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July 23, 2007

The Honorable Arnold Schwarzenegger  
State Capitol Building  
Sacramento, CA 95814

The Honorable Theodore R. Kulongoski  
160 State Capitol  
900 Court Street  
Salem, Oregon 97301-4047

The Honorable Christine O. Gregoire  
Office of the Governor  
P.O. Box 40002  
Olympia, WA 98504-0002

**VIA ELECTRONIC MAIL AND U.S. MAIL: [WCGAcomments@resources.ca.gov](mailto:WCGAcomments@resources.ca.gov)**

**Re:** Comments on West Coast Governors' Agreement on Ocean Health

Dear Governor Schwarzenegger, Governor Kulongoski and Governor Gregoire:

The California Coastkeeper Alliance (CCKA or Alliance) and its 12 member Waterkeepers<sup>1</sup> work to protect the health of the California coast from the Oregon border to San Diego. On behalf of the Alliance, I am writing to request that you lead the rest of the country on implementing much-needed measures to protect and improve coastal water quality, as part of the West Coast Governors' Agreement on Ocean Health (Agreement). The Agreement calls for the development of a more extensive suite of specific regional recommendations and initiatives for action by the fall 2007, centered around seven priority areas. These priority areas include "ensuring clean coastal waters and beaches" and "protecting and restoring healthy ocean and coastal habitats," among others.

This letter outlines specific recommendations to achieve meaningful and lasting improvements in coastal water quality and affected coastal habitat and marine life. These are summarized as follows:

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<sup>1</sup> Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper, Inland Empire Waterkeeper, and San Diego Coastkeeper.

- Polluted runoff, both stormwater and non-stormwater runoff, is the most significant and widespread source of contamination of coastal waters. The draft Agreement calls for full federal funding of coastal nonpoint pollution programs. However, while such funding is important in the short-term, ultimately its utility is limited in light of the fact that the programs funded rely almost exclusively on voluntary controls. **We ask that the Agreement make a commitment to implementing fully those existing laws that mandate controls on stormwater and non-stormwater runoff** (such as the federal Clean Water Act for stormwater and California’s Porter-Cologne Water Quality Control Act for non-stormwater runoff), **and adopt laws to fill gaps in mandatory runoff controls as needed. The Agreement also should commit to reducing stormwater pollution by implementing low-impact development techniques broadly in new coastal developments, redevelopments, and road construction**, which will provide immediate water quality improvements in the areas where such measures are put in place.
- The public can and should be an integral part of state efforts to improve the health of coastal waters. However, to be an active partner, the public needs the same information as its government. In particular, both the public and decisionmakers need readily-accessible information on coastal water quality and on efforts to enforce state and federal water quality laws. **We ask that the Governors commit to providing basic coastal water quality and enforcement information to the public and decisionmakers in a consistent and regularly updated format across all three states as soon as possible.**
- Once-through cooling systems used in coastal power plants devastate sensitive and important ecosystems. The California Ocean Protection Council took a leadership role on this issue in spring 2006, when it adopted a resolution highlighting the damage caused by this destructive technology. In early 2007, the 2<sup>nd</sup> Circuit Court of Appeals ruled against U.S. EPA’s weak regulations governing use of these cooling systems, and EPA recently rescinded the entire rule.<sup>2</sup> **We ask the Governors to implement immediately in new and reissued permits and other regulatory avenues the “best technology available” for controlling the impacts of once-through cooling systems in coastal plants, and not less than “the most protective controls to achieve a 90-95 percent reduction in impacts”<sup>3</sup>** as called for by the Ocean Protection Council.
- The Commission on Ocean Policy highlighted the significant damage done to coastal ecosystems by ship-borne invasive species. Petitions and litigation by environmental and fishing groups resulted, in late 2006, in a definitive federal court decision that discharges of invasive species must be regulated pursuant to the federal Clean Water Act. However, some currently-proposed bills in the U.S. Congress that ostensibly intend to control ballast water discharges of invasive species actually exempt them from federal Clean Water Act requirements and preempt more protective state action. To counter such proposed steps backwards, **we ask the Governors to call unequivocally for full regulation of ballast-borne invasive species that does not allow for exemptions from the Clean Water Act or preemptions of more protective state laws.**

We discuss each of these recommendations in more detail below.

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<sup>2</sup> “National Pollution Discharge Elimination System – Suspension of Regulations Establishing Requirements for Cooling Water Intake Structures at Phase II Existing Facilities,” 72 Fed. Reg. 37107 (July 9, 2007).

<sup>3</sup> California Ocean Protection Council, “Resolution of the California Ocean Protection Council Regarding the Use of Once-Through Cooling Technologies in Coastal Waters,” (April 20, 2006).

## **The Agreement Should Call for and Implement Mandatory Controls on Stormwater and Non-Stormwater Runoff**

### Non-Stormwater Runoff and Enforceable Controls

Polluted runoff – both stormwater and non-stormwater runoff – is the most significant source of coastal contamination nationwide. The Commission on Ocean Policy found that fully “[n]inety percent of impaired water bodies do not meet water quality standards at least in part because of nonpoint source pollution.”<sup>4</sup> Every year, an area of up to 12,000 square miles in the Gulf of Mexico becomes a dead zone as a result of nitrogen fertilizers from farms far inland washing into streams and other water bodies and ultimately flowing into the Gulf. These nutrients cause excess algal growth, depleting oxygen in the Gulf’s bottom waters to levels too low to support fish, crustaceans, and many other forms of marine life.<sup>5</sup> The Commission on Ocean Policy Report stated that “substantial enhancement of coastal water quality will require significant reductions in nonpoint source pollution.”<sup>6</sup>

The federal Clean Water Act requires that states issue National Pollution Discharge Elimination System (NPDES) permits for stormwater discharges from most cities throughout the nation (stormwater is discussed in more detail below). However, the Clean Water Act fails to mandate controls on most sources of non-stormwater runoff, including irrigated agriculture, silviculture, marinas, grazing and smaller confined animal facilities. As noted in the draft Agreement, voluntary and incentive programs do exist in the Clean Water Act (Section 319) and Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA Section 6217). But these are simply inadequate to control this serious source of pollution. The Commission on Ocean Policy itself found that “[i]mprovements to the [nonpoint] programs should . . . require enforceable best management practices and other management measures throughout the United States . . .”<sup>7</sup> and then made a formal recommendation that, “[t]o ensure protection of coastal resources nationwide, Congress should provide authority under the Clean Water Act and other applicable laws for federal agencies to establish enforceable management measures for nonpoint sources of pollution . . .”<sup>8</sup>

Accordingly, and as emphasized by the Commission, the existing federal programs of incentives and voluntary efforts are simply insufficient to reduce nonpoint source pollution. The Agreement will only be effective in reducing polluted runoff by (a) supporting the Commission’s call for enforceable controls in the Clean Water Act for all sources of runoff, and (b) showing the way to achieve that by establishing and implementing such controls in each state. In fact, California’s Porter-Cologne Water Quality Control Act already mandates such controls on polluted runoff through “waste discharge requirements” (WDRs); or, if “in the public interest” and warranted by the type and amount of discharge, “waivers of WDRs, with conditions”

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<sup>4</sup> U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century: Final Report*, p. 213, found at [http://www.oceancommission.gov/documents/full\\_color\\_rpt/15\\_chapter15.pdf](http://www.oceancommission.gov/documents/full_color_rpt/15_chapter15.pdf) (COP Report).

<sup>5</sup> *Id.* at 216.

<sup>6</sup> *Id.* at 204.

<sup>7</sup> *Id.* at 218 (emphasis added).

<sup>8</sup> *Id.* at 220 (emphasis added).

(waivers). Porter-Cologne requires all who discharge or propose to discharge waste “that could affect the quality of the waters of the state” (including groundwater) – both point and nonpoint source pollution – to report the discharge to the local Regional Water Quality Control Board. The local Regional Board then determines whether the discharge should be regulated through waste discharge requirements, or through a waiver of waste discharge requirements under Calif. Water Code Section 13269, to ensure that those discharges do not impact use of the state’s waters. In all cases, California law allows for collection of sufficient fees from all dischargers to pay for the costs of these programs. However, this significant and unique state authority to mandate controls on polluted runoff remains vastly under-utilized, despite mounting concerns about the significant impacts of this pollution.

**We urge the Agreement to move beyond solely voluntary and incentive-based actions, which will not achieve clean coastal waters, and commit to the adoption and full implementation of state programs that mandate enforceable permit controls on polluted runoff.** This action would be a model for the rest of the country, and potentially spur the adoption of similar controls within the federal Clean Water Act, as called for by the Commission.

#### Stormwater and Low-Impact Development

Stormwater runoff is a similarly significant source of coastal pollution, particularly for popular coastal recreation areas (such as in Southern California). As noted by the Commission on Ocean Policy, “[p]oor stormwater management may increase flooding, causing property damage from flash floods and leading to higher insurance rates. Stormwater is also a source of bacterial contamination, leading to increased disease incidence, thousands of beach closures in the United States each year, and loss of revenues from coastal tourism and sport fishing. Millions of dollars are spent on treating the symptoms of stormwater pollution but much less is spent on efforts to control its causes.”<sup>9</sup> A recent UCLA and Stanford University study found that there are nearly 1.5 million cases of gastrointestinal illnesses that occur annually as a result of fecal contamination in Southern California’s waters. The researchers estimated that health care costs for the cases range from \$21 million annually (based on very conservative assumptions) to \$414 million.<sup>10</sup>

Land use decisions dramatically affect the amount and type of stormwater runoff created, and so can significantly impact coastal water quality. For example, aquatic ecosystem health becomes “seriously impaired” when over 10% of the watershed is covered by impervious surfaces. By comparison, impervious surfaces cover 25%–60% of the area in medium-density residential areas, and can exceed 90% at strip malls and other commercial sites.”<sup>11</sup>

Recognizing the connections between development and stormwater pollution, the Commission noted that “while best management practices can be effective, these tools may not be sufficient on their own. In urban areas, construction activities still contribute significantly to

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<sup>9</sup> *Id.* at 217.

<sup>10</sup> UCLA, “Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches,” *Environmental Science and Technology* 40(16), 4851–4858 (2006).

<sup>11</sup> COP Report at 216-17.

sediment loadings and, where impervious surfaces are prevalent, stormwater flows directly into surface waters and sewer systems. A comprehensive approach will be required to minimize disturbance to the natural hydrology, minimize water flow over surfaces, and maintain water quality. Rigorous monitoring will also be needed to determine whether water quality standards are being achieved and to allow management approaches to be modified as needed to reach desired water quality goals.”<sup>12</sup> The Commission formally recommended that state and local governments “adopt or revise existing codes and ordinances to require land use planning and decision making to carefully consider the individual and cumulative impacts of development on water quality, including effects on stormwater runoff.”<sup>13</sup>

Stormwater discharges from roadways similarly pollute nearby waters with metals (copper, lead, and zinc) from brake pads and tires, as well as synthetic organics (petroleum products and pesticides), sediment, nutrients, debris, oxygen-demand substances (decaying vegetation, animal waste, and other organic matter), and other pollutants. The transport of these pollutants occurs from rights-of-way and other vehicular activities, road maintenance, construction, illegal dumping, spills, and landscaping care. Roads and highways (and certainly new roads) should be retrofit with control measures that capture and/or reduce the amount of pollutants, especially sediment, from entering the storm drain system or receiving waters.

To control runoff effectively and reduce expensive cleanup costs downstream, it is critical to stop pollution at its source. Implementation of Low Impact Development (LID) measures in particular is critical to reducing stormwater pollution into coastal waters. Examples of LID practices include designs for natural drainage; preservation of vegetation (*e.g.* through design of narrower streets with more vegetative buffers); rain gardens; grassy swales; and reducing impervious surfaces, such as the concrete surfaces of parking lots, by using porous pavement.<sup>14</sup> Pollution prevention through LID also offers myriad additional benefits over after-the-fact conventional treatment, such as pollution reduction, reduced stormwater runoff volume and rate (which reduces flooding), greater cost-effectiveness, increased groundwater recharge, and habitat protection. As recommended by the Commission, LID also “minimize[s] disturbance to the natural hydrology, minimize[s] water flow over surfaces, and maintain[s] water quality.”

The West Coast states have already begun development and implementation of LID strategies. Washington’s Seattle Public Utilities’ Natural Drainage Systems program<sup>15</sup> provides a model for other cities.<sup>16</sup> A number of far-sighted stormwater permits in California also include or are proposed to include LID requirements, and studies describe the benefits of LID (including benefits in reducing combined sewer overflows) in Portland, Oregon.<sup>17</sup> The Agreement can leverage these important nascent efforts to control stormwater pollution at the source by taking coordinated and publicized steps to require, fund and incentivize use of LID in new development

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<sup>12</sup> *Id.* at 220 (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> See The Low-Impact Development Center website at <http://lowimpactdevelopment.org/> for more information.

<sup>15</sup> [http://www.ci.seattle.wa.us/util/About\\_SPU/Drainage\\_&\\_Sewer\\_System/Projects/Natural\\_Drainage\\_Systems/NA\\_TURALDR\\_20031203121352.asp](http://www.ci.seattle.wa.us/util/About_SPU/Drainage_&_Sewer_System/Projects/Natural_Drainage_Systems/NA_TURALDR_20031203121352.asp).

<sup>16</sup> NRDC, Low-Impact Development Center, and Univ. of Maryland, *Rooftops to Rivers: Green Strategies for Controlling Stormwater and Combined Sewer Overflows*, pp. 29-31 (June 2006).

<sup>17</sup> See, *e.g.*, *id.* at 13-15, 24.

and redevelopment, including new and upgraded road systems. Specific policy suggestions are found in *Rooftops to Rivers*,<sup>18</sup> and include:

- Revise state and local stormwater regulations to encourage green design and remove disincentives to LID. Most state and local stormwater regulations focus on peak flow rate control. These regulations should be revised to require minimizing and reducing impervious surfaces, protecting existing vegetation, maintaining predevelopment runoff volume and infiltration rates, and providing water quality improvements. Green infrastructure can meet each of these objectives.
- Incorporate green infrastructure into long-term control plans for managing combined sewer overflows.<sup>19</sup>
- Establish dedicated funding for stormwater management that rewards green design and begins to offset the billions in costs associated with stormwater pollution.
- Provide incentives for residential and commercial use of green infrastructure. For example, Portland, Oregon, allows additional building square footage for buildings with green roofs, and provides up to a 35% discount in its stormwater utility fee for properties with on-site stormwater management.

**We ask that the Governors highlight the work done to date in each of their states to prevent stormwater pollution through LID, and to commit to implementing LID broadly in new coastal developments, redevelopments, and road construction.**

### **The Agreement Should Commit to Providing Publicly-Accessible Information on Coastal Water Quality and on Efforts to Enforce Water Quality Laws**

#### Water Quality Monitoring Information

Ready access to information about coastal water quality, and efforts to improve it, is essential to achieving clean water and healthy aquatic habitats. The Commission on Ocean Policy found that “[m]ore than any other measure, monitoring provides accountability for management actions,”<sup>20</sup> and recommended development of a “coordinated, comprehensive monitoring network that can provide the information necessary for manager to make informed decisions . . . and assure effective stewardship of ocean and coastal resources.”<sup>21</sup>

However, implementation of these recommendations will require focused and immediate effort to overcome decades of inattention to water quality monitoring. For example, according to California's 2002 biennial monitoring report to U.S. EPA, the state can only report on the health of 22% of its coastal shoreline, 34% of its lakes and reservoirs, and 15% of its rivers and streams. There is no single place where a member of the public can go to understand the health

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<sup>18</sup> *Id.* at 13-15.

<sup>19</sup> Each year Portland, Oregon’s downspout disconnection program diverts 1 billion gallons of stormwater from the collection system and has been used to help alleviate localized combined sewer system backups in city neighborhoods. *Id.* at 13.

<sup>20</sup> COP at 226.

<sup>21</sup> *Id.*

of water bodies in his or her own backyard, or even to get an overall picture of the health of the state's waters.

The Commission made several formal recommendations in this regard, including the development of a national monitoring network that: coordinates and expands existing efforts, includes adequate coverage in both coastal areas and the upland areas that affect them, has clear goals, specifies core variables and an appropriate sampling framework, and is periodically reviewed and updated.<sup>22</sup> Among other things, the COP specifically recommended that this national monitoring network include:

- clearly defined goals that fulfill user needs and provide measures of management success,
- a core set of variables to be measured at all sites, with regional flexibility to measure additional variables where needed, and
- technical coordination that establishes standard procedures and techniques.<sup>23</sup>

As with LID and other relatively new and critical strategies for improving the coastal environment, however, the knowledge that improved monitoring is necessary has not yet translated into action. California's SB 1070 (Kehoe, 2006) directs Cal/EPA and the California Resources Agency to improve the collection, coordination, integration and dissemination of data, and the methods by which data are summarized and distributed to ensure an easily accessible and understandable format for the public. Among other things, SB 1070 directs the state to begin data coordination with state agency data, and focus on information that will:

- support and improve understanding of the extent to which state waters meet existing beneficial uses;
- improve coordination of ongoing programs, rather than necessarily creating new ones;
- assess measurable progress in improving water quality through program and project implementation, including bond-funded projects;
- guide "on the ground" management and regulatory activities and decisions; and
- create an evolving presentation of the health of the state's waterways that is readily accessible to, and understandable by, the public.

However, work on this key initiative has yet to begin in earnest, despite the critical need for meaningful water quality information.

**We urge the Governors to again lead the nation in the implementation of the U.S. Commission on Ocean Policy's recommendations by guiding implementation of the coordinated water monitoring recommendations and requirements in the COP Report and California's SB 1070.** In addition, the three states' ongoing development of model ocean observing systems provides an excellent foundation for linking land-based monitoring systems with ocean-based observing systems, another of the key recommendations of the U.S.

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<sup>22</sup> COP Report at 232, 234.

<sup>23</sup> *Id.* at 234.

Commission on Ocean Policy.<sup>24</sup> **We ask that the development of coordinated water quality monitoring and reporting also include elements of the integrated ocean observing systems in development along the West Coast.**

### Enforcement Information

A March 2006 report by U.S. PIRG found that “[n]ationally, more than 3,700 major facilities (62%) exceeded their Clean Water Act permit limits at least once between July 1, 2003 and December 31, 2004” and that “[t]hese facilities often exceed their permits more than once and for more than one pollutant.”<sup>25</sup> Almost more disturbing, however, is the fact that California, Oregon, and Washington were the **only** states in the country excluded from the U.S. PIRG enforcement report, because they “**failed to provide reliable data to EPA**” on enforcement.<sup>26</sup> California’s State Water Quality Control Board’s August 2006 Enforcement Report to the Legislature similarly found that enforcement “data quality and completeness problems persist.” A staff report to the State Water Board at the Board meeting on June 5, 2007 confirmed that the state’s enforcement reporting system remains largely nonfunctional, and that numerous corrections need to be made before the system is reliably usable.

Regular, transparent, quality, and easily accessible enforcement data and reports from state water quality agencies are essential if the public is to hold its government accountable for implementing and enforcing state and federal water quality laws that protect the coast and ocean. Such information is also essential in order to prioritize use of limited funds for enforcement, as it will help target areas that need particular attention and save funds on areas that are doing well. However, much work remains to be done to provide this basic information, particularly in a coordinated way across the three states.

This does not need to be the case. For example, the Oregon Department of Environmental Quality (Oregon DEQ) has an online database structure to track formal enforcement actions<sup>27</sup> and notices of non-compliance<sup>28</sup> through fairly straightforward searches.<sup>29</sup> Moreover, Oregon DEQ provides regular monthly reports to the public summarizing DEQ’s enforcement activities; the most recent summarizes enforcement activity in May 2007.<sup>30</sup> With additional enforcement data, double-checked for quality assurance, this type of system could provide the foundation for a useful, West Coast-wide enforcement reporting system that will bring all dischargers into better compliance with state and federal water quality laws. **We ask that the Agreement commit to implementation of reliable enforcement tracking system that**

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<sup>24</sup> *Id.*, Recommendation 15-2 (NOAA “should ensure that the national monitoring network . . . is linked to the Integrated Ocean Observing System”). An interactive map of the ocean observing interface is now available at <http://oceanobs.org/map/>.

<sup>25</sup> U.S. PIRG, *Troubled Waters: An analysis of Clean Water Act Compliance: July 2003- December 2004*, <http://www.uspirg.org/uploads/iN/ZM/iNZM2tGz4x7smwVULhTpow/troubledwaters06.pdf>, Executive Summary (March 23, 2006).

<sup>26</sup> *Id.* at 9.

<sup>27</sup> <http://www.deq.state.or.us/programs/enforcement/enfquery.asp>.

<sup>28</sup> <http://www.deq.state.or.us/programs/enforcement/nonquery.asp>.

<sup>29</sup> The querant was directed to the DEQ’s enforcement website immediately by simply Googling the intuitive keywords “Oregon environment enforcement.”

<sup>30</sup> “DEQ Announces Penalties Totaling \$352,655 in May 2007,” (July 10, 2007), found at <http://www.deq.state.or.us/news/prDisplay.asp?docID=2401>.

**will help ensure that the Clean Water Act and state water quality laws are, ultimately, fully enforced, particularly as they impact the coast and ocean.**

**The Agreement Should Commit to Implementing Immediately the “Best Technology Available” to Control Impacts from Coastal Power Plants’ Cooling Systems**

Once-through cooling systems used in many coastal power plants devastate sensitive and important ecosystems and marine life, and can artificially support aging and inefficient fossil-fueled power sources. The California Ocean Protection Council found that there are “multiple types of undesirable and unacceptable environmental impacts associated with once-through cooling technology,” which is used by coastal and bay-side power plants that are “collectively permitted to withdraw nearly 17 billion gallons of water per day” in California alone.<sup>31</sup> These impacts include “entrainment and impingement; reductions of threatened and endangered species; damage to critical aquatic organisms, including important elements of the food chain; diminishment of a population’s compensatory reserve; losses to populations including reductions of indigenous species populations, commercial fisheries stocks, and recreational fisheries; and stresses to overall communities and ecosystems as evidenced by reductions in diversity or other changes in system structure and function.”<sup>32</sup>

For example, turning on one coastal power plant (San Onofre, in California) destroyed over two hundred acres (59,000 kelp plants) of rapidly-disappearing kelp forest. This, in turn, caused the displacement or death of thousands of individuals from numerous other species that depend on the kelp forest. In total it is estimated that the kelp fish population in the area has declined by 80%, all due to that single plant.<sup>33</sup> Ongoing destruction from this and dozens of other coastal power plants that use this antiquated technology continues, including fish kills (over five tons of anchovies in a single event in California in August 2005) and increasing pressure on threatened and endangered species (such as the Mirant plants’ ongoing intake of severely endangered Delta smelt). Now is the time to make active decisions on how to phase out this harmful technology, not to wait for further evidence of its ecological damage.

Earlier this year, the Second Circuit U.S. Court of Appeals gave guidance on how to move forward in this area. It ruled that U.S. EPA violated the Clean Water Act when it issued illegally weak regulations governing once-through cooling systems in power plants.<sup>34</sup> The Court then specifically found that permit decisions and regulations must be “based not the average Phase II facility but on the optimally best performing Phase II facilities,” adding “[i]n setting BAT, EPA uses the pilot plant which acts as a beacon to show what is possible.”<sup>35</sup> Among other things, the Court held that:

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<sup>31</sup> California Ocean Protection Council, “Resolution of the California Ocean Protection Council Regarding the Use of Once-Through Cooling Technologies in Coastal Waters,” (April 20, 2006) [http://www.resources.ca.gov/copc/docs/060418\\_OTC\\_resolution\\_LH2\\_adopted\\_2006-4-20.pdf](http://www.resources.ca.gov/copc/docs/060418_OTC_resolution_LH2_adopted_2006-4-20.pdf) (emphasis added).

<sup>32</sup> *Id.*

<sup>33</sup> UN Atlas of the Oceans (2002), <http://www.oceansatlas.org>; see also CA Dep’t of Fish and Game, “California’s Living Marine Resources: A Status Report” (Dec. 2001).

<sup>34</sup> *Riverkeeper, Inc., et al. v. U.S. Environmental Protection Agency*, 475 F.3d 83 (2nd Cir. Jan. 25, 2007).

<sup>35</sup> *Id.* at 100.

- U.S. EPA’s regulations for existing facilities (“Phase II regulations”) fail to require the “best technology available,” which is the standard that must be implemented.
- “Cost-benefit” analysis cannot be used in determining Section 316(b) performance standards.
- Percent ranges to meet performance standards cannot be used unless based on the Best Technology Available.
- Restoration measures cannot be used as a substitute for technology standards required under Section 316(b).

Implications of the court’s ruling include the following:

- State water quality agencies must exercise their “best professional judgment” in issuing Clean Water Act NPDES permit renewals or new NPDES permits for repowering at coastal power plants.
- “Best technology available” determinations must be based on the best technology that a plant can achieve, bearing in mind the technology-forcing character of the Act.
- Coastal facilities can no longer use site-specific cost-benefit analysis or restoration measures to avoid the technology-forcing requirements of the Clean Water Act.
- Restoration measures may not be utilized to offset/mitigate OTC impacts.
- Nuclear facilities can and should be included in any new state regulatory policy.

The California State Lands Commission and California Ocean Protection Council took leadership roles on this issue in spring 2006 resolutions. The Ocean Protection Council’s resolution highlighted the damage caused by this destructive technology and called on the state to “implement the most protective controls to achieve a 90-95 percent reduction in impacts” associated with once-through cooling.

**We ask the Governors to recognize the significance of the devastating impacts on coastal waters caused by once-through cooling systems, and commit to immediately implementing through NPDES permits and other regulatory avenues the “best technology available” (BTA) to control impacts from these systems. BTA should be no less than the California Ocean Protection Council’s recommendation to “implement the most protective controls to achieve a 90-95 percent reduction in impacts.”**

**The Agreement Should Strongly Support the Regulation of Aquatic Invasive Species in Ships’ Ballast Water through Clean Water Act Controls and Stronger State Actions as Needed**

As noted in the COP Report, “[t]he introduction of invasive species into ports, coastal areas, and watersheds has damaged marine ecosystems around the world, costing millions of dollars in remediation, monitoring, and ecosystem damage. Invasive species are considered one of the greatest threats to coastal environments, and can contribute substantially to altering the abundance, diversity, and distribution of many native species.”<sup>36</sup>

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<sup>36</sup> COP Report at 252.

Live species from other countries are carried to U.S. waters in ballast water that ships use for stabilization. The ballast water is discharged into bays, estuaries, and the Great Lakes as ships approach port and when cargo for export is loaded. Over 21 billion gallons of ballast water from international ports is discharged into U.S. waters each year. The cost of invasive species to the U.S. economy is estimated in the billions of dollars annually. Moreover, because the pollutants often multiply and their impacts grow, this figure could easily increase.

The U.S. Coast Guard began implementing federal ballast water management regulations in 1993 and mandated ballast water exchange for vessels bound for the Great Lakes. However, the lack of similar requirements across the nation led several states, with California,<sup>37</sup> Oregon and Washington in the lead, to pass laws making ballast water exchange mandatory for ships entering their state waters. These three states have been coordinating well for years in the implementation of their various ballast water initiatives. In the meantime, environmental and fishing groups petitioned and then sued U.S. EPA for failing regulate these “biological pollutants” as required under the federal Clean Water Act, and in September 2006, the U.S. District Court for the Northern District of California agreed with them. Finding that U.S. EPA’s regulation exempting ballast water discharges from the Clean Water Act is “plainly contrary to the congressional intent,” the court ordered U.S. EPA to come up with regulations by September 30, 2008 that ensure that shipping companies comply with the Clean Water Act and restrict the discharge of invasive species in ballast water in accordance with its provisions.

The Commission on Ocean Policy similarly recommended that a “national ballast water management program should include a number of important elements: uniform, mandatory national standards which incorporate sound science in the development of biologically meaningful and enforceable ballast water treatment, [and] a process for revising the standard to incorporate new technologies.”<sup>38</sup> These are elements of every Clean Water Act permit program. In addition, the Commission recognized the “chronic under-funding of investments in new ballast water treatment technologies,”<sup>39</sup> an issue that (as past regulation of other industries has shown) would be addressed relatively quickly through regulation under the Clean Water Act.

Unfortunately, several nationwide ballast water legislative proposals currently before the U.S. Congress purport to regulate invasive species releases in ballast water while at the same time exempting them from Clean Water Act coverage and denying the states the opportunity to enact more stringent standards needed to protect their coastal waters and habitats. As articulated in a 2006 letter from the Attorneys General of five states to the U.S. Senate, such proposals “do not . . . responsibly address[] the problems caused by aquatic invasive species in vessel ballast water discharges. Instead, [they] endorse[] federal agencies’ failure to enforce existing law by dismantling that law and putting in its place less environmentally protective proposals.”<sup>40</sup>

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<sup>37</sup> See [http://www.slc.ca.gov/Spec\\_Pub/MFD/Ballast\\_Water/Ballast\\_Water\\_Default.html](http://www.slc.ca.gov/Spec_Pub/MFD/Ballast_Water/Ballast_Water_Default.html).

<sup>38</sup> COP Report at 257.

<sup>39</sup> *Id.* at 258.

<sup>40</sup> Letter from Illinois Attorney General Lisa Madigan, Michigan Attorney General Mike Cox, Minnesota Attorney General Mike Hatch, New York Attorney General Eliot Spitzer, Pennsylvania Department of Environmental Protection Counsel Susan Shinkman, Wisconsin Attorney General Peggy A. Lautenschlager to Senator James M. Inhofe, Chair and Senator James Jeffords, Ranking Member, Senate Environment and Public Works Committee, “Continued Opposition to S. 363, the ‘Ballast Water Management Act’” (August 24, 2006).

**Accordingly, we ask that the Agreement call on Congress to reject any Clean Water Act or state law exemptions in federal ballast water bills, and demand immediate regulation of ballast water as required by the federal Clean Water Act that includes preservation of states' rights to enact more stringent controls as needed to protect coastal waters and habitat.**

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California, Oregon and Washington have already produced a groundswell of regional actions to protect our coast and ocean. But much remains to be done to reverse decades of degradation and begin to restore the marine environment to health. In many cases, this will require the West Coast states to take a leadership role in showing the rest of the country how to implement needed new steps that are called for by the Commission on Ocean Policy and are necessary to ensure success in our collective vision. We respectfully request that the Agreement include the above-described actions to protect water quality, to best ensure the continued good health of coastal waters and affected coastal habitat and marine life.

Thank you for your continued strong support and action for a vibrant coast and ocean.

Best regards,



Linda Sheehan  
Executive Director