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COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

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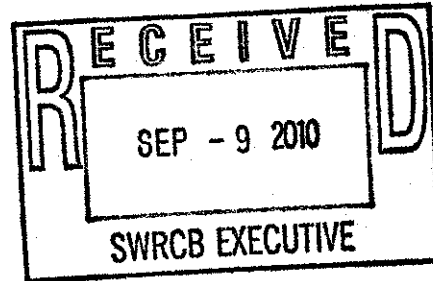
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September 9, 2010

IN REPLY PLEASE
REFER TO FILE: WM-9

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



Dear Ms. Townsend:

COMMENT LETTER – CALIFORNIA OCEAN PLAN TRIENNIAL REVIEW

The County of Los Angeles (County) and the Los Angeles County Flood Control District (LACFCD) have the following comments in response to the request for public comments to be presented at a hearing to seek public input on the next triennial review of the California Ocean Plan (Ocean Plan). The County and the LACFCD appreciate this opportunity to provide comments on the Ocean Plan.

1. Need for General Exception on Areas of Special Biological Significance (ASBS) Discharges

In an October 18, 2004, letter, State Water Resources Control Board (State Board) staff requested that the County, with respect to stormwater discharges to the ASBS No. 24, either cease such discharges or request an exception under the Ocean Plan. Similar letters were sent to municipal and other dischargers throughout the State. The County and the LACFCD subsequently submitted separate and timely applications for such exceptions, which were deemed complete by State Board staff more than a year ago.

Despite these facts, the State Board still has not approved a General Exception that would set forth the parameters to be followed by the County, the LACFCD, and the other municipal dischargers in allowing stormwater discharges to the ASBS. This failure to adopt a General Exception in a timely manner has created substantial uncertainty for these municipalities, as well as the opportunity for expensive and unnecessary citizen lawsuits in Federal court.

Such suits have already been filed against the County, the LACFCD, and the City of Malibu. In these cases, the Federal court has ruled that the prohibition of waste discharges into the ASBS was incorporated into the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit and, thus, discharges

into the ASBS violated the MS4 Permit and result in liability under the Clean Water Act. This ruling potentially affects all municipal dischargers who, while applying in good faith for the General Exception, could concurrently be held liable under the Clean Water Act on the grounds that discharges into an ASBS violate an MS4 Permit. Such liability could exist even though the General Exception and accompanying Special Protections were not available to be incorporated into that permit, as contemplated by State Board staff. While the County and the LACFCD disagree with the Federal court's reasoning, the risk of further litigation is real.

Potential litigation also compromises the State Board's ability to adopt a uniform General Exception policy Statewide. Since these suits also seek injunctive relief, there is a real threat that in the absence of a final General Exception, the Federal court in the Los Angeles County cases or another court in possible future cases, could order relief that conflicts with the Statewide General Exception. Along these lines, in our March 2010 comments on the California Environmental Quality Act Initial Study (IS) for the General Exception document, the County and the LACFCD requested that the State Board amend the General Exception document to make it clear that the General Exception will be applied retroactively from the date that an applicant originally applied for the exception.

The General Exception, so long as it can be applied to a municipal discharger covered by an MS4 Permit, should cover discharges that occurred while the discharger waited for the Exception Application to be approved and the document formulated, a process that has taken nearly six years and shows no sign of resolution any time soon. Making the General Exception retroactive will protect dischargers who relied in good faith on the State Board to provide the General Exception in a timely manner. As stated in Section I of the IS, the State Board "notified applicants to cease stormwater and nonpoint source waste discharges into ASBS or to request an exception under the Ocean Plan." Since the applicants covered by the General Exception made that application, in some cases several years ago, applicants should not be penalized for the length of time it has taken for the State Board to provide the required exception.

2. Need for Compliance Period for Implementation of ASBS General Exception

Prior to the last amendment of the Ocean Plan, Section III(F)(1) a requirement that the "Regional Board shall revise the waste discharge requirements for existing discharges as necessary to achieve compliance with this Plan and shall also establish a time schedule for such compliance." This requirement was deleted during the last Triennial Review on the ground that it did not comply with

the legal requirements applicable to State authorizations for compliance schedules in permits. In its place, the State Board inserted a reference in Section III(G)(1) to compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits.

In so doing, the State Board asserted that the previous language was "unnecessary, no longer appropriate, and is confusing." However, the reasons cited for removal of the time schedule language appeared to apply to NPDES permits issued under Section 301(b)(1)(C) of the Clean Water Act. This is apparent in the State Board's policy for Compliance Schedules in NPDES permits, which indicates that it is only effective with respect to Section 301 permits. Municipal stormwater dischargers, however, are not subject to this section of the Clean Water Act (*Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 [9th Cir. 1999]).

While regional boards may be able to provide a compliance schedule as part of their waste discharge requirement authority, the deletion of the language from the Ocean Plan provides no Statewide authority.

The County, therefore, urges the State Board to again incorporate a time schedule provision in the Ocean Plan with respect to municipal stormwater dischargers. Such a time schedule will be critical to allow municipalities that must discharge stormwater into ASBSs sufficient time to meet the requirements of the General Exception Program, when that program has been finalized and incorporated into municipal stormwater permits for purposes of enforcement. Further, the County believes that the State Board erred when it deleted Section III(F)(1) as a nonsubstantive amendment of the Ocean Plan. Such an amendment was in fact substantive, as it affected the rights of municipal storm water dischargers.

3. Ocean Plan Water Quality Objectives for Metals Should be Expressed in the Dissolved Fraction

As clarified through the recent nonsubstantive Ocean Plan amendments¹, the metal objectives in Table-B of the Ocean Plan are expressed in total recoverable concentrations. Several scientific studies have shown that dissolved metal concentrations, and not total recoverable metal concentrations, account for much of the bioavailable fraction of metals to aquatic organisms². It is because of this

¹ State Water Resources Control Board: Nonsubstantive amendments to the California Ocean Plan, September 2009.

² e.g., EPA Office of Water: Water Quality-based Permitting for Trace Metals, Fact Sheet, April 1996.

fact that the currently existing National and State Toxics Rules³ are established based on dissolved metals. To be consistent with the National and State water-quality objectives for metals, we recommend that all metal objectives in the Ocean Plan be converted and expressed as dissolved metal concentrations.

4. Ocean Plan Water-Quality Objectives Should be Up-to-Date

Since the publication of Klapow and Lewis' 1979 paper⁴ upon which the 1988 Ocean Plan criteria were based and have been applied until this day, much research has been conducted both in the State and across the nation⁵. As a result, a greater understanding has been gained on constituent objectives as they apply to ocean waters. We request that the Ocean Plan objectives be refined to reflect the most current scientific findings and knowledge gained over the last three decades.

5. Definition of Natural Water Quality as it Applies to ASBS Should be Provided in the Ocean Plan

Chapter III, Section E(1) of the Ocean Plan states that:

"...Discharges shall be located a sufficient distance from [ASBS] designated areas to assure maintenance of natural water quality conditions in these areas."

Currently, natural water quality conditions are neither defined nor are there any associated objectives in the Ocean Plan against which water quality of ASBS can be compared. The provisions of the Ocean Plan are not clear as to the type and concentrations of water-quality objectives that constitute natural water quality conditions. We request that appropriate definition of natural water quality, as developed by the Natural Water Quality Committee⁶, be added to Appendix I of the Ocean Plan. Also, associated objectives, based on multiple lines of evidence, should be established.

³ U.S. Environmental Protection Agency: Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California, May 2000.

⁴ Klapow, L.A., and R.H. Lewis: Analysis of toxicity data for California marine water quality standards, J. of Water Pollution Control, August 1979.

⁵ Studies have been done by NOAA, USGS, SCCWRP, and numerous Universities.

⁶ This committee was established under the State Board Resolution 2004-52.

6. Definition of Waste Should be clarified

As currently defined in the Ocean Plan, waste refers to "a discharger's total discharge, of whatever origin, i.e., gross, not net, discharge." This definition is very vague and could easily be misinterpreted. A definition with such a broad scope could be interpreted to mean that any discharge, including those that meet the Ocean Plan water-quality objectives, could be considered as waste. It is important that the definition of waste reflect the water-quality standards in the Ocean Plan. The definition should also take into account recent scientific findings associated with stormwater discharges, indicating that discharges do not necessarily affect marine biota. We request that a clear science-based definition of waste be provided in the Ocean Plan.

7. The Ocean Plan Should Have a Separate Chapter Dedicated to Stormwater

Most of the provisions and standards in the Ocean Plan were developed based on knowledge gained from nonstormwater discharges, such as effluent discharges from publicly owned treatment works and industries. However, these provisions are being applied to all discharges including stormwater. Such an approach neglects the inherent differences between wastewater and stormwater discharges. For example, unlike continuous wastewater discharges, the variable nature of stormwater discharges presents unique challenges with regard to accurately characterizing its impacts on ocean receiving waters. We recommend that the Ocean Plan be revised to include a separate chapter designed specifically to address stormwater discharges.

8. Compliance With Aquatic Life Objectives Should be Evaluated Based on Multiple Lines of Evidence

A number of factors potentially influence the impact of pollutants on marine life, including chemical factors and interactions, pollutant bioavailability, and sensitivity of organisms to particular pollutants in a given setting. Because of this complexity, the evaluation of ocean-water quality should not be based on a single line of evidence such as the chemistry standards in Table-B of the Ocean Plan. Relying on a single line of evidence does not accurately assess the health of marine life and may result in unnecessary management actions. Measurements of biological effects are needed to determine the ecological significance of chemical measurements. We request that provisions be added in Chapter II of the Ocean Plan that requires the use of multiple lines of evidence consisting of the chemical, toxicological, physical, and biological factors for compliance determination.

9. Ocean Plan Standards Should Take Into Account Site-Specific Conditions

Given the geographic extent of the ocean along the California coast, its hydrodynamics and ecology varies from region to region. Factors such as climate, geology, and physical setting could potentially influence the ocean's pollutant assimilative capacity as well as the types of aquatic communities that exist in it. Because of the highly variable nature of these factors, the assimilative capacity of the ocean and nature of ocean-dwelling species also varies widely. California's coast extends thousands of miles and is characterized by distinct oceanographic ecoregions attributed to the spatial variability of hydroclimatic and geologic features. Such variability demands having Ocean Plan water-quality standards that are specific to local conditions. We recommend that, similar to inland water bodies, the water-quality standards (beneficial uses and objectives) for the ocean should be established on a regional or site-specific basis, as opposed to having one-fits-all Statewide standard.

10. Individual, Municipal, and/or Statewide Permits Should Contain Provisions Specific to ASBS Protection Requirements Wherever Applicable

Of the thousands of NPDES permits issued to dischargers into inland water bodies, many are for discharges to streams and storm channels that are tributary to an ASBS. These NPDES permits do not, however, contain effluent limits necessary to meet the stringent ASBS standards. This regulatory inconsistency places unfair burden on municipal ASBS dischargers. Because municipalities cannot impose standards on NPDES discharges to their MS4s, yet must ensure that MS4 discharges be controlled to maintain natural water-quality condition in the ASBS, the municipalities are assuming an unfair burden. It is incumbent upon the State Board and the California Regional Water Quality Control Board, Los Angeles Region, to establish consistent requirements in all NPDES permits for discharges that will enter the ASBSs.

11. Applicability of Table-B in the Ocean Plan Should be Clearly Specified

It is our understanding that the water quality objectives in Table-B of the Ocean Plan were originally intended to apply to the receiving water only; in other words, they were intended to apply after dilution effects. However, we have observed the objectives being misused for evaluating water quality at the end-of-pipe, for example, in the draft Special Protections provision for the ASBSs. To avoid such misuses of the objectives, we request that the Ocean Plan clarify that the Table-B objectives are applicable only to the receiving ocean water.

12. Reference to Appendix VIII Maps of California Coast Waters Needs to be Added

There are currently no references leading to Appendix VIII, Figure VIII-1 to 5 in the Ocean Plan document. We suggest revising the INTRODUCTION, Section C(1) by adding a reference to Appendix VIII as follows:

1. This plan is applicable, in its entirety, to point source discharges to the ocean (see Appendix VIII for maps of California Ocean Waters).

Also, revise Chapter III, Section E(1) by adding a reference to Appendix VIII as follows:

1. Waste shall not be discharged to areas designated as being of special biological significance (see Appendix VIII for the locations of ASBS).

13. Reference to Appendix VII, Exceptions to the California Ocean Plan Needs to be Added

The Ocean Plan contains no references to Appendix VII, Table VII-1. We suggest adding the following to Chapter III, Section J:

3. Current exceptions to the Ocean Plan are listed in Appendix VII.

We look forward to your consideration of these comments. If you have any questions, please contact me at (626) 458-4300 or ghildeb@dpw.lacounty.gov or your staff may contact Ms. Rossana D'Antonio at (626) 458-4325 or rdanton@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works



GARY HILDEBRAND
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