

ASBS General Exception and Special Protections

March 20, 2012

Agenda

- Who we are
- The State Board has the discretion to regulate discharges into ASBS based on potential impact
- Historical regulation of storm flows to ASBS did not ban discharges
- Natural water quality test will result in “false positives”
- Water quality in ASBS is generally good
- The program is not feasible and would entail extraordinary cost for a benefit that has not been shown
- The Environmental Impact Report (EIR) is legally deficient

Who we are



We are concerned local communities

- Carmel-by-the-Sea
- City of Pacific Grove
- Pebble Beach Company



Carmel-by-the-Sea

- Carmel-by-the-Sea is one square mile in size and has approximately 4,000 residents.
- Carmel-by-the-Sea has limited resources to handle stormwater management, and would need to choose between providing basic services such as police, fire, and roads services, and complying with stormwater mandates. The city has been greatly impacted by the economic recession. In 2003, Carmel-by-the-Sea had 89 full time employees, and it now has 66.
- Carmel Beach is ranked as one of the nation's cleanest and most beautiful beaches.



City of Pacific Grove

- Pacific Grove is the sixth largest city in Monterey County, with a population of 15,041 (2010).
- Pacific Grove has a Proposition 84 ASBS grant which includes installation of dry weather diversions on two storm drain outfalls, construction of a stormwater treatment wetland, and other water quality improvement measures.
- Pacific Grove residents and visitors alike enjoy the Shoreline Park Network which includes 23.4 acres of parks and recreational areas on the coastal edge of the city.



Pebble Beach Company

- Pebble Beach Company (PBC) resorts are situated on 5,300 acres of coastal Monterey Peninsula property.
- PBC goes to great lengths to protect water resources, using reclaimed water for 100% of its golf course irrigation needs and maintaining a robust stormwater pollution prevention program. It is the sole fiscal sponsor of a \$67M wastewater reclamation project that enables reuse of locally generated wastewater and vastly reduced the amount of wastewater previously discharged into Carmel Bay.
- PBC's commitment to the environment has been recognized by receipt of awards such as the US EPA's Pesticide Environmental Stewardship Award, CalRecycle Waste Reduction Award Program, Cal. EPA's Innovator Award for Integrated Pest Management, and the Monterey County Hospitality Association Environmental Achievement Award, among others.



**The State Board has the
discretion to regulate
discharges into ASBS based on
potential impacts**

The State Board has the discretion to regulate discharges into ASBS based on potential impacts

- A detection-based approach is not mandated by the Porter-Cologne Act, the Ocean Plan, or the Public Resources Code.
 - See Paul Singarella and Kelly Richardson, When Water Becomes Waste: A Call for a Practical Approach to Regulating Stormwater Discharges, *Environs Environmental Law and Policy Journal* (2008).
- The State Board has been erroneously advised that a detection-based approach is required.
 - E.g., “State Water Board staff maintains that storm water contains waste, and waste discharges to ASBS are prohibited unless an exception is adopted.”

The State Board has the discretion to regulate discharges into ASBS based on potential impacts (cont.)

- This failure to acknowledge the State Board's discretion to regulate the discharges into the ASBS based on the quality of the discharges and potential impacts renders these proceedings an abuse of discretion.
 - “CEQA’s policy of promoting informed decisionmaking leads to the conclusion that a prejudicial abuse of discretion occurs when a public agency is misinformed regarding its discretionary authority and, as a result, does not actually choose whether to exercise that discretionary authority.” *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1063.

The State Board has the discretion to regulate discharges into ASBS based on potential impacts (cont.)

- Porter-Cologne and the Public Resources Code focus on receiving waters; it is harmful concentrations of pollutants in stormwater that can render such runoff a discharge of “waste.”
 - ASBS are a subset of the “state water quality protection areas,” which are defined as: “. . . a nonterrestrial marine or estuarine area designated to protect marine species or biological communities from an undesirable alteration in natural water quality, including, but not limited to, areas of special biological significance that have been designated by the State Water Resources Control Board through its water quality control planning process.” Cal. Pub. Res. Code 36700(f) (emphasis added.)
- The focus is on the ASBS receiving waters – not the number of detectable molecules present in incoming flows from the adjacent land mass.
- The State Board is not required to implement an inflexible exception-based program for regulating runoff to ASBS, where all such runoff is deemed to be “waste.”

The Ocean Plan does not include a detection-based prohibition on discharges to ASBS

- The 2009 Ocean Plan defines ASBS as: “those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable.”
 - This does not suggest that all discharges with detectable waste are prohibited.
- If the State Board interprets the Ocean Plan to include a detection-based prohibition on discharges to ASBS, it should evaluate amending the Ocean Plan to regulate discharges based on potential impacts.
- The EIR already lists one alternative that includes amending the Ocean Plan—so clearly amending the Ocean Plan in this way is feasible.
- And staff is recommending amending the Ocean Plan in the next triennial review to address storm runoff.

**Historical regulation of storm
flows to ASBS did not ban
discharges**

Historical regulation of storm flows to ASBS did not ban discharges

- 1975: “Discharge of waste from non-point sources, including...storm-water runoff...will be controlled to the extent practicable... for waste from nonpoint sources, Regional Boards will give high priority to areas tributary to ASBS.” LA Basin Plan (emphasis added).
- 1975: “Existing wastewater and/or heat discharges [point source discharges] which influence that natural water quality in the designated [ASBS] areas must be phased out...” LA Basin Plan.

Historical regulation of storm flows to ASBS did not ban discharges

- 1991: “throughout the years, many documents have treated storm water discharge as a nonpoint source, even though it is legally a point source...it is often obvious...that decision makers have sought to exclude storm water from requirements otherwise applicable to point sources.” SWRCB Order No. WQ 91-04 (emphasis added).

Historical regulation of storm flows to ASBS did not ban discharges

- 2000: “Municipal storm water dischargers are required to reduce discharge of pollutants ‘to the maximum extent practicable’ utilizing ‘best management practices’...” SWRCB, 2000 Ocean Plan FED.

The proposed regulatory approach is not supported by sound science

**Natural water quality test will result in “false positives”
Water quality in ASBS is generally good**

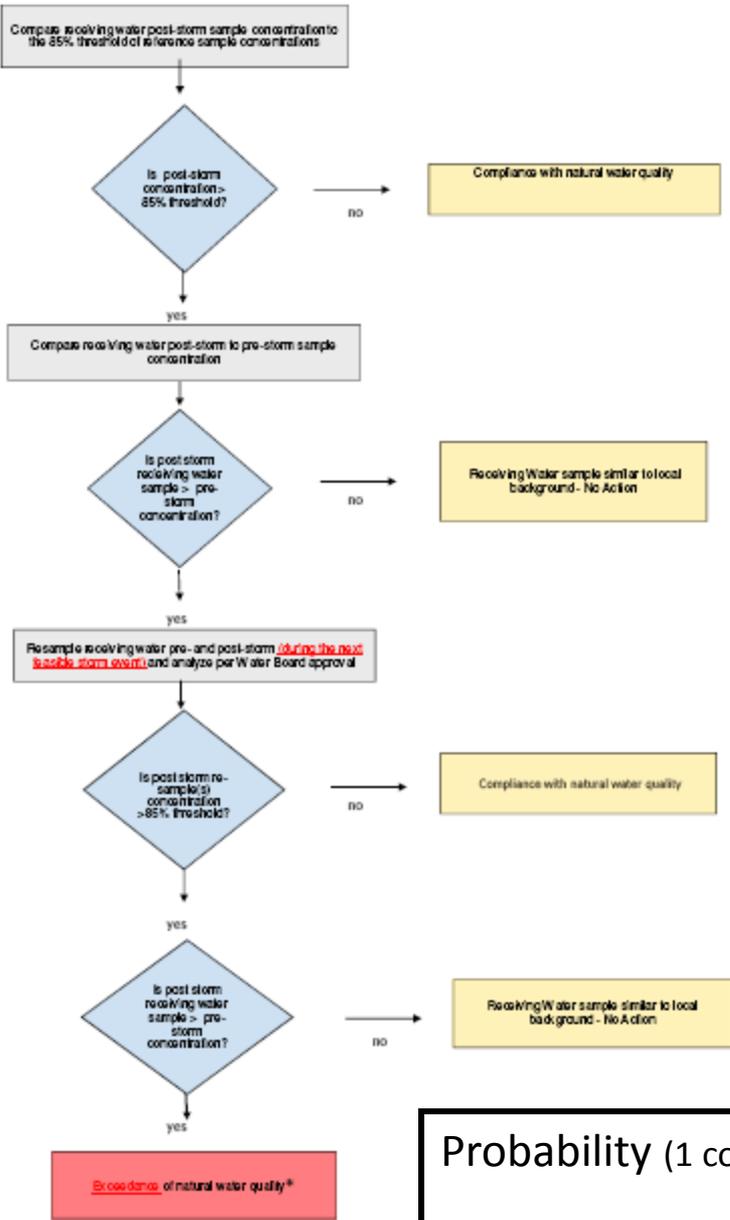
The special protections rely on vague, unproven features

- The special protections contain a number of features that have no prior basis in water quality regulation and have not been established as scientifically sound.
 - This is arbitrary and capricious.
 - For example, the response to comments admits: “The use of the 85th percentile is not substantiated because it is a policy recommendation, rather than a scientifically derived value, proposed by State Water Board staff to address the uncertainty in the use of reference site data.”
- Aspects of the special protections are so vague and ambiguous that they do not provide permittees with reasonable notice of their compliance obligations.
 - Reference sites in northern California have not even been defined and reference water quality has not been established.
 - This violates due process. Due process requires a regulation to be clearly defined in order to provide fair notice to the public and to avoid arbitrary and discriminatory application of the standard. *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1400.

Evaluation of Natural Water Quality test

- Hypothesis: if we assume:
 - ASBS water quality is the same on average as reference area water quality, AND
 - Post-storm water quality is the same on average as pre-storm water quality
- What is probability of exceeding Natural Water Quality (NWQ)?

Attachment 1
Special Protections Sections 1(A)(3)(e) and 1(B)(3)(e)
Flowchart to Determine Compliance with Natural Water Quality



Probability of NWQ exceedance (assuming ASBS=reference)

Step 1: $p = 0.15$

Step 2: $p = 0.50$

Step 3: $p = 0.15$

Step 4: $p = 0.50$

Probability (1 constituent, 1 event):

$p (>NWQ) = 0.005625$

$p (>NWQ) = 0.56\%$

Cumulative probability of NWQ exceedance

- *For each event, 39 constituents are analyzed*

$$p (>NWQ) = 19.8\%$$

- *Each year, 3 events are analyzed*

$$p (>NWQ) = 48.3\%$$



Likelihood of finding NWQ exceedance (when ASBS = reference) in any monitoring year is **48%**

Alternatives to NWQ test

- SWRCB could consider:
 - Alternative threshold (e.g., 95% would result in 7% “false positives” per year)
 - Statistical tests (e.g., US EPA-recommended statistical tests, such as student’s t-test or Wilcoxon rank sum test)

NWQ test cannot identify non-ASBS causes

- Stormwater plumes from rivers reach ASBS areas



Southern California Bight stormwater plumes
(Source: www.sccwrp.org)



Orange County Coast

(Source:
www.beachapedia.org)

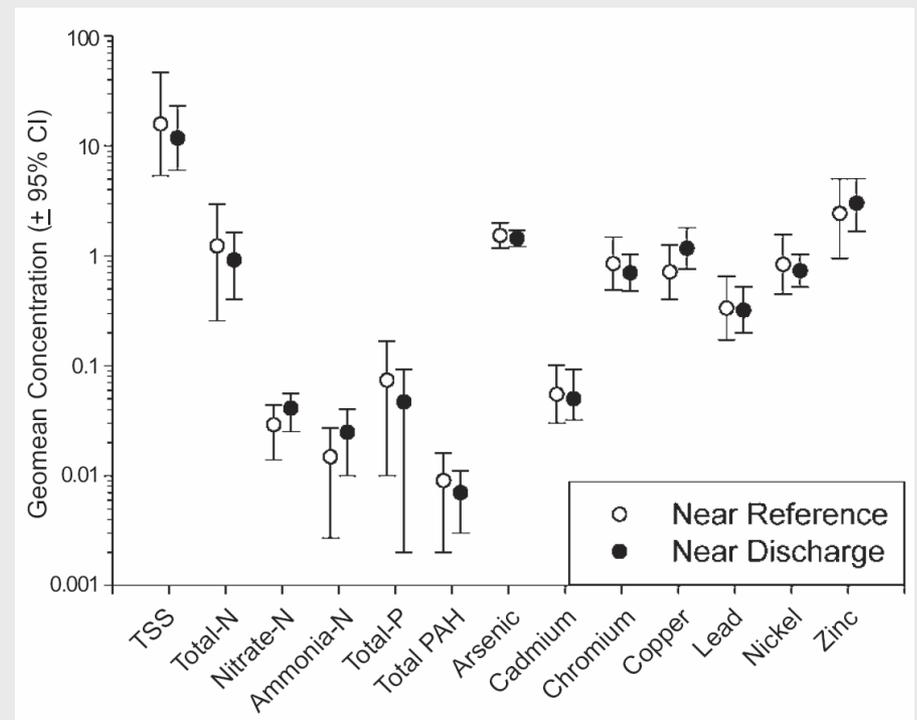


Gaviota Coast

(Source: www.ices.ucsb.edu,
from Mark Defeo, Santa
Barbara News Press, 1998)

High water quality is present in ASBS

- SCCWRP (2010): “...ASBS in southern California are consistently protective of natural water quality following storm events.”
- Monitoring should be conducted to determine if problems exist in other ASBS, before requiring extensive protections.



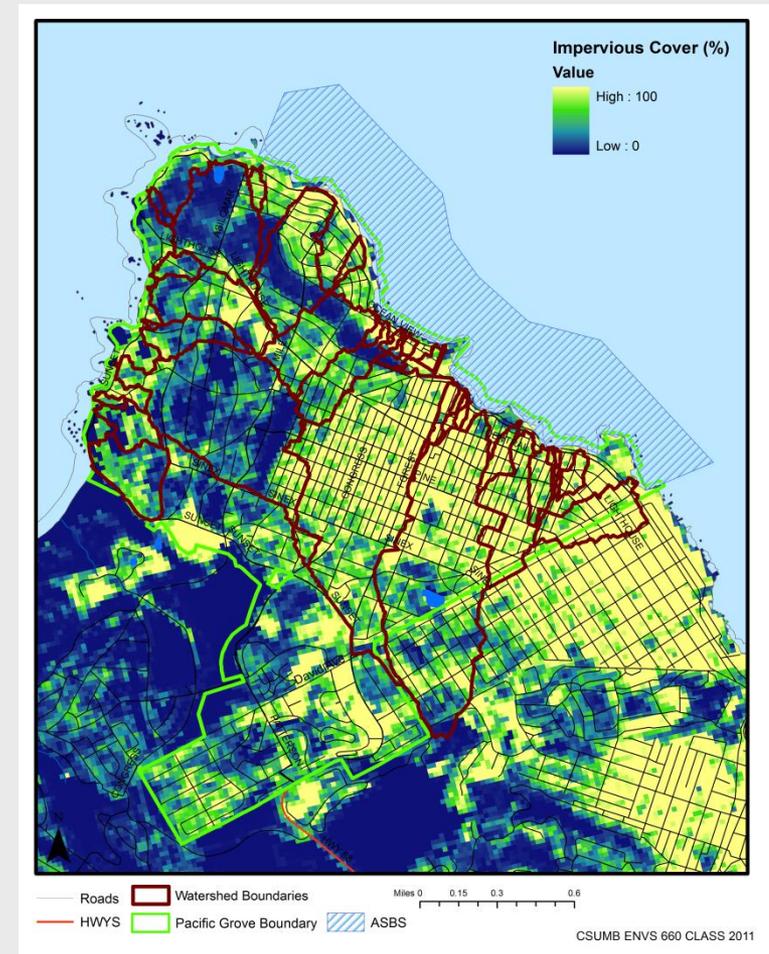
**The program is not feasible and
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shown**

The special protections would have significant costs to Pacific Grove

- The total potential estimated cost for Pacific Grove to comply could be between \$8,500,000 and \$49,000,000.
 - Additional phases of urban dry weather diversion facilities may be necessary at an approximate cost of \$3,000,000. Pacific Grove may need to expand an existing dry weather diversion facility, which may require extensive additional piping and additional pumping.
 - Pacific Grove may need to install vortex separators and drain inserts at an approximate cost of \$1,260,000, as well as implement other measures.
 - Ongoing costs and non-structural controls could cost approximately \$900,000/year.
- Proposition 84 grant funds are insufficient to meet the special protection requirements.
- Should Pacific Grove have to undertake a stormwater recycling project, this could cost the City an amount to the tune of \$40,000,000 (according to a 2008 estimate).

The special protections are infeasible for Pacific Grove

- It may be technically infeasible for Pacific Grove to reduce wet weather pollutant loads by 90% in the built out, urbanized setting. Pacific Grove would need a much larger area for filtration and retention. But the City has fewer than 100 vacant lots.
- The remedy of time for physical impossibility is insufficient. More time will not help Pacific Grove meet technically infeasible requirements.



The special protections would have significant costs to Pebble Beach and Carmel-by-the-Sea

- Like Pacific Grove, Pebble Beach Company and Carmel-by-the-Sea expect they would have to incur substantial costs to comply with the special protections.
- Projects that may be necessary to achieve compliance include dry weather diversions. For Pebble Beach Company, this may require constructing pump stations at numerous locations to pump dry-weather flow—much of which is natural flow from creeks—to the sanitary sewer. Structural BMPs and end-of-pipe treatment systems may be necessary.
- Operation and maintenance costs could be significant.
- Carmel-by-the-Sea's Proposition 84 funds, like Pacific Grove's, likely are not sufficient to cover compliance costs.

The special protections could adversely impact Pebble Beach's operations

- Construction projects required to comply with the special protections also may affect operations of the golf course and golf course aesthetics significantly.
- Any projects or improvements may require discretionary approvals, which there is no guarantee that Pebble Beach could even obtain.

The Environmental Impact Report (EIR) is legally deficient

The project description is inadequate

- The starting point for an adequate EIR is an adequate project description.
 - “An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency’s action. [Footnote.]” *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 406.
- The “project” is interpreted broadly to protect the environment.
 - *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1514.
- In other words, the project includes not just the State Board’s decision, but also the physical improvements that the dischargers will make to comply with the special protections.

The project description is inadequate (cont.)

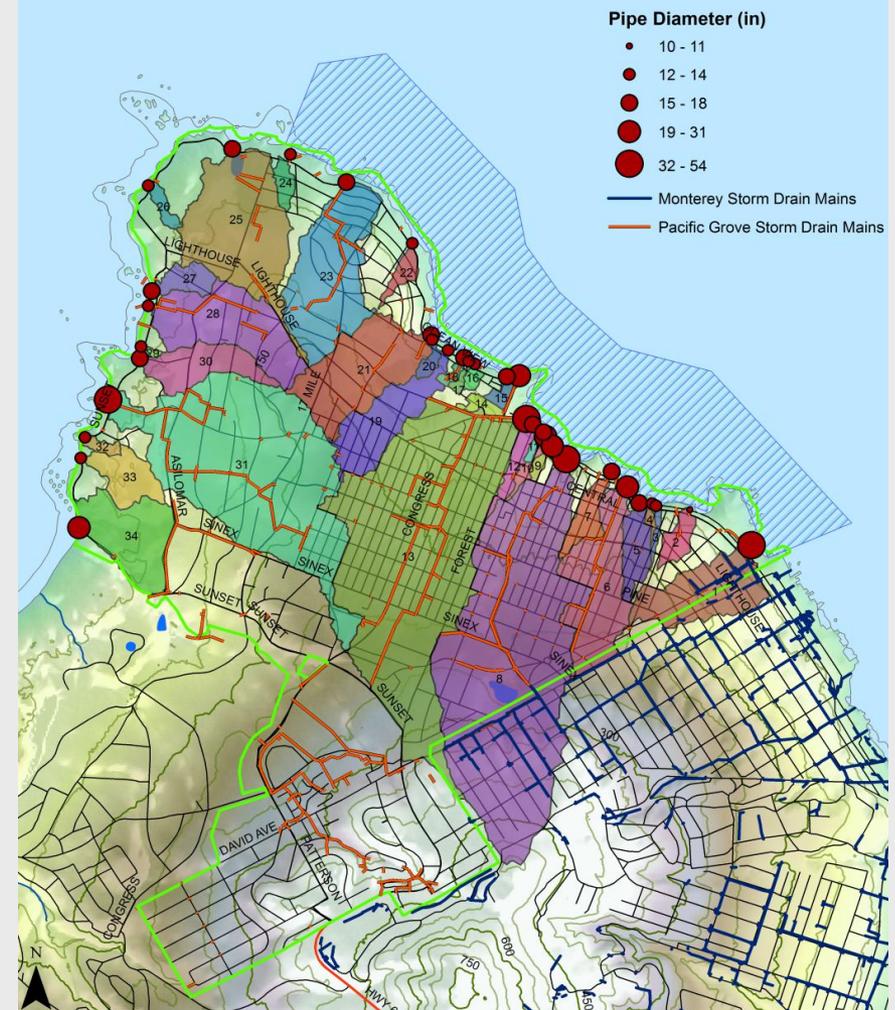
- The EIR's project description falls far short of what CEQA requires.
- It is a mere three-and-a-half pages long.
- Most importantly, it fails to describe any of the physical improvements that the dischargers would undertake to comply with the special protections. These are part of the project, and must be included.
- The failure to describe the project adequately also undermines the environmental analysis.

The baseline is flawed

- The EIR is muddled regarding baseline.
 - Sometimes it correctly states the baseline is the existing environmental condition.
 - Other times, it assumes that the baseline is a scenario in which there are no discharges into the ASBS. (“Significant impacts were identified for the No—Project [*sic*] Alternative which is used as the baseline for comparison with other alternatives.” EIR, p. 312.)
- The EIR must consistently use existing conditions as the baseline.
 - “[T]he baseline ‘normally’ consists of ‘the physical environmental conditions in the vicinity of the project, as they exist at the time ... environmental analysis is commenced’” *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 315 (citation omitted).

The baseline is flawed (cont.)

- Even the “existing conditions” data may be inaccurate, incomplete, and outdated. Despite repeated requests by Pacific Grove to use more updated available data, it appears the EIR used data from 1970s reconnaissance surveys that do not reflect current conditions.



The baseline is flawed (cont.)

- And it is clear that in one important sense the EIR uses an artificial construct as the baseline. That is, the EIR assumes enforcement could begin immediately to stop all discharges with even a molecule of waste, even if they do not cause impacts to ASBS.
- But interpreting the Ocean Plan to prohibit all discharges has never been CEQA reviewed. The State Board cannot adopt this interpretation of the Ocean Plan—which would have its own significant impacts—without adequate CEQA review.

The analysis of impacts is inadequate

- Much of the EIR consists of unsupported opinions and assertions. There is very little true analysis at all.
 - For example, for the analysis of impacts on scenic vistas, the EIR states: “As part of the scoping and environmental analysis conducted for the General Exception project, sensitive visual resources were considered, but no potential for long-term permanent adverse impacts to these resources were identified. Depending on what measures each applicant uses to comply with the proposed exception, there may be an impact on aesthetics.” (EIR p. 234.)
 - This is the total analysis for this topic. Analysis of other topics was similar.
- On its face, this fails CEQA’s requirement to provide a detailed analysis of potential environmental impacts.
 - “The purpose of an EIR is to inform the agency and the public, in detail, about the effect the project is likely to have on the environment and the ways available to minimize that impact.” *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal. 4th 165, 184, 185.

The analysis of mitigation measures is inadequate

- It is the State Board's obligation to show, with substantial evidence, that the proposed mitigation measures are feasible and will be effective.
 - "Mitigation measures must be feasible and enforceable. (CEQA Guidelines, § 15126.4, subd. (a)(1), (2).)" *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors* (2001) 91 Cal. App. 4th 342, 360.
 - "Although Respondents contend that we should defer to the Board's finding that the mitigation measures are effective, we decline to do so where the Board's findings are not supported by substantial evidence or defy common sense." *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1116.
- The EIR lacks any substantive analysis showing that mitigation measures will be either feasible or effective.
- Instead, the EIR defers any meaningful discussion of mitigation to the future.

The EIR is essentially devoid of cumulative impacts analysis

- An EIR must include discussion and analysis of significant cumulative impacts. CEQA Guidelines § 15130(a).
- Nowhere does the EIR list past, present, and probable future projects along the coast that could have cumulative impacts with this project, nor does it discuss another planning document describing or evaluating conditions contributing to any cumulative effects. CEQA Guidelines § 15130(b).
- The EIR improperly avoids discussion of cumulative impacts by relying on future project-level CEQA review. This ignores the exceptionally cumulative nature of this program's impacts.
- The project's environmental effects have not been analyzed "in connection with... the effects of probable future projects." CEQA Guidelines § 15065(a)(3). Indeed, there is no real analysis—or even identification—of other past, present, and future projects that the special protections could have cumulative impacts with.

The EIR is essentially devoid of cumulative impacts analysis (cont.)

- The EIR admit that the project “will foreseeably require many more... waste discharge prevention projects,” but state that the impacts of these projects “are not expected to be extraordinary in magnitude or severity.” EIR, p. 315.
 - Such a “conclusory statement ‘unsupported by empirical or experimental data, scientific authorities, or explanation of any kind’ not only fails to crystallize issues but ‘affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.’” *Whitman v. Bd. of Supervisors* (1979) 88 Cal. App. 3d 397, 411 (citations omitted).
- Cumulative impact discussion that is “but a conclusion utterly devoid of any reasoned analysis” is insufficient. *Id.*

The EIR is essentially devoid of alternatives analysis

- “The core of an EIR is the mitigation and alternatives sections.” *Watsonville Pilots Ass’n v. City of Watsonville* (2010) 183 Cal. App. 4th 1059, 1089 (citation omitted).
- Both the range of alternatives and level of analysis in this EIR are woefully inadequate.
 - This EIR does not adequately explain the agency’s reasons for selecting considered alternatives. CEQA Guidelines § 15126.6(c).
 - An EIR should identify alternatives that were considered but rejected as infeasible during the scoping process, and explain why they were rejected. *Id.* This EIR does not.
 - An EIR must include “sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project.” CEQA Guidelines § 15126.6(d) (emphasis added). This EIR does not.
 - An EIR must contain a quantitative and comparative analysis of alternatives. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 735. This EIR does not.

The EIR is essentially devoid of alternatives analysis (cont.)

- The EIR contains a cursory, policy-level discussion of alternatives to the staff-preferred project alternative.
- An EIR will be found legally inadequate if it contains an overly narrow range of alternatives. See, e.g., *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal. App. 4th 1059, 1087.
- Several jurisdictions proposed an alternative that would protect water quality and minimize environmental impacts. The alternative would “attain most of the basic objectives” of the project “while avoiding or substantially reducing the environmental impacts of the project,” and was required to be considered. *Id.*, citing CEQA Guidelines § 15126.6(a).
- “If an alternative is identified as at least potentially feasible, an in-depth discussion is required.” *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal. App. 4th 1437, 1457 (citation omitted) (emphasis added).

The EIR failed to analyze an important feasible alternative

- Several jurisdictions and Pebble Beach Company proposed an alternative to ensure ASBS are protected based on sound science.
- **Step 1:** State-funded panel would gather necessary data.
- **Step 2:** Map locations and causes of any statistically significant water quality degradation within an ASBS.
- **Step 3:** If the degradation is caused by discharge of pollutants, compare locations of degradation to those of existing dischargers and determine possible source of pollutants.
- **Step 4:** If degradation is caused by discharge of pollutants near a storm drain discharge, require end-of-pipe sampling.
- **Step 5:** If the sampling finds that the storm drain discharge does not contain appreciable amounts of pollutants, then the discharge would be deemed not to be causing the degradation. If the discharge is a significant contributor of the pollutant associated with the degradation, then require mitigation.

The “no project” alternative analysis is flawed

- An EIR’s discussion of alternatives must include analysis of a “no project” alternative. CEQA Guidelines § 15126.6(e). Such an alternative “provides the decision makers and the public with specific information about the environment if the project is not approved. It is a factually based forecast of the environmental impacts of preserving the status quo.” *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 210, 247 (emphasis added).
- The EIR purports to include a brief, approximately one page discussion of the “no project” alternative (later repeating three paragraphs). But the “no project” alternative presented is inaccurate.
- Under the “no project” alternative the EIR presents, “the Ocean Plan prohibition against waste discharges into ASBS would continue to apply to all discharges into ASBS” and all dischargers would either terminate or relocate the alleged 1,685 discharges into the ASBS. EIR, p. 11. The EIR asserts that this “no-General Exception” alternative could result in great impacts to the ASBS.

The “no project” alternative analysis is flawed (cont.)

- The proper “no project” alternative to consider is the status quo with its alleged 1,685 discharges and “what would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.” CEQA Guidelines § 15126.6(e)(3)(C) (emphasis added).
 - It cannot be reasonably expected that all 1,658 discharges would be moved or eliminated if the project were not approved.
 - Dischargers do not have the infrastructure or community services available to effect this change.

Programmatic nature of the EIR does not excuse its inadequate analysis

- Lead agencies may undertake program-level environmental review that establishes a framework for tiered or later project-level review. See CEQA Guidelines § 15168. But this EIR is inadequate even at the program level.
 - “Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR...” CEQA Guidelines § 15152(b) (emphasis added).
 - “[T]iering’ is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause.” *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal. App. 4th 182, 199.
 - “A program EIR will be most helpful... if it deals with the effects of the program as specifically and comprehensively as possible.” CEQA Guidelines § 15168(c)(5) (emphasis added).

Programmatic nature of the EIR does not excuse its failure to analyze cumulative impacts

- This EIR does not offer a key advantage of a program EIR, which is to “[e]nsure consideration of cumulative impacts that might be slighted in a case-by-case analysis.” CEQA Guidelines §15168(b)(2).
- The EIR erroneously assumes, but does not show, that the cumulative impacts associated with the project’s onerous requirements are “relatively minor.”
 - In fact, many permittees will be forced to undertake significant construction projects to comply the program requirements.
 - The EIR improperly defers consideration of the impacts of compliance to project-level review, thus failing to consider the dramatic cumulative impact of these compliance projects on the coastline.

The responses to public comments on the EIR are inadequate

- “Problems raised by the public and responsible experts require a good faith reasoned analysis in response. [Citation.] The requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not ‘swept under the rug.’” *Santa Clarita Org. for Planning v. County of L.A.* (2003) 106 Cal.App.4th 715, 723
- The EIR fails to meet this requirement. Responses are cursory, and often non-responsive.
- For example, Pebble Beach Company, Carmel-by-the-Sea, Pacific Grove, and others pointed out several flaws in the special protections approach to permitting discharges into ASBS, and recommended a sound alternative.
 - The response lacks anything like a “detailed analysis”: “State Water Board staff disagrees. The Special Protections were already developed with a great deal of public input, including input from municipalities and other responsible parties. ...” (Responses to Comments, p. 96.)