Ocean Plan Amendment
Public Comment
Deadline: 04/18/12 by 12 noon

CITY OF DANA POINT

DEPARTMENT OF PUBLIC WORKS

April 17, 2012

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I St., 24th Floor
Sacramento, CA 95814
Submitted via email: commentletters@waterboards.ca.gov

RE: **Comment Letter – California Ocean Plan Amendments.**

Proposed Amendment of the Water Quality Control Plan for Ocean Waters of California designating State Water Quality Protection Areas to Protect State Marine Protected Areas

Dear State Board,

Please accept the following comments from the City of Dana Point regarding the Proposed Amendments to Chapter III – Program of Implementation of the Ocean Plan, E. Implementation Provisions for Marine Managed Areas. The City of Dana Point has also worked cooperatively with the County of Orange and the California Stormwater Quality Association (CASQA) and thus supports the comments that they have submitted. In general, we believe the document raises a significant number of questions requiring careful thought.

The comments below are provided on the Draft Staff Report and Substitute Environmental Documentation (SED), dated February 23, 2012.

1. The amendment does not appear to recognize the fact that MS4s are also already regulated by NPDES Permits and in many instances, a higher level of protection via TMDL's. The proposal overlaps with existing programs including the South Orange County Regional Stormwater NPDES Permit, Bacteria Total Maximum Daily Loads for Beaches and Creeks, and Special Protections for Areas of Special Biological Significance. We feel that this information is important to be included in the document to provide a basis for a thorough and accurate review of all options, including a "No Action" option.

2. On Page 1, the statement is made that, "Based upon the review and analyses described in this SED, the proposed amendments if adopted, are not expected to result in significant impact on the environment."

   It is unclear if the draftor's intent in this statement is to take the position that; since no SWQPAs are being designated in this document, there are no environmental impacts; and that it is assumed that the Regional Boards will have to provide a CEQA analysis for each SWQPA they later may choose to designate. Please clarify if this is the case.

   However, if the draftor's intent is that the implementation actions prescribed in this amendment have no impact, such as "All dry weather flows shall be diverted to sanitary sewer systems", then we must disagree. Significant infrastructure will be required. Diversion structures typically cost anywhere from $100,000 to several million dollars each, based upon

our significant experience with the 19 diversions the City of Dana Point has installed. Should treatment facilities be required the cost will be substantially higher per facility. The City of Dana Point Ozone Treatment Facility cost approximately $6 Million. To comply with environmental concerns raised during the CEQA process for that facility regarding structures on the coast, the facility was relocated 600 feet back from the coast and housed/screened in an attractive structure, adding in excess of $1 Million to the cost of the facility. The California Coastal Commission is quite active in adding "environmental" requirements on all coastal public works projects in excess of $100,000.

3. The bottom of Page 33, top of Page 34, appears to contradict what was stated on Page 1 (comment #2 above). Please clarify.

4. The proposed amendment exempts wastewater outfalls from implementation of this amendment based upon cost, which is understood. However the same justification can be applied to MS4's as can be seen from the costs noted above. Believing implementation compliance cost for MS4's to be within the means of local government is not an accurate assumption. Stated cost/benefit considerations applied to wastewater should also be applied to stormwater.

   We agree with the Draftor's statement on the top of Page 34, "Storm water conveyance systems minimize flooding in built up areas. Relocation of these outfalls and conveyance systems may require substantial and costly construction as well." We contend that the same arguments that are written regarding "existing municipal sewage and industrial wastewater outfalls regulated under NPDES permits represent an important public service and substantial infrastructure." also apply to Municipal Stormwater Separate Sewer Systems (MS4s).

   On Pages 33 & 34, it is stated, "Where large wastewater and storm water outfalls are situated, implementing discharge prohibitions could cause significant environmental and socioeconomic impacts. Existing municipal sewage and industrial wastewater outfalls regulated under NPDES permits represent an important public service and substantial infrastructure. Prohibitions or limitations that would require the relocation or expansion of this infrastructure including treatment works, outfall, conveyance system and land to comply with discharge prohibitions or other limitation potentially imposed to protect a MPA could result in significant disruption of sewer services and require substantial rate increases to offset in part the large costs associated with relocation with potentially low cost benefit. Construction associated with these efforts could pose significant impacts to air, water quality and biological resources and jeopardize habitat in other areas along the coast thru new construction. In addition, those efforts by municipal waste water permittees to implement the State Water Boards Recycled Water Policy approved thru the adopted of Resolution 2009-0011 could be jeopardized by the new and unanticipated permit conditions. Storm water conveyance systems minimize flooding in built up areas. Relocation of these outfalls and conveyance systems may require substantial and costly construction as well."

   We contend that the storm water conveyance systems (MS4s) which are regulated under NPDES permits also represent an important public service and substantial infrastructure. Prohibitions or other limitations potentially imposed to protect a SWQPA could also result in significant disruption of existing flood control structures, resulting in potential harm to public and property. New construction associated with these multi-million dollar projects could also

pose significant impacts to air, water quality, and biological resources and jeopardize habitats, as noted in Paragraph 1.

5. The proposed language on Page 27, *5 CEQA Review and Analysis*, makes several references to "Basin Plan"; however it is understood that this document is a proposed amendment to the Ocean Plan. Please clarify.

6. On Page 27, *5.2 Project and Purpose*, we disagree with the statements that "The proposed amendments would, if adopted: "Establish a second category of SWQPAs that would be less restrictive than the provisions associated with existing SWQPA -ASBS while providing a higher level of protection than the California Ocean Plan provisions that apply to all ocean waters of the state. This new category would be identified as SWQPAs– General Protection;"

   As we review and interpret the proposed amendment language as written, it appears that the provisions for SWQPAs-GPs are more restrictive that those recently adopted by ASBS's. For example, on Page 43, d) Implementation Provisions for New Discharges, paragraph (3) states under: "All Other New Discharges:" There shall be no increase in nonpoint sources or permitted storm drains into SWQPA-GP. This could be interpreted to mean no one could build a home upon an existing vacant lot in the watershed and could curtail any new development or redevelopement, unless they were able to retain all stormwater on site or direct all stormwater to the sewer system. Neither of these options is really feasible, given our impermeable geology and our water utility district.

   We are also led to believe that the State Board staff has interpreted "no increase in non-point sources" from page 43 (5)(d)(3) to mean "no increase in flow rates". Please clarify how the proposed amendments are "less restrictive" than those established for ASBS's.

7. Page 34, 2nd paragraph, the last sentence states, "Though the objectives and conditions contained in the Ocean Plan are protective of water quality, this option provides no additional level of protection for ecologically sensitive habitats beyond the status quo."

   It is of great concern that this amendment is being proposed when it is indicated at the bottom of Page 7, "scientific analysis does not serve as the basis for any portion of these amendments." Why is this amendment necessary? There is readily available Southern California Bight 2008 testing prepared by the Southern California Coastal Water Research Project (SCCWRP) that shows that there have been improvements in ASBS water quality without additional levels of protection. Further, the Bight 2008 data does not show any substantial difference between anthropogenic influenced and non-anthropogenic influenced drainages for ASBS locations. Ergo, upon what scientific proof of impairment is this amendment based?

8. It appears that this amendment is not required by Federal law under the Clean Water Act. It is based upon California State's designation of Marine Protected Areas. This will result in a number of new unfunded mandates on local agencies, thereby subjecting the State Board to Unfunded Mandate Claims before the State Mandates Commission.

9. It should be acknowledged that higher priority for designation of SWQPA's should not be based upon Section 303(d) impairments where Standards are currently under review by the State (for example, Shellfish).

10. Page 43, In the Proposed Amendments Section 5: (d) Implementation Provisions for New Discharges (3) All Other New Discharges states: "There shall be no increase in nonpoint sources or permitted storm drains into SWQPA-GP."

    It appears that the intent would be to allow no increase in permitted storm drains which empty directly into the SWQPA-GP. For example, new inland subdrains for a new house to the MS4 should not be prohibited. Please add the word "directly".

11. No mention is made of Natural Sources Exclusion should Ocean Plan objectives be exceeded. There are many locations where ground water reaches our drainage ways and contributes to natural, non-anthropogenic "pollutants". For example, Salt Creek, which enters Dana Point's MPA was so named for its high salts. Further, we have naturally high iron content in the San Juan Creek basin and Salt Creek as well. Please include consideration for Natural Sources Exclusion in the amendment.

12. No MS4 applicable drain size is indicated in the document. The ASBS amendment addressed 18"-36" we have been told. We recommend excluding anything smaller than 36", to be consistent with SDRWQCB testing locations.

Significant legal concerns to be considered prior to adoption are raised in the attached document, LEGAL COMMENTS ON STATE WATER RESOURCES CONTROL BOARD'S PROPOSED AMENDMENT TO THE CALIFORNIA OCEAN PLAN REGARDING DESIGNATED STATE WATER QUALITY PROTECTION AREAS TO PROTECT MARINE PROTECTED AREAS, dated April 17, 2012, prepared by Richard Montevideo, Esq., on behalf of the City of Dana Point.

The City of Dana Point thanks the State Board and staff in advance for responding to our comments. With questions, please call Lisa Zawaski at 949-248-3584 or lzawaski@danapoint.org.

Respectfully,

Brad Fowler, P.E.
Director of Public Works & Engineering Services
City of Dana Point

cc: Lisa Zawaski, City of Dana Point

LEGAL COMMENTS ON STATE WATER RESOURCES CONTROL BOARD'S PROPOSED AMENDMENT TO THE CALIFORNIA OCEAN PLAN REGARDING DESIGNATED STATE WATER QUALITY PROTECTION AREAS TO PROTECT MARINE PROTECTED AREAS

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Submitted on behalf of the

City of Dana Point and Other Joining Local Governmental Agencies

April 17, 2012

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. SUMMARY OF CRITICAL DEFECTS WITH THE AMENDMENT 3

III. THE AMENDMENT HAS NOT BEEN DEVELOPED IN ACCORDANCE WITH THE REQUIREMENTS OF CWC §§ 13241, 13242 AND 13000 5

IV. THE REGULATIONS PROPOSED IN THE OPA SHOULD NOT BE ADDRESSED THROUGH THE OCEAN PLAN, BUT INSTEAD SHOULD BE LEFT TO THE INDIVIDUAL REGIONAL BOARDS TO ADDRESS 11

V. THE ADOPTION OF THE PROPOSED AMENDMENT WOULD RESULT IN A VIOLATION OF THE VARIOUS REQUIREMENTS UNDER THE ADMINISTRATIVE PROCEDURES ACT 14

VI. THE PROPOSED AMENDMENT HAS NOT BEEN ADOPTED IN ACCORDANCE WITH THE COST BENEFIT REQUIREMENT SET FORTH UNDER CWC § 13165 19

VII. THE SUBJECT ENVIRONMENTAL DOCUMENT VIOLATES THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 21

VIII. CONCLUSION 32

I. INTRODUCTION

These comments are being submitted on behalf of the City of Dana Point and other city or local agency who may join in these comments (hereafter, collectively "Cities"), for the State Water Resources Control Board's consideration in connection with the Proposed Amendment ("Amendment" or "OPA") to the California Ocean Plan ("Ocean Plan") involving designating State water quality protection areas to protect Marine Protected Areas ("MPAs"), and in connection with the draft Substitute Environmental Document ("SED") for such OPA.

For the reasons set forth herein and as set forth in those comments submitted on behalf of the California Association of Stormwater Quality Agencies ("CASQA"), as well as any separate comments submitted on behalf of the Cities, the Cities respectfully request that the State Board not adopt the proposed OPA, including but not limited to, for the following reasons:

(1) A new water quality objective of "zero" trash is being proposed by this OPA for all waters designated or to be designated Stormwater Quality Protection Areas – General Protection ("SWQPA-GP"). Further, a new water quality objective of "zero" dry weather runoff is being established where "capacity and infrastructure exists" to direct such flows to the sanitary sewer system. In addition, the OPA establishes a water quality objective for each of the chemical constituents proposed to be listed in Table 1, including the daily maximum daily concentration for chronic toxicity, for each and every inland water body and enclosed bay and estuary affected by this OPA. For all such non-ocean waters, Table 1 would not otherwise apply but for this OPA. Because the OPA is creating new water quality objectives with the apparent application of Table 1 to non-ocean water, the zero trash discharge objective, and the limitations on the discharge of dry weather runoff, without first complying with the requirements of

California Water Code ("CWC") sections 13241, 13242, and 13000, it cannot lawfully be adopted at this time.

(2) The OPA is improperly attempting to regulate regional waters with varying characteristics through a one-size fits all approach and without following the regional basin planning process under section 13241. Similarly, the OPA improperly seeks to regulate enclosed bays, estuaries, and inland surface waters, which are waters that are not subject to regulation under the Ocean Plan.

(3) The proposed OPA has not been developed in accordance with the requirements of the Administrative Procedures Act ("APA" – Government Code section 11340 *et seq.*), and specifically fails the "clarity" and "necessity" requirements under the APA.

(4) The OPA would impose a number of investigation, assessment, monitoring and reporting requirements on various local agencies, including the Cities, without the State Board first complying with the requirements of CWC section 13165.

(5) The Amendment has not been developed in accordance with the requirements of the California Environmental Quality Act ("CEQA" – Public Resources Code section 21000 *et seq.*), in light of the State Board's decision to attempt to "piecemeal" the project," its refusal to consider the reasonable foreseeable adverse impacts on the environment created by the proposed "project," and its failure to include a reasonable range of "project alternatives" to the recommended OPA, including a legitimate "no project" alternative.

II. SUMMARY OF CRITICAL DEFECTS WITH THE AMENDMENT

At the heart of many of the legal concerns expressed herein is the refusal/failure on the part of State Board staff to accurately characterize the OPA for what it is, *i.e.*, a Proposed Amendment to the Ocean Plan to apply new or expanded water quality objectives for certain designated areas throughout the State of California, and leaving no discretion to the various regional boards on whether and how to best regulate such waters.

Fundamentally, State Board staff (unconvincingly) asserts that the requirements of CWC sections 13241 and 13242 do not apply to the Amendment, claiming the OPA is not establishing any new or amending any existing water quality objectives. (OPA, p. 40.) At the same time the draft OPA designates a number of areas which fall into the category of Stormwater Quality Protection Area – General Protection ("SWQPA – GP"), and thereafter provides that it is an "*undesirable alteration in natural ocean water quality*" if there is a discharge that exceeds, in the receiving water, "*Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity.*" (OPA, p. 42.) In effect, the OPA is, for the first time, requiring the application of Table 1 effluent limits on waters not previously affected by Table 1, and specifically appears to attempt to regulate certain enclosed bays, estuaries and inland waters (*e.g.,* Newport Back Bay), as described in the CASQA comment letter. As a result of the breadth of the OPA, and particularly its apparent application to certain enclosed bays, estuaries, and inland surface waters, the OPA is creating a new set of water quality objectives (Table 1) for all such affected waters.

Similarly, the draft OPA for all SWQPA-GPs provides that "*the discharge of trash is prohibited,*" *i.e.*, it imposes a "zero" trash water quality objective on all designated or to be designated SWQPA-GPs. (*Id.*) Further, the draft OPA provides that "non-stormwater dry

weather" flows "*are effectively prohibited as required by the applicable permit*," and that where capacity and infrastructure exists, "*all dry weather flows shall be diverted to municipal sewer systems.*" (*Id.*) This prohibition on dry weather discharge is yet another new water quality objective of "zero" dry weather runoff (where the prohibition applies).

In short, the OPA's discussion notwithstanding, the draft OPA establishes a series of new water quality objectives for each of the constituents identified in what is to be Table 1, along with a new "zero" water quality objective for trash, and a new water quality objective of "zero" dry weather discharges to the extent capacity and infrastructure exists to divert such discharges to the sanitary systems. (OPA, p. 42.)

Another fundamental flaw with the OPA involves the numerous ambiguities and faulty assumptions it contains, including the faulty assumption that none of these water quality objectives will be applicable to the SWQPA-GP areas unless "*the State Water Board designates SWQPA to provide water quality protections to MPA or other unique areas.*" (OPA, p. 39.) A review of the OPA shows that it is de facto designating the subject waters at this time as SWQPA-GPs. In fact, the OPA contains no discussion of the circumstances upon which a regional board could refuse to designate the MPAs identified in the draft OPA as SWQPA-GPs. For example, the OPA provides (wrongly) that if the OPA is not adopted, the "only" avenue the water boards would have would be to designate the MPAs with "the designation of ASBS." (OPA, p.35.) Aside from the fact that the statement is legally incorrect, it shows that the State Board believes that once it adopts the OPA, all of the referenced MPAs will need to be designated as SWQPA-GPs, or otherwise face being designated as ASBS. No other conclusion can be reached from this statement.

Further, based on the invalid assumption that the OPA is not *per se* designating any MPAs as SWQPA-GPs, the State Board is also refusing to consider the reasonably foreseeable adverse environmental impacts from the adoption of this OPA, because according to the OPA, no formal designation is yet being made. The OPA then strives to find significant adverse environmental impacts of the discussed alternatives in order to reject such alternatives, in spite of the fact that CEQA requires the consideration of project alternatives that actually have lower environmental costs, not greater, and requires that the "no action" alternative be based on the practical result from a non-approval of the proposed project, which is not the "no action" alternative described in the SED.

The OPA is also fatally flawed given that it fails to provide the required legal authority to support its "necessity" as a new California regulation under the APA, or to provide the needed "clarity" for such a regulation. In fact, as described below, the OPA contains a series of substantive ambiguities that will make it enormously difficult for the regulated community to comply. All of these critical defects with the OPA, and others as described below, make adoption of the OPA legally improper at this time.

III. THE AMENDMENT HAS NOT BEEN DEVELOPED IN ACCORDANCE WITH THE REQUIREMENTS OF CWC §§ 13241, 13242 AND 13000

The OPA, although referencing the requirements of CWC sections 13241 and 13242, contains no analysis and includes no discussion as needed to comply with such sections. Instead, State Board Staff asserts, as follows:

> **The Amendments being proposed by staff would not alter existing water quality objectives or result in new water quality objective for ocean waters, therefore, Water Code section 13241 does not apply to these proposed amendments to the California Ocean Plan.**

> **Water Code section 13242 requires that the program of implementation include a description of the nature of the actions which are necessary to achieve the objectives, time schedules for management actions and required surveillance actions. As stated above, the amendments being proposed by staff do not amend existing water quality objectives or add new water quality objectives.**

(OPA, p. 40.) Staff's claim, however, that CWC sections 13241 and 13242 do not apply on the grounds that new water quality objectives are not being established nor existing objectives altered, is belied by the plain language of the proposed Amendment. Specifically, under Section 7 of the OPA, new water quality objectives and discharge prohibitions are imposed, as follows:

> (c) Implementation provisions for permitted separate storm sewer system (MS4) discharges and nonpoint source discharges.
>
> (1) **Existing waste discharges are allowed, but shall not cause an undesirable alteration in natural ocean water quality. For purposes of SWQPA-GP, an undesirable alteration in natural ocean water quality means that for intermittent (*e.g.*, wet weather) discharges, Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity, must not be exceeded in the receiving water.**
>
> **(2) The discharge of trash is prohibited.**
>
> **(3) Non-storm water (dry weather) flows are effectively prohibited as required by the applicable permit. Where capacity and infrastructure exists, all dry weather flows shall be diverted to municipal sanitary sewer systems.**
>
> (d) Implementation provisions for New Discharges.
>
> **(3) All other discharges.**
> **There shall be no increase in nonpoint sources or permitted storm drains into SWQPA-GP.**

(OPA, pp. 42-43.) The above-referenced provisions thus impose a series of new water quality objectives, *i.e.*, concentration-based effluent limits for certain chemical constituents and chronic

toxicity for waters where such effluents were not previously to be applied (namely the various enclosed bays, estuaries and inland waters the OPA attempts to regulate), as well as a "zero" water quality objective for trash (*i.e.*, "*the discharge of trash is prohibited*"), along with a prohibition on all dry weather flows "*where capacity and infrastructure* exists" to allow for diversion, and, finally, a complete prohibition on any increase in nonpoint source discharges or discharges from permitted storm drains. (OPA, pp. 42-43.)

Each of the concentration-based effluent limits set forth in new Table 1, to the extent they are to be applied to enclosed bays, estuaries and inland waters, would represent a new set of water quality objectives for all such waters. In addition, the outright prohibitions of trash and dry weather discharges (where capacity and infrastructures exist for diversion to the sanitary sewer), along with the prohibition of an increase in non-point source discharge and permitted drainage, are all, in effect, new water quality objectives. Accordingly, per the plain language of Water Code sections 13241 and 13242, the analysis required under Section 13241 and the implementation requirements of Section 13242 must all be complied with before the subject Amendment may lawfully be adopted.

Similarly, CWC sections 13000 and 13240 require a consideration of various factors when the State or Regional Boards develop either water quality control plans or water quality policy (both of which are being developed here). As such, irrespective of whether or not formal water quality objectives are being established the policy requirements of section 13000 must be met.

CWC sections 13000 throught 13242, provide, in relevant part, as follows:

§ 13000. Conservation, control, and utilization of water resources; quality; state wide program; regional administration.

. . .

The Legislature further finds and declares that activities and factors which may affect the quality of the water 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, tangible and intangible.**

§ 13240 Adoption of plan; conformance with state policy.

Each regional board shall formulate and adopt water quality control plans for all areas within the region. **Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control. During the process of formulating such plans the regional board shall consult with and consider the recommendations of affected state and local agencies**. Such plans shall be periodically reviewed and may be revised.

§ 13241 Water quality objectives; beneficial uses; prevention of nuisances.

Each regional board shall establish water quality objectives in water quality control plans as in its judgment will ensure the **reasonable** protection of beneficial uses and the prevention of a nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree **without unreasonably affecting beneficial uses**. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

(a) Past, present, and probable future beneficial uses of water.

(b) **Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.**

(c) **Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.**

(d) **Economic considerations.**

(e) **The need for developing housing in the region.**

(f) The need to develop and use recycled water.

<u>§ 13242 Program to achieve objectives</u>.

The program of implementation for achieving water quality objectives shall include, but not be limited to:

(a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.

(b) A time schedule for the actions to be taken.

(c) A description of surveillance to be undertaken to determine in compliance with objectives.

Pursuant to the above provisions of the Porter-Cologne Act, in any formulation or amendment to a water quality control plan, where water quality standards or objectives are being adopted or modified (as here, with the adoption of new, specific objectives such as "zero" trash), the policies set forth in section 13000 must be complied with and the factors set forth in section 13241 fully considered. (*See United States of America v. State Water Resources Control Board, et al.* (1986) 182 Cal.App.3d 82 ("*U.S. v. State Board*").) Compliance with CWC section 13000 is specifically required given the express language of section 13240, requiring compliance with the policies under CWC section 13000. (CWC § 13240.) Moreover, pursuant to section 13170, the State Board is required to comply "*with the provisions of sections 13240 to 13244*" for the OPA. (§ 13170.)

In *U.S. v. State Board*, the State Board issued revised water quality standards for salinity control and for the protection of fish and wildlife because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento-San Joaquin Delta ("*Delta*"). (182 Cal.App.3d at 115.) The State Board approved these standards with the

understanding it would impose more stringent salinity controls in the future. In invalidating the revised salinity standards, the Court consistently recognized the importance of complying with the policies set forth under section 13000 and the factors listed under section 13241. It emphasized the section 13241 need for an analysis of "*economics*," as well as the importance of establishing water quality objectives which are "*reasonable*," and adopting "*reasonable standards consistent with overall State-wide interests*."

> In formulating a water quality control plan, the Board is invested with wide authority "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, tangible and intangible**." (**§ 13000**.) In fulfilling its statutory imperative, the Board is **required** to "establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." (**§ 13241**), a conceptual classification far-reaching in scope.

(*Id.* at 109-110, emphasis added.) The Court further stated:

> The Board's obligation is to attain the highest reasonable water quality "*considering all demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000, italics added.)

(*Id.* at 116, italics in original.) Finally, the Court pointed out:

> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also** ***all*** **competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). In addition, **the Board must consider** . . . "[Water quality conditions that could **reasonably be achieved** through the coordinated control of *all* factors which affect water quality in the area."

(*Id.* at 118, italics in original, bolding added.)

In *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613 ("*Burbank*"), the California Supreme Court addressed the issue of whether the State Board and the Los Angeles Regional Board were required in that case to comply with CWC section 13241, which, through section 13263, requires the Boards to consider, among other issues, "economics" when issuing an NPDES permit. (*Id.* at 626.) The *Burbank* Court found that where the State and Regional Boards adopt provisions that "exceed the requirements of the Federal Clean Water Act," State law, specifically section 13241, must be complied with. (*Id.* at 627.) The Court held that unless the specific requirement is mandated by federal law, section 13241 must be complied with, even if the permit itself is being adopted to comply with federal law. (*Id.*)

In short, the California Supreme Court found the State law must be adhered to unless it is in conflict with federal law or proposes something that "federal law forbids." (*Id.*) Here, there is no claim that federal law is requiring the adoption of the proposed Amendment, nor is there any claim that the specific numeric limits imposed pursuant to the OPA, nor the prohibition set forth therein, are in any way being compelled by federal law. Consequently, as the State Board is developing new water quality policy and is further attempting to amend its Ocean Plan, the provisions of CWC section 13000, as applied through section 13240, and the requirements of sections 13241 and 13242, must all be complied with.

IV. THE REGULATIONS PROPOSED IN THE OPA SHOULD NOT BE ADDRESSED THROUGH THE OCEAN PLAN, BUT INSTEAD SHOULD BE LEFT TO THE INDIVIDUAL REGIONAL BOARDS TO ADDRESS

The OPA is contrary to law, in part, because it appears to be attempting to regulate, through an Ocean Plan, certain inland surface waters, and enclosed bays and estuaries, and because it is attempting to impose specific numeric limits and various discharge prohibitions, on a Statewide level, on waters that have unique regional characteristics, *i.e.*, the OPA is proposing

a one size fits all approach for a series of waters that can only appropriately be regulated considering the unique characteristics of the water bodies in issue, and the specific point and nonpoint sources discharging thereto.

Page 1 of the 2009 Ocean Plan provides as follows: "*This Plan is not applicable to discharges to enclosed bays and estuaries or inland waters ...*" (Ocean Plan, p. 1.) Yet, as discussed in other technical comments including those submitted by CASQA, the OPA appears to, in fact, be attempting to regulate these very types of waters. Because the 2009 Ocean Plan on its face acknowledges that it is not designed to regulate enclosed bays, estuaries and inland waters (Ocean Plan, p. 1), to the extent any aspect of the OPA can be interpreted as regulating any such waters (*e.g.*, Newport Back Bay), the OPA is beyond the State Board's authority and its adoption would be action that is contrary to law.

Moreover, as discussed above, the OPA does not identify any factors or considerations upon which the regional boards are to consider when deciding to designate SWQPA-GPs, and nor does the OPA provide any discretion to the Regional Boards to not designate the identified MPAs as SWQPA-GPs. (*See e.g.*, OPA, pp. 42-43.) Furthermore, and importantly, on pages 38-39 of the OPA, it provides that "*given the many different types of discharges and sources, there is significant variability in the flows and pollutants present within these [stormwater runoff and nonpoint source] discharges.* (OPA, p. 38.) Yet, the OPA fails to allow for any different regulatory applications to address there "*many different types of discharges*" and this "*significant variability.*"

In addition, in Section 4, entitled "Environmental Setting," the OPA attempts to describe the various areas to be designated as SWQPA-GP, and describes the particular environmental

characteristics and marine protection areas within the North Coast Region, the San Francisco Bay Region, the Central Coast Region, the Los Angeles Region, the Santa Ana Region and the San Diego Region. (OPA, pp. 8-26.) Throughout the discussion of the various environmental setting, the unique characteristics of the individual regions is consistently discussed. In short, the OPA makes clear that the unique characteristics of the individual discharges within the respective regions, as well as the characteristic of the particular water bodies in question, are significant factors in determining the proper regulatory scheme for the identified water bodies. Yet, the OPA seeks to regulate all of these water bodies with a one size fits all approach.

Subsection (b) of section 13241 requires that the Boards, when developing water quality objectives, consider the "***environmental characteristics of the hydrographic unit under consideration***, including ***the quality of water available thereto***." Subsection (c) then requires the consideration of the "water quality conditions that could reasonably be achieved through the coordinated control of ***all factors which affect water quality in the area***." Subsection (d) requires an evaluation of the "***economic considerations***," subsection (e) requires the consideration of the "need for developing housing ***within the region***." Each of the section 13241 requirements thus requires an evaluation of regional factors and specific considerations unique to the area when developing standards. Accordingly, for the State Board to establish a set of requirements, whether they are called water quality objectives or otherwise, on a Statewide level to be applied to discharges through a one size fits all program, would be arbitrary and capricious, and would be in conflict with the plain language of section 13241.

In addition, understanding that the requirements of section 13000 apply, through section 13240, to all water quality control plans (including to the Ocean Plan, *see* § 13170), adopting such a one size fits all program would also violate section 13000, namely the

requirement thereunder to regulate water quality "*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, tangible and intangible.*" (CWC § 13000.)

The State Board's recognition of the need to consider the unique factors involved in regulating each of the SWQPA-GPs designated areas, while at the same time establishing a series of concentration-based effluent limits and discharge prohibitions to be applied irrespective of the particular characteristics of the water body or the region, is evidence of arbitrary action that is contrary to controlling principles in the Porter-Cologne Site.

V. THE ADOPTION OF THE PROPOSED AMENDMENT WOULD RESULT IN A VIOLATION OF THE VARIOUS REQUIREMENTS UNDER THE ADMINISTRATIVE PROCEDURES ACT

The California Administrative Procedures Act (the "APA"), Government Code sections 11340 *et seq.*, is intended to advance meaningful public participation in the adoption of administrative regulations by state agencies, and to create an administrative record assuring effective judicial review. (*Pulaski v. Cal. OSHA* (1999) 75 Cal.App.4th 1315.) The APA establishes minimum procedural requirements for the adoption and repeal of administrative regulations, and is designed to give "*interested parties an opportunity to present statements and arguments . . . and calls upon the agency to consider all relevant matter presented to it.*" (*Id.*)

In Executive Order S-2-03 issued by the Governor of the State of California in November of 2003, the Governor characterized California's Administrative Procedures Act as requiring "*that all adopted regulations be* ***easily understandable, the least burdensome and effective***

***alternative**, be consistent with underlying legislative authority and **minimize the economic impact** to the regulated communities."* (*See State of California Executive Order S-2-03.*)

Under Government Code section 11349.1, any regulation to be adopted by the State must comply with the following standards: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication. (Gov. Code § 11349.1.) In this case, it is evident from the proposed OPA that it lacks the "necessity" demanded by the California Legislature in any regulation developed under the APA, and similarly lacks the "clarity" compelled by the APA.

The purported legal "necessity" for developing the amendment is set forth under Section 5.3 of the OPA, entitled "Necessity and Need for Project." There, the purported "necessity" for the Amendment is described as being State Board Resolution 2010-0057. Yet Resolution 2010-0057 is merely a State Board direction to its Staff to develop a strategy for designated SWQPAs. Resolution 2010-0057 does not identify any requirement under State or Federal law which in fact compels the need for the proposed "strategy", and nor does the proposed Amendment indentify any State or federal law that would satisfy the "necessity" requirement under the APA. Given the lack of any underlying State or federal Law that requires or otherwise makes the proposed regulation "necessary," the Amendment violates the APA in this regard, and as such cannot lawfully be adopted at this time.

Similarly, the proposed Amendment is hopelessly ambiguous on a number of fronts and as described further below, plainly fails the "clarity" requirements for any California regulation. To start with, the OPA is ambiguous with respect to whether it is actually designating areas as SWQPA-GPs, or is instead simply directing the various regional boards to do so, but without providing them with any discretion on whether or how to do so. The OPA appears to provide the

regional boards with no flexibility to avoid making the designations, and in fact identifies no factors to be considered by such boards when evaluating waters for designation. (*See, e.g.*, OPA, p. 27 ["*The proposed project if adopted does not designate new SWQPAs. Designations of specific areas as SWQPAs could be taken under future consideration by the State Water Board only after the proposed process for designating these areas is completed.*"].) Because the OPA does not provide any discretion to the regional boards to not designate the referenced MPAs or SWQPA-GPs, it appears to be de facto compelling their designation at this time.

Specifically, the Amendment is written in such a manner as to leave no discretion to designate or not designate the referenced areas as SWQPA-GP, and, in fact, implies throughout the discussion that the regional boards will be required to regulate all of the identified MPAs as SWQPA-GP, even going so far as to suggest that if the SWQPA-GP designation process is not followed, that the regional board will be left with the "no action" alternative, which according to the OPA, means the subject areas will be required to be treated as ASBS. (OPA, p. 35.) Further, even though there is no legal or technical support for this contention (that the ASBS requirements must apply to all of the potential SWQPA-GP areas if the OPA is not adopted), this discussion shows very clearly that the OPA is a de facto requirement that all of the described MPAs subject to SWQPA-GP designation, must be so designated. As such, the statement in the OPA that, by itself, the OPA is not requiring the designation of any particular areas as SWQPA-GPs, is at best ambiguous, and at worst, entirely inaccurate.

In addition, the OPA is unclear on whether either the State Board or a Regional Board is to be formally subsequently designating the SWQPA-GPs. For example, on page 39, the OPA provides that: "*If, in the future, the State Water Board designates SWQPAs to provide additional water quality protection to MPA and other unique areas, permittees in those specific areas will*

be required to comply with the new provisions." However, at the bottom of page 38 and continuing over to page 39, the OPA instead suggests that it will be left to "*individuals or the Water Boards to nominate an area.*" This ambiguity as well violates the "clarity" requirement of the APA, given that the regulated community will have no understanding of their due process rights, *i.e.,* the process to be followed, if this OPA is ultimately adopted.

Furthermore, the OPA lacks the clarity required under the APA in light of the significant discrepancies between the MPAs described in the text under Section 4 of the OPA (that are candidates for designation as SWQPA-GPs), versus those MPAs described as candidates within the various regional maps (also contained within Section 4 of the Amendment). The confusion is discussed in detail in the comments submitted by CASQA. This lack of clarity as to the potential areas that are even subject to regulation by the Proposed Amendment, again causes the OPA to fail the "clarity" requirements of the Administrative Procedures Act.

In addition, the proposed changes to the Ocean Plan itself, as set forth in Section 7 of the OPA, are extremely ambiguous and lack the clarity required by the APA. The following referenced provisions within the specific amendment language to the Ocean Plan, are all ambiguous and require clarification before the Proposed Amendment could be adopted in conformance with the APA:

(1) Section E.2 on page 41 of the OPA provides that "*no new or modified limitations, substantive conditions, or prohibitions . . . will be imposed upon existing **municipal point source waste water discharge outfalls** based on any MPAs designated as State marine parks and State marine conservation areas.*" There is, however, no definition of the term "***municipal point source wastewater discharge outfalls***," and in particular, the OPA lacks clarity on whether this

term is intended to apply to municipal separate storm sewer system (MS4) outfalls, or is only to apply to sanitary sewer outfalls.

(2) Section E.5 on page 42 of the OPA provides certain exemptions for "*existing point source wastewater discharges*," but again such term is not defined in the OPA, and it is unclear whether this term is designed to include MS4 "discharges," including MS4 "outfalls."

(3) Similarly, section E.5(d)(1) prohibits "*new point source wastewater outfalls*" from being established within an SWQPA-GP. Again, are new MS4 "outfalls" included within this prohibition?

(4) Section E.5(c)(3) provides that: "*Non-stormwater (dry weather) flows **are effectively prohibited** as required by the applicable permit. **Where capacity and infrastructure exists**, all dry weather flows shall be diverted to municipal sanitary sewer systems.*" The quoted language is ambiguous in that it is unclear whether dry weather discharges are to be prohibited in a different fashion, other than as already required by the applicable permits. Further, there is no explanation provided, and it is unclear, as to what is meant by "where capacity and infrastructure exists." Is a municipality, for example, not expected to install any infrastructure to divert dry weather runoff even if only 10 feet of piping would be required? 100 feet of piping would be needed? 1,000 feet? Are pumps or other equipment included in the term "infrastructure"? In short, it is unclear as to what showing is necessary to prove that "infrastructure" exists *i.e.,* what type and amount of investment would be necessary to justify not diverting dry-weather runoff? Further, what is meant by sufficient "I" for purposes of triggering the required diversion, *e.g.,* can future planned or potential development be accounted for when determining if there is sufficient "*capacity*?"

(5) Section E.5(d)(3) on page 43, provides that "*there shall be no increase in nonpoint sources or permit storm drains into SWQPA-GP.*" It is unclear, however, whether this prohibition applies to a previously permitted, but not yet constructed, nonpoint source, *e.g.*, where a residential development which has already been approved, but where some lots within the development area remain to be constructed. Is this "an increase in non-point sources"? Does it matter whether the new non-point source will be tying into an existing storm drain system? Similarly, the reference to "*permitted storm drains*" is unclear, as the term "*permitted storm drains*" is not defined. Does a "*permitted storm drain*" include storm drains within a commercial or residential development that have already been approved but have not yet been constructed? Does the phrase "increase in permitted storm drains" include individual drains from a single family home that have not yet been constructed, nor plans submitted? Does the prohibition on "*permitted storm drains*" prohibit all new development and redevelopment within an SWQPA-GP area, even when applicable low impact development (LID) requirements, in accordance with the applicable MS4 Permit, are being complied with?

In light of the numerous ambiguities mentioned above and others as described in comments submitted by the various interested parties, including CASQA, the Proposed Amendment fails the "clarity" requirements under the APA, as well as the "necessity" requirements, and as such, the Amendment cannot be adopted at this time.

VI. THE PROPOSED AMENDMENT HAS NOT BEEN ADOPTED IN ACCORDANCE WITH THE COST BENEFIT REQUIREMENT SET FORTH UNDER CWC § 13165

Section 13165 of the Water Code provides as follows:

> **§ 13165. Inspection and report by state or local agencies on technical factors; costs.**

> The state board may require any state or local agency to investigate and report on any technical factors involved in water quality control; **provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom.**

Nowhere in the OPA, nor in the SED or in any of the supporting documents identified in the record, is there any evidence that "*the burden, including costs*" created by the investigation, reporting and monitoring obligation being imposed upon local agencies under the OPA, will "*bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom.*" (§ 13165.)

Yet, there is no dispute that the Amendment will result in a significant burden on a number of local agencies, including the Cities herein, to comply with the extensive investigation, monitoring, assessment and reporting obligation required by the OPA. Specifically, the OPA requires a characterization and assessment of existing discharges into SWQPA-GP areas, which assessment is to include "*an evaluation of cumulative impacts as well as impacts coming from individual discharges.*" (OPA, p. 42.) The characterization and assessment requirements include the need to investigate the "*Water quality,*" "*Flow,*" "*Watershed pollutant sources,*" and "*intertidal and/or subtidal biological surveys.*" (*Id.* at 42-43.)

The OPA further requires an analysis of pre- and post-storm receiving water quality of the "*Table 1 constituents and chronic toxicity,*" as well as a requirement that "*if post-storm receiving water quality has larger concentrations of constituents relative to pre-storm, and Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity, are exceeded, then receiving waters* ***shall be re-analyzed*** *along with storm runoff (end of pipe) for the constituents that are exceeded.*" (*Id.* at 43.) In

addition, if "*undesirable alternations of natural water quality and/or biological communities are identified, control strategy/measures shall be implemented for those dischargers characterized as a high threat or those contributing to higher threat cumulative impacts first.*" (*Id.*)

In short, the Proposed Amendment imposes a series of investigation, assessment, monitoring, and reporting obligations upon local agencies throughout the State of California. As a result of these requirements, the State Board was and is required to first comply with the obligation imposed upon it by the California Legislature, *i.e.,* to only impose such requirements if the "*burden, including costs,*" can be shown to "*bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom.*" (CWC § 13165.) Because the analysis required by CWC section 13165 has not been conducted, the proposed OPA cannot lawfully be adopted at this time.

Finally, to the extent the claim is made that the actual monitoring, assessment and reporting obligation will not be imposed until the waters in question have been formally designated as SWPQA-GP by individual regional boards, and thereafter only after the requirements are included within individual NPDES permits, section 13165 must still be complied with at this time since it is the adoption of this Amendment that is first establishing the requirements for the monitoring, investigation and reporting to be imposed. Moreover, even if that were not the case, a cost/benefit analysis would be required, at worst, at the time the regional boards adopt/amend the NPDES permits, pursuant to sections 13225(c) and 13267.

VII. THE SUBJECT ENVIRONMENTAL DOCUMENT VIOLATES THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The sum and substance of the SED consists of checking the "no impact" box for each of the items referenced in the form CEQA Checklist. No substantive analysis of the potential

adverse environmental impacts from the project is provided anywhere in the SED. In short, and astonishingly, the State Board has failed to identify a single potentially significant adverse impact, or an impact that is less than significant with mitigation measures, or even a less than significant impact, anywhere in the CEQA analysis. The SED boldly concludes that there is no environmental impact of any kind, either on aesthetics, agriculture and forestry resources, air quality, biological resources, cultural resources, geology and soils, greenhouse gas emissions, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public services, recreation, transportation/traffic, and utilities and service systems. (*See* OPA, Appendix A – CEQA Checklist.) The SED this identifies no impact of any kind that is reasonably foreseeable from the adoption of the Proposed OPA. The SED is patently defective.

According to the Proposed Amendment, the apparent logic behind the faulty conclusion that there is "no impact" of any kind on from the adoption of the Proposed OPA is the flawed conclusion that no impacts were reasonably foreseeable, because:

> As previously stated, the State Board is not designating new SWQPAs through these proposed amendments. The State Water Board is adopting criteria and provisions for citing and designating SWQPA-GPs. Permittees discharging stormwater or wastewater into ocean waters would not be regulated any differently by this action. **Because no alteration of the environment will occur either as a direct result or indirectly from this action, the proposed project will not have any significant adverse impacts to the environment.** In addition, as no additional controls or treatment would be needed to comply with these measures, there are no adverse environmental impacts associated with compliance actions.
>
> If, in the future, the State Water Board designates SWQPAs to provide additional water quality protections to MPA or other unique areas, permittees and those specific areas will be required to comply with the new provisions. . . . Other existing dischargers [other than wastewater treatment plants] would be required to

> perform additional monitoring activities. If impacts were identified, dischargers would be required to develop and implement control strategies and best management practices to restore water quality to the maximum extent practical. New discharges would be prohibited in the SWQPA-GPs. Those proposing a new discharge would need to identify alternative approaches that comply with this prohibition. **However, Staff cannot foresee which MPAs will be selected for designation as SWQPAs or when.** In the process proposed for designating SWQPAs, environmental impacts associated with specific areas and potentially affected discharges will be evaluated in accordance with CEQA at that time. **To assess the environmental impacts of those future State Board actions at this time would be speculative, and difficult to assess accurately on a statewide basis.**

(OPA, p. 39.) The above argument that there are absolutely no reasonably foreseeable potential adverse environmental impacts from the adoption of the Proposed OPA, and that all such environmental impacts "would be speculative," is disingenuous and is flawed on its face.

In *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, the Cities there successfully challenged a trash total maximum daily load ("TMDL") adopted for the Los Angeles River, on the grounds that the Boards had failed to comply with the requirements of CEQA, specifically because they had failed to properly evaluate the potentially significant adverse impacts that could result from the adoption of the TMDL. There as well the Boards argued that the potential impacts from the proposed TMDL were "*speculative*" and could not be fairly analyzed until the specific projects needed to implement the TMDL were under way. (*Id.* at 1425-26.) The trial court found that the Environmental Checklist "was deficient," holding there was "*sufficient evidence of a fair argument that the project may have a significant effect on the environment, thus necessitating an EIR or its functional equivalent*." The Court of Appeal agreed. (*Id.* at 1420.)

In holding that this Board and the Los Angeles Regional Board violated CEQA in the *City of Arcadia* case by failing to identify and address potentially significant adverse impacts, the Court of Appeal held that:

> **The Water Board's CEQA documentation is inadequate, and remand is necessary for the preparation of an EIR or tiered EIR, or functional equivalent, as substantial evidence raises a fair argument the trash TMDL may have significant impacts on the environment. The [trial] court correctly invalidated the trash TMDL on CEQA grounds."** (*Id.* at 426.)

In this case, with the Proposed Amendment, as CASQA and other stakeholders have shown, the adoption of the OPA will result in numerous reasonably foreseeable adverse impacts on the environment, none of which have been analyzed by the State Board, as required by CEQA. In fact, the language contained in the Amendment itself shows the enormous potentially significant adverse impacts which will likely result from the OPA if adopted. For example, in explaining why the SWQPA-GP areas should be treated differently than ASBS areas should be treated, the Proposed Amendment provides as follows:

> Establishing ASBS with the associated discharge prohibition in densely populated areas poses significant challenges and may not be warranted for all MPAs. Where large waste water and storm water outfalls are situated, implementing discharge prohibitions could cause significant environmental and socioeconomic impacts. Existing municipal sewage and industrial wastewater outfalls regulated under NPDES permits represent an important public service and substantial infrastructure. Prohibitions or limitations that would require the relocation or expansion of this infrastructure including treatment works, outfall, conveyance system and land to comply with discharge prohibitions or other limitation potentially imposed to protect a MPA could result in significant disruption of sewer services and require substantial rate increases to offset in part the large cost associated with relocation with potentially low cost benefit. **Construction associated with these efforts could pose significant impacts to air, water quality and biological resources and jeopardize habitat and other areas along the coast through new construction. . . .**

> **Storm water conveyance systems minimize flooding in built up areas. Relocation of these outfalls and conveyance systems may require substantial and costly construction as well.**

(OPA, pp. 33-34.) Similar language is contained in the State Board's discussion of the problems created by individual regional boards deriving more stringent permit limits than the water quality based effluent limits presently in the Ocean Plan. In this regard, again the discussion of potential adverse environmental impacts is telling and directly applicable to the proposed OPA in light of the discharge prohibitions and effluent limitations imposed upon areas designated as SWQPA-GPs. The discussion is specifically applicable to MS4 outfalls, MS4 conveyance systems and MS4 treatment works (if one assumes that these MS4 facilities are not exempted in the same fashion POTW facilities are to be exempted). The OPA admits the following when it comes to a Regional Board's deriving of specific, more stringent, permit limits:

> The coastal Regional Water Boards could also adopt prohibitions through other special protections to provide a higher level of protection for areas impacted by discharges on a permit by permit basis. However, these actions may also require existing facilities construct new treatment works or relocate outfalls or conveyance systems and best management practices to meet the revised limits. **Much like the discharge prohibition associated with ASBS, this option can result in significant expenditures by public agencies and potentially cause significant impacts to air, water quality and biological resources and jeopardize habitat in other areas along the coast through new construction.**

(*Id.* at 34.) In this case, of course, the OPA specifically requires compliance with the Table 1 maximum concentrations for chemical constituents and daily maximum concentrations for chronic toxicity. It further specifically prohibits the discharge of trash, requires diversion of dry weather flows "*where capacity and infrastructure exists,*" and prohibits the establishment of any new point source wastewater outfalls or any increase in nonpoint source or permitted storm drains into an SWQPA-GP. To argue that a regional board when imposing specific permit limits

that may be more stringent than those imposed on the Ocean Plan, will have reasonably foreseeable potentially significant impacts "*to air, water quality and biological resources and jeopardizes habitat in other areas along the coast through new construction,*" while simultaneously arguing that the potential environmental impacts arising from the Boards adoption of the OPA with the above referenced similar effluent limitations "*would be speculative, and difficult to assess accurately on a statewide basis*" (*id.* at 39) is contradictory on its face, and wrong as a matter of law.

In point of fact, the environmental impacts discussed in the *City of Arcadia v. State Board* case are all environmental impacts resulting from a "zero" LA River Trash TMDL. Accordingly, the case's holding is directly analogous to the present case, where here, the State Board is similarly attempting to impose a "zero" trash discharge limitation for all waters to be designated as SWQPA-GP, and is similarly claiming that such impacts can only be evaluated down the line when the individual projects are being adopted. (*See Arcadia v. State Board, supra,* 135 Cal.App.4th 1392, 1401 ["*This case concerns ... efforts ... to ameliorate the problem [of litter] through the adoption and approval of a planning document setting a target of* ***"zero"*** *trash discharge within a multi-year implementation period.*"].) And, in fact, in the *City of Arcadia* case, the Boards made the very same "speculation" argument the State Board is making here to avoid compliance with CEQA. Yet, the Court of Appeal expressly rejected this "speculation" argument, holding as follows:

> **We reject the Water Boards' argument the regional board did all it could because there "is no way to examine project level impacts that are entirely dependent upon the speculative possibilities of how subsequent decision makers may choose to comply" with the trash TMDL. Tier 2 project specific EIR's would be more detailed under Public Resources Code section 21159.2, but the trash TMDL sets forth various compliance**

> **methods, the general impacts are reasonably foreseeable but not discussed.**
>
> **As a matter of policy, in CEQA cases a public agency must explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions.**

(135 Cal.App.4th 1392, 1425-26.) In this case the environmental Checklist submitted by State Board Staff in support of the OPA is even more sparse than that submitted in connection with the trash TMDL for the LA River, and is thus similarly defective. Moreover, the OPA does not include "a multi-year implementation period" as existed in the *City of Arcadia* case, making the environmental impacts under the OPA even more severe in comparison.

The State Board's refusal to fully and properly assess the potentially significant environmental impacts created by the adoption of the proposed OPA, and its determination that there will be no impact of any kind to air quality, water quality or any other potential environmental impacts, clearly violate CEQA.

In addition, it is evident from the discussion in the OPA that the State Board is, in reality, attempting to avoid having to conduct the requisite CEQA analysis altogether, by "piecemealing" the project in direct violation of CEQA. This "piecemeal" approach has been tried before, but has consistently been struck down by the courts. For example in *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, for example, the Court found that CEQA's definition of a project precludes "*piecemeal*" review, and prevents "*chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.*" (*Id.* at 235.) Similarly, in *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, the Court held it

was impermissible to only analyze the direct effect of the County's general plan amendment and ignore the indirect effects. The Court concluded the County could not evade environmental review by failing to address the consequences of the revisions to its procedures. (*Id.* at 408-409 [*"Not only does CEQA apply to revisions or amendments to an agency's general plan, but CEQA reaches beyond the mere changes in the language in the agency's policy to the ultimate consequences of such changes to the physical environment.*"].)

Here as well the State Board seems poised to amend its Ocean Plan, a process it acknowledges triggers CEQA compliance, but attempts to avoid true compliance with CEQA by seeking to "chop" the project up into "many little ones." As a result of its proposed "piecemealing" and the State Board's reliance on separate, subsequent environmental reviews to assess the potential adverse impacts from its Proposed Amendment, the State Board is acting in clear violation of CEQA.

Furthermore, the SED is deficient, as the State Board has failed to properly discuss a reasonable range of project alternatives. Under CEQA, the SED must evaluate a reasonable range of alternatives to the proposed activity being considered by the Board. (14 Cal. Code Regs. § 15126.6(a).) This requirement applies even where, as here, the environmental documents are prepared under a certified regulatory program. If the documents do not contain a discussion of legitimate alternatives, including a "no project" alternative, the documentation is deficient. (*Arcadia v. State Board, supra,* 135 Cal.App.4th at 1422; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1404.)

Moreover, the alternatives selected must meet certain criteria to be considered legitimate alternatives. In *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 ("*Goleta II*"), the California Supreme Court held that to satisfy CEQA, the alternatives considered in an EIR must meet two requirements: (i) They must potentially offer substantial environmental advantages over the project proposed; and (ii) they must be potentially capable of being feasibly accomplished in a successful manner considering the economic, environmental, social, and technological factors involved. (*Id.* at 566.) As stated in CEQA's Guidelines: "*The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project.*" (14 Cal. Code Regs. § 15126.6(f) (emph. added).)

Section 5.7 of the OPA contains a discussion of the so-called "project alternatives," including purportedly a "no action" alternative. Specifically, in addition to the purported "no action" alternative (discussed below – but which is wrongly described as requiring the designation of all of the identified areas as ASBSs), the only other alternative discussed is one of amending individual permits to require a greater level of protection through the use of more stringent effluent limits. (OPA, pp. 35-39.) However, none of the discussed alternatives will "*avoid or substantially lessen any of the significant effects of the project.*" (14 CCR § 15126.6(f)), and as such, the OPA's two alternatives, *i.e.,* (1) the purported "no action alternative", and (2) the permit amendment alternative with more stringent permit requirements, both fail to comply with the most basic of CEQA requirements, *i.e.,* to provide for an alternative that will have lesser, not greater, adverse impact on the environment. (*Id.*)

The very purpose of an alternatives analysis is to discuss project alternatives that could meet most of the project's objectives "at *a lower environmental cost.*" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 406.) In this

case, the SED in fact fails to discuss a single "project alternative" with "lower environmental cost" than the proposed project. To the contrary, the discussion on the OPA project alternatives seems to strive for higher environmental cost as a means of justifying their rejection as acceptable alternatives. (*See* OPA, p. 35-37.) This approach under the OPA is the exact opposite approach required by CEQA. (14 Cal. Code Regs. § 15126.6(f).)

In short, the SED's failure to discuss a reasonable range of potentially feasible project alternatives, with potentially substantial environmental advantages over the proposed project, contravenes CEQA's clear purpose of ensuring that public agencies regulate activities that affect environmental quality so as to give major consideration to preventing environmental damage. (Pub. Res. Code §§ 21000(g); 21001(g); 21002.)

Finally, CEQA specifically requires a "no action" alternative analysis that identifies the "***practical result***" of the project's non-approval. (14 Cal. Code Regs. § 15126.6(e)(3)(B) [*"where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the projects non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment."].)* Because in this case the SED does not analyze the "practical result" of non-approval, *i.e.,* a true "no action" alternative, it is legally flawed.

The OPA's so-called "no action alternative" is not framed as a "non-approval" alternative. Specifically, the OPA describes the "no action alternative" as "*leaving the Water Boards with one avenue for protecting MPAs, the designation of ASBS.*" (OPA, p. 35.) Subsequently, however the OPA implies that continued reliance on the existing Ocean Plan water quality objectives would be viable, but then confusingly dismisses this approach claiming

it "does not provide greater protection for MPAs," but without ever explaining why application of the existing Ocean Plan requirements would not be sufficiently protective of MPAs. Thus, the OPA's "no action" alternative wrongly assumes that such alternative will result in designating all of the subject MPAs as ASBS, a conclusion which is not supported by the OPA nor one that is otherwise accurate. As such, even though the State Board is required to include a true "no action alternative" in the SED, it failed to do so.

Further evidence that the OPA's "no action" alternative does not comport with CEQA is shown by the discussion on page 33 of the OPA. There, the State Board distinguishes between designating MPAs as an ASBS, and having the State and Regional Boards rely upon "*existing Ocean Plan objectives and requirements that apply to all ocean waters of the State*." This statement evidences the fact that the actual "no action" alternative would be to simply allow Regional Boards to rely upon "*existing Ocean Plan objectives and requirements that apply to all ocean waters of the State*," when developing NPDES permit, rather than designating the MPAs in issue all as ASBS (which was wrongly asserted in the OPA as being "no action"). In short, the actual "no action" alternative would be to simply utilize the existing Ocean Plan requirements and enforce them through existing NPDES permits. Yet, this "no action alternative" has not been analyzed anywhere in the SED, even though it would very likely have less significant adverse impacts on the environment than the proposed project, and even though it is required to be analyzed under the CEQA regulations. Because the State Board has failed to include a discussion of a true "no action" alternative in its SED, adopting the OPA at this time would violate CEQA's terms.

Given the failure of the State Board "to identify the environmental effect" of the proposed project (*Arcadia v. State Board, Supra*, 135 Cal.App.4th 1292-1420), and the State

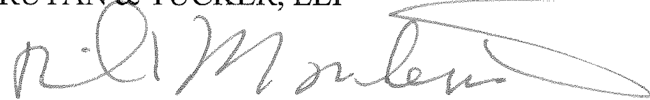
Board's blatant attempt to "piecemeal" the project, as well as the wholly deficient project alternatives analysis including its flawed "no action" alternative description, the State Board's SED clearly fails "*to afford the public and other agencies a meaningful opportunity to participate in the environment review process*." (*id.* at 1426), and the Proposed Amendment cannot lawfully be adopted at this time.

VIII. CONCLUSION

With the of the above discussed legal infirmities with the Proposed Amendment, the Cities respectfully request that the State Board not adopt the OPA at this time, that it instead evaluate the various legal and technical deficiencies discussed herein and in other comments submitted on behalf of interested stakeholders, and that it revise the OPA to address all such deficiencies.

Respectfully submitted,

RUTAN & TUCKER, LLP



Dated: April 17, 2012

Richard Montevideo