

April 18, 2012

Submitted via email: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Subject: Comments on the 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 Ms. Townsend:

OC Public Works appreciates the opportunity to comment on the proposed Amendment of the Water Quality Control Plan for Ocean Waters of California (Ocean Plan Amendment) addressing Implementation of State Water Board Resolutions 2010-0057 and 2011-0013 Designating State Water Quality Protection Areas (SWQPAs) to protect State Marine Protected Areas (MPAs), dated February 23, 2012.¹

With a population of over 3,000,000 and a large coastal community along over 40 miles of coastline, the County and its incorporated cities have a strong interest in protecting ocean water quality and coastal habitats for the residents, visitors, and wildlife. At the same time, the County and its cities are increasingly impacted financially by water quality regulations, including proposals in the subject Ocean Plan Amendment.

A new regulation as important as the proposed Ocean Plan Amendment must be technically and scientifically sound and justifiable, be considered appropriately within the current legal and regulatory scheme, and provide an achievable pathway to future regulatory compliance that considers economic means. Unfortunately, the current draft is deficient in numerous areas, incomplete in its overall justification, unclear on its consequences, and lacking on required elements. As presented, it should not be adopted.

Our overview comments on the Ocean Plan Amendment are provided below. We also endorse the more extensive comments provided in the letters from the California Stormwater Quality Association (CASQA) and the City of Dana Point.

¹ As used here, the term Ocean Plan Amendment includes the Staff Report, the substitute environmental document (SED), and the proposed amendment language.

1. As a preliminary comment regarding the application of the Ocean Plan Amendment, Section E(5)(c) should be revised to delete references to existing MS4 discharges. As written, proposed Section E(5)(c) conflicts with proposed Section E(5)(a). Section E(5)(a) excludes “existing point source wastewater discharges” from the SWQPA-General Protection (SWQPA-GP or GP) designation. Existing MS4 permittees are an existing point source discharge under the Clean Water Act (CWA). 33 U.S.C. § 1342(p). Given that there is no definition of wastewater in the California Water Code or implementing regulations, or the Ocean Plan or proposed amendment, and the Staff Report and the SED often include stormwater as part of the general wastewater discussion, the amendment should not separately call out MS4 discharges again in Section E(5)(c) and impose new SWQPA-GP requirements (such as the no trash prohibition). The words “permitted separate storm sewer system (MS4) discharges” should be deleted from Section E(5)(c), to ensure existing MS4 discharges are not included within an SWQPA-GP designation. As the Board Staff acknowledges, the “MPA designation process was not intended to interfere with existing permitted activities except those under the direct authority of the Fish and Game Commission, primarily commercial and recreational fishing.” Page 30, Section 5.6.2.

Moreover, if not revised, proposed Section E(5)(c) is contrary to the Marine Managed Areas Improvement Act. This Act limits “waste discharges” in SWQPAs. Pub. Res. Code § 36710(f). Under the Act, “[n]o other use is restricted.” *Id.* Under Section E(5)(c) as written, stormwater is not a “waste discharge” (because it is culled out from Section E(5)(a)). Thus, under the proposed amendments, stormwater is other than a “waste discharge” and therefore Section E(5)(c) inconsistent with the Marine Managed Areas Improvement Act’s prohibition against restrictions on other uses.

Finally, even if MS4 discharges could appropriately be culled out, Section E(5)(c) is contrary to the CWA’s regulation of such discharges. Under the CWA, MS4 discharges are only regulated “to the maximum extent practicable”; however, the implementation provisions in Section E(5)(c) include outright prohibitions and instantaneous maximum concentration limits for chemical constituents, in contravention of the maximum extent practicable standard. 33 U.S.C. § 1342(p)(3)(B)(iii).²

2. The Legislature intended for MPAs to be protected regionally—the State Water Board’s proposed imposition of a statewide scheme for MPAs over the pre-existing regional scheme appears to be contrary to this intent. California’s Marine Managed Areas Improvement Act and Marine Life Protection Act (MLPA) set up a “*regional MPA planning process*.” MLPA I-Team memorandum to MLPA Blue Ribbon Task Force, Oct. 1, 2009, attachment 1;³ Fish & Game Code §§ 2856, 2857 (MLPA—directing MPA designation by “biogeographical region”). While the Board Staff recognizes the uniquely regional nature of designating MPAs and the limited scope of the authority to designate MPAs, the staff nonetheless proposes a one size fits all SWQPA-GP designation. Staff’s proposal likewise is inconsistent with the regional approach envisioned in the California Water Code. *See, e.g.*, Water Code § 13000 (recognizing that water quality factors “vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally.”).

² While the Board Staff recognizes that discharges can only be regulated to the “maximum extent practical” (see page 39, Section 5.8), the proposed amendment fails to include this limitation.

³ All cited references are incorporated into these comments as if set forth in full.

3. The scope of the SWQPA-GP designation is unclear from the text of the Ocean Plan Amendment. The definition of SWQPA-GP in Appendix I of the amendment is limited to a subset of MPAs designated as "State Marine Parks" and "State Marine Conservation Areas." Similarly, Section 5.7.3 of the Staff Report (page 36) indicates that SWQPA-GPs are designed to provide a "second tier" of protection to State Marine Parks and State Marine Conservation Areas. However, proposed Section E(1)(a)(2) appears to contradict this straightforward limitation of SWQPA-GPs to a subset of State Marine Parks and State Marine Conservation Areas. As drafted, this section provides that the SWQPA-GP designation can apply to "or other unique and sensitive areas." Section E(1)(a)(2) should be revised to remove the "or other unique and sensitive areas" language to make it consistent with Appendix I.

Additionally, Section E(3) states that designation of SWQPAs to prevent the undesirable alteration for natural water quality within MPAs "may include either SWQPA-ASBS or SWQPA-GP or in combination." Proposed Section E(3). It is not clear how the same water body could be designated to be both an SWQPA-ASBS and SWQPA-GP. If the intention is that for the same MPA, both ASBS or GP could be designated at different locations, the language should be clarified.

4. In many parts of the Ocean Plan Amendment it appears that a large number of existing MPAs are being designated as SWQPA-GP. However, communications with State Water Board staff have indicated that the intent of the Ocean Plan Amendment is to establish a framework for future designation rather than designating new SWQPA-GPs. The language of the Ocean Plan Amendment requires revision to clearly reflect this intent. Accordingly, Section E(2) of the Ocean Plan Amendment should be revised to read: "No new or modified limitations, . . . will be imposed upon existing municipal point source wastewater discharge outfalls based on any MPAs to be designated as SWQPA-GP"
5. Proposed Appendix IV of the Ocean Plan Amendment, governing the SWQPA nomination process, should be revised to reflect the SWQPA-GP designation process as envisioned by Board staff. First, it appears that State Water Board takes the lead on designating new SWQPAs; however, most of the actions regarding designation are to be taken by Regional Boards. Appendix IV does not provide the process that must take place when the State Water Board nominates an area for SWQPA-GP designation. Second, Section 10 of Appendix IV states that once a SWQPA-GP recommendation is approved, the State Water Board will amend Table V-1 to add the area that has been designated SWQPA-GP. Table V-1, however, is entitled "State Water Quality Protection Areas, Areas of Special Biological Significance." Page 39, 2009 Ocean Plan. Appendix IV should be amended to create a table that lists SWQPA-GP, similar to the list of SWQPA-ASBS.
6. Page 1, Section C.2 of the 2009 Ocean Plan specifies that enclosed bays, estuaries, and inland waters are excluded from the jurisdiction of the Ocean Plan. The proposed amendment references a number of MPAs that are estuaries, suggesting that these may be subject to future SWQPA-GP designation. The proposed amendment should respect the exclusion of enclosed bays, estuaries, and inland waters and proposed Section E(1)(a) (2) should be revised to read: "SWQPA-General Protection (GP) designated by the State Water Board to protect water quality within Marine Protected Areas (MPAs), but excluding those in enclosed bays and estuaries, that require protection under the provisions described under section 5 below." Likewise, the definition of SWQPA-GP in Appendix I should be revised to add "excluding those in enclosed bays and estuaries" at the end of the definition.

7. The description in Staff Report Sections 4.5 and 4.6 of the seven MPAs in Orange County is incomplete and the maps provide no meaningful information on where they are located.
8. The Staff Report's "No Action Alternative" has not been given sufficient consideration. The following factors point to this being an extremely viable alternative:
 - a. Currently, Ocean Plan ASBS regulations provide strong protection of water quality for the most important biological resources and habitats. The Southern California Coastal Water Research Project (SCCWRP) found over 1,600 stormwater pipes discharging into ASBS statewide without apparently degrading water quality. While comparing those ASBSs that have stormwater discharges with those that do not, SCCWRP found no statistical difference in their water quality under wet weather conditions.
 - b. Southern California Bight Regional Monitoring Programs (Bight Programs), initiated in 1994 and conducted every five years, have shown improving ocean water quality over the years.
 - c. Existing NPDES monitoring does not show degrading stormwater quality. With progressively more stringent urban source control permit requirements, it can be reasonably expected that stormwater discharges will show continued improvement with time. This is consistent with the observations of the Bight Programs.
9. Section 5.7.3 of the Staff Report, entitled "SWQPA Categories," describes a two-tiered system: "Within the SWQPA-GPs certain types of low risk discharges are allowed; however, future discharges would be prohibited." Page 36. As noted in the previous comment, the overall justification of such a significant step may be lacking. Additionally, the definition of "future discharges" should be clarified to indicate whether it pertains to new discharge pipes/drains or additional discharges into existing pipes/drains.
10. A full Water Code § 13241 and § 13242 analysis should be conducted for the Ocean Plan Amendment. The framework for designating SWQPA-GPs creates new limitations with regard to new discharges, and existing stormwater discharges and nonpoint source discharges. These new discharge prohibitions are actually new water quality standards (WQSs) with enormous economic impact, and thus should be subject to § 13241 and § 13242 analyses, including a discussion of "economic considerations," a description of "the nature of the actions which are necessary to achieve the objectives," and "time schedules for management actions and required surveillance actions." Moreover, an economic analysis is consistent with the overall MPA process, which requires consideration of "socioeconomic impacts." Fish & Game Code § 2855(c)(2).

The City of Pacific Grove estimated that it would cost the City \$43 to \$54 million to comply with certain ASBS requirements. The implementation provisions in the proposed Ocean Plan Amendment have many requirements similar to those of ASBSs, and some even more restrictive than ASBSs. The cost for the County and coastal cities of Orange County can reasonably be expected to be much higher than those projected by Pacific Grove. Delaying the full § 13241 and § 13242 analyses until Regional Board proposal of SWQPA-GP designation is *de facto* piecemealing under the California Environmental Quality Act (CEQA) and inappropriate.
11. Section E(5)(c)(4) of the Ocean Plan Amendment requires characterization and assessment of "[e]xisting discharges in SWQPA-GP." To the extent MS4 permittees are required to conduct this monitoring, this represents a significant new (and unfunded) burden on coastal communities.

Under the California Water Code, the burden of any monitoring program must bear a reasonable relationship to the need and benefits of monitoring. Water Code § 13165. The Staff Report does not identify the costs and rationale for the required monitoring, which is very extensive and appears to go beyond the monitoring required for compliance. It is difficult to determine whether the burdens imposed on an impacted party bear a reasonable relationship to any potential benefits.

12. The requirement for universal diversion of dry weather discharges to Publicly Owned Treatment Works (POTWs) has many constraining factors that require analysis:
 - a. Do POTWs have the capacity to treat dry weather runoff and does increased flow, without conventional treated pollutants (total suspended solids and biochemical oxygen demand), create operational issues?
 - b. What infrastructure is required to divert all dry weather runoff and what is the cost?
 - c. What are the permitting issues for the POTW in handling all of the diverted dry weather flow?
 - d. What are the power and treatment process impacts on greenhouse gases?

13. The water quality criteria as listed in Table 1 (Table B of the Ocean Plan) are overly stringent and difficult to achieve. It is possible, and in some cases likely, that certain “high threat” stormwater discharges need to be treated on a regional scale by POTWs or by large scale regional treatment facilities in order to meet these criteria. These treatment options are cost prohibitive for arid Southern California. Additionally, the treatment capacity at POTWs and these regional facilities will be left unused for over 90% of the time during dry weather conditions.

It should also be noted that referencing limitations in the context of MPAs creates confusion because MPAs are for the purpose of protecting wildlife and habitats, not for water quality or waste discharge purposes.

14. A full peer review is needed because much of the basis for the proposed Ocean Plan Amendment appears to be scientific in nature. The State Water Board’s Continuing Planning Process document, dated May 2001 and posted on the State Water Board’s website, requires a scientific peer review. Specifically, it states that when the State Water Board adopts “regulations which have a scientific basis, the scientific data and analysis which serve as the basis for the regulation must undergo peer review in a manner specified in law Amendments to Basin Plans and state-wide water quality control plans, including TMDLs, are peer reviewed prior to adoption by the State or Regional Board. The results of the peer review are made available to the public and become part of the administrative record of the regulatory action.” Page 16 (emphasis added). Furthermore, peer review of scientifically-based regulatory measures ensures compliance with California Health & Safety Code § 57004. *Id.* at page 34. Finally, scientific peer review is consistent with the overall MPA process, which envisions decisions “based on the best readily available science.” Fish & Game Code § 2855.

For example, the following scientific questions could be subject to peer review:

- a. What is the general health of California’s coastal ocean?
- b. What are the trends in water quality in California’s coastal ocean?
- c. Has the lack of SWQPA-GP designation caused water quality challenges in MPAs?

- d. For regulatory purposes, what can be defined as background/reference conditions, or 'natural water quality?'
 - e. What are the expected water quality benefits if SWQPA-GPs are designated?
15. Federal stormwater regulations and resultant stormwater permits provide exemptions for certain non-stormwater flows that do not pose a threat to water quality. The Ocean Plan Amendment should include similar exemption language consistent with the approach for ASBSs. Proposed Section E(5)(c)(3) should be revised accordingly.
 16. "Natural water quality" is not defined in the Ocean Plan Amendment but the term is used in multiple places, including the reference to "undesirable alterations of natural water quality" in Section E(5)(c)(6). CASQA has previously suggested helpful clarifying language that "any detectable human influence on the water quality must not hinder the ability of marine life to respond to natural cycles and processes." CASQA comments to Ocean Plan Triennial Review, 2010.
 17. Recent stormwater permits are emphasizing low impact development requirements to retain pre-development hydrology and improve the water quality of stormwater runoff. As these goals are met, new developments in coastal regions may not necessarily result in more stormwater or pollutants in the ocean than a natural coastal area. On the contrary, diverting all stormwater from future SWQPA-GP areas, as proposed by the Ocean Plan Amendment, would certainly alter the natural hydrology and salt balance of these coastal areas and should be analyzed.
 18. The regulations governing the SED require the Board to identify "any significant or potentially significant adverse environmental impacts of the proposed project." Cal. Code Regs. tit. 23, § 3772(b)(2). Also, as the Board Staff recognizes, "the State Water Board must comply with CEQA's overall objectives." Page 6, Section 3.2.

The Board Staff concludes that "the proposed amendments if adopted are not expected to result in significant impact on the environment" (page 1, Section 1.1) and the CEQA checklist attached to the Ocean Plan Amendment identifies no impacts. The purported reason for finding no impacts is that no MPA/SWQPA-GPs have been designated. Page 39, Section 5.8. However, the State Water Board staff state that once an area is designated SWQPA-GP, "[o]ther existing dischargers 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 SWQPA-GPs. Those proposing a new discharge would need to identify alternative approaches that comply with this prohibition." *Id.*

Implementation of these new control strategies will almost certainly cause adverse impacts to the areas surrounding MPAs and/or the areas to which prohibited materials are diverted. For example, while the zero trash and zero dry weather runoff requirements may not cause adverse impacts in the protected SWQPA-GPs themselves, the prohibited discharges must be diverted somewhere. It is those locations that will potentially suffer adverse impacts.

The SED cannot avoid these potential impacts by focusing narrowly on the MPAs. CEQA's definition of "project" is broad in order to "encompass 'the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment'"; thus, an agency cannot analyze the project in "piecemeal" fashion. *Planning & Conservation League v. Castaic Lake Water Agency*,

180 Cal. App. 4th 210, 235 (2009). The Board also cannot avoid these impacts by refraining from designating specific MPAs as SWQPA-GPs until after adoption of the OPA. See page 39, Section 5.8 (“staff cannot foresee which MPAs will be selected for designation”); *City of Arcadia v. SWRCB*, 135 Cal.App.4th 1392, 1426 (2006) (court rejecting State Water Board’s argument that impacts are dependent on the “speculative possibilities” of how parties comply). Moreover, Board Staff has checked “no impact” for the over 90 items on the CEQA checklist. Board Staff should provide support for the conclusions in the checklist. See *California Sportfishing Protection Alliance v. SWRCB*, 160 Cal. App. 4th 1625, 1645 (2008) (court distinguishing an analysis where “ramifications [were] thoroughly described” and which “evaluate[d] environmental impacts . . . in all pertinent areas of consideration” from an unacceptable scenario where the agency “merely offer[s] a checklist that denie[s] the project would have any environmental impact.”)

The SED and CEQA checklist should include a more in depth analysis of potential environmental impacts.

19. The regulations governing the SED also require the Board to identify “mitigation measures to avoid or reduce any significant or potentially significant adverse environmental impacts.” Cal. Code Regs. tit. 23, § 3772(b)(3). The SED lacks a discussion of mitigation measures, however. The Board Staff’s position that it need not identify mitigation measures because there is “no fair argument” that the methods of compliance will cause any environmental impacts (page 39, Section 5.8) appears conclusory because it has not identified methods of compliance (see below). And, as discussed above, compliance with the OPA will likely result in potential adverse impacts.
20. The SED also needs to analyze the “reasonably foreseeable methods of compliance.” Cal. Code Regs. tit. 23, § 3772(b)(4). The SED lacks identification or discussion of compliance methods. For example, proposed Sections E(5)(c)(2) & (3) prohibit trash and dry weather runoff discharges, but the SED does not identify potential methods of complying with these prohibitions. Again, State Water Board staff simply state that it need not analyze alternative methods of compliance because there is “no fair argument” that the methods of compliance will cause any environmental impacts. Page 39, Section 5.8. Additionally, because the State Water Board staff has identified no methods, it has not met the additional SED requirements contained in Cal. Code Regs. tit. 23, § 3777(b)(4), namely, discussing adverse impacts of, alternatives to, and mitigating measures for, the methods of compliance.
21. California’s Administrative Procedure Act (APA), which contains rulemaking procedures and standards for California agencies, applies to the Ocean Plan Amendment. See Gov’t Code § 11346 (applies to “exercise of quasi-legislative power conferred by any statute”). The APA requires that regulations must satisfy certain standards, including “necessity” and “clarity.” *Id.* §11349.1(a).

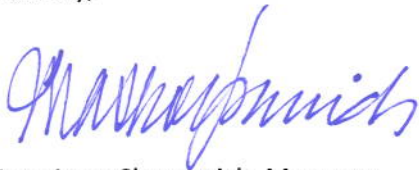
It does not appear that the Ocean Plan Amendment meets the “necessity” standard. As noted above, the Legislature intended that MPA planning process be a regional process, given the uniquely regional characteristics of California’s marine areas. State Water Board staff has not shown why regional agencies cannot continue to designate and issue regulations to protect non-ASBS MPAs, or why it is necessary that the State Water Board assume management of this issue.

Additionally, it does not appear that the Ocean Plan Amendment meets the “clarity” standard, which requires that the “meaning of regulations [] be easily understood by those persons

directly affected by them. *Id.* §11349(c). As the comments above explain, there are several points of ambiguity regarding the Ocean Plan Amendment's scope, applicability, and requirements. The definition of SWQPA-GP, the application of Section E(5)(c) to existing MS4 stormwater discharges, and what methods may be used to comply with the prohibitions in Section E(5)(c) are just a few of the areas of uncertainty created by the Ocean Plan Amendment.

Thank you again for the opportunity to provide comments. Please contact Chris Crompton at (714) 955-0630 or Jian Peng at (714) 955-0651 if you have questions on technical/scientific comments or Ryan Baron at (714) 834-5206 if you have questions on legal/regulatory comments.

Sincerely,



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