



April 18, 2012

Reply to:

500 Capitol Mall, Suite 1000
Sacramento, CA 95814
(916) 446-7979
blarson@somachlaw.com

Charles R. Hoppin, Chair, and Members of the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Attn: Jeanine Townsend, Clerk to the Board
commentletters@waterboard.ca.gov

**SUBJECT: Comments on the Proposed California Ocean Plan Amendment
Addressing Implementation of State Water Resources Control Board
Resolutions 2010-0057 and 2011-0013 Designating State Water
Quality Protection Areas to Protect State Marine Protected Areas**

Dear Chair Hoppin and Members of the Board:

On behalf of Tri-TAC, the California Association of Sanitation Agencies (CASA), and the Southern California Alliance of POTWs (SCAP) (hereinafter referred to as “the Associations”), thank you for the opportunity to submit comments regarding the draft Substitute Environmental Documentation (draft SED), including the staff report and proposed amendment (Draft Amendment) to the California Ocean Plan (Ocean Plan), regarding designation of State Water Quality Protection Areas (SWQPAs) to protect Marine Protected Areas (MPAs). Our comments focus on the provisions of the Draft Amendment related to municipal wastewater outfalls. We greatly appreciate staff’s efforts to date to develop the Draft Amendment, and the recognition by the State Water Resources Control Board (State Water Board) and in the staff report of the important public service and substantial infrastructure provided to the public by the municipal wastewater community. Existing wastewater infrastructure represents billions of dollars of public investment, and as such, is a valuable asset for California’s communities and economy. Furthermore, this essential public infrastructure plays a critical role in protecting water quality and public health. As such, we support the adoption of the Draft Amendment, with modifications described below, in accordance with the provisions related to municipal wastewater outfalls and the timeline specified in State Water Board Resolution No. 2010-0057 (the Resolution).

The Draft Amendment was prepared in response to the Resolution, to establish criteria for designating new SWQPAs, including conditions and prohibitions applicable to point source and nonpoint source discharges, with the Resolution expressly recognizing the existence of important public wastewater infrastructure as well as the

need to protect water quality in these areas. Among other things, the Draft Amendment is intended to outline requirements pertaining to existing municipal wastewater outfall discharges located in the vicinity of MPAs and/or SWQPAs. The Resolution included language that the State Water Board intended for staff to include in these amendments as well as a timeline for amending the Ocean Plan to address this issue.

The Associations appreciate the State Water Board staff's efforts to date in developing the Draft Amendment, and we have identified several key issues that we urge you to address either prior to adoption or in a later amendment, as specified. These issues are explained below.

1. The Draft Amendment Must Be Revised to Clarify the Definition of a State Water Quality Protection Area (SWQPA)-General Protection (SWQPA-GP)

The definition of SWQPA-GP in Appendix I should be consistent with the language in Provision E.3 of the Draft Amendment, which contemplates the ability to designate either an SWQPA-GP or an SWQPA-ASBS, or some combination of both. As currently written, though, the Appendix I definition of an SWQPA-GP appears equivalent to the definition of an SWQPA-ASBS. Further refinement of the SWQPA-GP definition is warranted in order for the rationale contained in the Staff Report to make sense, to comport with the Public Resources Code's definition of SWQPA, and to justify a different approach to designations and subsequent regulation of discharges to these areas. The Associations request that the definition be changed as follows prior to adoption (requested changes shown in underline/strikeout):

Appendix I

DEFINITION OF TERMS

State Water Quality Protection Areas – General Protection (SWQPA-GP) designated by the State Water Board to ~~maintain~~ protect marine species or biological communities from an undesirable alteration in natural water quality ~~in order to protect or conserve marine life and habit~~ within State Marine Parks and State Marine Conservation Areas.

2. The Draft Amendment Must Be Revised to Clarify Where SWQPA-GPs May Be Designated

Resolved 2 of the Resolution specifies that new SWQPAs are intended to protect water quality within MPAs by stating the following:

Upon completion of all work associated with ASBS discharges, and once all MPAs are implemented by the Department of Fish and Game and the Department of Parks and Recreation, directs staff to work with the Regional Water Boards to develop recommendations for new SWQPAs to protect water quality in MPAs.

In addition, Whereas 11 of the Resolution states that:

The Science Advisory Team has further recommended that marine water quality will play a role in the success of MPAs, and the regional water boards may recommend to the State Water Resources Control Board the designation of additional SWQPAs, or work on priority total maximum daily loads that could restore water quality in MPAs.

However, Provision E.1.(a)(2) of the Draft Amendment appears to expand the use of SWQPA-GPs beyond the proposed definition in Appendix I, which indicates that they would be designated “to protect or conserve marine life and habitat *within State Marine Parks (SMP) and State Marine Conservation Areas (SMCA)*” (emphasis added), by stating:

SWQPA – General Protection (GP) designated by the State Water Board to protect

water quality within Marine Protected Areas (MPAs), or other unique and sensitive

areas, that require protection under the provisions described under section 5 below. (Emphasis added.)

The Associations believe that this wording is overly broad and over-reaching, and is inconsistent with the proposed definition of a SWQPA-GP. Therefore, we request that the State Water Board strike the phrase “*or other unique and sensitive areas*” from Provision E.1.(a)(2) prior to adoption.

3. Appendix IV Should Be Renamed and Amended to Clarify the Criteria for SWQPA-GP Designation

The criteria for designating an SWQPA-GP in Appendix IV of the Draft Amendment are the same as those of an SWQPA-ASBS. Given that the definition of SWQPA-GP in Appendix I states the intent that SWQPA-GPs be designated to protect water quality in SMPs and SMCAs, the Associations request that the following language

be added to Appendix IV consistent with that definition, and prior to adoption, as follows:

APPENDIX IV

PROCEDURES FOR THE NOMINATION AND DESIGNATION OF AREAS* OF SPECIAL BIOLOGICAL SIGNIFICANCE STATE WATER QUALITY PROTECTION AREAS

1(c)(1) SWQPA-ASBS may be designated overlying the boundaries of State Marine Reserves.

1(c)(2) SWQPA-GP may be designated overlying the boundaries of State Marine Conservation Areas and State Marine Parks.

Alternatively, if the State Water Board does not adopt this language, the Associations recommend that the State Water Board adopt “placeholder” language (and/or include direction in the Resolution adopting the Amendment) regarding the need for development of criteria for designation of SWQPA-GP and directing staff to develop another amendment focused on refinement of Appendix IV at a later date. As currently proposed, Appendix IV simply does not provide enough guidance as to what would or would not qualify for designation as a SWQPA-GP rather than a SWQPA-ASBS.

4. The Draft Amendment Must Be Revised to Conform to the Provisions of Resolution 2010-0057

Language in the Resolution expressing the intent of the State Water Board with regard to regulation of municipal wastewater facilities has been omitted from the Draft Amendment. The omissions of greatest concern are in Resolved 3.b and 3.c of the Resolution, which were an essential part of the direction provided by the State Water Board regarding future regulation of existing municipal wastewater treatment facilities discharging in the vicinity of SWQPA-GPs.

Resolved 3.b. of the Resolution states “*where new SWQPAs are established in the vicinity of existing municipal wastewater outfalls, there shall be no new or modified limiting conditions or prohibitions for the SWQPAs relative to those outfalls.*” While Provision E.2 of the Draft Amendment provides similar direction in relation to designated MPAs, an overlying SWQPA is a Marine Managed Area (MMA) pursuant to the Marine Managed Areas Improvement Act, and not an MPA. Therefore, contrary to the intent of the Resolution, new or modified limiting conditions or prohibitions could be placed in NPDES permits based on the SWQPA designation if the language of Resolved 3.b is not added to the Draft Amendment. Additionally, the description of a SWQPA-GP in the Draft Amendment appears to possibly authorize designation of SWQPAs-GP that extend

beyond the boundaries of an MPA, or in areas other than where an MPA designation has occurred. Thus, SWQPAs-GP could be designated adjacent to, but outside the zone of initial dilution (ZID) of, a municipal wastewater outfall where no MPA exists. In this scenario, Provision E.2 of the Draft Amendment would not provide protection from “*new or modified limiting conditions or prohibitions*” because the new requirements would be based on the SWQPA-GP, not an associated MPA. Therefore, the Draft Amendment must be modified prior to adoption to include the language in Resolved 3.b. consistent with the State Water Board’s Resolution

Resolved 3.c states “*regulatory requirements for discharges from existing treated municipal wastewater outfalls shall be derived from the California Ocean Plan*”. This language is important to clarify that regardless of the location of a SWQPA-GP, if it is near an existing municipal wastewater discharge, the applicable water quality standards for that discharge will be the same as those required of other ocean dischargers without a SWQPA-GP in their vicinity. Therefore, the Draft Amendment must be modified prior to adoption to include the language in Resolved 3.c to provide clear direction for regulation of existing municipal dischargers, as intended by the State Water Board.

To fully realize the State Water Board’s intent, the Associations request that Provision E.5.(a) of the Draft Amendment be modified as indicated below, prior to adoption, to include new sections E.5.(a)(3) and (a)(4), which would incorporate the language from Sections 3.b and 3.c of the Resolution:

5. Implementation Provisions for SWQPAs-GP*

(a) Implementation provisions for existing point source wastewater discharges

(1) An SWQPA-GP shall not be designated over existing permitted point source wastewater discharges or encroach upon the zone of initial dilution associated with an existing discharge. This requirement does not apply to discharges less than one million gallons per day.

(2) Designation of an SWQPA-GP shall not include conditions to move existing point source wastewater outfalls

(3) Where new SWQPAs are established in the vicinity of existing municipal wastewater outfalls, there shall be no new or modified limiting conditions or prohibitions for the SWQPAs relative to those wastewater outfalls

(4) Regulatory requirements for discharges from existing treated municipal wastewater outfalls shall be derived from the California Ocean Plan

5. Clarification of Provision E.2 is Needed to Avoid Confusion During Implementation

Provision E.2 of the Draft Amendment states that

[N]o 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 based on any MPAs designated as State Marine Parks and State Marine Conservation Areas. This Provision does not apply to State Marine Reserves.

The parenthetical phrase “*beyond those in existing law, regulations, and water quality control plans*” should be removed to avoid regulatory confusion. This language could imply that existing laws, regulations, or water quality control plans may already apply to impose water quality-based limitations, conditions, or prohibitions based on SMP or SMCA MPA designations, and that new requirements could be imposed based on those laws without regard to the Draft Amendment, thereby creating contradictory provisions in these amendments. Moreover, the term “*existing*” is unclear, since it refers to a certain point in time, and future readers, including staff that write permits based on the California Ocean Plan, may be confused as to the timeframe and version of “*existing law, regulations and water quality control plans*” that should be used in crafting permits. Therefore, to meet the requirement of the California Administrative Procedures Act that plans for water quality control meet a standard of clarity (as well as necessity, authority, consistency, reference and nonduplication), this provision should be modified prior to adoption to eliminate the potentially confusing language. (Cal. Govt. Code, § 13353)

As revised, Provision E.2 would read:

[N]o 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 based on any MPAs designated as State Marine Parks and State Marine Conservation Areas. This Provision does not apply to State Marine Reserves.

7. Dry Weather Diversions of Non-Storm Water (Dry Weather) Flows to Municipal Sewer Systems Must Not Be Mandated

The Associations recognize that water quality benefits may occur when dry weather flow is diverted from storm drains to municipal sewer systems. Many of our members accept dry weather diversions and will likely continue to do so in the future when requested by the owner/operator of the municipal separate storm sewer system (MS4) in their service area, provided acceptance does not pose any operational problems for the treatment facility. However, these diversions must be considered on a case-by-case basis, and may not always be possible. For instance, a municipal wastewater collection system operator must determine whether adequate capacity exists in their system, both currently and in the foreseeable future, and the operator may need to impose conditions or limitations on dry weather diversions to ensure that diversions do not contribute to the potential for sanitary sewer overflows, which are prohibited under Statewide General Waste Discharge Requirements for Sanitary Sewer Systems (Water Quality Order No. 2006-003). Furthermore, municipal wastewater collection system operators must also ensure that acceptance of a dry weather diversion will not cause problems within the treatment system, thereby causing exceedance or non-compliance with permit requirements, including effluent limits, applicable to their treatment facilities and discharge. As a result, it is possible that some dry weather diversions may not be able to be accommodated. Therefore, the Associations recommend the following modification to Provision E.5.(c)(3) of the Draft Amendment prior to adoption:

5. Implementation Provisions for SWQPAs-GP*

(c) (3) Non-storm water flows are effectively prohibited as required by the applicable permit. Where capacity and infrastructure exists, all dry weather flows shall be diverted to municipal sewer systems. should be evaluated by MS4 permittees, and best management practices, including dry weather diversions, to reduce or eliminate discharges, should be selected as appropriate, after the characterization and assessment required by (c)(4) is completed.

8. The Potential Environmental Impacts Associated with Designation of New SWQPA-ASBS in the Vicinity of State Marine Reserves (SMR) Should Be Analyzed and Disclosed in the California Environmental Quality Act (CEQA) Checklist

Although the draft SED states that the Draft Amendment does not change any provisions related to designation or regulation of discharges to ASBS, it is clear that the intent of the State Water Board is for new and additional ASBS to be designated as a result of the implementation of the network of MPAs under the Marine Life Protection

Act (MLPA). (State Water Board Resolution No. 2010-0057 at Resolved Nos. 1 and 2.) As such, one area not disclosed in the CEQA checklist in the draft SED is the potential for environmental impacts associated with regulation of existing wastewater discharges in the vicinity of SMR over which SWQPA-ASBS may be designated in the future. If the State Water Board's intent is to regulate these dischargers in accordance with the most stringent designation, this option could include a prohibition on discharge that could result in either a need to relocate an outfall or to implement costly measures to achieve zero discharge (which may not even be achievable for some dischargers). Examples of the types of impacts that could occur include higher energy use (due to the potential need for reverse osmosis and other forms of advanced treatment), air quality impacts, including increased greenhouse gas emissions, the need to manage brine, which might potentially require management as a hazardous waste, and other potentially significant environmental impacts. Furthermore, there could be potentially significant impacts on utilities and service systems construction-related environmental impacts (i.e. item XVII(b) of the CEQA Checklist, "require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects"). Additionally, all of the potential impacts identified on page 33 of the draft SED as potential adverse impacts that could be triggered by designation of a new ASBS could occur and these potential impacts are not limited to "large" wastewater outfalls, but could similarly occur in association with small and medium municipal wastewater outfalls. The CEQA checklist should be updated to include these potential impacts prior to adoption.

9. Several Typographic Errors Should Be Corrected

The Draft Amendment contains several typographic errors that should be corrected prior to finalizing the document. One such error can be found in Section 5.6.2, Table 2, in which the list of MPAs is incorrect and incomplete. This list should be consistent with MPAs currently designated via the MLPA. For instance, in Los Angeles alone, the Abalone Cove and the Point Fermin SMPs no longer exist. However, two new MPAs in this area, the Point Vicente State Marine SMCA and the Abalone Cove SMCA are missing from the list.

In closing, the Associations thank you for the opportunity to comment on the draft SED and request that the proposed modifications to the Draft Amendment be incorporated into the final version that is proposed for adoption by the State Water Board.

Sincerely,

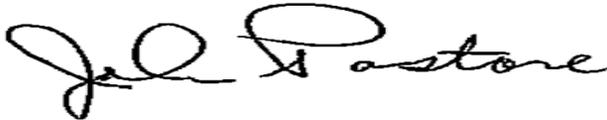


Roberta L. Larson
Director, Legal & Regulatory Affairs, CASA

Charles R. Hoppin, Chair, and Members of the Board
Re: Comments on the Proposed California Ocean Plan Amendment
April 18, 2012
Page 9



Terrie Mitchell
Chair, Tri-TAC



John Pastore
Executive Director, SCAP