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**Via Email (gregd@dwq.swrcb.ca.gov)  
June 9, 2004**

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

**RE: Proposed California Ocean Plan Exception - Scripps ASBS Discharge  
Draft Negative Declaration Comments**

Dear Mr. Gregorio:

Coast Law Group LLP represents San Diego BayKeeper and the San Diego Chapter of the Surfrider Foundation. These grassroots non-profit environmental organizations are dedicated to the preservation of coastal natural resources throughout San Diego County and the State of California. Both groups are particularly concerned with issues relating to Areas of Special Biological Significance, Marine Protected Areas, and Clean Water Act/Porter-Cologne Water Quality Act compliance.

Please accept the following comments in response to the Draft Negative Declaration for the project entitled *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*.

**General Comments**

Since February, 2004, Surfrider/BayKeeper have met with Scripps Institution of Oceanography (SIO) representatives at least six times to discuss the proposed exception. Throughout these meetings, we have been consistently impressed with the efforts of the University to develop a plan and process that will provide the utmost protection to the San Diego Marine Life Refuge. As a result of these meetings, we have developed a strong relationship with SIO, and are hopeful that collaborative efforts will continue well after this stage of the process is completed and the true work of implementing the monitoring program and discharge controls gets underway.

**The Surfrider Foundation and BayKeeper support the proposed exception to the**

**California Ocean Plan for SIO.** As noted, we believe that regardless of the conditions imposed, SIO is committed to undertake all efforts necessary to safeguard the heightened beneficial uses of the San Diego Marine Life Refuge. But, because this exception is being heralded as a likely model for future ASBS discharge Ocean Plan exceptions, we feel compelled to point out a number of issues that should be considered in this and future similar circumstances. Please also note, we have reviewed the comment letter recently submitted by The Ocean Conservancy, and concur with the statements contained therein.

### **The California Ocean Plan and The Other Approximately 1,600 ASBS Discharges**

The California Ocean Plan contains the relevant water quality objectives and beneficial use designations for Areas of Special Biological Significance. Recognizing that heightened standards must be applied to discharges in ASBS, the Ocean Plan specifically lists preservation and enhancement of designated ASBS as a beneficial use of ocean waters. Further, the Ocean plan *Implementation Provisions for Areas of Biological Significance (ASBS)* states:

1. 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.
2. Regional Boards may approve waste discharge requirements or recommend certification for *limited-term* (i.e. weeks or months) activities in ASBS. ... Limited term activities may result in *temporary and short-term* changes in existing water quality. Water quality degradation shall be limited to the shortest possible time. The activities must not permanently degrade water quality or result in water quality lower than that necessary to protect existing uses, and all practical means of minimizing such degradation shall be implemented. (Emphasis added)

Clearly, absent an exception, the Ocean Plan prohibits any long term discharges of waste to ASBS (whether direct, or indirect via discharges nearby). Further, the standard to be protected in ASBS is the highest possible - "natural water quality conditions." Importantly, given this standard, there is no allowance for degradation of the baseline water quality conditions *even when an exception is granted*. See Condition No. 1 ("The discharge must comply with all other applicable provisions, including water quality standards, of the Ocean Plan.")

There have been identified approximately 1,650 illegal discharges into ASBS. A number of the discharges, including those at issue in the Scripps exception, are into coastal waters that are Clean Water Act section 303(d) listed as impaired for bacteria and other pollutants. In these circumstances, where the water quality standards cannot be met until de-listing occurs, the

SWRCB should direct the Regional Water Board to take enforcement action against all non-point source and stormwater dischargers as part of any point source discharge exception process. Anything less would render the excepted discharge a disingenuous application of the receiving water standard.

### **Choice of CEQA Document**

SWRCB consideration of impacts from excepting the Scripps (or any future) ASBS discharges should not occur via a Negative Declaration under CEQA. Negative Declarations are appropriate where there exists sufficient information regarding the proposed discharges such that the decisionmakers can conclusively certify at the time of project approval that there will not be adverse impacts to the environment. Reviewing the Draft Negative Declaration, it is clear that the level of information necessary to make such a certification will not be available until the comprehensive monitoring program is designed and implemented, and the results of the program show that no impacts are occurring. See, e.g. Terms and Conditions Nos. 1-19, virtually all of which defer until some future date monitoring and actions that, while designed to minimize impacts, cannot be said to guarantee compliance with water quality standards applicable to ASBS *now*. In particular, condition 17 recognizes the arbitrary nature of the 2:1 historically applied dilution ratio and requires additional studies to establish an appropriate dilution factor and thereby, the appropriate copper discharge limits. Unless and until condition 17 is complied with, the SWRCB is wholly without evidentiary grounds to find that the proposed exception will absolutely not cause a significant impact to the environment.

Surfrider/BayKeeper suggest the document be styled as a *Mitigated* Negative Declaration instead. A Mitigated Negative Declaration suggests that significant environmental impacts may occur unless certain specified mitigation measures are adopted and implemented. The Terms and Conditions listed should be considered elements of the mitigation and monitoring program designed to render potential impacts insignificant.

Finally, while we recognize that CEQA review is not required for the issuance of Waste Discharge Requirements, the recently submitted Report of Waste Discharge for the Scripps discharges (May 14, 2004) should be considered *at the same time or before* the proposed ASBS exception. Embodiment of the Terms and Conditions of the Exception in the WDR will provide a measurable and enforceable “performance standard” recognized by CEQA as sufficient rationale for less specific or undetermined mitigation measures. CEQA Guidelines §15126.4(a)(1)(B); *See also, Sacramento Old City Association v. City Council of Sacramento*, 229 Cal.App.3d 1011,1028 (1991) (containing the Court of Appeal’s established principles for project approvals when mitigation measures are not final or specifically defined). While Surfrider/BayKeeper have no intention of challenging the SIO exception, the change should nonetheless be undertaken to safeguard against other third-party actions.

## Monitoring

The foundation of the entire exception process is the monitoring program that will be implemented to measure whether natural water quality conditions are being maintained in the San Diego Marine Life Refuge. As noted above, the entire monitoring program developed for compliance with the Waste Discharge Requirements should be coordinated with and incorporated into the approval of the ASBS exception. Further, because the monitoring program must assess whether the Scripps discharges are impacting *natural water quality*, a baseline must be established to identify what this term means with regard to species abundance and diversity. This will be difficult for a number of reasons, including:

- The current state of the ASBS is not natural. This subject stretch of the coast is listed as impaired for bacterial water quality standard exceedences. In addition, the Negative Declaration indicates that Scripps has not been in continued compliance with its permit at various points throughout the last thirty years. The monitoring program must take into account the significant degradation to the ASBS, both historic and current, with respect to bacterial and other inputs;
- Insufficient historical data exists to quantify appropriate ecosystem health indicators. The same unique characteristics that render this stretch of coast an Area of Special Biological Significance also make it difficult (or impossible) to identify an appropriate reference station. Efforts should be made to provide additional qualitative standards for measuring historic background conditions; and,
- We are unaware of any current plans to address the more than 200 illegal stormwater and non-point source discharge points into the San Diego Marine Life Refuge and adjoining La Jolla Ecological Reserve. Unless and until these discharges are addressed, it will be difficult (or impossible) to accurately allocate responsibility for degradation of natural water quality.

While Surfrider/BayKeeper generally believe the monitoring provisions are adequate, we must also note that given the aforementioned difficulties, it may be useful to increase the resolution of data to be acquired. More frequent and intensive sampling, though obviously more costly, should be required in the short term to help identify where additional efforts should be placed.

Finally, it must be noted that the Ocean Plan specifically provides for revision of waste discharge requirements for existing discharges *as necessary to achieve compliance* with the

Ocean Plan (including establishment of a time schedule for such compliance). Therefore, all parties are on notice that unnatural fluctuations in water quality should result in tighter regulations via Scripps' WDR.

### Copper Issues

Table C of the California Ocean Plan sets the background seawater concentration for copper at 2µg/l. The Negative Declaration acknowledges this as the appropriate natural ambient condition in the vicinity of the Scripps discharges. As noted above, the Negative Declaration also identifies the need for an empirical study and/or modeling to set an appropriate dilution factor to derive copper effluent limits. Until a scientifically valid dilution factor has been established, it is impossible to ensure discharges will not impact natural water quality. Further, in calculating the appropriate effluent limitation, the dilution factor must be applied such that the resulting impact beyond the zone of initial dilution is the discharge of background levels of 2µg/l. Given these unknowns, it is not currently possible to determine whether the 5, 32, and 86 µg/l discharge limits, upon which much of the Negative Declaration relies, are appropriate.

The following statement in the Negative Declaration also causes us concern:

“With better management of copper additive and elimination of dry weather urban runoff as required by the conditions in the exception *it seems feasible* that SIO will be able to meet the Ocean Plan effluent limits.” (Emphasis added)

The Board's assessment of whether SIO *might be able to comply* with the law is irrelevant. Discharges to ASBS must comply with water quality standards (Condition 1), or the Regional Board must take action to enforce compliance. Similarly, Condition 2 states:

“UCSD/SIO must take *all reasonable and appropriate measures* to minimize concentrations of chemical additives, including copper, and antibiotics, in the effluent. ... 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*. (Emphasis added)

There is no “reasonable and appropriate” standard applicable here. As noted, SIO must take all steps, without qualification, to achieve relevant water quality standards. The water quality standard with respect to any discharge into ASBS is natural water quality. Reference to Table B is incorrect.

### **Commingled Stormwater/Non-Point Discharges**

The standard for reduction of pollutants in stormwater discharged into an ASBS is not the traditional Clean Water Act Maximum Extent Practicable (MEP) standard. As has been discussed, the discharges, be they stormwater, non-point, or industrial, must meet the appropriate natural water quality standard for ASBS. Therefore, as Scripps revises its Storm Water Management Plan, it must consider how best to combine source control, structural treatment BMPS, and possibly sanitary sewer system diversions to achieve natural water quality during storm flows. Condition 10 is unclear regarding the time that will be afforded to achieve effective stormwater compliance. The Condition contemplates an implementation schedule that “must be designed to ensure an improvement in receiving water quality each year,” when in fact, water quality standards must be met by stormwater *now*. The Regional Board may choose to delay enforcement for a period of time while the program is implemented, but there is no grace period during which failure to adequately treat stormwater flows is not a violation. This will likely be the greatest challenge for SIO, and Surfrider/BayKeeper intend to work with the University to develop a suite of model BMPs that we hope will form the basis of requirements for the remainder of statewide illegal dischargers of stormwater in ASBS.

Condition 6 provides until January 1, 2007 for SIO to eliminate all discharges of non-stormwater urban runoff. This is too long. Dry weather flows should be effectively eliminated by the end of the year (at the latest).

### **Conclusion**

San Diego BayKeeper and the Surfrider Foundation look forward to tackling these difficult issues alongside Scripps as this process moves forward. Most importantly, we hope to ultimately achieve both a model process, and a model product, that can be utilized by stakeholders in other jurisdictions that will face these same issues in coming months. Please consider the foregoing as you prepare a final environmental review document and Conditions for the exception. And despite the issues and concerns noted above, we do support the SIO exception.

Sincerely,



MARCO A. GONZALEZ  
COAST LAW GROUP LLP