementing actions would impact, and are in fact designed to affect, hydrology and water quality. It is likely that not all impacts to water quality would be beneficial. Increased use of detention basins and the diversion of existing sources of freshwater (stormwater or otherwise) have the potential to upset the natural balance by changing the timing, amount, and quality of water entering the ocean; the State Board must analyze those potential impacts. The State Board must analyze potential flood control impacts from these measures. Removing every detectable pollutant concentration from drainage practically may mean removing all flow. Preventing or limiting waters from entering the ASBS could impact other water bodies to which that water is diverted. Rerouting all sources to existing discharge points could intensify flood impacts at existing discharge points, or could remove existing benefits from seeps and other longstanding drainage areas. Existing wetland areas near ASBS could be impacted negatively by an increase or decrease in flows resulting from water diversion structures. Construction of flood control and water quality devices could alter discharges of sediment, and could result in hydromodification (i.e., detention basins for water treatment could

upset the rate of flow or turn seasonal streams into streams that flow for longer periods of time).

- Land Use and Planning/Population and Housing: Implementation of the proposed Special Protections has the potential to significantly affect land use near and upstream from ASBS. The prohibitions on certain discharges (and the limitations resulting from “no new waste” requirements) could place significant constraints on new development in areas adjacent to ASBS. The requirement that all flows entering the ASBS meet water quality standards of a “reference stream” could affect land uses well inland from the ASBS themselves. These impacts on land use patterns could cause both direct and indirect impacts regarding population and housing. Housing supply is severely constrained in nearly all California coastal areas; it is unclear to what extent the housing industry would be able to develop new units near ASBS under the proposed Special Protections. Limits on development could cause the loss of jobs, or could escalate the cost of housing, at least in areas local to ASBS. Compliance with the Special Protections also will have a significant impact on existing land uses near ASBS; the EIR must analyze those impacts.
- Public Services/Recreation: The infrastructure construction activities required by the Special Protections may, at least on a temporary basis, render portions of the State’s ASBS unavailable for recreational use. These activities would impact numerous park and recreation areas adjacent to ASBS. Public and private beaches, marinas, golf courses, fishing areas and other forms of recreation associated with ASBS could be affected by the program. This is troubling given the central role that these enjoyable recreational resources play in the lives of California residents and visitors to California. Satisfying the conditions of the Special Protections will divert municipalities’ scarce funds away from other public services. For example, the City of San Diego testified at a prior workshop that it could cost more than \$300 million to design and construct a system to capture and treat the City’s municipal storm water that currently discharges to a single ASBS and would require the condemnation of a large number of homes and businesses in La Jolla.²⁵ The State Board needs to consider how these types of economic impacts could affect the provision of other public services.

²⁵ See *id.* at 68.

- Transportation and Traffic: Caltrans has testified to the severe burdens the Special Protections would impose on it. Caltrans' vast network of state highways adjacent to or near ASBS may need to be altered fundamentally to meet the standards of the Special Protections, through elaborate diversion systems and/or through the construction of treatment facilities. These projects could result in traffic impacts, especially near ASBS where there is often only a single, two-lane highway providing access to these areas. At the local level, counties and cities would be tasked with the project of removing all traces of human activity from flows entering ASBS from local streets. Even for sleepy bedroom communities like Carmel-by-the-Sea, this may be a challenging and costly endeavor.
- Utilities and Service Systems: The lead agency is specifically directed under the CEQA Guidelines to consider whether the action would "[r]equire or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which would cause significant environmental effects." For example, existing storm water facilities could be overwhelmed by increased flows diverted from ASBS to the facilities. Again, compliance with the Special Protections would require a significant engineering effort that would likely result in environmental impacts that must be analyzed.

The above list is not intended to be a comprehensive list of potential environmental impacts, nor do our discussions of the individual impacts above constitute all of the potential impacts in those categories. Because the State Board has provided such scarce information and content on the potential implementation plans and the baseline conditions, the agency has made it difficult for other public agencies, the regulated community, and the public to help it identify and anticipate the likely array of potentially adverse consequences. However, it is clear from our review to date that the State Board must prepare an EIR, not merely an MND, to meet its CEQA obligations.

D. Performance Standards and Economic Impacts.

Under Section 21159 of the Public Resources Code, when the State Board adopts a performance standard, it must prepare an analysis of the reasonably foreseeable environmental impacts arising from the reasonably foreseeable methods of compliance with the standard, as well as an analysis of economic and technical considerations arising from such methods.²⁶ From the limited information available,

²⁶ We do not concede that the performance standards proposed by the State Board would be valid if the State Board met Section 21159. There are

it is foreseeable that there likely will be significant economic impacts on municipalities, the agricultural industry, construction and related businesses, and tourism and recreation. It is also clear that complying with the Special Protections would be extremely challenging and complex, if not impossible, from a technical standpoint. For example, Caltrans testified at a State Board ASBS workshop that building a treatment plant for stormwater would not be possible, and “[e]ven if you did have a treatment plant . . . anything in excess of [the design amount of rainfall will result in] flooding . . . [and when] these diversionary structures get overwhelmed, the discharge will still occur [to the ASBS].”²⁷ Under Section 21159, the State Board must analyze these economic impacts and technical considerations.

In short, the State Board cannot ignore the significant economic impacts contemplated by the Special Protections. The agency needs to take a hard look at the economic impacts to sister state agencies (such as Caltrans), counties, cities, businesses, citizens, and taxpayers, and assess (i) whether the conditions of the ASBS merit the additional regulatory demands of the Special Protections at this time; (ii) whether those Special Protections will alter conditions in the ASBS in a manner that justifies the great cost involved; and (iii) whether there are alternatives that achieve the desired results with significantly fewer economic impacts.

III. Conclusions.

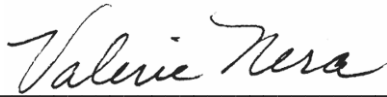
Based on the information contained in the June 14 working draft, and its expressed intention to prepare an MND rather than an EIR, the State Board is not on a path to meeting its CEQA obligations. It is essential that the State Board give a more detailed description of the proposed Special Protections, including a clear articulation of the alleged problem, the project objectives, and how the Special Protections will achieve those objectives. The State Board needs to describe the baseline conditions at the ASBS and present meaningful alternatives to the proposed actions, including a “no project” alternative, in order for it to undertake a meaningful analysis of environmental impacts and mitigation measures. Obviously this information will not be as developed now, in the scoping process, as it will be at the end of CEQA review. However, it is clear that the measures that likely would be required to comply with the Special Protections would have significant environmental and economic impacts in the ASBS watersheds, and possibly throughout the State. These impacts must be analyzed in an EIR – not an MND.

numerous other procedural and substantive requirements with which any such standards must comply.

²⁷ Workshop Transcript, *supra*, at 66-68.

We appreciate the opportunity to provide these comments, and are available to discuss them at your convenience. We respectfully request the State Board to add this letter to the administrative record for the proposed Special Protections.

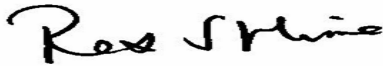
Respectfully submitted,



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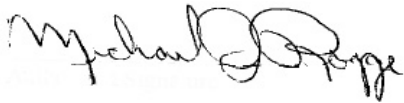
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