



February 21, 2012

Charlie Hoppin, Chair and Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95812-0100  
c/o Jeanine Townsend, Clerk to the Board  
*Via electronic mail: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)*



**Re: Comment Letter – ASBS Special Protections**

Dear Chair Hoppin and Board Members:

We are writing to comment on the changes to the General Exception to the California Ocean Plan Waste Discharge Prohibition (Exception), for Selected Storm Water and Nonpoint Source Discharges into Areas of Special Biological Significance (ASBS), including Special Protections for Beneficial Uses released on February 7, 2012. California Coastkeeper Alliance, Natural Resources Defense Council, and Santa Monica Baykeeper have advocated for the implementation of the decades-old Ocean Plan discharge prohibition for years, and have been similarly active in the process to address the ongoing discharges to ASBSs.

ASBSs are home to the state's most unique and sensitive marine communities, each one possessing a complex and fragile ecosystem.<sup>1</sup> Despite the hard work of staff to work with our organizations to add specificity and clarity to the Exception, we must contest the proposed Exception's legality. Given that the Exception applies to virtually everyone who asked, representing over two dozen applications for discharges into 26 of the 34 ASBSs, and including private corporations' stormwater and golf course runoff, the Board cannot legitimately find that the Exception will serve the public interest. Further, because the Exception does not ensure attainment or maintenance of natural water quality, the Board cannot legitimately find that the Exception will not compromise protection of the ASBSs for beneficial uses. This new approach makes no sense when the Board has existing enforcement mechanisms at its disposal. Thus, we continue to urge the Board to enforce the waste discharge prohibition, and we incorporate by reference the comments submitted by California Coastkeeper Alliance and Natural Resources Defense Council on May 20, 2011. Nevertheless, we offer comments below on the changes reflected in the February 7, 2012 draft of the Exception.

For the suggested clarifications below, added text is in underlined type, and omitted text is in ~~struckthrough~~ type. Page numbers refer to the Strikeout Underline Version of Attachment B to the February 7, 2012 version of the General Exception.

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<sup>1</sup> See, e.g., DEIR sections 5.1 and 5.5.

**Section I.A.2.f. on page 4**

We suggest a minor amendment to clarify that dischargers should not only *consider* LID practices as a course of first action in controlling stormwater runoff, but also to actually *use* LID practices where feasible.

**Amend last sentence as:** To control storm water runoff discharges (at the end-of-pipe) during a design storm, permittees must first consider, and use where technically feasible, ~~using~~ LID practices to infiltrate, use, or evapotranspirate storm water runoff on-site.

**Section I.A.3.e on page 5**

We suggest that the Exception eliminate the comparison of post-storm receiving water quality testing to reference water quality data *and* pre-storm conditions. This is inconsistent with the Ocean Plan and the requirement that dischargers not alter natural water quality. The only appropriate standard is to compare post-storm water quality conditions to the reference water quality data, alone.

**Amend as:** Within four (4) years of the effective date of the Exception, all dischargers must comply with the requirement that their discharges into the affected ASBS maintain natural ocean water quality. If the initial results of post-storm receiving water quality testing indicate levels higher than the 85<sup>th</sup> percentile threshold of reference water quality data ~~and the pre-storm receiving water levels~~, then the discharger must re-sample the receiving water, pre- and post-storm. If after re-sampling the post-storm levels are still higher than the 85<sup>th</sup> percentile threshold of reference water quality data, ~~and the pre-storm receiving water levels~~, for any constituent, then natural ocean water quality is exceeded. See attached Flowchart.

**Section I.A.3.f.2 on page 6**

We suggest a minor amendment to clarify that, to obtain an extension for lack of funding, government agencies must demonstrate that funding was unavailable or inadequate. This appears to be an oversight in subsection 2, as subsection 1 requires municipalities to demonstrate that funding is unavailable or inadequate.

**Amend as:** for other governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and that funding was unavailable or inadequate.

We also suggest a clarification to set a time limit on extensions for no longer than one year, with the opportunity to renew the extension.

**After A.3.f.2, add:** Extensions shall be granted for no longer than one year. If the circumstances above still exist when the extension expires, the discharger may apply for a continuation of the extension for up to one year.

**Section I.B.2.b. on page 8**

It appears that the intent of Section B.2.b.(1) and (2) on page 8 is to require the same design storm criteria for non-point sources as the design storm criteria for point sources, which is listed on page 3. If so, the wording should be consistent between the two provisions.

**Amend as:**

(1) ~~Set as the~~ Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan;  
or

(2) A 90% reduction in ~~By reducing~~ pollutant loading during storm events, for the applicant's total discharges, ~~by 90%.~~

**Section I.B.3.f.2 on page 10**

We suggest a minor amendment to clarify that, to obtain an extension for lack of funding, government agencies must demonstrate that funding was unavailable or inadequate. This appears to be an oversight in subsection 2, as subsection 1 requires municipalities to demonstrate that funding is unavailable or inadequate.

**Amend as:** for other governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and that funding was unavailable or inadequate.

We also suggest a clarification to set a time limit on extensions for no longer than one year, with the opportunity to renew the extension.

**After B.3.f.2, add:** Extensions shall be granted for no longer than one year. If the circumstances above still exist when the extension expires, the discharger may apply for a continuation of the extension for up to one year.

**Section III.E. on page 13**

The second paragraph contains a typo. There is no subsection d. or e. in Section E.

**Amend first sentence of paragraph two as:** If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in Section III.A.5. ~~d. or e.~~

We suggest a minor amendment to clarify that, to obtain an extension for lack of funding, government agencies must demonstrate that funding was unavailable or inadequate. This appears to be an oversight in subsection 2, as subsection 1 requires a demonstration that funding is unavailable or inadequate.

**Amend as:** for governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and that funding was unavailable or inadequate.

We also suggest a clarification to set a time limit on extensions for no longer than six months, with the opportunity to renew the extension.

**After III.E.2., add:** Extensions shall be granted for no longer than six months. If the circumstances above still exist when the extension expires, the discharger may apply for a continuation of the extension for up to six months.

#### **Section IV.A.3.a.(3) on page 14**

The Exception now includes a provision that if a discharger has no outfall greater than 36 inches, then it must analyze stormwater runoff from its largest outfall for Table B constituents and others. We agree that a discharger with no outfalls equal to or greater than 36 inches be required to monitor for these constituents. However, we believe that a requirement that only *one* larger outfall be monitored would, in circumstances of dischargers with many outfalls, not adequately protect ASBSs for beneficial uses. Accordingly, we suggest the following clarification:

**Amend as:** If an applicant has no outfall greater than 36 inches, then storm water runoff from the applicant's five largest outfalls shall be further analyzed during the same storm as receiving water samples for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates).

#### **Section IV.B.2.a. on page 17**

We suggest that the Exception clarify with further specificity what is meant by “minimal” development, aside from simply stating it shall not be more than 10% development. Given that this approach seeks to characterize “natural” water quality, simply setting a threshold at 10% is insufficient; very low levels (less than 10%) of urban development can lead to watershed degradation.<sup>2</sup> Rather, the approach suggested below offers more specificity and guidance in order for staff and stakeholders to better find sites that truly represent natural water quality.

**Amend first sentence as:** ~~Ocean reference areas shall be located at the drainages of flowing watersheds with minimal development (in no instance more than 10% development),~~ shall be the best attainable in the region as established, in order of priority, by: (1) substantial data demonstrating that established water quality standards (concentration criteria and beneficial uses) are achieved at or near the discharge point to the ocean; or (2) the lowest presence of human-dominated land uses, including urbanization, agriculture (crop and/or pasture), grazing, and timber harvest. In the event that no watershed in a region meets the first criterion and has no more than 5 percent human-dominated lands uses by area, the reference watershed(s) shall be the nearest located in another region that meets the first or second criterion. Ocean

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<sup>2</sup> See, e.g., U.S. Geologic Survey, Aquatic Life Declines at Early Stages of Urban Development (June 3, 2010), <http://www.usgs.gov/newsroom/article.asp?ID=2475>; DeLuca, W.V. et al., Coastal urbanization and the integrity of estuarine waterbird communities: Threshold responses and the importance of scale, *Biological Conservation* 141 (2008), 2669-2678; King, R.S. and M.E. Baker, An alternative view of ecological community thresholds and appropriate analyses for their detection, *Ecological Applications* doi:10.1890/10-0882.1; King, R.S. et al., How novel is too novel? Stream community thresholds at exceptionally low levels of catchment urbanization, *Ecological Applications*, 21(5), 2011, 1659–1678.

reference areas shall not be located in CWA Section 303(d) listed waterbodies or have tributaries that are 303(d) listed.

Also, the Exception should set a deadline for choosing ocean reference areas. We suggest adding a sentence at the end of Section IV.B.2.a. to read: Dischargers should select and present to the Water Boards for approval ocean reference areas within six months of the effective date of the Exception.

**Definition of Design Storm on page 19**

The Exception defines the Design Storm as the volume of runoff produced from one inch of precipitation per day. Stormwater permits may have a different definition for a design storm. Thus, we suggest amending the definition of Design Storm in the Exception to ensure consistency with the discharger’s applicable stormwater permit.

**Amend as:** For purposes of these Special Protections, a design storm is defined as the volume of runoff produced from one inch of precipitation per day, or, if this definition is inconsistent with the discharger’s applicable stormwater permit, then the design storm shall be the definition included in the discharger’s applicable stormwater permit.

**Response to Comments (RTC)**

**Page 61**

The RTC states: “The Special Protections would allow a discharger, that anticipates failure to meet the implementation schedule, to submit a report, containing its reasons and proposing a revised schedule, to the Regional Water Board. At that point the Regional Water Board could authorize additional time to comply.” This RTC appears to be based on a provision of the Exception that is omitted in the most recent draft (see A.2.i. on page 5 of the General Exception). The RTC should clarify that the Exception would allow a time extension to construct structural BMPs if the discharger could demonstrate lack of funding or physical impossibility, per the Compliance Schedule in the Exception.

Thank you for your careful attention to these comments.

Sincerely,



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