



California Stormwater Quality Association®

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Ocean Plan Amendment
Public Comment
Deadline: 04/18/12 by 12 noon

April 18, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Subject: Comments on the proposed amendment to the California Ocean Plan for designating State Water Quality Protection Areas to protect Marine Protected Areas

Dear Ms. Townsend:

The California Stormwater Quality Association (CASQA¹) appreciates the opportunity to comment on the proposed Ocean Plan amendments to establish criteria for State Water Quality Protection Areas (SWQPA) that may then be applied to Marine Protected Areas. We understand that these proposed criteria are intended to protect a subset of SWQPAs designated as SWQPAs– General Protection (SWQPA-GP), rather than the SWQPAs that are Areas of Special Biological Significance (ASBS).

Our member municipalities have a major interest in protecting the natural resources and water quality along the California coastline. We have reviewed the Staff Report, substitute environmental document (SED), and proposed amendments with the goal of ensuring that the final amendments provide clear requirements and a viable pathway to compliance for coastal communities and are based upon a compelling environmental protection rationale. We appreciate the hard work by Board staff in addressing the challenges presented by the variety of Marine Protected Areas (MPA) throughout the state and differing local conditions. However, additional work is required to address the significant deficiencies discussed below and CASQA requests that the amendments not be adopted at this time.

The following comments identify general issues of concern in this initial draft. Detailed comments are provided in the attachment.

- 1. Need for new requirements** – We understand the proposed requirements are intended to implement State Board Resolutions [2010-0057](#) and [2011-0013](#). However, the Staff Report and associated environmental documentation do not provide examples of where the proposed amendments are needed to benefit MPAs. MS4 permits currently require compliance with water quality standards and many permits additionally include TMDL allocations. We believe the

¹ CASQA is comprised of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout California. Our membership provides stormwater quality management services to more than 23 million people in California. CASQA was originally formed in 1989 as the Stormwater Quality Task Force to recommend approaches for stormwater quality management to the California State Water Resources Control Board.

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Staff Report should identify the current water quality problems that would be remedied by the proposed new criteria and also clarify where the existing regulatory tools are not sufficient. The statement in the Environmental Impact Analysis underscores the omission of an environmental rationale for the new program: *“In addition, as no additional controls or treatment would be needed to comply with these measures, there are no adverse environmental impacts associated with compliance actions.”* [page 39]

- 2. Differentiation between POTW and MS4 discharges** – The apparent intent is to allow the continuation of POTW discharges without change, but to require the termination or treatment of stormwater discharges. However, the impact—particularly cumulative pollutant loading—from permanent POTW discharges potentially presents much greater risk to receiving waters than the intermittent and normally short-term stormwater discharges. The rationale for this approach of ignoring POTW discharges and restricting MS4 discharges is not described or justified and the references in the text to the two types of discharges into MPAs are not consistent:

Section 5(c) of the proposed amendments conflicts with Section 5(a). Section 5(a) excludes *“existing point source wastewater discharges”* from SWQPA-GP designation. Existing MS4 permittees are an existing point source discharge under the Clean Water Act. 33 U.S.C. § 1342(p). The document provides no definition of wastewater and the Staff Report and SED often include stormwater as part of the general wastewater discussion. MS4 discharges would appear to fit both within 5(a) which essentially exempts discharges from any new controls and Section 5(c) which specifically targets MS4s for new controls including termination of some discharges and potential moving of outfalls. The applicable requirements for MS4s will need to be clarified.

More significantly, we strongly request the environmental justification for applying substantial new controls on intermittent stormwater discharges while not addressing POTW discharges. To the extent that MPAs have identified water quality problems caused by discharges, any source should be addressed. Similarly, if no problems are present, then neither POTWs nor MS4s need additional controls.

- 3. Purpose of Marine Protected Areas** - The proposed requirements specified in amendment 5(c) appear contrary to the intent of the legislature in establishing MPAs. As stated in Staff Report section 5.6.2 describing MPAs, the *“MPA designation process was not intended to interfere with existing permitted activities except those under the direct authority of the Fish and Game Commission, primarily commercial and recreational fishing.”* [page 30]. Stormwater is currently permitted yet the amendments at 5(c) create new criteria for these discharges.
- 4. MS4s impacted by the regulations** – The scope of possible future SWQPA-GP designations needs to be clearly described. The proposed amendments are unclear as to what areas will be designated SWQPA-GP. The definition of SWQPA-GP in Appendix I is limited to “State Marine Parks” and “State Marine Conservation Areas.” (page 44) However, elsewhere the

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document appears to contradict this definition by implying that the SWQPA-GP designation will apply to MPAs (other than ASBS MPAs) “*or other unique areas*”²

The general categories of MPAs and other areas targeted by these proposed amendments needs to be clarified within the amendments. In addition, it is essential that the currently known targets for the regulations be identified (e.g., current MPAs likely to be designated as SWQPAs). Otherwise the regulated community will not know if they potentially will be impacted and will not be able to participate in the regulatory process.

- 5. Multiple lines of evidence: problem-based vs. effluent monitoring-based compliance –** CASQA has recommended in many comment letters to the State Water Board that remedial measures for stormwater runoff should be triggered by identified water quality problems rather than the numerical exceedance of a chemical objective immediately adjacent to an outfall. Water quality problems should be scientifically identified prior to implementing potentially costly remedial measures that increase the financial burdens on coastal communities. To identify problems in MPAs, these proposed SQWPA criteria should utilize a multiple lines of evidence approach similar to that used by the State Water Board for establishing sediment quality objectives: chemistry, toxicity, and biological community impacts.
- 6. Statewide vs. local approach for establishing MPA controls –** The current approach in the Staff Report and proposed amendments of establishing statewide requirements is contrary to California’s Water Code and marine protection acts. More flexibility is needed to more effectively address specific regional and local conditions. The California Water Code recognizes that water quality factors “*vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally.*” Water Code § 13000. California’s Marine Managed Areas Improvement Act and Marine Life Protection Act set up a “*regional MPA planning process.*” [MLPA (Marine Life Protection Act) I-Team memorandum to MLPA Blue Ribbon Task Force, Oct. 1, 2009, at 1; Fish & Game Code §§ 2856, 2857 (Marine Life Protection Act)].

Moreover, the Staff Report, itself, describes the uniquely regional nature of designating MPAs and limitations on the ability to designate MPAs (e.g., page 30: “*In densely populated areas such as the Southern California Bight the development of candidate sites for consideration as MPA is especially challenging due to [regional characteristics]. The MPA designation process was not intended to interfere with existing permitted activities except those under the direct authority of the Fish and Game Commission...*”). The Legislature intended for MPAs to be protected regionally—the proposed imposition of a statewide scheme over the pre-existing regional scheme appears to be contrary to this intent.

- 7. Determining compliance –** The Staff Report lacks information or examples of how representative MS4 discharges will comply with the requirements as currently structured. Part of the difficulty is the absence of information on how compliance is assessed, e.g., where are the compliance samples taken, how are community alterations to be assessed, applicability of mixing zones, etc.? If compliance samples are taken immediately in front of

² The Proposed Amendment in Section 7.1 [E.1(a)(2)] refers to “*or other unique and sensitive areas*”.

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any outfall then attaining compliance with numeric objectives may be unachievable even with advanced treatment.³

- 8. Dual compliance goals** - The proposed SWQPA-GP amendments require compliance with the Ocean Plan Table 1 (currently Table B) instantaneous maxima for chemical constituents, and the daily maximum concentrations for chronic toxicity [E.5.(c)(1)]. In a separate provision [E.5.(c)(5)-(7)], the amendments require corrective measures for “undesirable alterations” of biological communities (not defined)⁴ and corrective measures for increases in post-storm concentrations. These corrective measures are implemented based on a threat classification. These requirements apparently apply independently although this is not clear. Please clarify.
- 9. Ban on dry weather discharges** - Dry weather discharges are banned with no exceptions. This ban raises several issues that should be addressed in the Staff Report:
- **Regulatory basis** - The environmental protection or regulatory justification for this ban need to be presented.
 - **Cost-benefit to society** - This requirement needs to be discussed in the context of the statements in Section 5.6.3 (page 33)

Where large wastewater and storm water outfalls are situated, implementing discharge prohibitions could cause significant environmental and socioeconomic impacts. Existing municipal sewage and industrial wastewater outfalls regulated under NPDES permits represent an important public service and substantial infrastructure. Prohibitions or limitations that would require the relocation or expansion of this infrastructure including treatment works, outfall, conveyance system and land to comply with discharge prohibitions or other limitation potentially imposed to protect a MPA could result in significant disruption of sewer services and require substantial rate increases to offset in part the large costs associated with relocation with potentially low cost benefit [emphasis added]

Will the potentially very significant costs of banning dry weather discharges be offset by environmental benefits in terms of problems addressed?

- **Evidence of current problems** - Have these discharges have been shown to be a significant source of pollutants? Have water quality problems been identified that resulted from the dry weather discharges?
- **Ability of implement** - Many or perhaps most municipalities cannot easily or readily implement effective enforcement programs to ensure that anthropogenic dry weather discharges do not occur. MS4s will need time to educate the public, other agencies, and

³ As requested elsewhere in these comments, examples of MS4 discharges that comply with the proposed criteria—with or without treatment—are critical.

⁴ Are biological community alterations caused by the intermittent discharge of freshwater the basis for controls? The Staff Report does not address this issue.

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businesses, and implement a new enforcement effort to ensure that these unauthorized flows do not enter the storm drain system.

- **Natural flows** - Some flows are uncontaminated groundwater and routing these to POTWs provides no environmental benefit but does increase POTW costs. In some locations, POTW collection systems are not available and ceasing the discharge of natural dry weather flows from the stormwater collection systems is virtually impossible.
- **Necessary controls and associated costs and impacts** - The Staff Report and SED⁵ will need to identify the controls—typically diversion—necessary to comply with these criteria and the associated costs and environmental impacts for representative sites. Diversion to POTWs includes costs for pipes and pumps, POTW connection fees, and also ongoing POTW fees. And, some POTW collection systems may not have the necessary capacity to accept all dry weather flows. In addition to costs and construction impacts, the Staff Report should assess the feasibility of obtaining the necessary permits for these new facilities in the coastal zone.

10. Other corrective measures: impacts and costs – The costs and impacts of other corrective measures need to be evaluated. In addition to dry weather diversion, other likely corrective measure costs and impacts—specifically end-of-pipe treatment—need to be identified for typical cases. As noted above, it will be difficult to assess needed compliance measures until the methods of determining compliance are clarified. The costs need to include expected costs for retrofitting businesses.

11. Absence of an exception option – The SWQPA-GP implementation provisions are intended to be less, rather than more stringent, than SWQPA-ASBS provisions. However, the proposed SWQPA-GP implementation provisions appear to allow no exceptions or alternatives to compliance. We note that although discharges are banned for SWQPA-ASBS, the highest category of protection, exceptions are allowed and were recently generally approved for stormwater by the State Water Board in the form of Special Protections.

12. SED and CEQA checklist – The Staff Report needs to address the absence—except for limited topics—of identified impacts of this regulatory action in the SED and CEQA checklist. The regulations governing SEDs require the Board to identify “*any significant or potentially significant adverse environmental impacts of the proposed project.*” Cal. Code Regs. tit. 23, § 3772(b). The checklist identifies no impacts although the anticipated environmental and socio-economic consequences of a ban on dry weather discharges and other controls are described in Section 5.6.3.⁶

Prohibitions or limitations that would require the relocation or expansion of this infrastructure including treatment works, outfall, conveyance system and land to comply

⁵ Substitute Environmental Documentation

⁶ It is not clear whether the intent of this section is to describe impacts on wastewater facilities or wastewater and stormwater facilities, regardless these are the types of impacts on stormwater infrastructure and the surrounding environment that should be addressed by the SED and Checklist.

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with discharge prohibitions or other limitation potentially imposed to protect a MPA could result in significant disruption of sewer services and require substantial rate increases to offset in part the large costs associated with relocation with potentially low cost benefit. Construction associated with these efforts could pose significant impacts to air, water quality and biological resources and jeopardize habitat in other areas along the coast thru new construction. [emphasis added]

The Board's apparent reason for finding no impacts is that no MPA/SWQPA-GPs have been designated (page 39). However, the Board states that once an area is designated SWQPA-GP, "[o]ther existing dischargers would be required to perform additional monitoring activities. If impacts were identified, dischargers would be required to develop and implement control strategies and best management practices to restore water quality to the maximum extent practical. New discharges would be prohibited in SWQPA-GPs. Those proposing a new discharge would need to identify alternative approaches that comply with this prohibition." [page 39] Implementation of these new criteria and the resultant control program will almost certainly cause adverse impacts to the areas surrounding MPAs and/or the areas to which prohibited materials are diverted.

The amendments develop specific performance standards for discharges into SWQPAs-GP that are intended to result in additional treatment controls on stormwater discharges. Impacts on individual MPAs may be addressed as they are designated but this is a piecemeal approach. This regulatory action is the only opportunity to assess cumulative environmental impacts resulting from the designation of areas as SWQPAs and therefore these impacts need to be addressed during this rulemaking.

In summary, CEQA Article 4 §21159 requires an assessment of impacts based on information regarding "reasonably foreseeable environmental impacts of compliance measures and feasible mitigation measures." This assessment should include environmental impacts, including cumulative impacts, associated with construction activities associated with discharge controls such as diversion and runoff filtration needed for compliance, as well as the dry weather ban.

- 13. State Marine Reserves (SMR)** – The significance of State Marine Reserves (SMR) needs to be clarified. The intent of the amendments is apparently to ban discharges into State Marine Reserves (a subset of MPAs) that are not ASBS; however, no information is presented on how many discharges currently enter these reserves, the effects of these discharges, or the need for the prohibition. The application of these SWQPA criteria to the reserves needs to be clarified and the SMRs with current stormwater discharges need to be identified.
- 14. SWQPA-GP nomination and designation process** - The SWQPA-GP nomination and designation process needs to be explained. The amendments to Appendix IV, which sets forth the nomination and designation process, are unclear. As amended, Appendix IV does not provide the process that must take place when the State Water Board nominates an area for SWQPA-GP designation. [See Appendix IV, Section 1 (contains nomination criteria only for "persons" who are nominating)] Additionally, the proposed amendments state that

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once a SWQPA-GP recommendation is approved, the State Water Board will amend Table V-1 of Appendix IV to add the area that has been designated SWQPA-GP. Table V-1, however, is entitled “State Water Quality Protection Areas, Areas of Special Biological Significance.” The proposed amendments should amend Appendix IV to create a table that lists SWQPA-GP, similar to the existing list of SWQPA-ASBS.

- 15. Schedule** – The compliance schedule for regulated dischargers needs to provide a transition period. As currently structured, the compliance requirements including the ban on dry weather flow must occur immediately. Provisions for a transition time period should be provided to allow time for the incorporation of the policy requirements. According to the State’s Continuous Planning Process (CPP 2001), a compliance schedule includes a schedule for completion that reflects a *realistic assessment of the shortest practicable time* required to achieve compliance. Immediate cessation of all dry weather flows is NOT a realistic time for achieving compliance. In particular, the schedule must recognize the time required to secure funding, apply for and receive permits, and complete construction.
- 16. Source Control** – Source Control alternatives need to be recognized. The Staff Report and Substitute Environmental Documentation (SED) do not address pollution prevention or source control as methods for addressing pollutants that may present a risk to MPAs. The SED should identify methods to address pollutants at the source as an alternative or adjunct to end-of-pipe treatment or diversion. In some cases pollutants of concern are being addressed by enhanced statewide source controls such as the legislative and policy measures that will reduce sources of copper and lead. However, the timing of these broad-based source control initiatives may not be adequate to address criteria that must be complied with immediately as specified in these proposed amendments. The availability of source control options, including the timing issues, should be addressed. Zinc is a constituent often found in stormwater at levels of concern based on Table B objectives. An alternative for addressing zinc, and similar chemicals, is the Green Chemistry Initiative being implemented by DTSC. These options should be included in the SED.
- 17. Flow reduction/loading reductions** – Flow reduction/loading reduction approaches need to be viable compliance options. The ASBS Special Protections include an option of reducing the overall loading of pollutants as an alternative to achieving the Table B criteria. Obviously, significantly reducing loading may be environmentally preferable even if the remaining discharge still exhibit a numeric exceedance. This general approach of reducing overall loading should be an option available to dischargers especially now that green technologies are being implemented to reduce flows.
- 18. Monitoring** – The burden of any monitoring program must bear a reasonable relationship to the need and benefits of monitoring. Water Code § 13165. The Staff Report should identify the costs and rationale for the required monitoring, which is very extensive and appears to go beyond the monitoring required for compliance. Additionally, the fact that the Staff Report does not identify the parties responsible for complying with the monitoring program makes it difficult to determine whether the burdens imposed on an impacted party bear a reasonable relationship to potential benefits.

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The draft Staff Report does not provide the regulated community with sufficient information regarding who will be affected or how to assess compliance and identify likely corrective measures. In addition, it is difficult to determine if implementation costs and impacts are offset by benefits as water quality issues in MPAs potentially addressed by these new requirements have not been identified. At a minimum the Staff Report and SED should evaluate representative sites using the proposed criteria. This effort, together with information on the performance of treatment technologies, will allow a better determination of the likely costs and environmental benefits associated with the proposed amendments.

Our detailed comments are attached. Thank you again for the opportunity to provide comments. Please contact me at (714) 955-0670 or Geoff Brosseau, our Executive Director, at (650) 365-8620 if you have any questions or need additional information. We are also available to meet at your convenience to review the issues described in these comments.

Very truly yours,



Richard Boon, Chair
California Stormwater Quality Association

cc: Charles Hoppin, Chair, State Water Board
Frances Spivy-Weber, Vice Chair, State Water Board
Tam Doduc, Member, State Water Board
Tom Howard, Executive Director, State Water Board
Jonathan Bishop, Chief Deputy Director, State Water Board
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Bruce Fujimoto, Section Chief-Stormwater, State Water Board
Chris Beegan, Ocean, Wetlands, and Watersheds Section, State Water Board
CASQA Board of Directors
CASQA Executive Program Committee

Attachment - CASQA comments on the proposed amendment to the California Ocean Plan for designating State Water Quality Protection Areas to protect Marine Protected Areas

Attachment - Detailed comments by the California Stormwater Quality Association (CASQA) on the proposed amendment to the California Ocean Plan for designating State Water Quality Protection Areas to protect Marine Protected Areas, and the draft substitute environmental documentation

The following comments are organized to follow the Draft Staff Report and Substitute Environmental Documentation dated February 23, 2012 that also contain the draft amendments.

Draft Staff Report: Introductory Material – Sections 1 - 4

Page 1 – Scope

Comment: In various locations the document refers to Bays (e.g., Humboldt Bay, Arcata Bay, Bodega Bay) as well as to estuarine MPAs. The document does not indicate whether or not these proposed requirements are intended to address these inland waters. CASQA’s presumption is that nothing in the proposed amendments applies to enclosed bays or estuaries because the 2009 Ocean Plan expressly states that it “*is not applicable to discharges to enclosed bays and estuaries or inland waters*” and the proposed Ocean Plan amendments make no changes to this statement. CASQA submits these comments with this understanding in mind. Should the State Board intend the proposed amendments to apply to enclosed bays and estuaries, CASQA reserves its right to submit additional comments. Additionally, the document should clarify the intent of the requirements with respect to the inland waters that are referenced.

Page 1 – paragraph 3 – *“The proposed amendments would also protect specific types of discharges from more stringent permit conditions based upon the designation of MPAs in the vicinity of these discharges”*

Comment: This is confusing. Does this mean the SWQPA– GP designation and associated criteria are needed to prevent the application of more restrictive conditions applicable to discharges to MPAs? What would be the basis of these more restrictive permit conditions? Please clarify.

This statement appears to conflict with later statements to the effect that SWQPA designation will, in fact, convey significant new restrictions:

“...the SAT has suggested that the Regional Water Quality Control Boards (Regional Water Boards) could recommend to the State Water Board the designation of additional SWQPAs over existing MPAs, or identify as a priority and complete the identification and allocation of total maximum daily loads that could restore water quality in MPAs.” [page 33]

The Regional Water Boards draft permits to implement the water quality standards in the Ocean Plan. The stated amendment goal of protecting discharges from “*more stringent permit conditions*” would appear to prevent the Regional Water Boards from carrying out their responsibilities under the Clean Water Act and the California Water Code to implement Ocean Plan standards. Moreover, the protection of MPAs is a “regional” issue (MLPA (Marine Life Protection Act) I-Team memorandum to MLPA Blue Ribbon Task Force, Oct. 1, 2009, at 1) and the Legislature has mandated that regional entities

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(Department of Fish and Game, Fish and Game Commission, Park and Recreation Commission) protect MPAs on a region-by-region basis. [Fish & Game Code §§ 2856, 2857 (Marine Life Protection Act); Pub. Res. Code § 36725(a)-(c) (Marine Managed Areas Improvement Act)] Please clarify the intent of preventing more stringent provisions being imposed by the Regional Boards.

Page 1 – paragraph 4 – *“Based upon the review and analyses described in this SED, the proposed amendments if adopted are not expected to result in significant impact on the environment.”*

Comment: The SED makes the above conclusory statement without any back-up support. The regulations governing SEDs require the Board to identify *“any significant or potentially significant adverse environmental impacts of the proposed project.”* Cal. Code Regs. tit. 23, § 3772(b). And, as the Staff Report recognizes, *“the State Water Board must still comply with CEQA’s overall objectives.”* [page 6]

The Staff Report states that *“dischargers would be required to develop and implement control strategies and best management practices to restore water quality to the maximum extent practical. New discharges would be prohibited in SWQPA-GPs. Those proposing a new discharge would need to identify alternative approaches that comply with this prohibition.”* [page 39] Implementation of these new control strategies will almost certainly cause adverse impacts to the areas surrounding MPAs and/or the areas to which prohibited materials are diverted. For example, while the zero trash and zero dry weather runoff requirements may not cause adverse impacts in the protected SWQPA-GPs themselves, the prohibited discharges must be diverted somewhere. It is those locations that will potentially suffer adverse impacts.

The SED cannot conclude that no impacts will result until the monitoring and correction action criteria have been applied to at least several representative locations to determine what corrective measures will typically be required for compliance. Significant construction in the coastal zone—diversion or treatment facilities—could very well have significant impacts which should be assessed on a programmatic basis. Similarly, the mandated connection to POTWs will require piping, pumps, chemical treatment, and will increase discharges elsewhere.⁷ These impacts may be significant.

The SED cannot ignore these impacts by focusing narrowly on the MPAs. CEQA’s definition of “project” is broad in order to *“encompass ‘the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment’”*; thus, an agency cannot analyze the project in “piecemeal” fashion. *Planning & Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210, 235 (2009).

Additionally, the SWQPA–GP designation will apparently be applied to MPAs piecemeal, the timing based, at least partially, on action by individual Regional Water Boards. In some cases, the individual SWQPA-GP designation may not have a significant impact, for example, when no discharges currently enter the SWQPA-GP. However, the cumulative impact in terms of follow-on discharge controls could be

⁷ And, as noted later, and POTWs may not have available capacity to accept flows.

substantial in the coastal zone if many stormwater discharges and/or existing excluded discharges under proposed amendment Section 5(a) currently enter these areas. CEQA addresses this irregular or intermittent-type of project occurrence by requiring assessment of cumulative impacts. A cumulative impact under CEQA “*consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.*”

The draft Staff Report does not identify any MPAs that have been reviewed or analyzed to determine the new criteria’s impact on discharges. Such a review and analysis should be done and is essential for evaluating the environmental impacts of the proposed amendments. Once a typical range of impacts has been identified in terms of controls necessary for compliance, the cumulative impacts must also be assessed under CEQA.

Page 7 – paragraph 1 – “*Agencies qualifying for this exemption must comply with CEQA’s goals and policies; evaluate environmental impacts; consider cumulative impacts; consult with other agencies with jurisdiction.*”

Comment: As discussed in the comment above, it does not appear that the SED complies with CEQA’s policies because it has not adequately addressed adverse impacts. As mentioned above, the SED also does not assess cumulative impacts (even though it identifies specific control strategies/measures) and does not indicate any consultation with the Coastal Commission regarding issues concerning construction in sensitive coastal areas. The lack of these evaluations, assessments, and consultation is a serious shortcoming of this SED.

Page 7 – paragraph 8 – “*Because scientific analysis does not serve as the basis for any portion of these amendments, peer review was not performed on these proposed amendments.*”

Comment: A peer review cannot be waived because a necessary scientific analysis has been simply omitted. In this case, a scientific assessment should have been completed to identify the probable individual and cumulative impacts in the coastal zone (including areas receiving diverted flows) of the projects necessary to implement the SWQPA– GP criteria. A preliminary peer review could help establish the parameters for assessing the cumulative impacts and identify what information is necessary and how it could be collected.

The SWRCB’s Continuing Planning Process document dated May 2001 and posted on the State Board’s website requires a Scientific Peer Review. Specifically, the document states (on page 16):

2. Scientific Peer Review

State law requires that when departments in the California Environmental Protection Agency (including the State Board) adopt regulations which have a scientific basis, the scientific data and analysis which serve as the basis for the regulation must undergo peer review in a manner specified in law

Amendments to Basin Plans and state-wide water quality control plans, including TMDLs, are peer reviewed prior to adoption by the State or Regional Board. The results of the peer review are made available to the public and become part of the administrative record of the regulatory action. [emphasis added]

The Continuing Planning Process further elaborates on the requirement for Scientific Peer Review as follows (on page 34):⁸

In adopting amendments to state-wide plans or basin plans, the state and regional boards comply with Cal/EPA's "Policy and Guiding Principles for External Scientific Peer Review" of March 13, 1998, and with the State Board's internal peer review guidelines [see footnote]. These guidance documents set out procedures to ensure compliance with Cal. Health and Safety Code Section 57004. Peer review of scientifically-based regulatory measures, such as TMDLs, and staff response to any significant peer review comments, must take place before their adoption as Plan amendments by the State or Regional Board.

Pages 8 to 26 – Environmental Setting

The environmental setting section is currently not adequate for addressing the environmental consequences of this rule-making and appears to have been prepared for a different purpose. An assessment of environmental impacts and other effects requires a clear identification of where these proposed SWQPA– GP criteria will applied. This information is missing it the draft document.

Environmental Setting Comment 1: *Inconsistency between text and maps regarding MPAs* - The text states that Humboldt County has one MPA and it is shown on the map but not named. The text states that Mendocino County has eight MPAs, however, the map appears to show only two (ASBS #5 and an unnamed site to the north). Similarly, Sonoma County is supposed to have nine but appears to have about three, including ASBS #3 and ASBS #4. Napa is mentioned as having one, as is Solano County. These are shown on the map but not as adjacent to any waterways and are not named (these also appear to be inland and outside the jurisdiction of the Ocean Plan). Strangely, the ASBS numbers are shown on the maps, and coastal (non-stormwater) NPDES dischargers are also named but no names are provided for the MPAs that do appear on the maps and may be designated as SWQPA-GP.

Marin County has twelve MPAs per the document but only two are shown. San Francisco County is supposed to have five MPAs and two or three are shown at the Farallones. Only two of the seven MPAs in San Mateo County are clearly shown. Of the 17 mentioned MPAs in Monterey County, perhaps ten are clearly identifiable, depending on how they are subdivided. Approximately 14 of the 17 Santa Barbara County MPAs are shown.

This problem appears to continue with the rest of the counties down the coast. For example, only one of the seven MPAs in Orange County appears to be shown. This identification of seven MPAs in Orange County is also repeated in the discussion of the San Diego Region, but again they are not located in the map or identified in the text.

Environmental Setting Comment 2: *MPAs not named in the text or maps* – The Coastal non-stormwater dischargers are named on the maps and summarized in Table 1.

⁸ The State Water Board's internal peer review guidance is included in a memorandum from Executive Director Walt Pettit: "Guidelines for Obtaining External Scientific Peer Review" August 31, 1998

The ASBS are numbered on the maps and named in the text. The MPAs are not named on the maps (and many appear to be missing—*see comment above*) or in the text. This prevents potentially impacted parties from knowing if this rule-making pertains to their discharges.

Environmental Setting Comment 3: *Non ASBS MPAs impacted by this regulatory action* – Which of these MPAs will potentially be affected by these amendments? Also, which MPAs currently have stormwater discharges and what is the environmental setting of these affected locations? It is not clear which current MPAs are candidates for designation as SWQPA-GPs and potentially subject to these amendments. Nor is it clear from the maps which are non-ASBS Marine Reserves in which discharges are likely to be banned (amendments not clear).

Environmental Setting Comment 4: *Lack of information on environmental setting* – The Staff Report provides very general overall descriptions of the geographic areas where MPAs are located, e.g., “*The Bay is located on the north central coast of California and functions as the only drainage outlet for waters of the Central Valley.*” What is missing is any information on the MPAs—either individually or in aggregate.⁹ For instance:

- What are the environmental conditions in the MPAs?
- Do they typically have point or non-point discharges to them?
- What problems do these discharges cause or may cause? Where is this information documented?
- What are the local environmental characteristics (cliffs, endangered species, critical habitat, etc.) that would be protected by the criteria or impacted by corrective measures?

This MPA-specific information appears to be missing. It is particularly important that the Staff Report identify where current problems exist that will be addressed by the SWQPA-GP criteria.

Environmental Setting Comment 5: *Endangered species* – Page 24 includes a list of managed, threatened, and endangered species for ocean waters but does not indicate how any of these are related to the MPAs or potential SWQPA-GPs. How will the criteria affect or benefit these species?

Environmental Setting Comment 6: *Environmental baseline* – From the bottom of page 24 to the top of page 26, this SED contains a section called “Environmental Baseline” which includes a discussion of the 66 NPDES discharges along the coast (apparently all non-stormwater) and a summary table. All coastal golf courses also appear to be listed. A paragraph is included that generally discusses Phase I (253 outfalls > 36 in), Phase II (198 outfalls > 36 in), and industrial stormwater discharges to the

⁹ The report includes a more detailed description of the Farallon Islands, Ano Nuevo, Channel Island, etc. However these discussions do not distinguish between the MPA and non-MPA portions and do not identify any potential impacts or concerns related to runoff. The Santa Barbara County Channel Islands consist of two ASBS which according to the map encompass all three islands and eight MPAs which presumably will not be addressed by this rule-making. This necessary information to identify specific sites, their environmental background, and relevance to this rulemaking is missing, however.

ocean. This baseline section does not identify which, if any, of these stormwater outfalls are into or near MPAs and which, if any, are potentially impacted by the SWQPA-GP criteria. This is not an adequate discussion of the environmental baseline for this proposed program.

It is not possible to assess the amendments' potential impacts on the regulated stormwater community if no affected dischargers or potentially regulated sites are identified. Additionally, it is not possible to generally assess cumulative impacts if this regulated subset of stormwater dischargers has not been identified.

The Environmental Baseline must identify the affected sites and the environmental conditions within those sites that may be affected or improved by these amendments.

CEQA Review and Analysis – Section 5

Page 27 – Section 5.2 – *“The proposed project if adopted does not designate new SWQPAs. Designation of specific areas as SWQPAs could be taken under future consideration by the State Water Board would only after the proposed process for designating these areas is completed.”*

Comment: Please clarify. What is the proposed process for designating these areas and when will it be established and implemented? Is this “proposed process” different than the process established in this Staff Report/SED? At what stage will cumulative impacts be assessed? The fact that the proposed amendments may allow piece-meal designation of individual SWQPAs–GP by the Regional Water Boards does not mean that the State Board can avoid the requirement to assess cumulative impacts. The assessment of cumulative impacts should be addressed in this SED.

Page 30 – Section 5.6.2, MPAs – *“The MPA designation process was not intended to interfere with existing permitted activities except those under the direct authority of the Fish and Game Commission, primarily commercial and recreational fishing. Those activities permitted by other agencies would be unaffected by the MPA designation and as a result planned around or avoided in general...”*

Comment: This statement appears to conflict with the general purpose of the proposed amendments. The proposed amendments identify additional protections which will apply to MPAs newly designated as SWQPAs–GP (as opposed to SWQPA-ASBS). However, the quoted material seems to indicate that MPAs are not to be the basis for changing or modifying the permits (e.g., stormwater permits) issued by other agencies, in direct opposition to what these amendments are intended to do. By proposing these amendments, the State Board staff uses the MPA designation effectively *“to interfere with existing permitted activities.”*

Please address this apparent conflict between the goals of these amendments and the statement quoted above.¹⁰

¹⁰ Likewise, please address the State Board's authority to regulate existing stormwater discharges in light of the explicit prohibition against regulation in Public Resources Code § 36710(f) (as explained on pages 2 and 7 of these comments).

Page 31 – Section 5.6.2, MPAs Table 2 – Identification of MPAs – In order to assess the effects of these amendments, please identify in the SED which current MPAs may be potentially covered. It is inconsistent to include designation of non-SMR, non-SMCA areas as potential SWAPQ-GPs. To the extent the State Board does include them, it is also necessary that the State Board identify, at least in a general way, what other sites may be designated as SWQPA-GP.

Identification of MPAs Comment 1 – Table 2 needs to be explained. Are all of these MPAs potential candidates for designation as SWQPAs-GP? Presumably the ASBS would not be dual designated; however, the ASBS and the listed MPAs are not necessarily congruent. Please clarify which of these MPAs (or non-ASBS portions of the MPAs) are potential candidates for being addressed by these amendments. These candidate sites should be clearly demarcated on maps and named. This will allow potentially regulated parties to determine whether or not they have a discharge into these areas that would be addressed by the amendment.

Identification of MPAs Comment 2 – While the existing MPAs are identified, the SED should also describe which general types of sites may be designated as MPAs in the future so that interested parties can assess the reasonable future consequences of this amendment. Which locations are pending Fish and Game designation as MPA? What locations have been recently nominated.

Identification of MPAs Comment 3 – The table does not appear to be consistent with the earlier descriptions in the Environmental Setting section. For example, the Environmental Setting section states that San Mateo County contains seven MPAs, but Table 1 lists three MPAs and also one ASBS that appears to be contained within one of the MPAs.

Identification of MPAs Comment 4 – Please also identify which of these Marine Reserves are not ASBS and therefore likely subject to the discharge ban that is sometimes implied in the SED.

Page 34 – paragraph 2, Section 5.6.3 – *“Discharges that meet existing narrative and numeric objectives are protective of a variety of beneficial uses designated for ocean waters including ... rare and endangered species; marine habitat; fish migration; fish spawning and shellfish harvesting. Though the objectives and conditions contained in Ocean Plan are protective of water quality this option provides no additional level of protection for ecologically sensitive habitats beyond the status quo.”*

Comment: This statement is unsupported by evidence that the beneficial uses identified above cannot be used to protect ecologically sensitive habitats. What habitats and what risks are being addressed by this statement? If the issue is new discharges, then the anti-degradation portion of the water quality standards can (and should) be used to protect ecologically sensitive habitats.

What is not clear is why the existing regulatory mechanisms and the existing water quality standards are inadequate to provide the protection needed for sensitive habitats. Please provide examples. If there is no need, then the State Board is creating a new regulatory superstructure that significantly complicates the challenges of permitting

existing discharges and, at a minimum, adds substantial additional monitoring requirements.

The discussion appears to be stating that this new “second category” of SWQPAs is necessary to prevent Regional Water Boards from issuing permits with effluent limits that “*could result in significant expenditures by public agencies and potentially cause significant impacts to air, water quality and biological resources and jeopardize habitat in other areas along the coast through new construction.*”

Is this a real problem and can an example be provided? Have the Regional Boards or are the Regional Boards considering adopting unnecessary permits with these adverse environmental and social impacts? That seems highly improbable. This section appears to be saying that the SWQPA-GP amendments are necessary to prevent the Regional Boards from taking unnecessarily stringent action via permits for discharges—*This makes no sense*. Please provide a non-ASBS example of where a Regional Board is proposing to ban existing point source discharges and the SWQPA-GP amendments are necessary to prevent this from happening.

The statements in the section are contradictory: they indicate that the amendments to include SWQPA-GP criteria are needed to address *ecologically sensitive habitats* (presumably needing more protection) and also to protect dischargers from overly stringent permit limitations. This apparent contradiction should be resolved.

Page 34 – paragraph 3 – *“The coastal Regional Water Boards also have the authority to derive more stringent permit limits than water quality based effluent limits based upon the Ocean Plan.”*

Comment: NPDES permits contain technology-based effluent limits¹¹ and, as necessary, water quality-based effluent limits to address the site-specific water quality standards. In addition, permits for new or expanded discharges must comply with the State’s antidegradation policy. These are the requirements in the Clean Water Act. Please identify what authorities are being referred to in this statement as allowing more stringent limits.

Page 34 – paragraph 4 – *“This option [SWQPA-GP] could allow some existing uses to continue and discourage new high risk discharges.”*

Comment: Please provide examples. What existing uses (discharges) would be allowed to continue? As currently structured, the criteria would allow POTW discharges and other existing point source discharges (such as golf courses) to continue and would force stormwater to be either re-located or to possibly provide advanced treatment.

In addition, why is this new criteria (SWQPA-GP) needed to “*discourage new high risk discharges*”? The State’s anti-degradation policy and related requirements have been established to do exactly that. Moreover, the Regional Boards can make such determinations—and appropriately address such concerns—as part of their regional permitting process.

¹¹ The technology-based standards include secondary treatment for POTWs and MEP pollutant control for stormwater.

Page 34 – last bullet 4 – “• *Assure that the designation of any new SWQPA would not include a condition to move existing wastewater outfalls, which represent an important public service and substantial infrastructure.*”

Comment: In this context, what is the meaning of “*existing wastewater outfalls*”? Are municipal stormwater outfalls considered existing wastewater outfalls? The Ocean Plan does not define wastewater and neither do the proposed amendments. Clarify if the intent is to not move POTW outfalls, alone, or if this directive also applies to stormwater outfalls, including outfalls from stormwater treatment facilities. These definitions should also be addressed in the amendments’ proposed changes to Appendix I – *Definition of Terms*. We raise this issue because only relatively recently has stormwater been defined to include “wastes.”

Page 35 – Section 5.7.1 No Action Alternative - “....*The “no action” alternative severely limits the Water Boards’ flexibility to tailor the designation of SWQPAs in a manner consistent with the goals and objectives of establishing the MPAs.*”

In addition, adopting the “no action” alternative, the coastal Regional Water Boards would be compelled to address water quality protection within MPAs on a case-by-case basis, without the benefit of a cohesive or consistent state wide framework. For existing and future permittees and respective rate payers situated near MPAs, the “no action” alternative would create significant regulatory uncertainty limiting their abilities to plan and budget future repairs or replacement projects without the proposed provisions in place.”

Comment: Given the wide variation in MPA characteristics as well as the variation in discharges and local conditions, a *case-by-case* determination of permit requirements appears preferable and provides the necessary *flexibility* discussed in this section. Some MPAs may be experiencing adverse affects from existing discharges – these discharges should be addressed. Other MPAs may be fully protected with existing permit conditions and new requirements would not be needed. A one-size-fits-all approach, which is part of a “*cohesive or consistent state wide framework,*” appears to be a step backwards. Additionally, as stated in previous comments, a statewide approach appears to conflict with the California Legislature’s intent to provide for regional designation and protection of MPAs in the Marine Managed Areas Improvement Act and the Marine Life Protection Act.

Please provide an example where the existing site-specific permitting capabilities of the Regional Water Boards are not capable of addressing the water quality protection needs in an MPA. If there are no such sites, then the *No Action Alternative* may, in fact, be preferable. Otherwise treatment controls such as diversion—and associated impacts—may be applied to sites not experiencing problems resulting in a net loss in environmental quality.

This statement appears incorrect: “*For existing and future permittees and respective rate payers situated near MPAs, the “no action” alternative would create significant regulatory uncertainty limiting their abilities to plan and budget future repairs or replacement projects without the proposed provisions in place.*”

The opposite appears to be the actual situation: these proposed amendments will establish an extensive ongoing monitoring program to assess compliance with Table B and to ensure that biological communities are not altered. The results of this monitoring assessment will be open to interpretation and dispute (e.g., are impacts from freshwater a basis for controls?), and permittees and rate-payers will have ongoing unresolved issues for many years concerning costs. However, the permittees and ratepayers currently are covered by existing NPDES permits that address protection of the ocean environment and should have a better idea of what is required compared with this new proposed program.

Additionally, this section references “rate payers.” Stormwater programs are most often general fund programs and stormwater utilities with rate paying customers do not exist in many or most locations.

Lastly, the Board staff’s statement identifying permit-by-permit amendments as a third option for setting aside areas that require special protections (Staff Report, page 36) contradicts the staff’s dismissal of the “no action” alternative as undesirable because it would limit the Regional Boards’ flexibility in achieving the goals of establishing MPAs.

Page 36, paragraph 1 – Section 5.7.2 Protecting MPA - *“Within MPAs or other unique areas where greater water quality protection is desirable, the State and Regional Water Boards have few options available for setting aside areas that require special protections from discharges. The options are: 1) designating these areas as ASBS, which prohibits the discharge of wastes in these areas; 2) continued reliance upon the Ocean Plan water quality objectives and discharge requirements applicable to all ocean water of the State; or 3) amending individual permits to accord a greater level of protection through termination of permit, or modification of permit conditions and effluent limits”* [emphasis added]

Comment: Why are options 2 and 3 (which appear to be the same from a regulatory standpoint), not adequate to protect MPAs? In what type of situations would these options be inadequate? Please provide an example using a typical MPA and current discharges (POTW, stormwater, and other existing NPDES discharges). Without an assessment of real-world effects, this discussion is speculative and the conclusions seem improbable.

Page 36, paragraph 2 – Section 5.7.2 Protecting MPA - *“As discussed in Section 5.6.3, options 1 and 3 may result in significant environmental and socioeconomic impacts through construction of new conveyance systems, treatment works and outfalls...”*

Comment: The new requirements in the amendments applied to stormwater discharges appear to have exactly the same potential “*significant environmental and socioeconomic impacts.*” Please clarify how the new requirements prevent—rather than cause—the construction of treatment facilities or diversion structures for stormwater discharges with the attendant environmental and socioeconomic impacts.

Page 36, paragraph 3 – Section 5.7.2 Protecting MPA - *“Another option is to propose a new category of SWQPAs that would provide a higher level of water quality protection for State Marine Conservation Areas and State Marine Parks over the baseline or existing regulation applicable to ocean waters of the state that would allow some discharges to continue.”* [emphasis added]

Comment: This option is the Staff Recommendation. Please clarify which discharges are likely to continue and which would be terminated—presumably by diversion around the SWQPA-GP. Is the intent to allow continuation of all existing discharges except stormwater discharges? Impacts—particularly, cumulative pollutant loading—from permanent POTW discharges and other existing NPDES point source discharges would appear to potentially present significantly more risk to receiving waters than the intermittent and normally short-term stormwater discharges.

Page 36 – Section 5.7.23 SWQPAs Categories – State Marine Reserves - *“Following this model the State Water Board has designated many State Marine Reserves as SWQPA – ASBS, where the discharge of waste is prohibited.”*

Comment: Is this correct? The six classifications for designating managed areas in the marine and estuarine environments were established in Public Resources Code, Section 36700, which became effective January 1, 2002. The ASBS were designated in the 1970s. The discussion in the report implies the SMR were designated first.

Page 36 – Section 5.7.23 SWQPAs Categories – ASBS discharge prohibition - *“This tiered system would consist of the existing SWQPAs designated ASBS (SWQPA ASBS or simply ASBS) representing the highest level of water quality protection and strictly regulated by discharge prohibition and SWQPA-GP.” [emphasis added]*

Comment: The State Board recently approved Special Protections allowing discharges into ASBS, contrary to the statement above.

Page 37 – Section 5.7.3 SWQPAs Categories – Two-tiered system - *“Within the SWQPA- GPs certain types of low risk discharges are allowed; however, future discharges would be prohibited. This category could provide general protection for those MPAs classified as State Marine Parks and State Marine Conservation Areas. Alternatives considered by staff include the need for additional categories of SWQPAs to address area or regional specific conditions. However development of State Water Quality Protection Areas additional categories would require additional information and data to develop adequate provisions that address the unique conditions.*

Staff Recommendation: *Adopt the two-tiered system consisting of the existing SWQPA-ASBS and the proposed SWQPA-GP.”*

Comment 1: This section is also confusing – are SWQPA-ASBS synonymous with State Marine Reserves? The intent of the amendments is apparently to ban discharges into these Reserves including those that are not ASBS; however, no information is presented on which SMRs are not ASBS, how many discharges currently enter these non-ASBS reserves, and the effects of such a prohibition. Please provide this information.

Comment 2: As stated in the excerpt above, possible additional categories of SWQPAs were considered *to address area or regional specific conditions*. This was apparently rejected due to the lack of data and information. However, the current—i.e., status quo—approach of permitting allows Regional Water Boards to do exactly this: address local conditions. The identified lack of information appears to be an argument against the

standardized approach being proposed in these amendments and in favor of the current approach of Regional Board site-specific permit requirements.

Comment 3: Section E(1)(a)(2) of the proposed amendments contains language contradictory to this apparent two-tiered system. The language of Section 5.7.3 of the Staff Report (and the proposed Appendix I definition) limit SWQPA-GPs to SMPs and SMCAs. However, proposed Section E(1)(a)(2) expands the definition to include the vague and currently undefined “*other unique and sensitive areas.*”

Page 38 – Section 5.7.4.3 Other Discharges [stormwater runoff and nonpoint sources] – “*Prohibiting some high threat discharges is a disincentive for those discharges that could be classified as high threat, but are in reality a low threat to natural water quality. By assessing all these dischargers, the Water Boards can focus on only those discharges that represent a significant threat, regardless of the type of discharge....*”

Staff Recommendation: *Adopt an approach that assesses all existing storm water and nonpoint source discharges categorized and use this information to determine what controls and prohibitions are needed to maintain natural water quality.*”

Comment: Please clarify this discussion. What is an example of high threat discharges that are in reality a low threat? Also, the approach that is recommended should be described—it is not clear from the discussion in this section. The amendments, in requiring compliance with Table B, appear to using an across-the-board approach that could result in classifying some discharges as high-threat when, in reality, they present a low threat at the specific location of discharge.

Page 39 – Section 5.8 Environmental Impact Analysis – impact assessment – “*Because no alternation of the environment will occur either as a direct result or indirectly from this action, the proposed project will not have any significant adverse impacts to the environment. In addition, as no additional controls or treatment would be needed to comply with these measures, there are no adverse environmental impacts associated with compliance actions.*”

Comment: What is the basis for making the statement that “*no additional controls or treatment would be needed to comply with these measures*”? While it appears the intent of the amendments is to not affect POTW discharges, the same cannot be said for stormwater discharges. The clear purpose is to prohibit all discharges into non-ASBS State Marine Reserves and to impose very specific requirements on stormwater and nonpoint source discharges.¹² These requirements mandate compliance with the Ocean Plan Table 1 (currently Table B) instantaneous maxima for chemical constituents, and the daily maximum concentrations for chronic toxicity. In addition, the discharges cannot alter biological communities. Urban stormwater may not consistently comply with these criteria at the point of discharge even with treatment. Advanced treatment or diversion around the SWQPA-GP to a new ocean discharge location may be necessary. The

¹² Under the Marine Managed Areas Improvement Act, nonpoint source pollution “*shall be controlled to the extent practicable.*” Pub. Res. Code § 36710(f). To the extent that Section 5(c) of the proposed amendments requires nonpoint source discharges to implement controls beyond the “*extent practicable,*” Section 5(c) contravenes the Marine Managed Areas Improvement Act

treatment facilities or diversion structures will have obvious environmental impacts as will the re-directed discharge to a new non-SWQPA location.¹³

A substantial body of monitoring data from MS4s demonstrates that stormwater from urban discharges does not comply with Table B instantaneous maxima. Less data is available regarding toxicity but the available information indicates potential non-compliance.

Please provide the monitoring data from coastal or other MS4 locations where sampling¹⁴ indicates consistent compliance with the criteria at the location or compliance sampling (not some distance away). Similarly, please provide any information where treatment facilities, such as multi-media filters applied to urban runoff, provide compliance with Table B maxima. Providing this data will allow an assessment of needed facilities and impacts.

This section states, “*However, staff cannot foresee which MPAs will be selected for designation as SWQPAs or when.*” The reasonable projection is that all MPAs will eventually be nominated for designation; however, the designation may take place in a piecemeal manner. Thus, the rule-making consisting of these proposed amendments will be the only opportunity for the State Board to assess the cumulative impacts.

The absence of any discussion of environmental impacts of the necessary controls is possibly the major deficiency of the SED.

Page 39 – Section 5.8 Environmental Impact Analysis – MEP – “*If impacts were identified, dischargers would be required to develop and implement control strategies and best management practices to restore water quality to the maximum extent practical*”

Comment: Does this statement intend to refer to the required control of stormwater pollutants to the *maximum extent practicable*? If so, the above statement is correct because the Clean Water Act provides for regulation of MS4 discharges to the “*maximum extent practicable.*” 33 U.S.C. § 1342(p)(3)(B)(iii).¹⁵ However, Section 5(c) of the proposed amendments fails to reflect this statement. The proposed amendments mandate compliance with Table B maxima. Identification of impacts and restoration to the maximum extent practicable are not part of the amendments as drafted. What is the quoted statement referring to?

Water Code Section 13241 and 13242 – Section 6

Page 40 – paragraph 3 – “*The amendments being proposed by staff would not alter existing water quality objectives or result in new water quality objective for ocean waters; therefore, Water Code section 13241 does not apply to these proposed amendments to the California Ocean Plan.*”

¹³ Additionally, POTW discharges may also be impacted by the dry weather flows diverted to them

¹⁴ We presume samples will need to be taken in front of the outfall on the incoming wave.

¹⁵ Additional requirements to address water quality standards are discretionary with the state.

Comment: The intent of the amendments is apparently to shield POTW discharges from having to alter their operations¹⁶ but to apply new requirements on stormwater and nonpoint source discharges. As stated in Section 5.7.4.3:

***Staff Recommendation:** Adopt an approach that assesses all existing storm water and nonpoint source discharges categorized and use this information to determine what controls and prohibitions are needed to maintain natural water quality.*

Similarly, the amendments specifically identify new controls that will be applied to stormwater in Section 5(c) [page 43]:

(6) If undesirable alterations of natural water quality and/or biological communities are identified, control strategies/measures shall be implemented for those dischargers characterized as a high threat or those contributing to higher threat cumulative impacts first.

(7) If those strategies fail, additional control strategies/measures will be implemented for dischargers characterized as medium impact dischargers. If these strategies do not result in improvement of water quality, those discharges classified as low threat shall also implement control strategies/measures.
[emphasis added]

Depending on how it is implemented, the requirement to prevent undesirable changes in natural water quality is a new water quality objective. This requirement is being applied to these discharges as part of these amendments with the clear expectation that the new objectives will require additional controls. The current Ocean Plan does not require maintenance of natural water quality except in ASBS. Extending this requirement beyond ASBS appears to be an establishment of new standards. Consequently, section 13241 applies and the State Board evaluation must consider the factors in Sections 13241 and 13242, including “*economic considerations.*”

Page 40 – paragraph 4 – “*As stated above, the amendments being proposed by staff do not amend existing water quality objective or add new water quality objectives. The proposed amendments would add a new category of SWQPAs that would protect natural water quality within MPA and other areas designated by the State Water Board*”

Comment: This statement is self-contradictory: the proposed requirements to ensure natural water quality (or prevent undesirable alterations) constitute new objectives and should be addressed under 13242. In particular, this Staff Report and SED should “*include a description of the nature of the actions which are necessary to achieve the objectives, time schedules for management actions and required surveillance actions.*”

¹⁶ “*No new or modified limitations, substantive conditions, or prohibitions (beyond those in existing law, regulations and water quality control plans) will be imposed upon existing municipal point source wastewater discharge outfalls...[except for SMRs]*”

Proposed Amendments – Section 7

Page 42 – section 5(a)(2) – “ *Designation of an SWQPA-GP shall not include conditions to move existing point source wastewater outfalls.* ”

Comment: Assuming this provision does not apply to stormwater outfalls,¹⁷ the social-economic cost considerations that are used in this document to justify not moving POTW outfalls should apply equally to stormwater outfalls. As stated on page 33, with respect to ASBS prohibitions, “*Where large wastewater and storm water outfalls are situated, implementing discharge prohibitions could cause significant environmental and socioeconomic impacts.*” Yet, the proposed amendments appear to protect POTW outfalls but not stormwater outfalls from having to relocate. What is the basis for this differing approach?

Page 42 – section 5(c)(1)

“(c) *Implementation provisions for permitted separate storm sewer system (MS4) discharges and nonpoint source discharges.*

(1) Existing waste discharges are allowed, but shall not cause an undesirable alteration in natural ocean water quality. For purposes of SWQPA-GP, an undesirable alteration in natural ocean water quality means that for intermittent (e.g. wet weather) discharges, Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity, must not be exceeded in the receiving water.”

Comment: Does the Board have examples of where urban runoff can comply with Table 1 (Table B in the current Ocean Plan) when sampling occurs as specified in these criteria? Are samples taken at the point of discharge and therefore essentially end-of-pipe? Please clarify. The only major attempt that we are aware of to provide advanced treatment for urban wet weather discharges along the California coast is the multi-media filters constructed by UCSD for the localized urban runoff into the San Diego-Scripps ASBS. These filters did not provide compliance with Table B.¹⁸ Before imposing these very substantial requirements on communities with urban stormwater dischargers, the feasibility should be assessed as well as the financial capability of funding the needed controls. Moreover, the Clean Water Act generally provides that MS4 discharges are only regulated “*to the maximum extent practicable*”—a fact that the Board staff recognizes at page 39. 33 U.S.C. § 1342(p)(3)(B)(iii).¹⁹ It does not seem practicable for an MS4 permittee to evaluate “*cumulative impacts*” and “*impacts stemming from individual discharges.*” Additionally, as has been noted, the methods of assessing compliance need to be specified.

A second and critical issue is implementation schedule. As currently stated, these requirements must be met immediately upon designation. A compliance schedule should be specified for whatever new requirements will be imposed.

¹⁷ Please clarify in the definitions.

¹⁸ Some of the data is [here](#); also check later data tables available from UCSD.

¹⁹ As noted previously, additional requirements to address water quality standards are discretionary.

Page 42 – section 5(c)(2) – *“The discharge of trash is prohibited.”*

Comment: As indicated previously, a compliance schedule should be specified for any new requirements and appropriately limited to the “maximum extent practicable.”

Page 42 – section 5(c)(3) – *“Non-storm water (dry weather) flows are effectively prohibited as required by the applicable permit. Where capacity and infrastructure exists, all dry weather flows shall be diverted to municipal sanitary sewer systems.”*

Non-stormwater Comment 1: This prohibition is not appropriate as currently structured. At a minimum, the types of non-stormwater discharges allowed in ASBS should also be allowed in SWQPAs:

- (i) Discharges associated with emergency fire fighting operations.
- (ii) Foundation and footing drains.
- (iii) Water from crawl space or basement pumps.
- (iv) Hillside dewatering.
- (v) Naturally occurring groundwater seepage via a storm drain.
- (vi) Non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain, as long as there are no contributions of anthropogenic runoff.

Non-stormwater Comment 2: Where capacity and infrastructure exists, diversion to municipal sanitary sewer systems should not be mandated. Although this may be the preferred option in some cases, it is expensive because of the ongoing POTW charges. In some cases, infiltration or other controls, such as diversion, may be environmentally preferable and should be allowed by these amendments (why would diversion to a POTW with the attendant costs be preferred over green infrastructure options?). The amendments should not dictate only a single compliance option.

Non-stormwater Comment 3: As before, a compliance schedule should be specified because these controls cannot be implemented instantaneously. Funding, Coastal Commission permits, POTW negotiations, construction contracts, etc. will all require time to implement.

Non-stormwater Comment 4: What if the POTW local limits or other requirements are such that the flows cannot be accepted? Who is responsible for the fees (and is this a Proposition 218 issue)?

Pages 42 & 43 – section 5(c)(4) – Characterization and Assessment

“Existing discharges into SWQPA-GP shall be characterized and assessed to determine what effect if any these inputs are having on natural water quality in the State Water Quality Protection Area. Such assessments shall include an evaluation of cumulative impacts as well as impacts stemming from individual discharges. Information to be considered shall include:

- a. Water quality;*
- b. Flow;*
- c. Watershed pollutant sources; and*
- d. Intertidal and/or subtidal biological surveys.*

Within each SWQPA-GP the assessment shall be used to rank these existing discharges into low, medium and high threat impact categories. Cumulative impacts will be ranked similarly as well.”

Assessment Comment 1: The fact that the proposed amendments do not identify the parties responsible for complying with the monitoring program makes it difficult to determine whether the burdens imposed on an impacted party bear a reasonable relationship to any potential benefits. Assuming MS4 permittees are required to perform the monitoring under Section 5(c), this monitoring and assessment effort is too extensive and costly. How will it be funded? This represents a significant new (and unfunded) burden on coastal communities.

Assessment Comment 2: Additionally, this monitoring constitutes a significant burden on stormwater dischargers and should be identified in the Section 13241 economic assessment. The Staff Report and SED should also provide the justification for the components of the monitoring program - currently monitoring is not addressed in the documents.

Assessment Comment 3: As currently stated, the requirements are open-ended. Which water quality parameters must be evaluated? How much detail is necessary for the watershed analysis and the intertidal and/or subtidal biological surveys? These activities could be extraordinarily complex and expensive depending on the size of the watershed. Are these surveys included for general information or are they for an assessment of compliance? Are they based on the Clean Water Act or do they constitute a new unfunded mandate?

Page 43 – section 5(c)(5) – Compliance assessment

“An initial analysis shall be performed for pre- and post-storm receiving water quality of Table 1 constituents and chronic toxicity a storm. If post-storm receiving water quality has larger concentrations of constituents relative to pre-storm, and Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity, are exceeded, then receiving water shall be re-analyzed along with storm runoff (end of pipe) for the constituents that are exceeded.”

Comment: This approach for identifying alterations, based on pre- and post-storm monitoring, differs from the requirements in section 5(c)(1) which state that “*Table 1 instantaneous maximum concentrations for chemical constituents, and daily maximum concentrations for chronic toxicity, must not be exceeded in the receiving water.*” Section 5(c)(1) makes no reference to pre- and post-storm conditions and is more restrictive since a sample could be taken during the discharge. Since Section 5(c)(1) is a stand-alone requirement, it consists of an independent permit provision and presumably is independently enforceable.²⁰ The amendments should be internally consistent. Or, perhaps these sections have different purposes—please clarify.

²⁰ As specified in the NRDC/LA County U.S. 9th Circuit Court of Appeals revised opinion

Page 43 – section 5(c)(6) and (7) – Corrective measures

“(6) If undesirable alterations of natural water quality and/or biological communities are identified, control strategies/measures shall be implemented for those dischargers characterized as a high threat or those contributing to higher threat cumulative impacts first.

“(7) If those strategies fail, additional control strategies/measures will be implemented for dischargers characterized as medium impact dischargers. If these strategies do not result in improvement of water quality, those discharges classified as low threat shall also implement control strategies/measures.”

Comment: This approach for addressing undesirable alterations needs further clarification. Why does failure of control measures for higher threat discharges mean that lower threat dischargers are to be addressed? The rationale for this approach is not explained or justified in the SED. Examples would be helpful and should be discussed in the Staff Report.

In addition, these requirements for the first time introduce “*undesirable alterations of biological communities*” as a criterion. This criterion has not been discussed or evaluated in the SED and undesirable alterations with respect to biological communities has not been defined. For example, the discharge of stormwater (freshwater) on an intermittent basis does sometimes alter biological communities in certain coastal locations, particularly partially enclosed or shallow areas. Are biological community alterations attributable to the freshwater from stormwater but not the freshwater from POTWs or other existing point source discharges the basis for implementing controls?²¹

Page 43 – section 5(d) Implementation Provisions for New Discharges

This section states:

*“(1) Point Source Wastewater Outfalls
No new point source wastewater outfalls shall be established within SWQPA-GP.*

....

*“(3) All Other New Discharge
There shall be no increase in nonpoint sources or permitted storm drains into SWQPA-GP.”*

Comment: This provision will significantly constrain new or modified roadways and other essential facilities located in the coastal zone. Rerouting discharges to pre-existing outfalls may not be feasible or even desirable. New or relocated outfall locations may be needed and should be allowed when they provide the same level of protection or provide a benefit to receiving waters. For example, routing intermittent runoff to a new outfall within the same MPA with better circulation could help prevent impacts associated with the discharge of freshwater to constrained coastal locations such as small bays or inlets.

²¹ We note that a permanent freshwater discharge from POTWs or industrial sources may be more likely to alter the natural environment in some locations than the intermittent and relatively infrequent discharge of stormwater.

APPENDIX I - DEFINITION OF TERMS

Page 44 - Definition of ASBS: “...those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that maintenance alteration of natural water quality is assured ~~undesirable~~”

Comment: This is a significant change which is not addressed in the SED and appears to be outside the scope of these amendments to address SWQPAs-GP. Please delete. If the State Water Board intends to change the requirements applicable to ASBS then it should do so by notifying the ASBS community.

Page 44 - Definition of SWQPA-GPs – “*State Water Quality Protection Areas – General Protection (SWQPA-GP) designated by the State Water Board to maintain natural water quality in order to protect or conserve marine life and habit within State Marine Parks and State Marine Conservation Areas.*”

Comment: This definition is different that that used in the SED. In the SED the goal is to prevent undesirable alterations in natural water quality; not an absolute mandate to maintain natural water quality as applies to ASBS. An enforcement action could potentially be based on this definition to require the same conditions applicable to ASBS.

Also, the definition of SWQPA-GP is limited to State Marine Parks and State Marine Conservation Areas. Accordingly, Section 1(a)(2), which states that SWQPA-GP is designated by the State Water Board to protect water quality within MPAs (other than ASBS MPAs) “*or other unique and sensitive areas*” is contradictory to this definition. Section 1(a)(2) and should be revised to delete the “*or other unique and sensitive areas*” language to make it consistent with Appendix I.

In addition, in the SED the SWQPA-GP designation appears to apply to State Marine Reserves that are not ASBS. This should be clarified.

Appendix A - CEQA Check-list

Pages 49 – 61 (Checklist items)

Comment – The proposed amendment to the Ocean Plan specifically requires control strategies/measures for exceedances of Table B and if undesirable alterations of natural water quality and/or biological communities are identified. Certain discharges are also banned. However, the checklist identifies “No Impact” for all 17 environmental categories and for all of the over 90 individual items in the list. This conclusion in all categories is inappropriate and it is not supported by evidence in the SED. Control measures implemented in the sensitive coastal zone will include treatment facilities and diversion facilities (such as the mandated connection of dry weather flows to POTWs). As explained previously, impacts will occur and need to be assessed as part of this SED which is the only opportunity to address cumulative impacts.

Page 61 – “*This analysis indicates that the proposed amendments will have no significant impact on the environment nor are cumulative impacts expected.*”

Comment: What is the basis for this statement when neither the affected sites nor prospective controls have been identified?