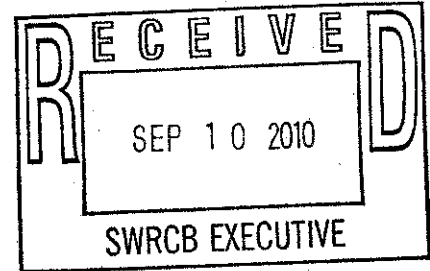


City of Malibu

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September 9, 2010

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-0100



Submitted by email to: commentletters@waterboards.ca.gov

Re: COMMENT LETTER- CALIFORNIA OCEAN PLAN

Dear Ms. Townsend:

I write on behalf of the City of Malibu with respect to the State Water Resources Control Board notice soliciting comments from the public regarding issues relevant to the Ocean Plan. The City raises these issues because achievement of the goals of the Ocean Plan depends on complex, evolving and expensive technologies. Given the fiscal constraints of both State and local governments, the City raises these issue in recognition of the need to work together to find efficient and effective methods to achieve clean water and protect beneficial uses using limited available funds.

The City wishes to emphasize three issues that are the highest triennial review priorities for the City, all primarily related to the Areas of Special Biological Significance (ASBS):

- 1) Adoption and implementation of a practical but protective ASBS regulatory approach;
- 2) Establish a functioning exception process; and
- 3) Explicitly allow a compliance schedule for stormwater discharges.

First, the reality is that the outright prohibition on discharges to the ASBS is impractical and unrealistic. As a result, the Ocean Plan sets a standard that is unachievable and ecologically unnecessary. The City favors a practical but protective ASBS regulatory approach in lieu of an outright prohibition. The City proposes that the Ocean Plan set a standard that *detectable human influence on the water quality must not hinder the ability of marine life to respond to natural cycles and processes.* This criterion is also discussed in the State's Natural Water Quality Committee report currently being finalized. The City proposes that the Ocean Plan be amended to allow the discharge of stormwater to ASBS subject to compliance with this standard and to establish attainable criteria for these discharges. This amendment should be a top priority in order to resolve the current regulatory uncertainty facing



hundreds of stormwater discharges to ASBS. The adoption of a straightforward approach to permitting ASBS discharges would also help resolve the current near deadlock in drafting the Special Protections and issuing these permits.¹

The City believes the Ocean Plan should be modified to allow the continuation of existing stormwater discharges to ASBS. In probably most cases, urban stormwater discharges into ASBS predate the designation of the ASBS. At the time of ASBS designation, storm water runoff was considered a non-point discharge and not subject to Clean Water Act (CWA) permitting provisions. Earlier versions of the Ocean Plans required urban runoff treatment "to the extent practicable" with a high priority placed on discharges to ASBS, but no prohibition.² However, court decisions have clarified that storm water runoff is generally considered to be a point source and thus subject to the permitting requirements of the CWA. Although the clear wording of the Ocean Plan now specifies that stormwater discharges are prohibited, the documentation for the amendments implementing these prohibitions does not indicate consideration by the Water Board of either the costs or environmental consequences of this prohibition, both of which are necessary considerations for sensible regulation.³

Second, the City respectfully submits that the Water Board must establish a functioning and consistent process for applying for and granting exceptions to the Ocean Plan. Special protections in the form of exceptions provide an excellent method of accounting for specific environmental conditions; however, the current process seems to have stalled. The Ocean Plan currently allows the following:

1. The State Water Board may, in compliance with the California Environmental Quality Act, subsequent to a public hearing, and with the concurrence of the Environmental Protection Agency, grant exceptions where the Board determines:
 - a. The exception will not compromise protection of ocean waters for beneficial uses; and
 - b. The public interest will be served.

However, no guidelines currently exist for the process which would establish an exception. This lack of a clear process left dischargers in limbo where they have applied for an exception after having been notified by the Water Board to "either cease discharges or apply for an exception."

¹ The initial working draft of the *Special Protections* was completed in June 2006.

² In 1974, the State Board in its Draft Final FED noted: "c) Discharge of waste from nonpoint sources, including but not limited to storm water runoff, silt and urban runoff, will be controlled to the extent practicable. In control programs for waste from nonpoint sources, Regional Boards will give high priority to areas tributary to ASBS."

³ The State Water Board did not consider effects on stormwater dischargers, possibly because the intent was to control thermal dischargers (new power plants were an issue at the time). The State Water Resources Control Board's Resolution No. 74-28 states: "6. The list of Areas of Special Biological Significance will be used to identify for planning purposes, those areas where the regional water quality control boards will prohibit waste discharges from all sources controlled within the authority of the Temperature Control Plan, recognizing that the Ocean Plan is not applicable to vessel wastes, the control of dredging, or the disposal of dredging spoil. [emphasis added] In July 1976 ASBS report posted here.



Currently, the classification of ASBS is a subset of State Water Quality Protection Areas; therefore, the ASBS designation does not change the use for these areas. Waste discharges to ASBS are still prohibited under the Ocean Plan "**unless an exception is granted**"⁴ (emphasis added). The City applied for an exception to the ASBS discharge prohibition in July 2007 and, at the request of the State Board staff, contributed funds toward a monitoring study aimed at helping define the appropriate special protections for the subject ASBS. Along with other ASBS dischargers, the City has been waiting ever since for the issuance of a General Exception. It seems that the granting of this exception would preclude the need for an outright discharge prohibition, thus allowing existing discharge points subject to conditions that can be established in the Special Protections program. While the City has been increasingly implementing the prohibition to the maximum extent practicable since becoming aware of the ASBS discharge prohibition with the State's October 2004 letter and subsequently expressing an interest in seeking an exception in a January 2005 response, the City should not be held accountable for the lag in regulatory process. Information on how to apply for an exception was not provided by the Water Board until August 2005, and even that direction was not clear enough to garner consistent enough application content from dischargers that would allow the Water Board to use the information in preparing a General Exception. Further analysis by an outside consultant, at a cost to the State and certain ASBS dischargers (including the City of Malibu), was still required for recommendations to Special Protections and yet a General Exception has still not been adopted or granted. At the moment it appears that a discharger either must comply with an infeasible target (cease all discharges of stormwater to the ASBS) or comply with an exception process and Special Protections that have not been determined

Third, the City urges the Board to require that a compliance schedule be established for implementing protections of the ASBS. Municipalities should not be under the threat of civil penalty actions or citizens' suits while working on a program for implementing special protections. In a letter to the Office of Administrative Law dated December 16, 2009, the City petitioned the approval of the "non-substantive" changes to the Ocean Plan on the basis that the changes were indeed quite substantive. That letter is attached for reference.

The "non-substantive" changes to the Ocean Plan in 2009 changed the requirements for compliance schedules in ways that may be substantive and should be addressed during the triennial review. The changes related to compliance schedules are the following:

F. Revision of Waste* Discharge Requirements

- ~~1. The Regional Board shall revise the waste* discharge requirements for existing* discharges as necessary to achieve compliance with this Plan and shall also establish a time schedule for such compliance.~~

G. Compliance Schedules in National Pollutant Discharge Elimination System (NPDES) Permits

1. Compliance schedules in NPDES permits are authorized in accordance with the provisions of the State Water Board's Policy for Compliance Schedules in [NPDES] Permits (2008).

⁴ State Water Board Resolution No. 2005-0035 Adoption of the Proposed Amendments to the California Ocean Plan



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Thus, the original wording that allowed establishment of a non-enforcement compliance schedule has been replaced with a reference to the *Policy for Compliance Schedules*, which constrains the use of compliance schedules, does not apply to stormwater since it only applies to discharges subject to CWA section 301(b)(1)(C), and may adversely impact permits including those for discharges to ASBS. Compliance schedules for stormwater discharges to ASBS would consequently not be allowed. From the new Policy:

11. This Policy does not specifically authorize compliance schedules for prohibitions. The State Water Board finds that it is unnecessary to authorize compliance schedules for prohibitions because the Water Boards are authorized to adopt prohibitions that are not effective immediately, but rather at a specified future date.

In addition, the definitions for "*New, revised, or newly interpreted water quality objective or criterion in a water quality standard*" and for "*Newly interpreted water quality objective or criterion in a water quality standard*" do not appear to support compliance schedules for ASBS discharges.

The Ocean Plan has included the ASBS discharge prohibition for stormwater since 1987; however, the Board did not recognize or apply the prohibition until 2001 in a water quality order aimed at Caltrans' stormwater discharges. Even now, the Board is still developing regulatory approaches for addressing the ASBS prohibition as related to stormwater and all potential dischargers are in legal limbo in the meantime, subject to fines of up to \$37,500 per day, pending adoption of exceptions to the prohibition. The necessary controls may be costly and also complex from an implementation standpoint (e.g., construction of major facilities in the coastal zone, which creates significant technical and regulatory obstacles). Non-enforcement compliance schedules will be necessary, but have apparently been precluded by the State Board's "non-substantive" 2009 amendments. The Water Board should reverse its earlier decision and explicitly allow compliance schedules for stormwater in the Ocean Plan, which is now precluded from using them.

A better approach is an iterative one employing BMPs and monitoring to demonstrate compliance. For example, the City of Malibu has taken a proactive, iterative approach to improve water quality under the NPDES Permit and any associated TMDLs (Santa Monica Bay Beaches Bacteria for wet and dry weather), as well as applying for an exception to the ASBS discharge prohibition and implementing programs and projects to protect the ASBS which are also complementary to the aforementioned water quality regulatory requirements. As part of the City's comprehensive program for compliance with water quality standards, the City has constructed or committed to construct the Civic Center Stormwater Treatment Facility (CCSTF), Legacy Park, and the Paradise Cove Stormwater Treatment Facility (which is sited in the ASBS); has implemented outreach programs and development planning conditions to eliminate discharges to the ASBS; and in spring of 2008, the City began concept planning for two drainage improvements projects in the ASBS which the City was awarded grant funding under the Proposition 84. Despite these progressive efforts, the City still faces citizen suits and potential civil penalties based on the discharge prohibition.



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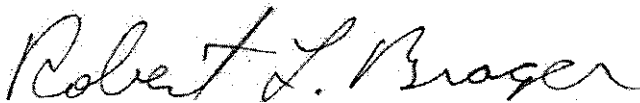
As demonstrated in the City's example, an agency may be diligently working in an iterative manner to focus on specific areas of concern, committing substantial resources, and working toward compliance; yet it is left vulnerable to significant civil penalties. The implication of enforcing this prohibition without a compliance schedule or workable solution in place, while thought to be in best interest of protecting marine habitat, has severe negative consequences that may hinder an agency's progress toward successful compliance. Instead of being focused on project completion, resources are directed toward costly litigation defense and away from real water quality and beneficial use benefits.

The requirement to implement ASBS Special Protections on top of the existing NPDES MS4 permit requirements and TMDL program implementation, including developing compliance and monitoring plans, conducting monitoring, and BMP design and installation, in total have the potential to prove to be the most expensive element of an agency's annual budget, surpassing public safety and all City operations costs.

In conclusion, the City urges the Board to consider the importance of a protective and practical program of implementation for the ASBS, and especially to reverse its earlier decision and explicitly allow compliance schedules for stormwater. If you have any questions regarding these comments you may contact Jennifer Voccola, Senior Environmental Programs Coordinator at jvoccola@ci.malibu.ca.us or (310) 456-2489 ext. 275.

Thank you for the opportunity to comment and for your attention to this matter.

Sincerely,



Robert L. Brager
Public Works Director

cc: Jim Thorsen, City Manager
Christi Hogin, City Attorney
Jennifer Voccola, Senior Environmental Programs Coordinator
Tom Howard, State Water Resources Control Board
Bruce Fujimoto, State Water Resources Control Board
Dominic Gregorio, State Water Resources Control Board

