

## Legal Concerns

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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.
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.
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.
CEQA doc not adequate in several respects and fails to provide public with meaningful info.	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.
Fails to identify single mitigation measures.	City County	120 192	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).
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.
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
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

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			other implementation actions to attain TMDLs, other actions by the City, and this prohibition should be beneficial to restoring the water quality.
MOU with Co 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.
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..
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.
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

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			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.
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.
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.
SWRCB state-wide proposed regs for OWDSs not considered by staff as a program alternative.	Hughes	318	Earlier efforts to develop '885' regulations were not successful. The timing for a future effort by the State Board is not clear.
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.
Inadequate project description re: eval 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.
Enforcement of prohibition is unknown; staff should make enforcement actions explicit.	Morton Gerson La Paz	314 9/14/09 email	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

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			as uninhabitable). In the absence of information regarding actual compliance with the prohibition, compliance alternatives with the prohibition are still speculative as well.
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.
Prohibition is a taking; denies property owners right to substantive due process because it is arbitrary and capricious as applied to AZWM.	Towing	507	The property owners may 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.
Prohibition denies property owners equal protection because current dischargers can continue while non-dischargers will not be able to discharge.	Towing	507	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.
Prohibition denies property owners all reasonable, economic use of its property.	Towing	507	The prohibition does not deprive the property owners of all reasonable economic use. The discharge of wastewater is a privilege, not a right. Therefore, the right to discharge waste in such a way as to endanger public health and safety is not a taking since there is no right vested with the property owners.