



California Stormwater Quality Association™

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

September 1, 2006

Song Her, Clerk to the Board
Executive Office
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



Subject: CASQA Comment Letter – ASBS “Special Protections”¹

Dear Chair Doduc, Vice-Chair Secundy, and Board Members:

Thank you for the opportunity to provide early comments on staff’s first “Working Draft – Staff Proposal, Special Protections, Areas of Special Biological Significance” (June 14, 2006). Thank you as well for conducting the three recent Public Scoping Meetings on the working draft. We found these meetings to be informative and constructive – similar to shared fact-finding sessions, so we thank staff for their willingness to share their proposals at an early stage. We encourage the State Water Board to continue conducting such meetings, particularly on topics, such as this one, which may be controversial, and/or complex, and for which a new program is being designed. We believe the resulting program will be much better for early and regular public involvement. Such involvement will minimize misinterpretations and misunderstandings and allow us all to focus on the real issues and questions.

Many of the dischargers affected by the ASBS regulation are members the California Stormwater Quality Association (CASQA)². As a result, CASQA has submitted comments on ASBS on several occasions³. In our previous comments we identified a number of issues (and corresponding solutions) that we felt the State Water Board should address. Although many of our earlier comments are still relevant (especially the need for the State Water Board to amend the Ocean Plan to allow stormwater to be discharged to an ASBS as long as certain conditions are met), our comments herein focus on the working draft “Special Protections”. In particular, our comments focus on the technical and practical aspects of the “Special Protections”. We understand there are other issues, including legal and CEQA issues on which others are commenting. To ensure the ASBS program is built on a solid foundation, we believe it is vital for the State Water Board to address these other issues as well as those discussed in this letter.

¹ Except when specifically referring to staff’s working draft document, CASQA uses “special conditions” instead of “special protections” to be consistent with enacting legislation, as explained in our recommendation on page 5.

² CASQA is composed of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout the state, and was formed in 1989 to recommend approaches to the State Water Resources Control Board (State Water Board) for stormwater quality management in California. In this capacity, we have assisted and continue to assist the State Water Board with the development and implementation of stormwater permitting processes.

³ November 4, 2005 - CASQA Comments on Adoption of the Ocean Plan Triennial Review and Workplan, 2005-2008
August 24, 2005 - CASQA Recommendations for Addressing Stormwater and ASBS
January 11, 2005 - CASQA Comments on Prohibition of Stormwater Discharges to ASBS

CASQA comments on Working Draft – Staff Proposal,
“Special Protections”, Areas of Special Biological Significance

Our overarching comment is that, unfortunately, as stormwater quality practitioners, we found the working draft hard to understand, hard to interpret, and therefore difficult to comment on. The three scoping meetings helped provide some clarity as to what was intended in the working draft but also made it clear that this first draft suffers from some significant uncertainty about basic tenets of the ASBS program, including:

Goal – The goal of the ASBS program is unclear.

The working draft states:

“The intent is to ensure that such discharges [storm water and nonpoint source waste discharges] will be controlled both to protect beneficial uses within ASBS and to protect and maintain the natural hydrological cycle and coastal ecology (.e.g., the flow of clean precipitation runoff into the ocean, by preserving coastal slope stability, and by avoiding landslides and anthropogenic erosion).” (p. 2 of 12)

This expression of the goal or intent of the program is very different from that already expressed in statute and the State Water Board’s Ocean Plan, which essentially state that the goal of the ASBS program is “to protect marine species and biological communities from an undesirable alteration in natural water quality” (AB 2800, 2000) (Ocean Plan, 2005). Besides being different than statute and the Ocean Plan, these imprecise and inconsistent statements of the goal unduly confuse and complicate program development and implementation, and although well meaning, set the program on a different course with a different endpoint than that intended by the Legislature and State Water Board. At the August 15 scoping meeting in Monterey, Board Member Wolff asked commenters to express “where they want to go” (i.e., what is the goal). We appreciate this request and believe that until we are all clear on the goal, discussions about the rest of what the ASBS program might entail are premature.

***CASQA recommendation:** The special conditions should clearly state the goal of the ASBS program and the goal statement should match previous expressions of the goal as contained in statute and the State Water Board Ocean Plan: The goal of the ASBS program is to protect marine species and biological communities from an undesirable alteration in natural water quality.*

***CASQA recommendation:** Once the goal statement is set, every provision in the working draft special conditions should be checked against the agreed-to goal to see if the provision is necessary, consistent with, and focused on reaching the goal. After this exercise and consistent with this principle, the initial staff proposal should be rewritten and provisions that do not conform to the goal should be deleted or substantially rewritten.*

Means versus ends – The difference is unclear.

It became apparent during the scoping meetings that there is confusion as to what the ends (i.e., goal) are and what the means are to reach those ends. Some viewed the protection against “undesirable alteration in natural water quality” as the ends while others seemed to focus on the prohibition as the ends.

***CASQA recommendation:** The special conditions should clearly state the goal (ends) of the ASBS program and clearly distinguish and describe the difference between the goal and the means (prohibition) for reaching the goal.*

The definition of one means of reaching the goal – waste discharge prohibition – is unclear.

It is not clear in the working draft and from statements by various staff at the scoping meetings what definition of waste is being used or that it is consistent with Porter-Cologne and the Ocean Plan⁴. The working draft “Special Protections” appears to propose a functional definition of waste by defining a new kind of discharge on page 3 (see below), defining natural water conditions for two types of waters on pages 6-7 (see below), and defining what constitutes waste or a discharge (depending on what is intended to be prohibited – waste or discharges) on page 3 (see below):

Monitoring

“Samples collected from the reference streams will represent natural background for runoff.” (5.a., p. 6)

“Samples collected at the reference monitoring station [in the ocean] will represent natural water quality for all Ocean Plan constituents except indicator bacteria.” (5.b., p. 6-7)

Existing permitted storm water point sources

“Discharges “composed of natural precipitation runoff” are discharges that do not cause a statistically significant increase (in pollutant concentrations in the receiving water adjacent to the storm water runoff as compared to the reference stream.”

“Such discharges must not cause or contribute to a violation of the Water Quality Objectives in Chapter II of the California Ocean Plan, and must not alter natural water quality in an ASBS.” (p. 3-4)

These last two passages appear to define waste, yet these definitions are not consistent with Porter-Cologne or the Ocean Plan.

CASQA recommendation: *The State Water Board should clarify the definition of waste in the Ocean Plan and clarify the definition in the special conditions. As currently written, the Ocean Plan definition could be interpreted to mean total discharge (quantity and quality), which effectively means the prohibition against waste is a prohibition of discharge (using the Porter-Cologne definition of waste,) or total discharge in quantity only (i.e., silent as to defining quality or what constitutes waste).*

⁴ (Porter-Cologne 13050(d)) “Waste” includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

(p. 20, Ocean Plan, 2005) Waste* shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas. (p. 27, Ocean Plan, 2005) *WASTE: As used in this Plan, waste includes a discharger’s total discharge, of whatever origin, i.e., gross, not net, discharge.

Standing of the other means of reaching the goal – special conditions – is not consistent with enacting legislation.

Both AB 2800 (2000) and SB 512 (2004) describe two means of reaching the goal of protecting against undesirable alterations in natural water quality: waste discharges are 1) prohibited or 2) limited by special conditions. Both pieces of legislation, now law, present the two means as being of equal standing. The special conditions were not intended to be subservient or a less than equal (e.g., an exception) to the prohibition. The current Ocean Plan is silent on the second means – special conditions, hence the current effort to define them and the Ocean Plan is silent on the mechanism by which special conditions would be implemented.

In addition to the legislative reason that the standing of special conditions be equal to that of a waste discharge prohibition, there is an important scientific reason that they be equal. The goal of the ASBS program to protect against “undesirable alterations in natural water quality” includes an implicit consideration of effects on the receiving water and a recognition that some level of waste could exist in ASBS without causing undesirable alterations in natural water quality. The goal of the ASBS program is an effects-based definition. The definition of waste in Porter-Cologne however, does not include a consideration of impact on the receiving water. It is a presence/absence-based definition. Therefore, the prohibition of waste discharges, as a means to reach the goal, effectively overshoots the goal because that means does not consider effect. One must assume that the Legislature did not use phraseology for the goal of the ASBS program such as “no waste in ASBS” because they intended effect to be considered and recognized scientifically in the goal statement as a certain level of allowable waste. So they directed there also be an option for continued discharge into ASBS – limited by special conditions – to meet that effects-based goal.

***CASQA recommendation:** The special conditions should clearly state, consistent with the enacting legislation, that there are two equivalent means to reach the goal of protecting against undesirable alterations in natural water quality: waste discharges are 1) prohibited or 2) limited by special conditions.*

Definitions – The working draft misuses regulatory and technical terms; invents new ones.

One of the most difficult aspects in reviewing and trying to understand the intent of the working draft is the inconsistent and incorrect use of regulatory and technical terms (the definition of waste is just one example; many others were recognized in the workshops). In hindsight, this may not be completely surprising, as the proposed ASBS program affects all discharge types – point and non-point, stormwater and non-stormwater, storm event and non-storm event, permitted and non-permitted, direct and indirect, those discharges that flow from municipal separate storm sewer systems (MS4s) and those that do not. Regardless, the use of correct and consistent terminology is obviously critical to public understanding and well-informed decision-making.

***CASQA recommendation:** The State Water Board should develop a definitions section using existing definitions of regulatory and technical terms and include this section in the special conditions. CASQA has taken the liberty of developing the beginnings of a definitions section to help initiate that process (see Attachment A). As stormwater quality practitioners, we would be happy to assist staff with this exercise as it relates to stormwater. After this exercise, the working draft should be rewritten using consistent and correct regulatory and technical terminology.*

***CASQA recommendation:** Given the wide range of affected discharge types and geographic locations (e.g., ASBS, streams, ocean, seeps, springs) discussed, the State Water Board should develop and include in the special conditions a generalized map or drawing to complement and illustrate location-based definitions.*

A major example of the inconsistent use of regulatory terms and the invention of new ones is the naming of staff’s working draft as “Special Protections”. This term is unnecessarily inconsistent with the direction from the Legislature, which stated in SB 512 (2004) that:

“Areas of special biological significance” are a subset of state water quality protection areas, and require special protection” [emphasis added]

and that:

“waste discharges shall be prohibited or limited by the imposition of special conditions” [emphasis added]

Again, one must assume that the Legislature chose its terms for a reason. The Legislature used “special protection” merely as a descriptor and when it defined the regulatory options for discharges, used the term “special conditions”.

***CASQA Recommendation:** The State Water Board should use “special conditions” instead of “special protections” to be consistent with enacting legislation.*

Procedures for setting water quality standards are not being followed.

As drafted, through the use of a Reference Stream, the ASBS “Special Protections” appear to establish new numeric water quality standards. The federal regulations at 40 CFR 131 and the State Water Code both specify how permitting agencies go about establishing water quality standards. Staff’s proposal to derive numeric standards from the Reference Stream and apply it to runoff and to the ASBS receiving water are completely new and have no precedent in any existing water quality standards. The Ocean Plan Table B and bacteria objectives already exist; however, they are not now routinely applied to stormwater runoff in the receiving water. In particular, Table B objectives should not be applied to stormwater prior to discharge (i.e., end-of-pipe).

Our understanding is that State Water Board staff believes these performance standards are merely an interpretation of the requirement for maintenance of “natural water quality” in ASBS. However, it is the position of CASQA that the staff’s proposal creates new objectives that were never anticipated or analyzed when the ASBS were designated nor at any other time during the development of the Ocean Plan. Similarly, the “Special Protections” apply existing objectives in a manner not described in the current Ocean Plan. Staff has not followed the required procedures for implementing new standards.

CASQA comments on Working Draft – Staff Proposal,
“Special Protections”, Areas of Special Biological Significance

***CASQA recommendation:** To set new water quality standards, the State Water Board should adhere to required procedures for implementing new standards. If the State Water Board comes to considering numeric effluent limitations for stormwater in the context of the ASBS program, the State Water Board should follow the recommendations of its Blue-Ribbon Panel report.*

These are some of our comments on this initial staff proposal. As we expressed above, until these fundamental issues of document design, organization, and definition are addressed, we feel it will be unproductive and premature to comment further the a working draft. Thank you again for the opportunity to provide early comments and we look forward to working with staff on the second draft. Please contact me at (916) 808-1434 or our Executive Director, Geoff Brosseau (650) 365-8620 if you have any questions or we can provide further assistance.

Sincerely,



Bill Busath, Chair
California Stormwater Quality Association

enclosure: Attachment A – Draft Suggested Functional Definitions for ASBS Management

cc: CASQA Board of Directors and Executive Program Committee

Attachment A **Suggested Functional Definitions for ASBS Management**

CASQA strongly recommends that the special conditions provisions include an attachment for definitions. The following definitions are intended to be used to facilitate the management of ASBS in compliance with the Ocean Plan. In some cases these definitions repeat or expand on existing regulatory definitions.

Areas of Special Biological Significance (ASBS) – 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. All Areas of Special Biological Significance are also classified as a subset of STATE WATER QUALITY PROTECTION AREAS. (*from Ocean Plan*)

Co-mingled – MS4 flows that contain flows from a separate discharger not under the control of the MS4. See run-on.

Direct discharge – See discharge to an ASBS.

Discharge to an ASBS – A direct liquid-to-liquid contact from a point source to the waters of the ASBS. The return period must be greater than once per three years.

Discharge to land – A discharge in which the discharged liquid does not reach receiving water as a confined or surface flow.

Discharge point – The location at which a point source enters the receiving water.

Discharge to a stream – Discharge at least 100 meters from the mouth of a stream or river.

Non-storm event runoff – Runoff that is not a direct result of rainfall, melted snow, or other precipitation.

Municipal Separate Storm Sewer System (MS4) – A municipally-owned storm sewer system regulated under the Phase I or Phase II storm water program implemented in compliance with Clean Water Act section 402(p). Note that an MS4 program’s boundaries are not necessarily congruent with the permittee’s political boundaries.

Non-point source – Non-point pollution sources generally are sources that do not meet the definition of a point source. Non-point source pollution typically results from land runoff, precipitation (except those discharges regulated by an NPDES permit), atmospheric deposition, drainage, seepage, or hydrologic modification. The term “discharge of waste” in Porter-Cologne covers non-point, as well as point, sources of pollution.

* Partial discussion draft to help initiate process of establishing clear and consistent definitions of regulatory and technical terms.

Non-storm water – The component of liquids conveyed through an MS4 that are not completely composed of precipitation.

Objectives – The Ocean Plan water quality objectives including those in Tables A and B and elsewhere in Section II of the Ocean Plan.

Point source – “any discernible, confined, and discrete conveyance” of pollutants to a water body. The definition of discrete conveyance includes, but is not limited to, “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.” (federal def.; see addition material at 40 CFR; probably need to include all of the federal def.)

Private storm drain – A drain not owned by an MS4.

Receiving water – A natural body of water such as a stream, river, lake, or ocean, which receives storm water, wastewater, or other discharges.

Reference stream – To be determined

Run-on – Flows from a non-related source, generally upgradient, which enter an MS4.

Sheet-flow – Runoff that flows across land surfaces at a shallow depth relative to the cross-sectional width of the flow. These types of flow may or may not enter a storm drain system before discharge to receiving waters.

Significant difference – Statistically significant difference in the arithmetic means of two distributions of sampling results at the 95 percent confidence level. (*from Ocean Plan*)

Storm water runoff – The portion of rainfall, melted snow or other precipitation that flows across the ground surface to a drain, sewer, stream, lake, pond, river, or other waterway.

Storm drains – Above- and below-ground structures for transporting stormwater to outfalls or receiving waters.

Surf zone – The nearshore zone between the outermost breakers and the area of the wave uprush; also called the breaker zone. (*adapted from American Heritage*)

Total (in reference to total metals and other constituents) – Ocean Plan objectives are given in terms of total metals (not dissolved); therefore samples should not be filtered. However, if large particles are present, the following procedure is acceptable:

Adjust the sampling technique or location to avoid sand particles in the sample. 2. If sand and settleable grit is present in the sample, agitate the sample then allow 1-2 minutes for

* Partial discussion draft to help initiate process of establishing clear and consistent definitions of regulatory and technical terms.

settling, then decant the liquid portion of the sample prior to analysis. 3. If decanting is not feasible, filter the sample through a coarse screen (approx. 1 mm).[from SWRCB guidance]

Waste – “As used in this Plan, waste includes a discharger’s total discharge, of whatever origin, i.e., gross, not net, discharge.” (*from Ocean Plan*)

“Waste” is broadly defined in Porter-Cologne to include sewage and “any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation” This definition includes all Attorney General interpretations of the terms “sewage”, “industrial waste”, and “other wastes” under Porter-Cologne’s predecessor legislation.¹ The Attorney General had interpreted the latter terms to include wastes from a variety of activities typically considered nonpoint, such as:

- drainage, flow, or seepage containing debris or eroded earth from logging operations;²
- garbage disposal;³
- drainage, flow or seepage containing garbage, ashes, mixed refuse, or solid industrial waste from inactive or closed dumps;⁴
- return irrigation or drainage water from agricultural operations;⁵
- pesticides improperly applied to waters of the state, or which find their way into waters of the state after application;⁶
- changes in the physical or chemical characteristics of receiving waters caused by extraction of minerals from a streambed;⁷ and
- dumping of earth moved from construction operations, or drainage of wastewater from construction sites.⁸

These examples indicate that discharges of waste are not limited to waste disposal but also include illicit or improper releases of pollutants as part of other activities. Hydrological or hydrogeological modifications, for example, that cause the release of wastes into state waters may be regulated under waste discharge requirements. (*from SWRCB Nonpoint Source Program – Vol. 1*)

Storm event runoff – Runoff that occurs as a direct result of rainfall, melted snow, or other precipitation.

¹ *Lake Madrone, supra*, fn. 11, 209 Cal.App. 3d at 169, 256 Cal.Rptr. 894; see Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969) (Final Report), App. A, p. 23.

² 27 Ops.Cal.Atty.Gen. 182, 184 (1956).

³ 16 Ops.Cal.Atty.Gen. 125, 126-30 (1950).

⁴ 27 Ops.Cal.Atty.Gen. 182, 184 (1956).

⁵ *Ibid.*

⁶ 43 Ops. Cal.Atty.Gen. 302, 304 (1964).

⁷ 32 Ops.Cal.Atty.Gen. 139, 140-41 (1958).

⁸ 16 Ops.Cal.Atty.Gen. 125, 130-31 (1950).

* Partial discussion draft to help initiate process of establishing clear and consistent definitions of regulatory and technical terms.