

Legal Concerns

No.	Comment	Parties	Page #	Response
164	CWC section 13241 analysis is missing	City County	130 193	Evidence for determinations in accordance with the CWC and other codes is in both the Technical and Environmental Staff Reports. Also, staff has added a summary of this evidence, organized by code section, on pages 13 through 19 of the Overview for the Technical Staff Report.
165	Proposed findings are not supported by evidence	City	100	The weight of the evidence prepared by the staff, set forth in the technical memoranda, supports the need for the prohibition and addresses each of the legal factors required by the Water Code section 13280-13283.
166	GW as potential drinking water source not supported by record and doesn't meet 13241 or the State Board's "Sources of Drinking Water" policy, Resolution No. 88-63.	City	103	Staff is required to consider all MUN designations as the beneficial use standard until amended by the Regional Board. State Bd Resolution No. 88-63 does indeed contain exceptions for waters that may not be suitable for drinking water, but that issue is not the subject of this prohibition.
167	CEQA document is not adequate in several respects and fails to provide public with meaningful information	City	118	The Environmental Staff Report, in the checklist and narrative, identifies reasonable compliance alternatives, provides mitigation measures when feasible and discusses the reasonably foreseeable impacts from the project.
168	CEQA document fails to identify mitigation measures	City County MHAB (Gaines)	120 192 485	The original checklist had many mitigation measures. The revised checklist has included many more specific mitigation measures. A commenting public agency should provide either complete and detailed performance objectives for mitigation measures addressing the effects the public agency identifies or refer the lead agency to appropriate, readily available guidelines or reference documents concerning mitigation measures. Title 14, CCR, section 15086, subd (d).
169	Costs of compliance not adequately analyzed	City	130	In the Environmental Staff Report, in the section entitled Options for Compliance Projects, staff provides estimates (including key assumptions) of capital costs for three conceptual projects. These costs range from \$17 million to \$80 million. The City's comments are noted as providing an alternate view of the cost of compliance.
170	Civic Center boundaries not justified	City	130	The rationale for the boundaries is described in detail in the Technical Staff Report, beginning on page 1. See also responses provided in the Boundary matrix.

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171	TMDLs don't indicate prohibition on OWDSs necessary	City	133	The nutrient TMDL for Malibu Lagoon allocates a nitrogen load of 6 lb/day from OWDSs. As demonstrated in Tech Memo #4, existing loads from OWDSs far exceed the target. Because the Regional Board has attempted other strategies for reducing pollutant loads from OWDSs which have not been successful in reducing the impairment and restoring the quality of water resources in the area, this prohibition is necessary. The cumulative effects of other implementation actions to attain TMDLs, other actions by the City, and this prohibition should be beneficial to restoring the water quality.
172	MOU with County doesn't give enforcement authority; need for modification to carve out target area from MOU	County	189-190	If the prohibition is adopted, the Regional Board will discuss appropriate modifications to the MOU with the County of Los Angeles.
173	Findings of 13280 etc. require adjudicative hearing process	County	190	This Basin Plan amendment is a quasi-legislative action. Therefore, the APA does not apply.
174	No discussion of impact if nothing done in 5 years	County	192	Staff does not believe that it is a reasonably foreseeable conclusion that no action will be taken by the prohibition deadline date, and thus did not evaluate the impacts from the closing of the entire Malibu Civic Center area.

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175	No discussion of global climate change from project	County Latham & Watkins	193 462	CEQA regulations and guidance, to expand environmental reviews to include climate change, are in the process of being revised and are not yet approved. Staff believes this is more appropriate for a project level analysis when a specific project has been designed and proposed. However, staff has discussed potential climate change impacts in the checklist narratives for air, housing, transportation, and energy. The specific amount of potential greenhouse gas emissions were not calculated because of the lack of agency guidance on how to determine the significance of the greenhouse gas emissions that directly or indirectly result from the project and the lack of published thresholds of significance. The potential compliance projects discussed and analyzed in the ESR are reasonably foreseeable means of compliance but none of the projects have detailed specific designs, timetables, or any other concrete documentation. Therefore, any analysis done must be somewhat speculative, although staff has exercised its best judgment and good faith in determining the potential impacts. Mitigation measures for climate change impacts are evolving but the California Air Resources Board has published its Climate Change Scoping Plan, dated December 2008, which sets forth several potential mitigation measures that should be considered by the lead agency reviewing the compliance projects. These measures include use of energy efficient technologies or equipment, low carbon fuels, energy efficient building design and construction materials, and water system and water conservation measures. Staff concludes that determining the significance of the potential impacts of the project, or determining whether the mitigation measures can reduce that contribution to a level that is less than cumulatively considerable and thus less than significant, is uncertain and thus speculative at this time. If there are significant impacts, the project's benefits override and outweigh its potential unavoidable impacts, as set forth in the statement of override in the draft Resolution, because the benefits include restoration of the beneficial uses of water resources, which will enhance the recreational use of the Malibu beaches, improve the aquatic habitat and restore the drinking water potential of the groundwater.
176	Draft resolution doesn't have 13241 or 13280 findings	County	194	A revised draft (Oct 21, 2009) resolution addresses the issues raised and contains appropriate findings.
177	Consider less drastic alternatives	City School District	134 209	Many alternatives were considered but none met the objectives of the prohibition. A partial prohibition would not meet the objective because, based upon experience with compliance with and enforcement actions taken on individual WDRs, water quality is not improving enough to restore beneficial uses in an acceptable timeframe.

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178	SWRCB state-wide proposed regs for OWDSs not considered by staff as a program alternative	Hughes	318	Earlier efforts to develop AB 885 regulations were not successful. The timing for a future effort by the State Board is not clear.
179	Set the effective date of prohibition 30 days after approval by OAL	Latham & Watkins	427	The legal effective date of the regulation is when OAL approves it. The tentative Resolution states that the deadline for termination of existing discharges is November 5, 2014. All other discharges are prohibited as of November 5, 2009.
180	Inadequate project description re: evaluation of compliance projects	Latham & Watkins	427	This is a program or first-tier level environmental document because it is evaluating the effects of an amendment to the <i>Basin Plan</i> . As such, the details of any compliance projects are largely hypothetical at this time. Staff has used its best judgment in forecasting reasonably foreseeable impacts for impacts that are likely to occur from any of the potential compliance projects. However, the level of specificity required by CEQA generally depends upon the degree of specificity involved in the proposed activity. An EIR on a policy or plan need not be as detailed as in EIR on the specific compliance projects that will follow. An analysis of the impacts of future actions should be undertaken when those actions are sufficiently well-defined that it is feasible to evaluate their potential impacts.
181	Enforcement of prohibition is unknown; staff should make enforcement actions explicit	Morton Gerson La Paz	314 413	Staff agrees with Schmitz and Associates that enforcement actions that <i>may</i> be taken by the Regional Board at the end of the prohibition period is currently speculative and not at issue. However, staff disagrees that there are only “two alternatives” (store and pump off-site or abandon the premises as uninhabitable). In the absence of information regarding actual compliance with the prohibition, compliance alternatives with the prohibition are still speculative as well.
182	Staff Report fails to analyze other potential causative factors to the degradation of GW quality in the MCC target area, citing State Board Resolution 88-63	Towing	500	State Board Resolution 88-63 sets forth the policy that all surface and ground waters of the State are considered to be suitable for a water supply, with several exceptions. The Regional Board must take steps to amend the <i>Basin Plan</i> beneficial uses. That is normally done during the “Triennial Review” process, which the Regional Board is currently undertaking in a separate proceeding. Therefore, until such time that beneficial use designations are changed by the Regional Board, it must be assumed that all water is suitable for a water supply.

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183	Prohibition is a taking; denies property owners right to substantive due process because it is arbitrary and capricious as applied to AZWM.	Towing	507	Water Code section 13262, subdivision (g), specifies that there is no right to discharge waste. The contention that the prohibition is arbitrary as applied to the commenter because it lacks voting rights in the city is erroneous. The prohibition applies based upon the effects of the discharge, not based upon the identity or status of the discharger. If the commenter was correct, no land-use regulation could ever be enacted against a business entity. Nor do the property owners lack ability to affect the public policies of the City of Malibu. The property owners may properly exercise their political rights with the City of Malibu to encourage the construction of a compliance project in a timely fashion. The prohibition is not a “taking” because this regulation is being proposed to prevent harm in the nature of a nuisance to the public.
184	Prohibition denies property owners equal protection because current dischargers can continue while non-dischargers will not be able to discharge	Towing MHAB (Gaines)	507 484	Equal Protection is equality under the same conditions and among persons similarly situated. The Regional Board may make a reasonable classification of persons and pass special regulations applying to certain classes. The classification must not be arbitrary and must be based on some difference in the classes having a substantial relation to a legitimate object to be accomplished. Current dischargers must terminate their discharges by November 5, 2014. This class of persons is different from persons who are not currently discharging as staff believes it would be inappropriate to require immediate cessation of waste discharges. The commenter is being treated the same as all other property owners who are not currently discharging. This difference is not arbitrary and has a substantial relationship to the object of restoring beneficial uses of water resources, and grandfathering existing dischargers for a period of time is a well-established accommodation for the economic hardships attendant with replacing an existing infrastructure. This distinction bears a rational basis.
185	Prohibition denies property owners all reasonable, economic use of its property	Towing MHAB (Gaines)	507 483	The discharge of waste is a privilege, not a right (see Water Code section 13262, subd.(g)). The commentors have submitted no evidence that prohibiting discharges of waste from OWDSs deprives the property owners of all reasonable economic use, and the fact that most other municipalities in the state of California have constructed alternatives to the use of septic systems and nevertheless have thriving businesses tends to demonstrate the inaccuracy of the claims. The requirement to discharge waste in such a way as to not endanger public health and safety does not effect a taking in any event, since the prevention of nuisance is not a taking, and furthermore since no right has vested with these property owners who do not yet have authorized OWDSs.