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Submitted via email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



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

**Subject: Comment Letter--California Ocean Plan SWQPA Amendments**

Dear Ms. Townsend:

Orange County Public Works appreciates the opportunity to comment on the proposed Amendment of the Water Quality Control Plan for Ocean Waters of California ("Ocean Plan Amendment") addressing Implementation of State Water Board ("Board") Resolutions 2010-0057 and 2011-0013 Designating State Water Quality Protection Areas ("SWQPAs") to protect State Marine Protected Areas ("MPAs"), dated July 25, 2012.<sup>1</sup>

With a population of over 3 million and a large coastal community along over 40 miles of coastline, Orange County and its incorporated cities have a strong interest in protecting ocean water quality and coastal habitats for residents, visitors, and wildlife. At the same time, the County and its cities are increasingly impacted financially by water quality regulations, including proposals in the subject Ocean Plan Amendment.

Given this strong interest, Orange County stakeholders submitted extensive public comments to the State Water Board in response to the February 23, 2012 draft Ocean Plan Amendment.<sup>2</sup> The County and others worked in good faith to collaborate, spending many hours reviewing the proposed amendments and submitting voluminous detailed and technical public comments that deserve consideration. Unfortunately, the July 25, 2012 draft of the Ocean Plan Amendment fails to address the majority of the comments contained in these letters. It appears Board staff either provided perfunctory responses or simply ignored the comments altogether.<sup>3</sup>

We note that collaboration is key to success of the Ocean Plan Amendment, and we have collaborated successfully with the Board in the past. If we are unable to work collaboratively,

<sup>1</sup> As used here, the term "Ocean Plan Amendment" includes the Staff Report, the substitute environmental document ("SED"), and the proposed amendment language, dated July 25, 2012.

<sup>2</sup> See, e.g., OC Public Works comment letter, dated April 18, 2012, submitted in anticipation of the May 1, 2012 public hearing.

<sup>3</sup> For example, of OC Public Works' 21 comments, only comments 1, 3, 4 and 15 were addressed, and those were addressed only in part.

we risk losing control of the process and facing the specter of potential challenges. All parties wish to avoid that result.

OC Public Works understands that resource constraints may affect the Board staff's ability to respond to all comments. However, a new regulation as important as the proposed Ocean Plan Amendment must be technically and scientifically sound and justifiable, be considered appropriately within the current legal and regulatory scheme, and provide an achievable pathway to future regulatory compliance that considers economic means. Because the Board did not address the majority of comments submitted by OC Public Works and other Orange County stakeholders, the current Ocean Plan Amendment falls well below the standard required of the Board in promulgating any amendment to the Ocean Plan. As currently drafted, the Ocean Plan Amendment is deficient and should not be adopted. We respectfully ask that the Board direct staff to review these comments and respond to them fully so that we may understand the basis for the proposed action and correct errors and deficiencies.

Provided below is an overview summarizing several of OC Public Works' comments to the proposed Ocean Plan Amendment.<sup>4</sup>

1. As a preliminary comment, the Ocean Plan Amendment must be within the scope of the Board's authority, meet procedural requirements of necessity and clarity, and contain evidentiary support. The Ocean Plan Amendment as currently drafted fails to meet these requirements.
2. The Ocean Plan Amendment exceeds the scope of the Board's authority. The Legislature intended for MPAs to be protected regionally, yet the Board's inflexible "one size fits all" statewide proposal appears contrary to this intent. See Marine Managed Areas Improvement Act; Marine Life Protection Act; California Water Code. In addition, the 2009 Ocean Plan specifically excludes bays, estuaries, and inland waters; however, the proposed Ocean Plan Amendment references a number of MPAs that are estuaries, suggesting they may (improperly) be subject to future State Water Quality Protection Agencies - General Protection ("SWQPA-GP") designation.
3. The Ocean Plan Amendment fails to meet the California Administrative Procedure Act ("APA") requirement of "necessity". See Gov't Code § 11349.1(a). The Board's imposition of a statewide scheme for MPA designation is contrary to the Legislature's intent and unnecessary. The Board has not shown why regional agencies cannot continue to designate and issue MPA regulations, or why the Board must assume management.
4. The Ocean Plan Amendment fails to meet the APA requirement of "clarity". See Gov't Code § 11349.1(a). As currently drafted, the document contains ambiguities and outright contradictions regarding the amendment's scope, applicability and requirements. Though the Board staff's removal of the "trash prohibition" requirement from Proposed Section E(5)(c), as requested in OC Public Works' April 18, 2012 letter (Comment 1), is a step in the right direction, the current revisions to the proposed amendment do not fully address the confusion and lack of clarity.

For example, Proposed Section 7.1(E)(5)(a) still conflicts with Proposed Section E(5)(c). Proposed Section E(5)(a) currently excludes "existing point source wastewater discharges" from the SWQPA-GP designation. Existing MS4 permittees are an existing point source discharge under the Clean Water Act ("CWA"), and therefore should be

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<sup>4</sup> OC Public Works incorporates by reference and as if stated in full the comments, including proposed solutions to noted deficiencies, contained in its April 18, 2012 letter submitted to the Board.

excluded under Proposed Section E(5)(a). Yet inexplicably, existing MS4 permittees are subject to additional requirements under Proposed Section E(5)(c). Adding to the confusion, Proposed Section E(5)(c) is contrary to both the Marine Managed Areas Improvement Act and CWA, which limit regulation of MS4 discharges.

Also regarding Proposed Section E(5)(a), to be feasible, the County notes the section needs to be amended to include language that clarifies that non-storm water discharges for primarily non-anthropogenic runoff may be allowed. An entirely non-anthropogenic exclusion is not viable in urban areas where there is always a comingling of anthropogenic and non-anthropogenic runoff. Alternatively, criteria could be attached.

Moreover, Proposed Section E(5)(c)(1) is implicitly lacking in clarity and consistency. Although it states "Table 1 instantaneous maximum concentrations" and "daily maximum concentrations" cannot "be exceeded in the receiving water", the sampling location is not defined. Without a defined sampling location, one party could take a sample in front of or adjacent to the outfall (with resulting little to no dilution) and exceed the standard, while another party could take a sample in the "mixing zone" (with resulting dilution) and meet the standard. The Ocean Plan Amendment should define the sampling location by reference to the existing EPA mixing zone standard of 100 meters. See 40 CFR 125.121. Using the EPA standard will ensure consistent and uniform sampling results and provide a realistic opportunity for compliance. Requiring sampling at any point closer than 100 meters will set an infeasible and unattainable standard.<sup>5</sup>

We also note Board staff responded to OC Public Works' Comment 3 regarding removal of the terms "or other unique and sensitive areas" from the definition of SWQPA-GP in Section E(1)(a)(2). Though the removal of this language provides some clarity to the scope of SWQPA-GP designation, the designation process and definition of a SWQPA-GP remain ambiguous. There is still a lack of consistency between the definitions provided in Appendix I and Proposed Section E(1)(a)(2). Moreover, Proposed Section E(3) is inherently inconsistent; it can be read to allow a mutually exclusive designation of the same water body.

Finally, the proposed Amendment contains undefined terms such as "natural water quality" and "future discharges". These terms are ambiguous and, if left undefined, could easily lead to confusion through possible conflicting interpretations.

5. The Ocean Plan Amendment fails to meet statutory requirements concerning an evaluation of economic impacts. The Ocean Plan Amendment does not provide an analysis of the costs and rationale for the extensive investigation, assessment, monitoring, and reporting requirements imposed by the proposed changes. Without such an analysis, it is impossible to determine whether the burden of this program bears a reasonable relationship to its need and benefits, as required under Water Code Section 13165. In addition, the Staff Report does not provide a full Water Code analysis, including a discussion of economic considerations, the nature of necessary actions, and time schedules for actions. Water Code §§ 13241, 13242.
6. The Ocean Plan Amendment lacks adequate evidentiary support. The Board staff relied on an impermissible "piecemeal" approach to conclude there are no significant or potentially significant adverse environmental impacts from the amendment, without offering any substantive support. The sole basis for this finding is no MPA/SWQPA-GPs have been designated at this time. In reaching this conclusion, Board staff did not

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<sup>5</sup> Similar to Proposed Section E(5)(c)(4), this proposed section (E(5)(c)(1)) is also an unfunded mandate. See OC Public Works' April 18, 2012 letter (Comment 11).

comply with CEQA's overall objectives, as some of the proposed strategies would almost certainly result in adverse impacts upon designation of MPA/SWQPA-GPs. Accordingly, the SED and CEQA checklist should both be amended to include a more in-depth analysis of potential environmental impacts.

Furthermore, Board staff have not adequately considered the "No Action Alternative" or submitted the proposed Ocean Plan Amendment for a full peer review. Several factors suggest that the "No Action Alternative" is a viable alternative, including the improving quality of ocean and storm water. In addition, because much of the basis of the amendment appears scientific in nature, a scientific peer review is required. See Board's Continuing Planning Process document, dated May 2001; Cal. Health & Safety Code § 57004; Cal. Fish & Game Code § 2855.

Finally, the Ocean Plan Amendment lacks adequate identification and discussion of mitigation and compliance measures. OC Public Works understands that the Board staff's position is it does not need to identify mitigation or compliance measures because no adverse environmental impacts are expected; however, as discussed above, once implementation and MPA/SWQPA-GPs designation is underway, impacts are likely. These impacts necessitate a consideration of mitigation and compliance measures by the Board. Cal. Code Regs. tit. 23, §§ 3772(b)(3), 3772(b)(4).

Thank you again for the opportunity to provide comments. Please contact Chris Crompton at (714) 955-0630 or Jian Peng at (714) 955-0651 if you have questions on technical/scientific comments and Ryan Baron at (714) 834-5206 if you have questions on legal/regulatory comments.

Sincerely,



Mary Anne Skorpanich, Manager  
OC Watersheds

cc: Charles Hoppin, Chair, State Water Board  
Frances Spivy-Weber, Vice Chair  
Tam Doduc, Member, State Water Board  
Steven Moore, State Water Board  
Felicia Marcus, State Water Board  
Tom Howard, Executive Director, State Water Board  
Jonathan Bishop, Chief Deputy Director, State Water Board  
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Orange County cities