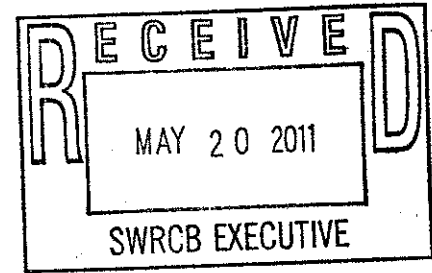




environmental
DEFENSE CENTER

Public Hearing (5/18/11)
ASBS Special Protections
Deadline: 5/20/11 by 12 noon



May 20, 2011

State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

RE: Program Draft Environmental Impact Report for Proposed Exception to the California Ocean Plan for ASBS Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections

Dear Board Members:

The Environmental Defense Center (EDC) offers the following comments and questions regarding the Program Draft Environmental Impact Report (DEIR) for the proposed "Exception to the California Ocean Plan for Areas of Special Biological Significance Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections."

EDC is a non-profit public interest law firm that represents community organizations in environmental matters affecting California's south central coast.

As stated in the California Ocean Plan (Ocean Plan), "waste shall not be discharged to areas designated as being of special biological significance," unless an exception is granted that "will not compromise protection of ocean waters for beneficial uses, and, the public interest will be served." (Ocean Plan Sections III(E)(1) and III(J)(1).) The Ocean Plan defines beneficial uses as the "preservation and enhancement" of areas of special biological significance (ASBS). (Ocean Plan Section I(A).)

We urge the State Water Board to examine a two-fold approach to regulating discharges into ASBS that combines the efficiency of a general exception with the efficacy of individualized exceptions. Specific comments, questions and recommendations follow:

I. GENERAL COMMENTS AND QUESTIONS

A. Biological Monitoring

1. Existing Biological Surveys Provide Inadequate Data

The DEIR addresses the finding that some ASBS discharge sites and reference sites differed in community composition of marine biota, and that these differences "may be a result of the effects of anthropogenic runoff." (DEIR 5.6.13.) However, State Water Board staff concluded that these differences could not reasonably be attributed to

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discharges due to “the inconsistencies and inadequacies” of some of the surveys and reports featured in the DEIR. (DEIR 5.6.16.) Moreover, State Water Board staff stated that much of the collected data was “inadequate to attribute the variation [in community composition] to the impacts of discharge.” (DEIR 6.3-2; 6.3-3; 6.3-4; 6.3-5.)

Many biological surveys could not be used by the State Water Board to assess differences between ASBS discharge sites and reference sites because the surveys were not designed for this explicit purpose. (DEIR 5.6.1.1.; 5.6.7; 5.6.7.1; 5.6.8; 5.6.12.2; 5.6.13; 5.6.16.) Other attempts to distinguish between the community composition of ASBS discharge sites and reference sites were later considered unreliable because selected reference sites were not similar enough to ASBS discharge sites to warrant a valid comparison. (DEIR 5.6.5.2; 5.6.12.3; 5.6.15.) In two other cases, State Water Board staff did not approve of the statistical technique contractors used to determine whether there were differences between ASBS discharge sites and reference sites. (DEIR 5.6.14; 5.6.15.)

Of all the biological surveys submitted by applicants to the State Water Board, only “[f]our reports provided data sufficient to statistically compare impact from reference locations.” (DEIR 6.3-2; 6.3-3; 6.3-4; 6.3-5.) Though the reports showed evidence that “at three ASBS the impact locations are different from reference locations,” the results were questioned on the basis of sample design. *Id.*

The fact that “there were some differences identified between those ASBS survey sites influenced by runoff and survey ‘reference’ sites” suggests that, as the DEIR states, “[a]dditional biological monitoring must be performed in order to insure protection of marine aquatic life.” (DEIR 5.6.13, emphasis added.)

State Water Board staff stated that “to adequately quantify the effects of discharges on marine life,” future biological monitoring should make use of a “regional approach, with statewide consistency,” along with: “adequate” replication, multivariate cluster analysis, and a larger, better selection of reference sites using “the advice of a team of experts.” *Id.*

Some of the biological surveys were found unreliable because they: a) were too short to produce conclusive data; b) did not collect enough data; and/or c) covered too small of an area. (DEIR 5.6.5.2; 5.6.11.2.) As such, the State Water Board should insure that future biological monitoring is conducted over an appropriate range, for a sufficient amount of time, and that enough data is collected to determine whether discharges are having an effect on ASBS biota. Monitoring should be comprehensive, but should also be conducted as soon as possible. Monitoring results should then be used to guide implementation of individual exceptions.

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2. Additional Questions and Comments Regarding Monitoring

The DEIR states that “[a]dditional biological monitoring *must be performed* in order to insure protection of marine aquatic life.” (DEIR 5.6.13, emphasis added.) When would additional biological monitoring take place? Monitoring should be conducted as early as possible to inform the conditions of a general exception.

Data collected through consistent methods by regional monitoring programs “can be compared and integrated across broad spatial scales and across programs, greatly increasing the overall utility of the data.” (DEIR 4.3.5.) Thus, conducting biological monitoring of each ASBS would probably be most informative, as it would aid in the determination of regional trends.

Additional biological monitoring should be done as soon as possible, and that subsequent biological monitoring should be done relatively frequently, both at a regional and individual ASBS level. These sites are deemed areas of *special biological significance*, thus maintaining the biological integrity of these areas is crucial. Relatively frequent biological monitoring of each ASBS would protect biological communities by insuring that impacts associated with discharges are identified early on and addressed with proper mitigation measures as soon as is feasibly possible.

B. Water Quality Testing

As part of their exception applications, dischargers submitted the results of water quality tests. As with biological monitoring, some water quality tests provided inadequate data due to the “inconsistency in the applicants’ sampling and analysis methodology.” (DEIR 5.8.3.) The implementation of regional monitoring programs with statewide consistency, as is currently in the process of being established, should remedy this issue. (DEIR 7.1.)

State Water Board staff doubted the results of some of the water quality tests applicants submitted because they “had very little replication,” which signifies that the results may have been “temporally and/or spatially variable.” (DEIR 5.8.3.) Future water quality testing, on both the regional and individual scale, should thus perform an adequate amount of sampling replication. Another problem State Water Board staff identified was “small sample size;” thus, future water quality testing should make use of larger sample sizes. *Id.*

C. Special Protections

State Water Board staff declares that “the adoption of Special Protections will reduce wastes in discharges to achieve and maintain natural water quality in ASBS.” (DEIR 5.8.3.) Special Protections include implementing Low Impact Development

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(LID), dry-weather flow diversions and other Best Management Practices (BMPs), as well as monitoring. (DEIR S.1; S.7.).

Some of the BMPs suggested in the DEIR, such as catch basin inserts and vortex separation systems, are effective wastewater treatment measures but may not provide adequate special protection on their own. Catch basin inserts, for example, which are used to capture sediment and debris, are ideally used as pretreatment to another stormwater management practice, according to the EPA. Likewise, vortex separation systems are primarily used to remove solids prior to primary treatment. (EPA Wastewater Management Fact Sheet.) How will the State Water Board insure that applicants employ Special Protection BMPs that not only address pretreatment concerns, such as solids and sediment, but also address soluble pollutant concerns as well?

If Alternative D is adopted, EDC urges the State Water Board to insure that applicants employ Special Protection projects/BMPs and mitigation measures that are most properly suited to the nature of applicants' discharges and the water quality and biological communities of the receiving ASBS. Individual exceptions would be the most efficient way to do this.

D. Significant Impacts of Mitigation Measures

Section 6.0 of the DEIR provides general information about the potentially significant impacts of four BMPs (catch basin inserts, vortex separation systems, road and parking lot street sweeping, and public education) and mitigation measures that could reduce potentially significant impacts associated with the implementation of these BMPs to less than significant. However, the DEIR does not provide information on the potentially significant impacts of other types of projects identified in the DEIR, projects such as Low Impact Development (LID) and dry-weather flow diversions. Why were the potentially significant impacts of these types of projects, as well as mitigation measures that could reduce any potentially significant impacts associated with these projects, not included in the DEIR?¹

E. Individual Monitoring

According to the DEIR, "Monitoring is mandatory for all dischargers to assure compliance with the Ocean Plan. Monitoring requirements include both: (A) core discharge monitoring, and (B) ocean receiving water monitoring" (DEIR Appendix 1, IV).

In regards to the Core Discharge Monitoring Program: How often will applicants be required to report their analysis of runoff samples from storm events to their respective

¹ The CEQA Guidelines require discussion of the potentially significant impacts that may emanate from proposed mitigation measures. (14 CCR § 15126.4(a)(1)(D).)

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Regional Water Board? Section IV of Appendix 1, the monitoring requirements, states the time frame in which samples must be taken and analyzed, i.e. "samples shall be analyzed annually;" however, does analyzing necessarily include reporting?

Again, pertaining to sections (a) and (b) of the Ocean Receiving Water Monitoring Program, does sampling and analyzing necessarily include reporting? Similarly, for waterfront and marine operations, how often will samples be required to be reported?

F. Additional Questions and Comments Regarding Monitoring, Reporting and Enforcement

As is well established, discharges allowed under this general exception "shall not alter natural ocean water quality." (DEIR Appendix 1 Glossary.) Natural ocean water quality will be "determined by a comparison to the range of constituent concentration in reference areas agreed upon via the regional monitoring program(s)." (DEIR Appendix 1 Glossary.)

Per the compliance schedule found in Appendix 1 of the DEIR, applicants' discharges must be found not to alter natural ocean water quality within four years of the general exception being granted. Thus, within four years applicants will need the ability to compare receiving water samples to natural ocean water quality. How soon will the regional monitoring programs determine natural ocean water quality? How will information on what constitutes natural ocean water quality be made available to applicants not participating in a regional monitoring program?

Strict monitoring, reporting and enforcement is critical. Frequent monitoring and reporting provides an opportunity for undesirable alterations in natural water quality to be identified as early as possible. As soon as detrimental changes in ASBS water quality are identified, mitigation measures can be sought and quickly put in place. Additionally, if an exception with special protections is demonstrated to result in further degradation of water quality, the exception may be removed and further discharge prohibitions implemented. In this way, the State Water Board can insure the protection of beneficial uses of ASBS.

II. INDIVIDUAL EXCEPTIONS PROVIDE THE BEST PROTECTIONS FOR ASBS, THUS THE PROPOSED GENERAL EXCEPTION SHOULD BE LIMITED

Alternative C, "Implement Individual Exceptions for Each Storm Water and Nonpoint Source Discharger," would provide the best long-term preservation and enhancement of ASBS by addressing ASBS discharges and receiving communities at a more detailed level.

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ASBS are recognized as "intrinsically valuable" areas requiring "protection beyond that offered by waste discharge restrictions or other administrative and statutory mechanisms." (California Ocean Plan Appendix IV 1(a)(2)(3).) Normally, discharges into ASBS are strictly prohibited and are only allowed under exceptions that "will not compromise protection of ocean waters for beneficial uses." (California Ocean Plan III(E)(1) and III(J)(1).)

A *general* exception to the Ocean Plan waste discharge prohibition was desired in this case due to the similar nature of applicants' discharges, all of them being either storm water runoff or nonpoint source discharges. (DEIR 4.2.) Under this general exception, "special conditions and prohibitions are *generally* applicable" to all dischargers. *Id.* (emphasis added).

However, while it is true that all 27 applicants have similar types of discharges, the discharges are not necessarily similar in chemical composition or in the effects they may have on the ASBS they discharge into. Indeed, the DEIR verifies that "each applicant has a *unique* set of runoff issues within their ASBS." (DEIR 7.6, emphasis added.)

Given the unique situation that each discharge and ASBS presents, the "generally applicable" special conditions and prohibitions prescribed in the general exception may not sufficiently protect beneficial uses of ASBS. The general exception is incapable of assigning Special Protection projects designed to address the unique circumstances surrounding each ASBS discharge, and fails to identify specific significant impacts and appropriate mitigation measures. In doing so, the general exception may fail to preserve and enhance ASBS in the long-term.

Individual exceptions, however, which thoroughly analyze both discharges and individual ASBS, would provide the rigorous assessment necessary to devise proper special protections and mitigation measures for each ASBS, and would thus successfully protect each ASBS "from an undesirable alteration in natural water quality," as required by Public Resources Code (Section 36700 (f)).

The main limitation of adopting individual exceptions is that preparation of individual exceptions could take an estimated three years, during which current discharges would persist. (DEIR 4.2.) We urge the State Water Board to adopt a two-fold approach, with adoption of a general exception preceding adoption of individual exceptions in the very near future.

III. CONCLUSION

Individual exceptions would provide the State Water Board with an opportunity to both thoroughly assess impacts of specific discharges and suggest the most appropriate Special Protections and mitigation measures. In this way, individual exceptions would

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insure that applicants enact projects that most adequately address their discharges and the needs of ASBS.

A general exception may not provide ASBS the "special protection" they require under Public Resources Code Section 36700 (f). If a general exception is adopted at this time, the State Water Board should implement individual exceptions on a rolling basis, as soon as is feasible.

Thank you for the opportunity to comment on this DEIR, and thank you for all of the time, effort and resources that went into the production of this DEIR. We look forward to your responses and to the ongoing process.

Sincerely,

Elise O'Dea
Environmental Advocacy Intern