

Ocean Plan ASBS Exceptions. What are they? Why do you want one? How do you get one?

Based on a presentation made by Sheila Vassey, staff attorney for the State Water Board, at the ASBS Stakeholder Meeting held in La Jolla on January 13, 2005.

The State Board's Ocean Plan prohibits waste discharge into ASBS. If you are a discharger, you can legally comply in 1 of 2 ways: stop discharging or get an exception.

An exception in this case is a special permission, granted by the State Water Board, to discharge into the ASBS despite the discharge prohibition. It is not a discharge permit, however. So, if an entity is currently discharging into an ASBS, in order for the discharge to be legal, the discharger must have both a permit and an approved exception.

The State Water Board's authority to grant exceptions comes from the Ocean Plan. The plan allows the board to grant exceptions to any plan requirement provided three conditions are met. These are procedural and substantive. The State Water Board must provide public notice and hold a hearing before acting on an exception request. Second, the Board must comply with the California Environmental Quality Act. And, third, the Board must make two findings that:

- (1) The exception will not compromise protection of ocean waters for beneficial uses; and
- (2) The public interest will be served.

So, what must a discharger do to apply for an exception? The discharger must prepare and submit an application requesting an exception. Send the application to both the Regional Board and the State Board. The application must include information that will enable the State Water Board to comply with CEQA and to make the necessary findings to approve the exception. I will now briefly go over the application process. (Note that the State Board does not have application forms.)

- (1) The first step in the process is to contact the appropriate Regional Board and ask them to assist you in requesting an exception. The Regional Board is responsible for permitting the discharge and so they must be involved in the process.
- (2) Prepare an application package that includes: [Note: If you do not have all the listed information, you may need to include a reasonable schedule to gather and submit it.]
 - (a) The discharger's name, address, & contact information.
 - (b) Any applicable permit or order numbers, if the discharge is regulated under a permit or WDRs.
 - (c) The specific Ocean Plan requirement for which an exception is sought. The ASBS prohibition is found in Sections III.E.1 and III.H.2 of the Ocean Plan.

(d) Documentation that shows that allowing the discharge to continue will not compromise protection of ocean waters for beneficial uses. This documentation is needed to support 1 of the 2 required board findings.

Note that one beneficial use is the preservation and enhancement of ASBS, which are defined as “those areas designated by the [State Board] as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable.” This means that any data that you may have on natural background is relevant and should be submitted.

(e) Documentation for the other finding, i.e. that the public interest will be served by granting the exception. For the Scripps discharge exception, for example, the board found that Scripps’ activities had invaluable education and research benefits. Other relevant factors might include the degree of environmental damage that would occur if the discharge were moved, for example, if the discharge were in a particularly fragile area and moving it would cause greater damage than leaving it. Discharges associated with defense activities might arguably be justified as in the public interest (assuming appropriate treatment, etc.).

(f) CEQA information: CEQA applies to discretionary projects by public agencies. The State Water Board has to comply with CEQA when the board decides whether or not to grant an exception because this is a discretionary decision. Also, the board did not consider the potential environmental effects of granting individual exceptions to the ASBS prohibition when the board adopted the Ocean Plan. (The NPDES CEQA exception in Water Code §13389 does not apply because the action is not issuing the permit but rather granting the Ocean Plan exception.) So the question facing the board when it gets an exception application is: will granting the exception have a significant adverse effect on the environment?

If the applicant is a state or local agency and the agency has already adopted an environmental document, e.g. EIR, that addresses the potential significant adverse environmental effects of discharging into an ASBS; then that document should be submitted. If no analysis has been done, then the discharger needs to submit:

1. data on existing environmental conditions, including a description of marine life near the discharge and at a reference location away from the discharge.
2. an analysis of the potential environmental impacts of the discharge if it continues. This analysis should include data of discharge volume and quality, chemical analyses, toxicity, bacteria.
3. a description of current treatment processes, pollution controls, best management practices currently used or planned
4. an analysis of alternatives to the discharge and their impacts.

5. if the facility has a discharge permit, the facility's compliance history, including any spills or upset events that resulted in the discharge of untreated or partially treated wastewater to the ASBS

(g) The Regional Board may also require you to submit a revised permit application. If so, forms and instructions can be obtained from the Regional Board.

Next Steps: In general, once an application is submitted, Regional Board staff will work with the discharger and State Board staff (i.e. Dominic Gregorio) to ensure that the State Board has adequate information to process the exception request. Once the application is complete, State Board staff will prepare the necessary documents for the exception. These include an appropriate environmental document and a draft resolution with detailed conditions, if staff recommends granting the exception. If the State Board is the lead agency under CEQA, staff will typically prepare an initial study and, based on the results of the study, either a negative declaration, mitigated neg dec or an EIR. Normally, if the applicant is a private party, the State Board will be the lead agency. If the applicant is a state or local agency, the board will generally look to the agency to be the lead under CEQA.

[The State Board has 2 possible processes to comply with CEQA when it acts as lead agency – the traditional way, which involves preparing an EIR, neg. dec. or mitigated neg. dec., or through the board's certified regulatory program. Under the latter, the board doesn't have to prepare an EIR or neg dec, but rather a staff report that analyses environmental consequences, mitigation measures and alternatives. State Board staff have decided to follow the traditional route.]

Once the documents are ready, State Board staff will provide 45 days notice to the public of the upcoming hearing on the proposed exception. The public will have the opportunity to comment on the documents and to attend the hearing. After the hearing, staff will respond to comments, make any necessary changes in the documents, and present the item to the State Board for final action at a publicly-noticed meeting sometime later.

Once the State Board acts to approve an exception, it is sent to USEPA for concurrence. After that, the Regional Board will normally adopt a revised permit for the discharge that incorporates the exception conditions adopted by the State Board.

An approved exception grants permission to discharge into an ASBS but doesn't grant this right indefinitely. Exceptions generally are subject to review every 3 to 5 years. They are typically incorporated into discharge permits, which last for five years. When the permit expires, the exception is reviewed to determine whether it's still appropriate.

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