



May 1, 2020

Chair Joaquin Esquivel and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: General Exception to the California Ocean Plan Areas of Special Biological Significance (ASBS) Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges

Sent via electronic submission to: commentletters@waterboards.ca.gov

Dear Chair Esquivel and Members of the Board,

California Coastkeeper Alliance (CCKA) is a network of California Waterkeeper organizations committed to protecting and enhancing clean and abundant waters throughout the state for the benefit of Californians and California ecosystems. We write to express our concern regarding the rampant noncompliance of the Areas of Special Biological Significance (ASBS) General Exception to the Waste Discharge Prohibition for Stormwater and Nonpoint Source Discharges.

California has designated 34 ASBSs, which comprise one-third of the California coastline and support a wide variety of unique marine species that are the “basic building blocks” for a sustainable and resilient coastal environment and economy.¹ The concept of “special biological significance” was developed in recognition that certain biological communities, because of their value or fragility, deserve special protection, including the preservation and maintenance of natural water quality conditions. For this reason, the Ocean Plan explicitly prohibits the discharge of waste into an ASBS.

In 2012, the State Water Board adopted a statewide General Exception to the California Ocean Plan ASBS Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges (General Exception) to allow the discharge of waste into an ASBS for “essential public services,” such as public health and safety, erosion control, and the maintenance of the natural hydrologic cycle between terrestrial and marine ecosystems.² In the Final Environmental Impact Report (Final EIR) for the General Exception, the State Water Board found that applicants for the General Exception had demonstrated runoff containing toxic levels of constituents to receiving ocean waters in many ASBS and did not meet water quality objectives to protect marine life. Despite the toxic runoff demonstrated by the General Exception applicants, the State Water Board ultimately granted the exception to all 27 applicants, reasoning that:

“Most of the significant discharges into ASBS are permitted storm water runoff (approximately 350). Hence certain developed ASBS are a more manageable microcosm of our greater ocean storm water issues. By focusing on ASBS storm water and certain nonpoint discharges, with comprehensive monitoring and control efforts, we will make measurable progress in solving the last great pollution problem in the coastal ocean.”³

¹ Natural Water Quality Committee (NWQC) Summation of Findings 2006-2009, at p. 1.

² State Water Resource Control Board (SWRCB) Order No. 2012-0012.

³ SWRCB, ASBS Program Final Environmental Impact Report (Feb. 21, 2012) at p. 17, https://www.waterboards.ca.gov/water_issues/programs/ocean/asbs/docs/asbs_eir022112clean.pdf.

The General Exception imposes special conditions on the 27 stormwater and nonpoint source dischargers that were granted an exception to the ASBS discharge prohibition. The prohibitions and conditions contained in the General Exception comprise “Special Protections” that include the explicit mandate that stormwater discharges “shall not alter natural ocean water quality in an ASBS.”⁴ Meanwhile, conditions to the General Exception include the requirement that a final ASBS Compliance Plan (for NPDES dischargers) or final ASBS Pollution Prevention Plan (for nonpoint source dischargers) be submitted to the State Water Board by September 20, 2014 – 30 months after the 2012 effective date of the General Exception⁵ – and that pollutant reductions be achieved within six years of the effective date.⁶ Unfortunately, the General Exception conditions have failed to make “measurable progress” – if any progress at all – due to rampant non-compliance by dischargers covered by the General Exception and lack of oversight by the State Water Board to ensure final Compliance Plans and Pollution Prevention Plans are completed, and that comprehensive monitoring and control efforts are enacted.

The current ASBS General Exception is flawed and must be reformed to protect coastal water quality and ecologically sensitive ASBSs. A review of the ASBS General Exception data and submitted ASBS Compliance Plans and Pollution Prevention Plans revealed the following:

- (1) The ASBS General Exception compliance deadline was over 2 years ago (March 20, 2018); however, there is no evidence that structural and/or non-structural BMPs were ever employed and that natural water quality or a 90% reduction in pollutant loading was ever achieved.
- (2) All ASBS General Exception dischargers that have submitted water quality data have failed to comply with the natural water quality standard.
- (3) Of the 27 General Exception Permits granted, 14 of 16 (88%) of public agencies and water districts, 100% of Caltrans sites, 3 of 5 (60%) of private entities, and 2 of 3 (67%) of Department of Defense sites have demonstrated water quality exceedances since 2012.
- (4) No water quality data is available for 4 General Exception dischargers, therefore compliance with the natural water quality standard is unknown.
- (5) Submission of final ASBS Compliance Plans and ASBS Pollution Prevention Plans are long-overdue, with only 20 out of 27 draft Compliance Plans submitted, only 14 out of these 20 draft Compliance Plans receiving feedback from State Water Board staff, and only 6 out of 27 Final Compliance Plans have been submitted.
- (6) The submitted ASBS Compliance Plans and Pollution Prevention Plans do not provide adequate justification for continued natural water quality exceedances, nor provide a substantial plan to rectify these exceedances.

We provide a summary of current flaws of the ASBS General Exception and offer a set of recommendations to ensure ASBS General Exception dischargers comply with the requirement to achieve the natural water quality standard. As discussed at further length below, compliance plans should, at a minimum, include an enforceable compliance schedule for pollutant reduction, best management practices (BMPs) to achieve a 90% reduction in pollutant loading during storm events, a plan of action and BMPs that must be employed when natural water quality exceedances are detected, and consistent monitoring must be required to ensure the discharger is meeting the natural water quality standard.

⁴ State Water Resource Control Board (SWRCB) Order No. 2012-0012, Attachment B, Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges, § I.A.1.b.

⁵ While the 2019 SWRCB Water Quality Control Plan for Ocean Waters (Ocean Plan) (2019) lists July 1, 2013 as the effective date of SWRCB Resolutions 2010-0057 and 2011-013, the SWRCB staff response letters to draft compliance plans reference the March 20, 2012 adoption date when calculating compliance dates.

⁶ State Water Resource Control Board (SWRCB) Order No. 2012-0012, Attachment B.

At a minimum, the State Water Board should complete the following to remedy this failing program:

- (1) ASBS Compliance Plans and Pollution Prevention Plans must be submitted that identify specific BMPs to meet the natural water quality standard or a 90% reduction in pollutant loading during storm events.
- (2) Plans need to include a compliance schedule with interim milestones to meet the natural water quality standard or a 90% reduction in pollutant loading as soon as possible.
- (3) Enforcement must be strengthened to ensure compliance with ASBS General Exception.
- (4) Consistent water testing parameters and monitoring guidelines must be established to ensure consistent and accurate water quality test results.
- (5) Ongoing monitoring must be incorporated into appropriate discharge permits to ensure ongoing compliance with the ASBS General Exception.

I. THE ASBS EXCEPTION POLICY IS INADEQUATE AND ALLOWS FOR ONGOING NATURAL WATER QUALITY EXCEEDANCES.

The General Exception was adopted on March 20, 2012 to grant compliance extensions for dischargers that were deemed to benefit the public. The State Water Board found that granting these exceptions were in the public interest due to “the various discharges [that] are essential for flood control, slope stability, erosion prevention, and maintenance of the natural hydrologic cycle between terrestrial and marine ecosystems, public health and safety, public recreation and coastal access, commercial and recreational fishing, navigation, and essential military operations (national security).”⁷ Since the General Exception was adopted, the majority of General Exception dischargers continue to exceed the natural water quality standard, have yet to submit final compliance plans, have submitted insufficient draft compliance plans, and have otherwise failed to demonstrate that the requisite structural and non-structural BMPs have been employed.⁸ The State Water Board’s failure to enforce compliance of the General Exception requirements has resulted in ongoing natural water quality exceedances – whether known or unknown – among General Exception dischargers

A. The majority of ASBS General Exception permit sites have failed to comply with the natural water quality standard.

In the Final EIR for the General Exception, the State Water Board found that granting the requested exceptions would not compromise protection of ocean waters for beneficial uses, provided that the applicants comply with the prohibitions and special conditions that comprise the Special Protections.⁹ The Special Protections lay out five general provisions for permitted point source discharges of stormwater, the second provision requiring that discharges shall not alter natural ocean water quality in an ASBS.¹⁰ Of the twenty-seven General Exception permits granted, twenty-one dischargers have reported exceedances of natural water quality for pollutants such as nitrogen, ammonia, metals, pesticides, and bacteria since the adoption of the General Exception in 2012:

⁷ *Id.*

⁸ See Ocean Standards Unit, SWQPA-ASBS General Exception: Compliance Plans and Pollution Prevention Plans, https://www.waterboards.ca.gov/water_issues/programs/ocean/asbs_general_exception.html.

⁹ SWRCB Order No. 2012-0012, Finding 9 at p. 1.

¹⁰ SWRCB Order No. 2012-0012, Attachment B, § I.A.

Discharger	Total Exceedances (2012 – 2019)
City of Carmel by the Sea	7
Connolly-Pacific Company	3
Department of Transportation (7 sites)	60
Humboldt County	3
Humboldt Bay Harbor District	1
City of Laguna Beach	3
County of Los Angeles	3
Los Angeles County Flood Control District	4
City of Malibu	4
Marin County	6
City of Monterey	6
County of Monterey	6
City of Newport Beach, on behalf of Pelican Point Homeowners	3
City of Pacific Grove	6
Pebble Beach Company, on behalf of the Pebble Beach Stillwater Yacht Club	6
City of San Diego	3
San Mateo County	6
Santa Catalina Island Company, on behalf of Santa Catalina Island Conservancy	2
City of Trinidad	9
U.S. Department of Defense, Navy (2 sites)	6

Of the twenty-seven General Exception Permits granted, fourteen out of sixteen (88%) of public agencies and water districts, 100% of Caltrans sites, three out of five (60%) of private entities, and two out of three (67%) of Department of Defense sites have demonstrated water quality exceedances since 2012. One discharger has since notified the State Water Board that discharges to the ASBS were eliminated and is no longer required monitoring as required by the General Exception.¹¹ Water quality data, however, is unavailable for the following five dischargers: Department of Parks and Recreation, Irvine Company, Sea Ranch Association, Trinidad Rancheria, U.S. Department of the Interior, and U.S. Department of Defense, Air Force. Therefore, it is inconclusive whether these dischargers are compliant. Despite this lack of information, the data that is available demonstrates that the majority of ASBS General Exception dischargers – if not all – have not complied with the natural water quality requirement.

B. Submission of final ASBS Compliance Plans and ASBS Pollution Prevention Plans are long-overdue for a majority of General Exception dischargers.

The General Exception adopted by the State Water Board required that final ASBS Compliance Plans (for NPDES dischargers) or ASBS Pollution Prevention Plans (for nonpoint source dischargers) be submitted to the State Water Board by September 20, 2014 – thirty months after the General Exception effective

¹¹ SWRCB Letter to Sea Ranch Association, Acknowledging the Elimination of Discharge (April 18, 2014), https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs_general_exception/searanch_response_04302015.pdf.

date.¹² Of the twenty-seven General Exception permits granted, only twenty dischargers have submitted draft ASBS Compliance Plans and ASBS Pollution Prevention Plans to-date.

Following the response letters provided by State Water Board staff regarding the draft plans, only six General Exception dischargers submitted final ASBS Compliance Plans or ASBS Pollution Prevention Plans. Now, nearly six years after the compliance deadline, fourteen of the twenty submitted draft Compliance Plans and Pollution Prevention Plans remain as drafts and seven dischargers have failed to submit any draft plan at all.¹³ This is in direct violation of the ASBS General Exception, as dischargers granted the exception were required to submit final plans within thirty months of the General Exception effective date.¹⁴ Due to the lack of enforcement and oversight by the State Water Board, the twenty-one dischargers who have not submitted final plans – some submitting not even a draft plan at all – have been allowed to continue discharging above natural water quality, leaving fragile coastal ecosystems vulnerable to ongoing natural water quality exceedances.¹⁵

C. The submitted ASBS Compliance Plans and Pollution Prevention Plans do not provide adequate justification for continued natural water quality exceedances, nor provide a substantial plan to rectify these exceedances.

Of the relatively few final ASBS Compliance Plans and Pollution Prevention Plans submitted to the State Water Board, these plans are only required to state that the permitted discharger will submit a written report to the State Water Board within thirty days of a detected exceedance.¹⁶ To date, no known written reports have been submitted to the State Water Board nor has any enforcement action been taken for documented natural water quality exceedances. Further, there are a range of issues with each of the submitted final and draft compliance plans, such as compliance plans ranging in length from 3 to 231 pages,¹⁷ of which none provide justification for natural water quality exceedances, and compliance plans include no substantial action plan to rectify non-compliance.¹⁸ At a minimum, compliance plans should include enforceable metrics, such as explicit numeric limitations of natural water quality for each constituent, increased routine monitoring and reporting, and an explicit best management practices and a plan of action that must be employed when an ASBS monitoring site shows natural water quality exceedances.

D. There is no demonstration that structural and non-structural BMPs were ever employed and achieved pollutant reductions by the General Exception compliance deadline.

ASBS Compliance Plans submitted under the General Exception must include a schedule for structural controls based on the results of runoff and receiving water monitoring. Any structural controls identified in a final Compliance Plan must then be operational within six years of the effective date.¹⁹ Of the dischargers that have submitted draft Compliance Plans, State Water Board staff directed a number of these dischargers to identify additional structural BMPs to comply with the natural water quality requirement and to include

¹² While the 2019 SWRCB Water Quality Control Plan for Ocean Waters (Ocean Plan) (2019) lists July 1, 2013 as the effective date of SWRCB Resolutions 2010-0057 and 2011-013, the SWRCB staff response letters to draft compliance plans reference the March 20, 2012 adoption date when calculating compliance dates.

¹³ See Ocean Standards Unit, SWQPA-ASBS General Exception: Compliance Plans and Pollution Prevention Plans, available at https://www.waterboards.ca.gov/water_issues/programs/ocean/asbs_general_exception.html.

¹⁴ SWRCB Order No. 2012-0012, Attachment B, § I.B.3.b.

¹⁵ ASBS Monitoring: Ocean Receiving Water Results Distribution, https://public.tableau.com/profile/paul.levy#!/vizhome/ASBS_draft_30/ASBSMonitoring.

¹⁶ SWRCB Order No. 2012-0012, Attachment B § I.B.3.f.

¹⁷ See https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs_general_exception/humboldt_dcp_04302015.pdf; see also https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs_general_exception/la_dcp_04302015.pdf.

¹⁸ See e.g., James V. Fitzgerald Area of Special Biological Significance (ASBS) Draft Compliance Plan, § 6.1 at p. 45, https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs_general_exception/mateo_dcp_04302015.pdf.8.

¹⁹ SWRCB Order No. 2012-0031 (Resolution Amending the ASBS General Exception pollutant reduction requirement from four years to six years), https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0031.pdf.

a schedule for these projects to be implemented by the compliance deadline of March 20, 2018 – indicating that these plans were insufficient.²⁰ Further, given the vast majority of General Exception dischargers have failed to submit final Compliance Plans or Pollution Prevention Plans, there is no assurance that structural BMPs were actually identified and implemented by the General Exception compliance deadline.

The General Exception further requires any ASBS Pollution Prevention Plan for nonpoint source dischargers describe non-structural BMPs currently employed and an implementation schedule for those planned to be employed.²¹ The two draft ASBS Pollution Prevention Plans submitted to the State Water Board, however, do not contain any descriptions of non-structural BMPs that were in place or anticipated to be implemented. Only one of these draft plans was resubmitted as a final ASBS Pollution Prevention Plan. Unfortunately, the attachment describing the non-structural BMPs is not readily available for public review and it remains unclear whether the final ASBS Pollution Prevention Plan was sufficient.

Finally, the General Exception requires pollutant reductions be achieved and documented within six years of the 2012 effective date. Without adequate ASBS Compliance Plans and Pollution Prevention Plans that demonstrate pollutant reductions, nor any other demonstration that pollutant reductions have been achieved through water quality monitoring or employed BMPs, it is presumed that pollutant reductions have not been met by General Exception dischargers and that discharges into sensitive marine areas are continuing unabated.

II. RECOMMENDATIONS TO IMPROVE THE ASBS GENERAL EXCEPTION AND ASBS PROGRAM TO PREVENT THE PROLIFERATION OF ONGOING COASTAL WATER QUALITY EXCEEDANCES.

Given the inadequate implementation of the current ASBS General Exception, we offer the following recommendations to strengthen enforcement and oversight of the ASBS program, such as developing consistent standards and guidelines for General Exception dischargers, and establishing a compliance schedule with interim milestones and consistent monitoring. These recommendations provide a baseline to reform the ASBS General Exception and overall integrity of the ASBS program to protect California's marine ecosystems from ongoing pollution.

- A. *ASBS Compliance Plans and Pollution Prevention Plans must be submitted that identify specific BMPs to meet the natural water quality standard or a 90% reduction in pollutant loading during storm events.*

Since the General Exception was adopted, dischargers have continued to exceed the natural water quality standard, a majority have yet to submit final ASBS Compliance Plans and ASBS Pollution Prevention Plans, and draft plans have failed to identify and schedule BMPs to meet the pollutant reduction deadline of March 20, 2018. The General Exception explicitly requires ASBS Compliance Plans and ASBS Pollution Prevention Plans to identify and include a schedule for structural and non-structural BMPs that must be operational within six years of the effective date – a deadline that passed two years ago. These Plans are necessary to control stormwater discharges and achieve pollutant reductions in stormwater runoff that are necessary to comply with the special conditions of the General Exception. Specifically, BMPs must be identified, and a schedule for their implementation created, to achieve the instantaneous maximum water quality objectives of the Ocean Plan or a 90% reduction in pollutant loading during storm events, as required by the General Exception.

²⁰ See e.g., SWRCB Response Letter to City of Carmel (June 8, 2015), https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs_general_exception/carmel_wbresponse060815.pdf, and SWRCB Response Letter to Laguna Beach (Nov. 6, 2013), https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs_general_exception/laguna_response_04302015.pdf.

²¹ SWRCB, Order No. 2012-0012, Attachment B, § I.A.2.

Without the submission of adequate Compliance and Pollution Prevention Plans, however, there is no guarantee or demonstration that any pollutant reductions have been achieved since the adoption of the General Exception. The State Water Board must require that ASBS Compliance Plans and ASBS Pollution Prevention Plans be submitted that include explicit BMPs and implementation schedules to meet the natural water quality standard or achieve pollutant reduction targets – and finally place controls on unabated discharges into sensitive marine areas along California’s coast.

B. Enforcement must be strengthened to ensure compliance with ASBS General Exception conditions as soon as possible.

The State Water Board’s Ocean Plan prohibits the discharge of waste into an ASBS, and the General Exception provides special conditions for the 27 stormwater and nonpoint source dischargers that were granted an exception to the ASBS discharge prohibition. The prohibitions and conditions contained within the General Exception comprise “Special Protections” to ensure any continued discharge does “not alter natural ocean water quality in an ASBS.”²² Unfortunately, lack of oversight and enforcement by the State Water Board has allowed for rampant non-compliance of the General Exception conditions.

General Exception dischargers must be held accountable for completing and implementing final ASBS Compliance Plans and Pollution Prevention Plans, and ultimately achieving the conditions of the General Exception. Over two years have passed, however, since the compliance deadline for the General Exception conditions, and the State Water Board must require a detailed schedule of specific actions each discharger will take to correct or prevent any further violation of the General Exception.²³

The State Water Board could additionally improve this process by establishing guidelines for dischargers to develop adequate Compliance Plans that, if implemented, would achieve the natural water quality standard and pollutant reduction targets. One improvement to hold dischargers accountable for exceedances of natural water quality could include an explicit section within each ASBS Compliance Plan dedicated to “non-compliance.” This section should outline a plan of action in the case of an exceedance, such as identifying the discharge and constituent causing the exceedance, a discharge reduction plan, a compliance schedule, consistent water quality testing and monitoring of the ASBS site, and prompt reporting of the actions taken and the water quality test results. In instances where natural water quality continues to be exceeded, or BMPs fail to be employed or fail to meet the 90% pollutant load reduction during a storm event, the State Water Board should take enforcement action to ensure ongoing pollution is actually addressed and remediated. The State Water Board should further assess strict penalties when General Exception dischargers fail to conduct water quality testing in order to deter against general inaction.

C. Consistent water testing parameters and monitoring guidelines must be established to ensure consistent and accurate water quality test results.

In addition to including a specific plan of action for the occurrence of an exceedance in each Compliance Plan, water quality testing parameters must also be established to appropriately assess exceedances or compliance with the natural water quality requirement. These parameters should include (1) consistent water quality testing timing requirements (e.g., tests must be done on the same day, at the same time, on a bi-weekly basis; such as every other Wednesday between 8 and 9 am); (2) post-storm water quality testing for stormwater runoff must be conducted within 24 hours of the storm event; (3) water samples must be kept on ice until they reach the laboratory where they will be tested; (3) water quality testing must be conducted only by trained individuals; (4) weather conditions at the time of test must be recorded: water levels (high, regular, low), turbidity, current weather (precipitation level), and weekly weather (if it rained in the past 24-hours), and (5) quality assurance tests must be submitted alongside their regular water sample

²² SWRCB Order No. 2012-0012, Attachment B, § I.A.1.b.

²³ Cal. Wat. Code §§ 13167.5 and 13300.

on a tri-monthly basis. These parameters, if imposed by the State Water Board, will help ensure consistent and accurate water quality testing results.

D. Compliance schedules with interim milestones and consistent monitoring must be established for dischargers that are unable to comply with the ASBS General Exception.

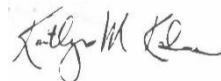
Given few water quality samples are tested by a General Exception discharger during any given year, coupled with the fact that nearly every discharger has had a natural water quality exceedance since the adoption of the General Exception, compliance schedules with enforceable milestones must be adopted to prevent ongoing pollution into sensitive coastal ecosystems. Second, a minimum number of water quality samples must be conducted each year and General Exception dischargers should be required to provide an annual notice and explanation to the State Water Board when minimum sampling requirements are not met, such as drought years. Monitoring requirements should be incorporated into the appropriate discharge permit to ensure ongoing compliance with the General Exception. Consistent and ongoing water quality monitoring is necessary to not only ensure dischargers meet interim milestones, but ensure the adequacy of BMPs over time.

California's fragile and valuable marine ecosystems have endured rampant and unchecked discharges to areas deemed to be of 'special significance' for far too long. We look forward to working with you to improve and ensure the success of the ASBS program for the benefit of California's marine ecosystems, coastal communities, and our ocean economy.

Sincerely,



Sean Bothwell
Executive Director
California Coastkeeper Alliance



Kaitlyn Kalua
Policy Analyst
California Coastkeeper Alliance