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DEPARTMENT OF PUBLIC WORKS

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IN REPLY PLEASE

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March 15, 2010

Ms. Constance Anderson
Environmental Scientist
State Water Resources Control Board
Division of Water Quality, Ocean Unit
P.O. Box 100
Sacramento, CA 95812-0100

Dear Ms. Anderson:

COMMENTS ON NOTICE OF PREPARATION AND INITIAL STUDY FOR A STATEWIDE PROGRAM ENVIRONMENTAL IMPACT REPORT FOR A GENERAL EXCEPTION TO THE CALIFORNIA OCEAN PLAN WASTE DISCHARGE PROHIBITION FOR SELECTED DISCHARGES INTO AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE, INCLUDING SPECIAL PROTECTIONS FOR BENEFICIAL USES

These comments are being submitted on behalf of the County of Los Angeles (County) and the Los Angeles County Flood Control District (LACFCD) in response to the State Water Resource Control Board's (State Water Board) Notice of Preparation dated February 4, 2010, regarding the above-described subject matter. The County and the LACFCD welcome the opportunity to comment on the Notice of Preparation and the accompanying Initial Study.

As applicants for the general exception, the County and the LACFCD generally support using the general exception as a regulatory mechanism for discharges into the Areas of Special Biological Significance. Along those lines, we request that any general exception ultimately approved by the State Water Board be issued retroactive to the application submittal date. All applicants, including the County and the LACFCD, have waited several years for the issuance of the general exception and the proposed Special Protections provisions without being able to obtain any coverage for continued discharges into the Areas of Special Biological Significance.

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The enclosed comments focus primarily on the Initial Study checklist and request that the Environmental Impact Report adequately reflect and analyze the full range of potential environmental impacts associated with the various control measures that might be required in order for dischargers to comply. Our comments set forth some examples of potential control measures under consideration by the County and the LACFCD. With respect to Attachment A of the Initial Study, the draft Special Protections document, it is not clear whether the State Water Board has intended to solicit comments on this draft, which has not been circulated for comment since it was originally released in March 2008. Therefore, to the extent that our comments dated August 15, 2006, have not been addressed, we hereby incorporate them by reference. Finally, the County and the LACFCD have reviewed and support the comments of the California Stormwater Quality Association being submitted under a separate cover.

Thank you for your consideration of these comments. If you have any questions, please contact me at (626) 458-4300 or ghildeb@dpw.lacounty.gov or your staff may contact Mr. Hector Bordas at (626) 458-5947 or hbordas@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works



GARY HILDEBRAND
Assistant Deputy Director
Watershed Management Division

FW:jtz

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Enc.

cc: Chief Executive Office (Lari Sheehan)
County Counsel (Lauren Dods, Judith Fries)
Department of Beaches and Harbors (Charlotte Miyamoto)

**COMMENTS OF COUNTY OF LOS ANGELES AND LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT ON INITIAL STUDY FOR GENERAL EXCEPTION TO
CALIFORNIA OCEAN PLAN WASTE DISCHARGE PROHIBITION FOR SELECTED
DISCHARGES INTO AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE**

The following are the comments of the County of Los Angeles (“County”) and the Los Angeles County Flood Control District (“LACFCD”) to the Initial Study (“IS”) for the proposed General Exception to the California Ocean Plan Waste Discharge Prohibition for Selected Discharges into Areas of Biological Significance (“ASBS”).

Before turning to those comments, the County and LACFCD request that the State Water Resources Control Board (“State Board”) staff amend the General Exception document to make clear that the General Exception will apply retroactively to the date that the applicant applied for the exception. This is required due to a recent ruling by the U.S. District Court for the Central District of California in *Natural Resources Defense Council v. County of Los Angeles*, Case No. CV 08-1467-AHM (PLAx), in which the court asserted that the prohibition of waste discharges into the ASBS had already been incorporated into the Los Angeles County municipal separate storm sewer system (“MS4”) permit and, thus, discharges into the ASBS could violate the permit and lead to liability under the Clean Water Act. This ruling potentially affects all municipal dischargers who, while in good faith have applied for the General Exception, could nonetheless be liable on the grounds that discharges into an ASBS violated an MS4 permit, even though the General Exception and accompanying Special Protections were not available to be incorporated into that permit.

The General Exception, so long as it can be applied to a municipal discharger covered by an MS4 Permit, should cover discharges that occurred while the discharger waited for the Exception application to be approved and the document formulated, a process that has taken nearly six years. This will protect dischargers who have relied in good faith on the State Board to provide the General Exception in a timely manner. As stated in Section I of the IS, the State Board “notified applicants to cease storm water and nonpoint source waste discharges into ASBS or to request an exception under the Ocean Plan.” Since the applicants covered by the General Exception made that application, in some cases several years ago, in response to the request to “cease . . . discharges . . . or request an exception,” the applicants should not be penalized due to the length of time it has taken for the State Board to provide the required exception. In making these comments, the County and LACFCD do not admit that they are, or have been at any time, in violation of the Clean Water Act or the MS4 permit with respect to ASBS discharges or that the ASBS discharge prohibition has been incorporated into the MS4 permit.

The County and the LACFCD also wish to note that the Special Protections document attached as Attachment A to the IS has not undergone formal notice and comment, which is required. If the Special Protections document is revised through that process, any Environmental Impact Report (“EIR”) would have to be updated to reflect the changed project description. Nevertheless, we have concerns regarding Attachment A

and have provided some comments in this regard. The County and LACFCD expressly reserve the right to provide additional comments during the preparation of the Environmental Impact Report (“EIR”) and in response to a formal notice.

Comments on Initial Study

I. Background

Section I of the IS, “Background,” erroneously fails to note that the LACFCD separately applied for a General Exception for discharges into the Laguna Point to Latigo Point ASBS and is thus covered among those dischargers to be covered by the General Exception. Section I, as well as Table 1 and 2, only lists the County of Los Angeles, which is a separate legal entity from the LACFCD, as seeking the exception. The EIR must reflect that both the County and the LACFCD are covered under the proposed General Exception.

II. Environmental Impacts

Before turning to a discussion of the specific Environmental Impacts noted in the IS, the County and LACFCD would like to emphasize the importance of a preparation of a full and complete EIR. Even though as the IS points out in numerous places, implementation of the General Exception by individual dischargers will require project-specific environmental review, the State Board must ensure that as a Tier I document, the EIR provide dischargers with a full and complete discussion of potentially significant environmental impacts that would be common to all projects, as well as possible mitigation for those impacts. See *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal. App.4th 182, 198, in which the court provided an excellent example of this point:

Consider, for example, a series of five new downtown office building construction projects. Each might be expected to generate significant additional automotive traffic. Rather than present a new traffic impact analysis in each of five EIR’s, a “first tier” EIR might be used to analyze traffic impacts and other common environmental impacts expected to result from the five projects.

The court held, however, that “‘tiering’ is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause.” *Id.* at 199. Moreover, proper analysis in a Tier I EIR allows agencies preparing the project-specific Tier II environmental analysis to rely upon the work done in the Tier I EIR. See Pub. Res. Code § 21093 (tiering allows exclusion of “duplicative analysis of environmental effects examined in previous environmental impact reports.”)

Also, a Tier 1 EIR should identify reasonably foreseeable mitigation in applicable impact areas and not defer that to a subsequent environmental document.

As a further general comment, the County and the LACFCD note that in many places in the IS, “No Impact” is checked as the conclusion of staff. However, the IS provides no evidentiary basis or reference to any documentation to substantiate this conclusion, as required by Section 15063 of the State CEQA Guidelines.

The County and the LACFCD are considering potential methods to comply with the proposed General Exception. Any method would depend on the ultimate requirements of a Special Protections document approved by the State Water Resources Control Board and implemented by the Los Angeles Regional Water Quality Control Board. Based on a preliminary analysis, it appears that the steps required to comply with the general requirements of the General Exception could include possible construction of water storage, pipe conveyance and treatment facilities, with associated right-of-way acquisition, construction, maintenance, water transport, and water quality monitoring activities. The types of facilities and equipment that would be anticipated include, but are not limited to, the following: underground water storage vaults, diversion structures, pump stations (requiring power supply), pipelines, small wastewater treatment plants, water quality monitoring equipment, control panels and water hauling trucks. We would anticipate that other urban municipalities located adjacent to ASBS areas may need to consider similar types of facilities. The EIR should take into account the types of activities and facilities that may be required for dischargers to comply with the proposed General Exception.

Aesthetics

The County and LACFCD concur that aesthetics may be impacted by implementation of the project. In the case of the Laguna to Latigo ASBS, which is located along a scenic stretch of the Malibu coastline, construction of water treatment or storage facilities may affect views of the Pacific Ocean. For example, the construction of waste water treatment plants and above-ground pipelines may detract from the area’s natural beauty and recognized viewshed unless otherwise mitigated at significant cost. The County and the LACFCD do not concur that there would be no impact from new sources of light or glare and staff has not substantiated its conclusion that there would be no light or glare issues. Additionally while the narrative indicates that there may be impacts but that they could be mitigated, the check boxes indicated that all impacts would be less than significant, instead of less than significant with mitigation. Also, while the IS notes that “the State Water Board believes that mitigation is available to reduce any potential impacts to aesthetics to less than significant levels” and that the “mitigation measures would be implemented at the project-specific level,” as discussed above, the EIR must identify those mitigation measures.

Air Quality

The County and the LACFCD concur that air quality may be impacted by implementation of the project. In the case of the Laguna to Latigo ASBS, one compliance methodology for ending dry weather discharges could be to store runoff and then pump and truck that stored water to a wastewater treatment plant. Any pumping

and trucking may involve diesel or gasoline emissions. Emissions also would likely occur during the construction of structural BMPs, such as those outlined above. These types of emissions also would likely involve odors, which could be substantial depending on the intensity of the operations and the proximity of receptors. Also, the IS provides no evidentiary basis for the conclusion that the project would not conflict with or obstruct implementation of an air quality plan or result in cumulatively considerable net increase of criteria pollutants. While the IS notes that “the State Water Board believes that mitigation is available to reduce any potential impacts to air quality to less than significant levels” and that the “mitigation measures would be implemented at the project-specific level,” again, the EIR must identify those mitigation measures.

Biological Resources

While the IS correctly notes that biological impacts, if any, of a specific project must be analyzed on a project-by-project basis, as a Tier I EIR, the EIR prepared for the Project must identify reasonably foreseeable impacts and reasonably foreseeable mitigation. For example, the EIR should address the potentially significant impact to aquatic fauna and organisms that currently rely on dry-weather flows in streams which would cease under proposed General Exception.

Cultural Resources

Based on the project description set forth in the IS, it is likely that facilities may need to be constructed to comply with the Special Protections and that construction could require excavation. As a result, there could be an impact to cultural resources, especially given that the work would likely be done in the immediate coastal area. The IS, however, concluded in the checklist that there would be no or less than significant impacts, though the narrative does not support that conclusion, stating that “there may be an impact on cultural resources.” The EIR must evaluate this potential impact and suggest potential mitigation measures.

Geology and Soils

The County and LACFCD do not agree with the conclusion in the IS that there would be no geologic or soils impact from implementation of the project. As noted above, excavation and soil movement may be required to construct facilities required to implement the Special Protections. In the Laguna to Latigo ASBS, local soil conditions have shown to be conducive to landslide activity. For that reason, pipelines that may need to be constructed (due to the current lack of sewer infrastructure) may potentially be required to be built above ground. It is likely that in other ASBSs, dischargers would similarly be required to perform excavation and movement of soil with respect to necessary BMPs and other facilities. The IS, moreover, provides no evidentiary basis for its conclusion that there would be no impacts.

Greenhouse Gas Emissions

The County and LACFCD concur with staff that implementation of the project would cause greenhouse gas emissions. Again, the EIR must identify the mitigation noted by State Board staff to reduce potential impacts to less than significant levels, as well as determine the threshold of significance. Also, staff's conclusion that there would be no conflict with plans, policies or regulations ignores the potential impact of local greenhouse gas ordinances, and is unsupported by any evidence.

Hydrology and Water Quality

The County and LACFCD believe that the discussion of hydrology and water quality impacts does not take into account foreseeable environmental impacts of implementation of the project. For example, storage and transport of dry weather runoff could impact the quantity of recharge to local groundwater aquifers. To address wet weather discharges, above ground pipe conveyances, treatment plants, and associated excavations have the potential to result in erosion, flooding, or alteration to existing drainage patterns if not properly mitigated. Finally, there are 100-year flood hazard areas within the drainage area of Laguna to Latigo ASBS, so there is a potential that new structures could be placed within a flood hazard area and impede or redirect flows, if not properly mitigated. The checklist, however, indicates less than significant or no groundwater, erosion, flooding, drainage pattern or flood hazard impacts. These impacts should be addressed by the checklist, or evidentiary basis provided to the contrary. As noted with other identified impacts, the EIR must discuss and analyze the impacts to water and suggest and analyze necessary mitigation measures.

Land Use and Planning

Activities and facilities possibly required to implement the Special Protections would occur and be built within the Coastal Zone, with the need to obtain coastal permits, either from the state Coastal Commission or local coastal programs. It is also possible that land may need to be acquired to construct facilities, especially if the ASBS is located adjacent to a heavily urbanized area, as is the case with portions of the Laguna to Latigo ASBS. Given these facts, the County and the LACFCD disagree with staff's conclusion that there would be no potential for adverse impacts. This conclusion also has no evidentiary basis, but is merely conclusory. These impacts must be discussed in the EIR, along with mitigation.

Noise

The County and LACFCD concur with staff's conclusion that there will likely be noise impacts from the implementation of the project. As discussed above, the potential use of pump stations and haul trucks could create noise impacts. The construction of facilities required to meet the Special Protections requirements would also likely create noise impacts. Again, the EIR must identify the mitigation noted by State Board staff to

reduce potential noise impacts to less than significant levels. As discussed above, the EIR cannot defer this effort to project-specific environmental reviews.

Housing

Depending on the need to construct facilities to meet the Special Protections requirements, dischargers may possibly need to acquire land in ASBS adjacent areas, which could impact existing housing. In portions of the Laguna to Latigo ASBS, for example, there is relatively little open land due to the urbanization of the area. These impacts, and potential mitigation, must be discussed in the EIR.

Public Services

The activities and facilities possibly required for the County and the LACFCD to comply with the Special Protections are outlined above in Section II. These involve the “provision of new . . . governmental facilities.” In the Laguna to Latigo ASBS, any construction of facilities will involve temporary impacts associated with construction on narrow residential streets, which has the potential to hinder access to emergency personnel such as fire and police. In addition, because a number of the drains into this ASBS are associated with County beaches (which already are very crowded during warm weather), it is anticipated that there will be impacts on the access to recreation at those beaches. In terms of long-term impacts, the facilities outlined above will require capital improvements. Thus, the conclusion in the narrative that there would be no “new demand for community services since no capital improvements are included” is incorrect. In addition, the ability of water purveyors to provide a continued supply of safe drinking water may be impacted if the purveyors are not able to flush water from their system. Emergency flushing is recommended by both the Environmental Protection Agency and the California Department of Public Health (CDPH) to ensure safe drinking water for the public. Prohibiting potable water discharges into an ASBS could lead to the degradation of the drinking water which could impact public health and lead to fines and penalties from CDPH. Therefore, we request that Sections I.A.1.e.(2) be modified to include discharges that are essential to maintain public health, including discharges associated with emergency water system flushing operations. It may be noted that such discharges are allowed under MS4 permits. The County and LACFCD note further that in the Mandatory Findings of Significance, the IS concludes that there may be impacts to public services. As noted elsewhere, the EIR must discuss these impacts and potential mitigation, despite the fact that project-specific environmental documents may be required to address local impacts.

Recreation

The County and LACFCD disagree with staff’s conclusion that there would be no impact on recreation facilities. As noted above, since some of the Laguna to Latigo ASBS drainage facilities that would be impacted by implementation of the project are located along County beaches (where parking, and thus access to the beach, already is a problem), any construction required on those beaches could impact access to

recreational opportunities. As a result, the EIR must discuss these impacts and potential mitigation.

Transportation/Traffic

As discussed above, potential construction of facilities to implement the project in the highly urbanized area adjacent to the Laguna to Latigo ASBS, as well as in other urbanized areas located adjacent to ASBSs, could potentially disrupt traffic patterns and could impact emergency access, at least on a temporary basis. Again, the EIR must identify the mitigation noted by State Board staff to reduce potential transportation impacts to less than significant levels. The EIR, as a Tier I document, cannot ignore reasonably foreseeable impacts of the project and defer the discussion of those impacts to project-specific environmental documents.

Utilities and Service Systems

The County and the LACFCD do not agree with staff's conclusion that there will be no impacts on utilities and service systems from implementation of the project. Some of the control measures potentially needed to implement the proposed Special Protections have been outlined earlier in Section II. These control measures may include the construction of new stormwater and non-stormwater treatment, transportation and storage facilities, all of which may cause significant environmental impacts during and after construction, as detailed above. Please note also the previously noted impact on water purveyors who may be prohibited from flushing potable water. Again, the EIR must identify the mitigation noted by State Board staff to reduce potential utilities and service systems impacts to less than significant levels. The EIR, as a Tier I document, cannot ignore reasonably foreseeable impacts of the project and defer the discussion of those impacts to project-specific environmental documents.

Mandatory Findings of Significance

The County and the LACFCD concur with staff's conclusion that the project may have the potential to degrade the quality of the environment, as noted elsewhere in the IS and as discussed in these comments, including in areas where the IS found no impacts. The County and the LACFCD also believe that the issue of cumulative impacts must be assessed. For example, in the case of the Laguna to Latigo ASBS, construction activities by the County and the LACFCD could be occurring at the same time that the City of Malibu is addressing its ASBS discharges (the County and LACFCD drains all are located within the City) as well as efforts to comply with the Regional Board's recently approved ban on onsite wastewater disposal systems. Again, the EIR must identify the mitigation noted by State Board staff to reduce all potential environmental impacts to less than significant levels. The EIR, as a Tier I document, cannot ignore reasonably foreseeable impacts of the project and defer the discussion of those impacts to project-specific environmental documents.

Comments on Special Protections

Lack of Scientific Evidence

State Water Board staff has not presented any scientific information linking the degradation of marine life beneficial use in ASBS to stormwater discharges. The presence of elevated concentrations of certain pollutants in the ocean does not necessarily suggest stormwater as the source or cause. Unlike inland water bodies, the ocean is a gigantic and highly dynamic water body. The fate and transport mechanism of pollutants in ocean media is highly complex and direct linkages to stormwater cannot be drawn without conducting appropriate cause-effect analysis and source tracking studies. Beneficial use impairments at the ASBS could be the result of a complex function of numerous factors, and not attributed solely to external discharges. Internal ocean dynamics and natural, non-controllable, external factors could play a great role. Therefore, it is paramount for staff to conduct additional scientific study to better understand the causes and devise appropriate control mechanisms. A better approach would be to conduct comprehensive monitoring to identify problem areas and focus on controlling the identified problems.

Ocean Plan Objectives Should Not Be Required to be Met at End-of-Pipe Locations

The proposed Special Protections require that implementation actions (such as BMPs) be designed in such a way that those actions achieve Ocean Plan Table B targets at the end-of-pipe. Such requirement goes beyond the scope of federal and state water quality regulations. For example, the Clean Water Act requires that dilution effects of the waterbodies should be taken into account by allowing mixing zone areas. Given that ocean has a significantly high dilution potential, compliance should only be measured within the receiving water after dilution effects are taken into account.

Inconsistency Between “Natural Water Quality” and Ocean Plan Table B Objectives

There appears to be an inconsistency in the Special Protections document between compliance with natural water quality and Table B objectives. The Ocean Plan requires maintenance of natural ocean water quality. As presented in the special protections, “Natural water quality” is being defined in terms of reference conditions. This condition is independent of the Table B targets. It is unclear how compliance would be interpreted if either natural water quality or Table B targets are attained, but not both. Further, neither the Ocean Plan nor the Special Protections document has provided an appropriate definition for what constitutes compliance with natural water quality.

Dry Weather Discharge Prohibition

Under the current proposed Special Protections, non-stormwater discharges are prohibited. If these discharges meet applicable water quality standards, it is unclear

why this prohibition is required. There is no scientific evidence that suggests that non-stormwater discharges negatively alter natural ocean water quality. In fact, the cessation of discharges might harm marine life that depends on such discharges. Staff needs to conduct a study to justify the prohibition by examining the benefits and costs of such actions. In the absence of such studies, non-stormwater should be allowed under conditions that they meet applicable water quality standards. Further, the Special Protections document should require monitoring of such discharges to see if they affect the ASBS beneficial uses, and if so, require efforts to address such discharges.

Prohibition of New Discharges

The proposed Special Protections prohibit the addition of new discharges since January 2005. This prohibition could affect the ability of responsible parties to address the treatment of discharges through, for example, the consolidation of old multiple discharges into a single new discharge with treatment. To our understanding, such requirement goes beyond the provisions of the Ocean Plan for ASBS. Per the Ocean Plan, exception can be granted as long as the discharges do not compromise the protection of the ocean beneficial uses or contribute to the alteration of natural water quality. The exception provision in the Ocean Plan did not distinguish between existing and new discharges. Therefore, room for exception should be available for new additions as for the existing ones.

Potable Water Discharges

The ability of water purveyors to provide a continued supply of safe drinking water is contingent upon their ability to flush water from the potable water distribution system. Emergency flushing is recommended by both the Environmental Protection Agency and the California Department of Public Health (CDPH) to ensure safe drinking water for the public. Prohibiting potable water discharges into the ASBS could lead to the degradation of the drinking water which could impact public health and lead to fines and penalties from CDPH. Therefore, potable water discharges should be included in the list of non-stormwater exemptions under Section I.A.1.e.(2) of the proposed Special Protections.

Non-MS4 Discharges

In the Laguna to Latigo ASBS, more than 80% of the storm drains identified to date are privately owned and are not part of the MS4 system. The proposed Special Protections document covers only storm drains that are owned by the County, LACFD, the City of Malibu, and Caltrans. The County and LACFCD cannot regulate discharges from private storm drains (in fact, most of the area adjacent to the Laguna to Latigo ASBS is within the City of Malibu). The governmental agencies cannot be held responsible for any inability to achieve natural water quality conditions by virtue of private discharges.

Compliance Schedules

The proposed Special Protections document requires that responsible parties cease non-stormwater discharges immediately upon the adoption of the exception. It also requires that responsible parties implement structural solutions and comply with maintenance of natural water quality for all discharges within four years of the adoption of the exception. Meeting such timelines is infeasible. The planning, coordination, permitting, land acquisition, funding, studies, designing, and construction phases required to achieve these requirements cannot be met within the proposed timelines, which may, depending on the work ultimately required, take up to 10 years to achieve. State Water Board staff should re-assess the proposed schedule for compliance.

Triad Approach

The compliance assessment for ASBSs should be made based on multiple line of evidence. In particular, chemical, toxicological, physical and biological information should be used in evaluating beneficial use impairment at the ASBS. This “triad” approach is called for because the concentrations of chemicals in water alone cannot account for the impairment of marine life.