



April 18, 2012

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 15th Floor
P.O. Box 100
Sacramento, CA 95814-0100
Sent via electronic mail: commentletters@waterboards.ca.gov



RE: Comment Letter – Ocean Plan Amendment, SWQPA

Dear Chair Hoppin and Board Members:

On behalf of California Coastkeeper Alliance, Heal the Bay, Natural Resources Defense Council, Surfrider Foundation, Orange County Coastkeeper, and Santa Barbara Channelkeeper, we welcome the opportunity to provide comments on the draft Substitute Environmental Document (“Draft SED”) and proposed California Ocean Plan Amendment on State Water Quality Protection Areas and Marine Protected Areas (“Amendment”). Polluted discharges to nearshore waters can contaminate fish and shellfish and trigger a cascade of public health, ecological, and economic impacts for California communities. Strong protections for coastal water quality, especially within Areas of Special Biological Significance (“ASBSs”) and Marine Protected Areas (“MPAs”), are vital to California’s ocean health and coastal economy. The Ocean Plan is critical to ensuring the health and vitality of California’s marine and coastal ecosystems. Additionally, marine water quality will play a key role in the success of MPAs established pursuant to the California Marine Life Protection Act (“MLPA”) Initiative.

As several of our groups have stated in previous comment letters and oral testimony, we believe that there is no need to formally amend the Ocean Plan to address State Water Quality Protected Areas (“SWQPAs”). In November 2010, the State Water Resources Control Board (“State Water Board”) adopted Water Board Resolution 2010-0057¹ in response to concerns raised by Los Angeles County Sanitation Districts (“LA County Sanitation”) about the potential for the State Water Board to take future action to implement stricter water quality standards in the South Coast MPAs adopted by the Fish and Game Commission under the MLPA. We believe that Resolution 2010-0057 provided sufficient clarity regarding the regulation of SWQPAs, and do not support further State Water Board action to address this individual entity’s complaints.

Further, amending the Ocean Plan to restrict and proscribe the State Water Board’s ability to regulate water quality in the future is unwise and unnecessary. The Ocean Plan makes clear that “[t]he discharge of waste shall not cause violation of [water quality] objectives” established to ensure the protection of beneficial uses. Marine protected areas preserve and enhance many already-listed beneficial

¹ State Water Resources Control Board Resolution No. 2010-0057, available at:
http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2010/rs2010_0057.pdf.

uses, including: designated ASBS; rare, threatened and endangered species; marine habitat; migration of aquatic organisms; spawning, and reproduction and/or early development of fish. Further, the new regulations, as described in the current Draft SED and Amendment, constrains the public's ability to recommend new SWQPAs as described in the Marine Managed Areas Improvement Act ("MMAIA").

We are concerned that several provisions in the proposed Amendment would undermine holistic protection of these areas, including that afforded by statewide MLPA implementation. If the State Water Board moves forward with an Ocean Plan amendment on SWQPAs (which we believe is unnecessary and unwarranted), we recommend edits in Attachment 1 to ensure that the proposed Amendment is consistent with federal and state laws, and is compatible with the implementation of the MMAIA, the General Exception to the California Ocean Plan Waste Discharge Prohibition, for Selected Storm Water and Nonpoint Source Discharges into ASBS and the MLPA. The rationale for these recommended changes is provided by section below.

Municipal Point Source Wastewater Discharge Outfalls (Provision 2)

The State Water Board has a legal mandate to protect water quality in MPAs and SWQPAs under federal and state law. Provision 2, as currently drafted provides that:

No new or modified limitations, substantive conditions, or prohibitions (beyond those in existing law, regulations and water quality control plans) will be imposed upon existing municipal point source wastewater discharge outfalls based on any MPAs designated as State Marine Parks and State Marine Conservation Areas.

This provision is at odds with the primary purpose of the Ocean Plan to protect "the quality of the ocean waters for use and enjoyment by the people of the State" which "requires control of the discharge of waste to ocean waters."² Provision 2 inappropriately carves out a blanket exception for continued municipal wastewater discharge and possible water quality and marine life and habitat degradation in MPAs.

The intent of MPA designations under the MLPA, and SWQPAs under the authority of the MMAIA is to protect important marine life, ecosystems, habitats and/or resources from negative impacts, including undesirable alteration of natural water quality and/or biological communities from any source. These laws do not include language supporting exceptions for existing municipal wastewater dischargers. In fact, MMAIA Section 36710(f) distinguishes nonpoint source controls with the expressed limitation of regulating discharges "to the extent practicable."³ There is no similar language in that section qualifying an exemption for point source discharges.

The State Water Board should help facilitate the effective implementation of MPAs through the Ocean Plan. At a minimum, the Board should refrain from formal adoption of an exemption that prohibits future regulation protecting ecologically important areas. Such regulation would be wholly appropriate if wastewater is causing or contributing to degradation of marine life, habitat, and/or water quality in nearby MPAs (or unprotected waters). Ironically, as written, the amendment may be interpreted to provide an exemption for wastewater discharges near an MPA that would not be exempted in the absence of a nearby MPA. The amendment could also have the bizarre effect of preventing a regulation change warranted more broadly by new information on impacts, undermining both the

² State Water Resources Control Board Water Quality Control Plan, Ocean Waters of California 2009, available at: http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/2009_cop_adoptedeffective_usepa.pdf.

³ Marine Managed Areas Improvement Act, Cal. Pub. Res. § 36710(f) (2000).

established 5-year review process and the intent of the Clean Water Act to modify permits for new threats, as well as new technology and practices to improve water quality.

The scope of protection afforded by newly designated SWQPAs should be strict yet flexible to be consistent with the “technology forcing” policies embedded in current law. For example, the ongoing nature of research on the impacts of “contaminants of emerging concern,” advanced treatment for wastewater reuse, and other foreseeable and unforeseeable developments in science and technology argue against the exemptions in section 2 of the current draft.

Therefore, we recommend revising Provision 2 to explicitly state that the designation of an MPA *alone* will not trigger additional regulation; yet if water quality, marine life, and/or habitat within MPAs are being degraded, such regulation is appropriate and necessary, and is consistent with the comprehensive and holistic benefits embodied in the intent and letter of the MMAIA.

Further, we disagree with the assertion in the Draft SED that stricter regulations of discharges from wastewater treatment facilities would jeopardize the State’s goal to advance the use of recycled wastewater.⁴ In fact, the opposite is true. Past experience in Orange County, and current efforts in San Diego, suggest that strict enforcement of water quality objectives in NPDES permits can result in the advancement of recycled wastewater.

Implementation for SWQPAs-GP (Provision 5)

Provision 5 includes several implementation provisions for SWQPAs-GP which change existing Ocean Plan requirements in an arbitrary and inconsistent way. Additionally, the provisions create different water quality standards for SWQPAs-GP and SWQPAs-ASBS. This framework will be confusing and resource-intensive to implement for both Board staff and dischargers, particularly in the many areas along the coast where MPAs and ASBSs overlap.⁵

As described below, some of these amendments are duplicative with existing Ocean Plan standards, while others are potentially confusing to implement. For example, Section 2 in combination with Section 5 (a) (1) are confusing in that they seem to limit the existing authority to constantly update wastewater discharges under existing law, as well as limit new authority to establish SWQPAs under a strict read of the MMAIA. We recommend several revisions to sections of Provision 5 to improve this section, for clarification and assurance that the proposed Amendment cannot be read in a manner that would undermine the intent and letter of the MMAIA and other existing laws.

Implementation provisions for existing point source wastewater discharges

Provision 5(a)(1), states that “a SWQPA-GP shall not be designated over existing permitted point source wastewater discharges or encroach upon the zone of initial dilution associated with an existing discharge,” but limits the requirement to discharges over one million gallons per day (“MGD”). No justification for the proposed 1 MGD limit is included in the proposed Amendment or draft SED. By constraining the areas where SWQPAs-GP can be designated on the volume of wastewater discharge, certain areas, such as the MPAs along the Palos Verdes Peninsula, may merit designation of a SWQPA-GP, yet be limited because of this seemingly arbitrary threshold. This language is contrary to the intent of

⁴ See draft Substitute Environmental Document for the proposed California Ocean Plan Amendment on State Water Quality Protection Areas and Marine Protected Areas at p. 33.

⁵ For a map of the overlay of MPAs and ASBSs, see www.cacoastkeeper.org/programs/healthy-marine-habitats/ASBS.

the MMAIA section 36710 (f) which expressly contemplates "...point source waste and thermal discharges shall be prohibited or limited by special conditions." Further, this blanket exemption for existing point source wastewater discharges inexplicably undermines the provisions allowing public proposals, and the required information justifying the adoption of new WQPAs, as articulated in the MMAIA sections 36900 and 36850.

We recommend that this provision be removed from the proposed Amendment in order to protect the statutory provisions allowing the public to submit a proposal for reasonable new regulations in the form of a SWQPA for existing wastewater discharges. At a minimum, we ask the State Water Board to identify the scientific and legal basis for the 1 MGD threshold.

Implementation provisions for existing and new seawater intakes

We support the inclusion of Provision 5(b), which designates SWQPAs-GP implementation provisions for existing seawater intakes. Seawater intakes for coastal power plants, ocean desalination, and other industrial uses cause significant marine life mortality associated with entrainment and impingement. Intake systems also pose a clear threat to the success of MPAs, as is directly articulated in the report prepared by the MLPA Master Plan Science Advisory Committee – *Draft Recommendations for Considering Water Quality and Marine Protected Areas in the MLPA South Coast Study Region* (April 20, 2009).

It is worth noting that the State Board has already taken steps to minimize the intake and mortality of all marine life with the adoption of the Policy on Cooling Water Intakes (OTC Policy)⁶, and is currently working on similar guidance for ocean desalination seawater intake standards. In fact, the inclusion of interim mitigation measures in the OTC Policy to attempt to replace marine life lost to entrainment and impingement, prior to power plants coming into compliance with the Policy, includes the option to fund MLPA enhancement projects.

Therefore, we support the inclusion of Provision 5(b) to control against entrainment and impingement in SWQPAs-GP. However, we are concerned that Provision 5(b)(1) does not apply to intakes less than 1 MGD. Consistent with our recommendation regarding point source wastewater discharges, we recommend the exemption for facilities smaller than 1 MGD be removed. At a minimum the 1 MGD threshold must be conditioned on a showing that retrofitting the existing intake with superior technology is infeasible. Also, to the extent these lesser volume intakes are exempted to allow scientific facilities conducting research, we believe the provisions in the MLPA allowing permitted "take" for scientific purposes is the more appropriate vehicle for these facilities.

Further, we strongly support Provision 5(d)(2), which details a clear prohibition of new seawater intakes within MPAs. Additionally, we recommend that new seawater intakes between MPAs be strictly regulated, as the cumulative impacts of marine life mortality associated with entrainment and impingement could seriously threaten the network benefits of the MPAs established under the MLPA. Therefore, we recommend the State Water Board include an additional provision under 5(d)(2) that addresses the potential cumulative impacts associated with new seawater intakes.

While we advocate a comprehensive and holistic approach to ensuring the new network of MPAs are fully successful, avoidance of any impact that would undermine success is the preferable alternative

⁶ State Water Resources Control Board, Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, adopted October 2010. Available at: http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/policy100110.pdf.

and sound public policy. Therefore, we have included recommended edits to sections 5(b) and 5(d)(2) in order to ensure clarity in the definitions and regulations of future SWQPAs to ensure the strictest protection of marine ecosystems in these special places.

Implementation provisions for wet weather storm water and non-storm water (dry weather flow) from storm drains, and nonpoint source discharges

Currently, Provision 5(c)(1) defines an undesirable alteration of natural water quality as that which exceeds Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity. We ask the Board to explain the rationale behind this definition.

We are concerned that the language in Provision 5(c)(4) “to determine what effect if any these inputs are having on natural water quality” suggests a bias at the outset in the analysis of discharges into SWQPAs-GP. Therefore, we recommend amending the language in this provision to include monitoring, and focus the question on whether any alteration to natural water quality is occurring.

Moreover, we urge the Board to clearly define the ranking approach outlined in Provision 5(c)(4). The current language fails to delineate how staff should rank threats, making it exceedingly difficult to implement this provision. The proposed Amendment should clarify how Board staff will set and implement rankings. Similarly, the current language in Provisions 5(c)(6) and 5(c)(7) seem to require a value judgment on whether or not alterations in natural water quality are “undesirable.” Such value judgments are subjective, and would be difficult for Regional Water Quality Control Boards to implement consistently throughout the state. Instead, we recommend basing this provision and the associated triggers for water quality improvement on whether or not natural water quality is being met. If natural water quality is not met, that is by definition, an undesirable alteration.

Additionally, the threat ranking approach proposed in current Amendment language is too vague to be implemented effectively and consistently across regions. It provides no specificity to dischargers, Water Board staff, and the general public as to how threats would be ranked, and what constitutes a “high” threat. It is also inappropriate to ignore alterations to natural water quality that may fall into the low or medium threat categories. If natural water quality is not being met, water quality improvements are needed. Instead, we recommend a more simple approach that requires water quality improvements in SWQPAs-GP where natural water quality is not being met.

Impaired Tributaries to MPAs, SWQPA ASBS and SWQPA GP (Provision 6)

We strongly support the Board’s prioritization of total maximum daily load (“TMDL”) development for impaired MPAs and SWQPAs, as well as impaired tributaries that drain to impaired MPAs and SWQPAs.

The undersigned organizations are dedicated to protecting coastal resources and water quality throughout California. We have spent significant time working to ensure successful implementation of State’s new MPAs under the MLPA, and will continue to work towards holistic protection of these ecologically important areas. We have also worked for many years to protect against marine life mortality from once-through cooling systems on coastal power plants, and look forward to the State Water Board’s adoption of similar protections from seawater intakes for proposed ocean desalination facilities.

Although we think the proposed Amendment is unnecessary, we recognize that the State Water Board is moving forward with it. We recognize that the State Water Board sees this Ocean Plan Amendment process as an opportunity to establish a framework for water quality protection in SWQPAs; however as currently written, it falls short of this opportunity, and may actually compromise protection in these new underwater parks. We strongly urge the State Water Board to revise the proposed Amendment as proposed in this letter so that is compatible with the goals of the MLPA, MMAIA, and other statutes to protect the natural diversity and abundance of marine life; to protect the structure, function, and integrity of marine ecosystems; and to help sustain marine life populations.

Thank you for the consideration of these comments. Please contact us if you have any questions.

Sincerely,



Sarah Abramson Sikich
Coastal Resources Director
Heal the Bay



Sara Aminzadeh
Policy Director
California Coastkeeper Alliance



Joe Geever
Water Programs Manager
Surfrider Foundation



Karen Garrison
Co-Director, Oceans Program
NRDC



Kira Redmond
Santa Barbara Channelkeeper



Garry Brown
Orange County Coastkeeper

Attachment 1

7 Proposed Amendments¹

7.1 Draft text of the amendments proposed by Staff to Chapter III - Program of Implementation

E. Implementation Provisions For Areas* of Special Biological Significance (ASBS) Marine Managed Areas*

1. Section E addresses the following Marine Managed Areas*:

(a) State Water Quality Protection Areas (SWQPAs)* consist of:

- (1) SWQPA – Areas of Special Biological Significance (ASBS) designated by the State Water Board that require special protections as defined under section 4 below.
- (2) SWQPA – General Protection (GP)² designated by the State Water Board to protect water quality within Marine Protected Areas (MPAs), or other unique and sensitive areas, that require protection under the provisions described under section 5 below.

(b) Marine Protected Areas as defined in the California Public Resources Code as State Marine Reserves, State Marine Parks and State Marine Conservation Areas, established by the Fish and Game Commission, or the Parks and Recreation Commission.

2. The designations of State Marine Parks and State Marine Conservation Areas cannot serve as the sole basis for ~~new or modified limitations, substantive conditions, or prohibitions (beyond those in existing law, regulations and water quality control plans) will be imposed upon existing municipal point source wastewater discharge outfalls based on any MPAs designated as State Marine Parks and State Marine Conservation Areas.~~ This provision does not apply to State Marine Reserves.

3. The State Water Board may designate SWQPAs* to prevent the undesirable alteration of natural water quality within MPAs. These designations may include either SWQPA-ASBS or SWQPA-GP or in combination. In considering the designation of SWQPAs over MPAs, the State Water Board will consult with the affected Regional Water Quality Control Board, the Department of Fish and Game and the Department of Parks and Recreation, in accordance with the requirements of Appendix IV.

4. Implementation Provisions For SWQPA-ASBS*

- 1(a) Waste* shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.

¹ P. 41 of Draft Staff Report and Substitute Environmental Documentation for the Amendment of the Water Quality Control Plan For Ocean Waters of California Addressing Implementation of State Water Board Resolutions 2010-0057 and 2011-0013 Designating State Water Quality Protected Areas to Protect State Marine Protected Areas. (January 6, 2012) http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/oplans/swqpa_rpt.pdf

² Designated by the State Water Board to maintain natural water quality in order to protect or conserve marine life and habit within State Marine Parks and State Marine Conservation Areas.

1(b) Regional Boards may approve waste discharge requirements or recommend certification for limited-term (i.e. weeks or months) activities in ASBS*. Limited-term activities include, but are not limited to, activities such as maintenance/repair of existing boat facilities, restoration of sea walls, repair of existing storm water pipes, and replacement/repair of existing bridges. Limited-term activities may result in temporary and short-term changes in existing water quality. Water quality degradation shall be limited to the shortest possible time. The activities must not permanently degrade water quality or result in water quality lower than that necessary to protect existing uses, and all practical means of minimizing such degradation shall be implemented.

5. Implementation Provisions for SWQPAs-GP*

(a) Implementation provisions for existing point source wastewater discharges

~~(1) An SWQPA-GP shall not be designated over existing permitted point source wastewater discharges or encroach upon the zone of initial dilution associated with an existing discharge. This requirement does not apply to discharges less than one million gallons per day.~~

~~(2)~~(1) Designation of an SWQPA-GP shall not include conditions to move existing point source wastewater outfalls.

(b) Implementation provisions for existing seawater intakes

(1) Existing permitted seawater intakes must be controlled to minimize entrainment and impingement by using best technology available. ~~Existing seawater intakes of less than one million gallons per day may implement alternative technologies to minimize the intake and mortality of marine life, but only after showing the "best" available technology is not feasible. "Not feasible" shall be defined as not being technologically feasible or incompatible with other laws, but shall not be determined by cost. Existing seawater intakes less than one million gallons per day are excluded from this requirement.~~

(c) Implementation provisions for wet weather storm water³ and non-storm water (dry weather flow) from storm drains, and nonpoint source discharges.

~~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. storm runoff) discharges, Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity, must not be exceeded in the receiving water.~~

~~(1) Stormwater and nonpoint discharges shall not cause an undesirable alteration in natural water quality.~~

~~(4)~~(2) The discharge of trash is prohibited.

³ Permitted point source storm drain discharges are synonymous with storm water drains.

~~(2)~~(3) Non-storm water flows are effectively prohibited as required by the applicable permit. Where capacity and infrastructure exists, all dry weather flows shall be diverted to municipal sewer systems

~~(3)~~(4) Existing discharges into SWQPA-GP shall be characterized ~~and~~, assessed, and monitored to determine if these inputs are causing any alteration to what effect if any these inputs are having on natural water quality in the State Water Quality Protection Area. Such assessments and monitoring shall follow existing best-practice methodology and interpretation employed for assessing status and potential impacts to SQWRPA-ASBS designated areas. This shall include an evaluation of cumulative impacts as well as impacts stemming from individual discharges. Information to be considered shall include, but are not limited to:

- a. Water quality;
- b. Flow;
- c. Watershed pollutant sources; and
- d. Intertidal and ~~for~~ subtidal biological surveys.

Within each SWQPA-GP the assessment shall be used to rank these existing discharges into low, medium and high threat impact categories. Cumulative impacts will be ranked similarly as well.

~~(4)~~(5) An initial analysis shall be performed of pre- and post-storm receiving water quality during a storm event for Table 1 constituents. 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 water shall be re-analyzed along with storm runoff (end of pipe) for the constituents that are exceeded.

~~(5)~~(6) If natural water quality is not met ~~undesirable alterations of natural water quality and/or biological communities are identified~~, the Board will require the implementation of control strategies/measures until natural water quality is met. ~~C~~control strategies/measures shall be implemented for those dischargers characterized as a high threat or those contributing to higher threat cumulative impacts first.

~~(6) If those strategies fail, additional control strategies/measures will be implemented for dischargers characterized as medium impact dischargers. If these strategies do not result in improvement of water quality, those discharges classified as low threat shall also implement control strategies/measures.~~

(d) Implementation Provisions for New Discharges

(1) Point Source Wastewater Outfalls

No new point source wastewater outfalls shall be established within SWQPA-GP.

(2) Seawater intakes

(a) No new seawater intakes shall be established within SWQPA-GP.

(b) New seawater intakes proposed outside SWQPAs shall utilize the best technology available to minimize entrainment and impingement, and first be evaluated by the State Water Board for any negative cumulative impacts that may compromise the network functionality of California's MPAs.

- (c) New seawater intakes outside the SWQPAs likely to interfere with the transport or migration of all forms and life stages of marine life, shall be prohibited when the area affected would overlap with another seawater intake.
- ~~(a)~~(d) Provision 2 (ii) would not apply to sub-seafloor intakes where studies are prepared showing there is no predictable entrainment or impingement of marine life.

(3) All Other New Discharges

There shall be no increase in nonpoint sources or permitted storm drains into SWQPA-GP.

6. Impaired Tributaries to MPAs, SWQPA ASBS and SWQPA GP

(a) All water bodies draining to , or that are designated as, MPAs and SWQPAs that appear on the State's CWA Section 303(d) list shall be given a high priority to have a TMDL developed and implemented.