

June 7, 2004

Dominic Gregorio
Division of Water Quality
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



VIA FACSIMILE

RE: Proposed Exception to the California Ocean Plan for Discharge by the University of California, San Diego, Scripps Institution of Oceanography into the San Diego Marine Life Refuge Area of Special Biological Significance.

Dear Mr. Gregorio:

On behalf of The Ocean Conservancy and its more than 25,000 California members, I am submitting the following comments on the proposed exception to the California Ocean Plan (Ocean Plan) for discharge by the University of California, San Diego, Scripps Institution of Oceanography (UCSD/SIO) into the San Diego Marine Life Refuge Area of Special Biological Significance (ASBS), including the proposed Negative Declaration and Initial Study. We greatly appreciate and share your interest in addressing existing discharges into ASBSs, and we thank you for the care that clearly went into developing these documents. We agree that an Ocean Plan exception may be an acceptable means of addressing UCSD/SIO's discharge, but only if additional necessary safeguards are provided.

1. Illicit Discharges Into ASBS Must Be Eliminated Throughout the Region and State.

As you know, the Ocean Plan defines "ASBS" as "those areas designated by the SWRCB as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."¹ Protecting these areas is so critical to the people of California that "preservation and enhancement" of any ASBS is a beneficial use explicitly listed in the Ocean Plan,² as well as in several regional basin plans.³ Protection of this beneficial use and prevention of alteration of natural water quality is accomplished in the only conceivable way, given the definition of "ASBS" – through an outright prohibition on discharge of waste. This provision of the Ocean Plan is abundantly clear: "Waste shall not be discharged to areas designated as being of special biological significance."⁴

¹ State Water Resources Control Board, "Water Quality Control Plan – Ocean Waters of California" (2001) at Appendix I (Ocean Plan).

² Ocean Plan at I.A.

³ See, e.g. http://www.swrcb.ca.gov/rwqcb3/BasinPlan/BP_text/Chapter2.htm.

⁴ Ocean Plan at III.E.1. This prohibition applies to both point and nonpoint sources of waste, and the only explicit exception is for certified limited-term activities.

In July of 2003, the Southern California Coastal Water Research Project (SCCWRP) released the results of a survey of discharges⁵ into all 34 ASBS in California. The report, entitled “Discharges into State Water Quality Protection Areas,” stated that there are 1,658 direct discharges into ASBS statewide.⁶ These discharges were subdivided into wastewater discharge points (31 statewide), municipal/industrial storm drains (391 statewide), small storm drains (1012 statewide), and nonpoint sources (224 statewide). Exceptions to the ASBS provisions of the Ocean Plan have been granted for only four of these discharges. Consequently, 1,654 of these discharges are illegal. This is an intolerable amount of discharge into areas that have been protected by an unequivocal prohibition against discharge of any kind.

The Ocean Conservancy urges the State Water Resources Control Board (SWRCB) to begin to take steps to address and remedy the discharges into ASBS. The Board should encourage the Regional Boards to issue cease-and-desist orders for discharges into ASBS in cases where dischargers do not seek exceptions. Exceptions should be granted under limited circumstances, discussed below. This standard for exceptions should be strictly applied – an exception should not be used as a “quick fix” to legalize illicit discharges into ASBS.

2. An Exception to the Ocean Plan is Acceptable for Addressing Discharges to ASBS Only Under Limited Circumstances.

SWRCB may grant an exception to the provisions of the Ocean Plan – including the ASBS discharge prohibition – if, after a public hearing, it determines that the exception “will not compromise protection of ocean waters for beneficial uses,” and “the public interest will be served.”⁷ In the case of discharges into ASBS, the relevant beneficial use is “preservation and enhancement of designated Areas of Special Biological Significance.”⁸ This beneficial use is implemented by the discharge prohibition, and the maintenance of “natural water quality conditions.”

Accordingly, an Ocean Plan exception may be made for a discharge into an ASBS only under the following circumstances:

1. All exceptions must be conditional, and crafted to ensure that permitted discharges are consistent with **natural** water quality, not Ocean Plan water quality objectives. Consequently, discharges should be consistent with the Ocean Plan’s Table C Background Seawater Concentrations.⁹ These conditions should apply equally to point source discharges, as well as stormwater and non-stormwater discharges.
2. All exceptions must be accompanied by a rigorous monitoring and reporting program. Such a program must include monitoring requirements adequate to demonstrate that discharge is consistent with natural water quality and applicable permit requirements. Monitoring should include, at a minimum, biological, water quality, and sediment quality monitoring. If

⁵ Discharges were defined as non-natural sources. The total number of discharges reported above does not include outlets, which are defined as naturally occurring sources. Southern California Coastal Water Research Project, “Final Report: Discharges into State Water Quality Protection Areas” (July 2003), at 7-8 (SCCWRP Report).

⁶ *Id.* at 7.

⁷ Ocean Plan at III.I.

⁸ *Id.* at I.A.

⁹ The Ocean Plan lists specific background concentrations for arsenic, copper, mercury, silver and zinc, but sets the background concentration of all other Table B parameters at 0.

monitoring results indicate that the conditions of the exception are not being met, the exception should be void.

3. All exceptions must be contingent upon compliance with all applicable permits, waste discharge requirements or waivers. If monitoring results demonstrate that the discharger is out of compliance with any permit requirement, the exception should be void.
4. No exception should ever be granted to permit a new discharge into an ASBS.
5. No exception should be granted in the absence of a public hearing.
6. All exceptions must be in the public interest.

These are the minimum criteria that must be met in order to ensure that an exception is consistent with the Ocean Plan's ASBS beneficial use and exception standard. As discussed in more detail below, the proposed exception for the UCSD/SIO discharge does not currently meet these requirements. However, if the proposed exception were amended to meet these criteria, The Ocean Conservancy would support the use of an Ocean Plan exception to address this discharge.

3. The Copper Discharge Provisions Will Not Ensure the Maintenance of Natural Water Quality.

UCSD/SIO's wastewater is composed of seawater that has been circulated through various aquaria, picking up other substances along the way, including copper sulfate, which is used to treat disease in the aquaria. Copper is well known to be toxic to marine organisms (indeed it is this very toxicity that makes it an effective antibiotic, and the reason it is used in aquaria).¹⁰ The Ocean Plan contains a receiving water quality objective for copper of 3µg/L (6-month median), and a background seawater concentration of 2µg/L. The Initial Study indicates that "ambient sea water in the vicinity of SIO has a copper concentration of approximately 2 µg/L."¹¹

The Draft Negative Declaration (Negative Declaration) contains the following condition with respect to copper:

UCSD/SIO must take all reasonable and appropriate measures to minimize concentrations of chemical additives, including copper, and antibiotics, in the effluent. UCSD/SIO must consider appropriate alternatives, including alternative treatment techniques, pollutant minimization, source control, and process optimization, to reduce effluent concentrations of copper, antibiotics, and other treatment additives. . . . Copper and other additives to the seawater from the Birch Aquarium must be minimized to meet the water quality objectives in Table B of the Ocean Plan.

This condition is not adequate to meet the minimum criteria for exceptions to the ASBS provisions of the Ocean Plan, as outlined above. The condition would reduce copper concentrations in UCSD/SIO's discharge to the level of the receiving water quality objective, but water quality in ASBS are held to a higher standard set for them in the Ocean Plan: natural water quality. For this reason, copper in the discharge should be reduced to be consistent with background seawater concentrations for copper, or 2 µg/L.

Any discharge of other substances must be held to this standard as well, and should be consistent with natural background concentrations of that substance as set forth in Table C. The additional requirement that UCSD/SIO "must take all reasonable and appropriate measures to minimize concentrations of . . .

¹⁰ SWRCB, Initial Study – Exception to the California Ocean Plan for the University of California Scripps Institution of Oceanography Discharge into the San Diego Marine Life Refuge Area of Special Biological Significance (April 29, 2004) at 8.

¹¹ *Id.* at 4.

copper . . . in the effluent” is weak, and unlikely to cause further reduction of copper concentrations below the receiving water quality objective.

It should be noted that UCSD/SIO’s discharges of copper have periodically exceeded its NPDES permit effluent limitation. According to the terms and conditions outlined in the Negative Declaration, “[t]he discharge must comply with all other applicable provisions, including water quality standards, of the Ocean Plan.” As outlined above, we believe that compliance with NPDES permits, as well as with any other relevant permits including waste discharge requirements or waivers, should be a condition of any exception to the ASBS provisions of the Ocean Plan. This condition of the exception should be expanded accordingly.

4. The Stormwater Discharge Provisions of the Exception Will Not Ensure Maintenance of Natural Water Quality.

The proposed exception contains provisions relating to storm water discharge that would require UCSD/SIO to develop a revised stormwater management plan (SWMP) that will address “how pollutants will be reduced in storm water runoff into the ASBS through the implementation of Best Management Practices (BMPs).” The BMPs must be implemented according to a schedule designed to ensure ongoing improvement in receiving water quality either through reduction in stormwater discharge or reduction of pollutants in stormwater discharge.

Although these requirements will undoubtedly result in improvement of receiving water quality in the ASBS, they are not consistent with the criteria for Ocean Plan’s exceptions outlined above. The implementation of BMPs, even on an accelerated schedule requiring mandatory improvements, will not ensure the maintenance of natural water quality. This requirement must be made an explicit condition of the proposed exception.

5. The Non-Stormwater Discharge Provisions of the Exception Should be Implemented Immediately.

The proposed exception contains a condition requiring UCSD/SIO to eliminate all non-storm water discharges by January 1, 2007. While the substance of this condition is excellent, the delay in its implementation is unacceptable. UCSD/SIO’s discharges into the ASBS are illegal. The Board should not write provisions into any exception that legalize – even temporarily – discharges that do not comply with the Ocean Plan’s exception standard. By allowing UCSD/SIO to continue to discharge non-storm water into the ASBS for nearly three more years, the Board would be doing just that: writing a get-out-of-jail-free card. We strongly encourage the Board to require immediate implementation of this condition.

6. The Monitoring Provisions of the Exception are Strong.

The Ocean Conservancy has consistently taken a strong stance on the need for dischargers of waste into public waters to monitor their discharge at their own expense. We believe strongly that any exception to the ASBS provisions of the Ocean Plan should be accompanied by a monitoring plan that is adequate to demonstrate compliance with the exception criteria discussed above.

We are pleased to see that the proposed exception contains strong monitoring provisions, including quantitative benthic community surveys and bioaccumulation studies. We think that these

monitoring provisions are incomplete, however, and need to include sediment and water quality monitoring, as well. We realize that UCSD/SIO performs water quality monitoring in the context of its NPDES permitting requirements. Because the exception should be conditioned on such monitoring, we encourage the Board to incorporate by reference the monitoring provisions of any applicable permits, WDRs or waivers.

7. Miscellaneous Comments.

We object to staff's continued reference to "[t]he change in terminology from ASBS to State Water Quality Protection Area" that purportedly "went into effect on January 1, 2003 (without State Board action) pursuant to Section 36750 of the PRC."¹² This position reflects a misreading of the law. As we have stated elsewhere, ASBS were not transformed into SWQPAs via the Marine Managed Areas Improvement Act of 2000 (AB 2800, Shelley). Instead, the Act created an umbrella category – SWQPAs – of which ASBS, retaining their own pre-existing management measures, were a part. The assertion that this transformation occurred is inconsistent with both the letter of the MMAIA, which clearly contemplates the continued existence of ASBS, and with subsequent laws, including AB 1747 which designates ASBS as high priorities for receiving Proposition 50 grant money.

Finally, we object to the use of a Negative Declaration, rather than a Mitigated Negative Declaration or a Functional Equivalent Document, as the vehicle for this proposed exception. As you know, under CEQA, a Negative Declaration may be adopted when "there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment."¹³ The "Mitigated Negative Declaration," as defined in Public Resources Code section 21064.5, is another alternative that the applicant can use when it can modify its project to avoid all potentially significant effects. The Initial Study identifies several impacts – including copper discharge – that are potentially detrimental to the marine environment, which the conditions go some distance toward mitigating. Consequently, it is clear that a Negative Declaration is an inappropriate mechanism here. Adopting the exception through the form of a Negative Declaration would send the message that the conditions are not important, and that even without them, the exception would be eligible for a Negative Declaration. It most certainly would not be.

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In sum, the proposed exception requires amendment before it will meet the Ocean Plan exception standard. If these changes were made, however, we would support the use of an exception in this case. Thank you for the opportunity to provide these comments, and – as always – please feel free to call me if you have any questions.

Sincerely,

Sarah G. Newkirk
Pacific Region Ecosystems Manager

¹² Initial Study at 1.

¹³ California Code of Regulations § 15070(a).