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**To: Clifford Moriyama  
From: Barton H. Thompson, Jr.  
Subject: Stormwater Discharges in Areas of Special Biological Significance**

You have asked me to review the September 6, 2006 memorandum of Latham & Watkins regarding the regulation of stormwater discharges into Areas of Special Biological Significance (ASBS) and to independently consider whether California state law requires the California State Water Resources Control Board (the Board) to prohibit discharges that contain any measurable quantities of anthropogenic compounds. I have done so and conclude that California state law does not mandate regulation of such discharges absent evidence that the quantity of the compounds could be harmful to water quality in the relevant ASBS.

## **I. Introduction**

The hearings on ASBS stormwater discharge rules show significant agreement on the importance of protecting ASBSs from harmful stormwater discharges. ASBSs provide critical biological habitat along California's coast. Protecting ASBSs from stormwater discharges that would degrade their quality is thus one of the Board's most important missions. No one appears to question the Board's authority to regulate the discharge of stormwater into an ASBS if the discharge contains one or more anthropogenic compounds in concentrations that could harm receiving water quality and uses. As the California Ocean Plan emphasizes, the Board must maintain indigenous marine life and provide maximum protection to the marine environment.

The question is whether state law also requires the Board to prohibit discharges that the Board has not concluded are harmful but that nonetheless contain some measurable amounts of anthropogenic substances. Under the staff's suggested interpretation of state law, the Board must prohibit such discharges, forcing the discharger to either eliminate the discharge or go through the potentially burdensome and uncertain process of seeking an exception under the California Ocean Plan. State law, however, does not mandate regulatory procedures that are unnecessary to protect water quality. California water quality law is concerned with the practical protection of water quality – not with abstract concerns for complete water purity. From the outset, state law has encouraged the Board to take practical steps to address the most critical water quality issues in an effective and reasonable fashion. Without any offsetting benefit, the staff's proposed interpretation, which could effectively prohibit all stormwater discharges, threatens to take the Board's attention away from the important task of improving receiving water quality.

## II. Discussion

The Porter-Cologne Water Quality Control Act focuses on reducing discharges of harmful substances into the state's waterways, not on abstract efforts to eliminate all measurable trace of anthropogenic compounds in the waters. In passing the Porter-Cologne Act, the legislature's goal was practical: protecting water "quality" for the "use and enjoyment by the people of the state." Cal. Water Code § 13000. To achieve this goal, the Act establishes a program for protecting water quality from "degradation," not for eliminating all discharges. *Id.* Indeed, far from calling for absolute water purity, the Porter-Cologne Act calls for the "highest water quality which is reasonable." *Id.*

This practical interest in protecting water quality from discharges that could harm the "use and enjoyment" of the state's waters runs throughout the provisions of the Porter-Cologne Act. In setting out California's policies regarding the coastal marine environment, for example, section 13142.5(a) provides that "discharges shall be treated to *protect present and future beneficial uses* and, where feasible, to *restore past beneficial uses* of the receiving waters. Highest priority shall be given to improving or eliminating discharges that *adversely affect ... biologically sensitive sites*" (emphasis added). Chapter 4, Article 3 of the Act provides that regional water quality control plans shall "ensure the *reasonable protection of beneficial uses* and the *prevention of nuisance*," and explicitly recognizes that it "may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." Cal. Water Code § 13241.

The Porter-Cologne Act, moreover, generally provides for regulatory oversight only where discharges might injure the environment. Under Chapter 4, Article 4 of the Act, for example, dischargers must file a report of their discharges with the appropriate regional board if the discharges "could affect the quality of the waters of the state." *Id.* § 13260(a)(1). The Act, in short, is not interested in unnecessary process or regulation. Its focus is on solving actual problems.

The question before the Board is whether the California Ocean Plan, which merely implements the Porter-Cologne Act, abandons this practical, harm-based approach and calls for the regulation of stormwater discharges that do not contain harmful quantities of anthropogenic substances. Most provisions of the California Ocean Plan are fully consistent with the practical, harm-based approach of the Porter-Cologne Act. Section II.A.1, for example, provides that the water quality limits of the Ocean Plan should "ensure the reasonable protection of beneficial uses and the prevention of nuisance." Staff, however, suggests that the following two sentences in section III.E require the Board to prohibit discharges that contain measurable but not harmful anthropogenic compounds:

Waste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in those areas.

In interpreting these sentences, the meaning of “waste” under the Porter-Cologne Act is critical. The Latham & Watkins memorandum goes into the history and meaning of the term “waste” in great depth. There are three key points. First, some forms of effluent are sufficiently and consistently dangerous to the environment that they are explicitly identified as “waste” in the Porter-Cologne Act. Both sewage and mining waste fall into this category. Cal. Water Code §§ 13050(d) & (q). In developing the prohibition of section III.E, the Board initially had such categorical wastes in mind.

Second, as the Board has recognized in its prior decisions, stormwater runoff itself is not waste. State Board Order WQ 2001-15, at 12. Section III.E applies to some stormwater runoff only due to the “pollutants in the runoff” and the “volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff.” *Id.* It is the pollutants that can constitute waste, “not the runoff itself.” *Id.*

Finally, anthropogenic substances found in stormwater are “waste” only when they are present in such quantities that they are potentially harmful to the environment into which they are discharged. The Board recommended the current definition of “waste” in its proposals to the California legislature of March 20, 1969. In notes to the recommended definition of “waste,” the Board observed that the new definition combined the former definitions of “sewage,” “industrial waste,” and “other waste.” Recommended Changes in Water Quality Control, March 1969, App. A-23. The Board, moreover, emphasized that the California Attorney General had previously found that waste constitutes the “current drainage, flow, or seepage into waters of the state of *harmful concentrations*” of various anthropogenic substances. *Id.* at A-24. According to the Board, the new definition would “include all the materials, etc., which the Attorney General has interpreted to be included in definitions of ‘sewage,’ ‘industrial waste,’ and ‘other waste.’” As the Board has noted, this is the “definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act.” State Board Order WQ 2001-15, at 12.

The California Ocean Plan thus does not require the Board to ban or regulate stormwater discharges even when the discharges do not contain potentially harmful concentrations of anthropogenic substances. Like the Porter-Cologne Act that it implements, the California Ocean Plan focuses on the regulation of potentially harmful activities. Indeed, any other interpretation of the California Ocean Plan would be arguably inconsistent with the provisions of the Porter-Cologne Act that authorize the plan. The authorizing provisions focus on protecting the state’s ocean waters against harmful discharges, not on trying to ensure abstract water purity. The California Ocean Plan is a “water quality control plan for ocean waters of the state.” Cal. Water Code § 13170.2(a). And the Porter-Cologne Act provides that the Board should establish the water quality objectives that serve as the linchpins of such a plan “for the *reasonable protection of beneficial uses* of water or the *prevention of nuisance* within a specific area.” *Id.* § 13050(h) (emphasis added). The Porter-Cologne Act, moreover, requires the Board to regularly review the plan to “guarantee that the current standards are adequate and are not allowing degradation to indigenous marine species or posing a threat to

human health.” Id. § 13170.2(b). In short, the emphasis is on protecting against real risks to water quality.

Interpreting “waste” in section III.E of the California Ocean Plan to require some showing that the quantity of anthropogenic compounds is sufficiently high to be harmful is also consistent with the California Public Resources Code. Like the Porter-Cologne Act, the Public Resources Code focuses on the elimination or regulation of harmful discharges. In particular, the purpose of designating an ASBS or other state water quality protection area is to “protect marine species of biological communities from an *undesirable alteration* in natural water quality.” Cal. Pub. Res. Code § 36700(f) (emphasis added).

By interpreting waste to include *any* measurable quantity of an anthropogenic substance, the staff’s proposed “detection” approach is thus inconsistent with the focus and structure of both the Porter-Cologne Act and the Public Resources Code. Rather than pursue abstract goals of absolute water purity, California law requires the Board to take the necessary steps to identify and regulate potentially harmful stormwater discharges. If particular discharges contain harmful quantities of pollutants that thus constitute “waste,” the Board must either prohibit the discharge or impose “special conditions” on the discharge that eliminate the potential for harm. Cal. Pub. Res. Code § 36710(f).

### **III. Conclusion**

In summary, the Porter-Cologne Act and the California Public Resources Code take a practical, harm-based approach to the problem of water quality. The emphasis is on regulating discharges that might harm water quality, not seeking an unrealistic goal of complete water purity. By potentially sweeping in stormwater discharges whether or not they present any risk to water quality, a “detection” approach threatens to create an overbroad and controversial regulatory program that could well impose significant administrative and operational costs on local communities without any benefit to water quality. If implemented too rigorously, a detection approach might also encourage local governments to collect and treat some stormwater runoff that, far from being harmful to the environment, plays an important role in the local ecosystem. Neither California statutory law, nor the California Ocean Plan that implements the law, requires the Board to prohibit stormwater discharges that contain anthropogenic compounds in quantities that will not be harmful to receiving water quality or the environment.