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September 28, 2010

The Honorable Lester Snow, Chair and Council Members
California Ocean Protection Council
1330 Broadway, 13th Floor
Oakland, CA 94612-2530
c/o Laura Engeman

VIA ELECTRONIC MAIL: lengeman@scc.ca.gov

Re: Comments on Ocean Protection Council White Paper, "Towards Improving the Ocean Protection Council" (Aug. 26, 2010)

Dear Chair Snow and Council Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeeper organizations spanning the coast from the Oregon border to San Diego, I welcome the opportunity to submit these comments on the Ocean Protection Council's White Paper, "Towards Improving the Ocean Protection Council" (White Paper).¹ CCKA and its members have been active in the establishment, development and implementation of the Ocean Protection Council (OPC or Council) since its inception. We greatly appreciate this opportunity to weigh in on key lessons learned in the OPC's first five years.

In particular, we focus our comments below on the White Paper's assessment of the OPC's implementation of its leadership and coordination roles to date, and the White Paper's recommendations with regard to funding of OPC mandates. Specifically, we believe that the White Paper under-emphasizes the critical leadership role that the OPC can and must play to ensure that the state meets its ocean and coastal protection goals. We also believe that the White Paper inappropriately recommends private corporate funding of OPC activities.

We urge that the final White Paper be revised to correct these proposed findings and recommendations, which we believe will significantly dilute the OPC's effectiveness in achieving the state's goal to "conserve the health and diversity of ocean life and ecosystems."² We provide more detail on these conclusions and requests below.

¹ http://www.opc.ca.gov/webmaster/ftp/project_pages/Evaluation/OPC_White_Paper--Draft--08-26-2010.pdf.

² Public Resources Code § 35510(b)(1).

THE WHITE PAPER UNDER-EMPHASIZES THE OPC’S ESSENTIAL LEADERSHIP ROLE

Statutory Background

The Council was created in the Public Resources Code (PRC) pursuant to the California Ocean Protection Act (COPA, 2004).³ Among other things, the Legislature found in COPA that:

PRC Sec. 35505(a). California's coastal and ocean resources are critical to the state's environmental and economic security, and integral to the state's high quality of life and culture. A healthy ocean is part of the state's legacy, and is necessary to support the state's human and wildlife populations. Each generation of Californians has an obligation to be good stewards of the ocean, to pass the legacy on to their children.

COPA directs the new Council to achieve these and other goals as follows:

PRC Sec. 35515. The Legislature finds and declares that the purpose of this division is to integrate and coordinate the state's laws and institutions responsible for protecting and conserving ocean resources . . . to . . . (a) Provide a set of guiding principles for all state agencies to follow, consistent with existing law, in protecting the state's coastal and ocean resources.

PRC Sec. 35615. The council shall do all of the following:

(a) (1) Coordinate activities of state agencies that are related to the protection and conservation of coastal waters and ocean ecosystems to improve the effectiveness of state efforts to protect ocean resources

(6) Identify and recommend to the Legislature changes in law needed to achieve the goals of this section.

(b) (1) Identify changes in federal law and policy necessary to achieve the goals of this division and . . .

(2) Recommend to the Governor and the Legislature actions the state should take to encourage those changes in federal law and policy.

In summary, COPA calls on the OPC to “integrate and coordinate” laws and agencies *with the goal of*:

- “[p]rovid[ing] a set of guiding principles for all state agencies to follow, consistent with existing law,”
- “improve[ing] the effectiveness” of state agencies’ coast and ocean initiatives,
- “[i]dentify[ing] and recommend[ing] . . . changes in [state] law needed” to “achieve the goals of this section,” and
- “[i]dentify[ing] changes in federal law and policy necessary to achieve the goals of this division” and recommending actions that the state “should” take to encourage such federal changes.

³ Public Resources Code §§ 35500 *et seq.*

In other words, the OPC's integration and coordination role must be accomplished not solely to ensure more collaborative processes, but also to ensure that the OPC specifically *leads* the state toward meeting our collective ocean and coastal protection goals. COPA directs the OPC not just to be a coordinator or facilitator, but to be a leader, by "providing guiding principles for all state agencies to follow" in implementing the law, by ensuring that agencies' effectiveness actually improves, and by identifying changes in law and policy needed to further enhance effectiveness and ocean protection.

Application of Legislative Language and Intent in Defining OPC's Leadership Role

Based on the legislative language and history that created the OPC, we strongly support the White Paper's finding that

the best outcomes will occur when [the OPC] embraces its leadership role, follows through each issue to a logical conclusion, and promotes accountability, both for itself, and its partner agencies.⁴

Each of these three objectives is essential to meeting the mandates and goals of COPA to ensure that the Council adds significant value to existing state efforts to achieve healthy, biologically diverse coastal and ocean ecosystems.

Similarly, we agree with the White Paper that the OPC "has an opportunity to build a stronger culture of leadership, follow-through and accountability," and we strongly concur that one important way of achieving this goal is for the Council members and Executive Director to "support policies and recommendations that they believe offer the best solutions for the particular policy issue at hand."⁵ These findings and recommendations are completely consistent with the letter and intent of COPA that the OPC provide leadership and guidance, and that the OPC actually work to improve agencies' effectiveness in implementing their mandates to protect the coast and ocean. Without a focus on leading state agencies to achieve greater ecosystem protection, the OPC becomes merely a vessel for coordinated science and potential bond funding. Certainly these are helpful roles, but they do not in any sense create the desired ocean *leadership* in the style of the recommendations of the Pew Oceans Commission and U.S. Commission on Ocean Policy reports, which provided the genesis for COPA.

White Paper Rollback of OPC Leadership Mandate

Given the mandates, findings and recommendations correctly asserting that more leadership is required and needed, it is particularly disconcerting to see that the White Paper then retreats not only from its own recommendations but also from COPA. Specifically, the White Paper's Wikipedia-based language regarding the OPC's coordination role⁶ is inconsistent with

⁴ White Paper, p. 3.3.

⁵ *Id.*, p. 3.4.

⁶ We found questionable the White Paper's turn to Wikipedia for guidance on the Council's collaboration and coordination role, particularly given that the Wiki references ignored the interaction of "collaboration and coordination" with the Council's other mandates. (White Paper, p. 3.9.) The OPC would have been far better served by a more thorough analysis of the role of coordination *in the context of* the OPC's other responsibilities, specifically as articulated in the actual operating statute and its legislative history.

the statute and the OPC's ability to lead state agencies toward more effective ocean governance. For example:

- The White Paper characterizes the OPC's "standing alone" on a policy position as a "risk," effectively discouraging the OPC from taking positions that further its mandate if those positions are potentially inconsistent with the status quo.⁷ We would argue that it is precisely the OPC's job to be open to taking such positions. Indeed, the White Paper notes correctly that the hats that the OPC "can (and should) wear" include "bully pulpit,"⁸ which implies taking a stand that not every entity may be happy with. This "bully pulpit" role has prompted some of the OPC's greatest successes to date, as discussed below, and should be retained throughout the White Paper.
- The White Paper states plainly that the "OPC's role is to make it easier for the regulatory agencies to do their jobs."⁹ The purpose of COPA is not to make regulatory agencies' work easy. The purpose of COPA is to protect and enhance the health of ocean ecosystems, ideally in a way that is consistent with efficient and effective (not necessarily "easy") agency operations. In some, if not many, cases, implementation of COPA may require changes in agency operations that will be periodically difficult to accomplish. To assert its leadership role effectively, though, the OPC must sometimes take such positions, regardless of whether they are perceived as making oversight agencies' work easier.
- The White Paper appears to take the position that an OPC position "may not help the overall effort" if it makes an agency "look bad."¹⁰ Again, the purpose of the OPC is to protect and enhance our coast and ocean environment. If an agency is not meeting its environmental protection mandates, and/or is operating inefficiently, calling out this problem will indeed make an agency "look bad" – because it is *in fact* performing at a sub-par level. The OPC simply cannot shy away from issues that may be controversial within an inter-agency context but that are essential to tackle for the health of our coast and ocean, solely because it is worried about public opinion of agency operations.
- Inconsistent with the assumption that agencies do not want to "look bad," the White Paper also assumes that agencies will work collaboratively to identify specific problems that they would like the OPC to help resolve through its strategic planning and work plan processes.¹¹ It has been our experience that even outside, objective analyses of agency operations sometimes fail to clearly identify agency problems in need of assistance. It is relatively rare that agencies will volunteer that information about themselves in a stakeholder or other group setting. Additional tools and strategies need to be identified to ensure that the OPC effectively identifies not only obvious substantive problems to be corrected (coastal pollution, fish declines) but also breakdowns in agency communications, operations, etc. that impact agency missions and would benefit from OPC guidance.

⁷ *Id.*, p. 3.4.

⁸ *Id.*, p. 3.15.

⁹ *Id.*, p. 3.9.

¹⁰ *Id.*

¹¹ *Id.*, p. 3.11.

- The White Paper notes that the OPC will be “more successful” if it understands both “real *and perceived* institutional limitations.”¹² While it is important to understand the *actual* variables that are preventing the state and its agencies from achieving our mutual goal of a healthy coast and ocean, calling on the OPC to spend staff and contractor time assuaging non-existent (“perceived”) concerns will only slow the state towards achieving a thriving environment. An institutional limitation that is “perceived” rather than “real” should be called out as inconsistent with the facts, and the OPC and agencies should move on quickly from there to accomplish the hard work at hand.

Example of Application of Rollback in Leadership Mandate: Once-Through Cooling Resolution

As was raised by Council members at the September 7, 2010 OPC public meeting, some of the above findings and recommendations appear to have stemmed at least in part as a result of the experience of the OPC and member agencies with the OPC’s 2006 “once-through cooling” (OTC) resolution.¹³ The White Paper notes that “resolutions have been most successful when they highlight the importance of a particular ocean policy issue and identify follow-up actions that are within the scope of the OPC.”¹⁴ The 2006 OTC resolution, which we view as one of the OPC’s most successful endeavors of its first five years, did just that. It pushed the State Water Board and numerous other involved agencies toward completion and adoption of a final OTC Policy in May 2010 based on extensive science and input, funded in large part by the OPC. Despite the fact that the federal Clean Water Act mandate to control once-through cooling had been in place for decades, and despite the fact that OTC causes significant and well-documented harm in the marine environment,¹⁵ the state had done little to implement this mandate; this changed with the Council’s OTC resolution. The OTC resolution clearly articulated the Council’s position on OTC as causing significant environmental harm, set reasonable and achievable guidelines for correcting this problem, and allowed for the OPC to fund important independent research that was important to informing the final OTC Policy.

In reviewing the lessons learned from the OTC Policy, the White Paper should have highlighted the critical need for this effort, and described the important and valuable leadership, coordination and research roles that the OPC played in ensuring State Water Board adoption of a final OTC Policy. While the White Paper did somewhat highlight the OPC’s important role in

¹² *Id.*, p. 3.10 (emphasis added).

¹³ <http://www.opc.ca.gov/2006/04/resolution-of-the-california-ocean-protection-council-regarding-the-use-of-once-through-cooling-technologies-in-coastal-waters/> (April 20, 2006).

¹⁴ White Paper, p. 3.16; *see also* p. 2.5.

¹⁵ Among other things, the State Water Board’s Final Substitute Environmental Document supporting the final OTC Policy found that just the 12 Southern California coastal power plants using OTC kill up to 30% of the number of fish recreationally caught in the Southern California Bight each year. (SWRCB, “Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, Final SED,” p. 35 (May 4, 2010), available at: http://www.waterboards.ca.gov/water_issues/programs/npdes/docs/cwa316may2010/sed_final.pdf.) These are fish that California is at the same time struggling to save through the Marine Life Protection Act (MLPA). Indeed, in their guidance on placement of MPAs, the MLPA Science Advisory Team stated: “Intakes from power generating facilities are the greatest threat because they operate year round or over many months and there is virtually complete mortality for any larvae entrained through the cooling water intake system.” (*Id.*, citing MLPA Master Plan Science Advisory Team, “Draft Recommendations for Considering Water Quality and MPAs in the MLPA South Coast Study Region” (Draft Revised May 12, 2009).)

this effort, its assessment of the resolution’s “Accomplishments” was disappointingly sparse. Further, its review of the “Challenges” the White Paper was both confusing and inaccurate. Specifically, the White Paper articulated the Challenges posed by the Resolution as follows:¹⁶

- As an unintended consequence, environmental groups used the OPC resolution to pressure the SWRCB, some believe on an unrealistic timeframe.
- The resolution included a provision on US EPA findings, which were later thrown out in court.
- An alternative would have been to be less specific and more flexible in the resolution text.
- Because the OPC did not clearly specify its role in OTC, there were different expectations among stakeholders and the SWRCB, as to what actions the OPC would take on this issue. The OPC could have done a better job of communicating with the SWRCB as to how it could, and should, support the SWRCB’s OTC efforts, and a better job of communicating with stakeholders to manage expectations as to how involved the OPC would be (or would not be) in SWRCB regulatory development.

As to the first point, we are confused by the White Paper’s assessment of the “intent” of the OPC with regard to the resolution. Since it was environmental groups who first supported such a resolution in public comment at the noticed OPC meeting in September 2005 in La Jolla, and environmental groups spoke in significant numbers in support of such a resolution at the noticed OPC meeting in January 2006 in Santa Barbara (which agendaized this item), it should have been a fully expected result that environmental NGOs would advocate strongly in support of such a position before the State Water Board as well. We would ask if the White Paper is in fact asserting that the OPC should consider editing future resolutions based on the concern that public advocates for a healthy ocean might appropriately cite strong OPC resolutions in future advocacy efforts. We obviously would have significant concerns with such an assertion.

As to the second and third points, we have carefully reviewed the OTC resolution and find no reference to U.S. EPA findings that were “thrown out in court.” The specific language in the resolution referencing U.S. EPA findings is as follows:

- *WHEREAS*, the U.S. Environmental Protection Agency (U.S. EPA) has determined, after a thorough review of the rulemaking record for implementation of section 316(b) of the Clean Water Act, that there are multiple types of undesirable and unacceptable environmental impacts associated with once-through cooling technology; and
- *WHEREAS*, The U.S. EPA has found these types of impacts to 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

¹⁶ White Paper, p. 2.7.

Both of these sets of findings are well-supported in the State Water Board's Final Substitute Environmental Document and were not affected by court rulings.

The White Paper may be referring to the resolution's Resolved section, which states that in agreement with U.S. EPA findings, the environmental impacts from once-through cooling technologies for coastal power plants can be significant, and resolves to urge the State Water Resources Control Board to implement Section 316(b) and more stringent state requirements requiring reductions in entrainment and impingement at existing coastal power plants and encourages the State to implement the most protective controls to achieve a 90-95 percent reduction in impacts

Again, the U.S. EPA finding that "the environmental impacts from once-through cooling technologies for coastal power plants can be significant" is well-supported in the Final Substitute Environmental Document and was not touched by a court. The OPC's decision to "urge" (not mandate) the State Water Board to "achieve a 90-95 percent reduction in impacts" was not a citation of then-existing U.S. EPA rules,¹⁷ but instead represented the OPC's independent (and we believe, correct) assessment of the level of impact reduction needed to protect the state's coastal, marine, bay and estuarine ecosystems from the devastating impacts of once-through cooling. Rather than being "thrown out in court," their decision to set an appropriate and achievable target¹⁸ fully supported both at the appellate level¹⁹ and in front of the U.S. Supreme Court,²⁰ cases in which CCKA was an actively involved co-litigant. Accordingly, we strongly disagree with the White Paper's suggestion that the OPC be "be less specific and more flexible" in its recommendations. As argued above, this is not the job of the OPC. Rather, the OPC, as it did in the 2006 OTC resolution, can and should set an appropriately high and specific bar for state agencies to reach in protecting the health of the coast and ocean – an issue on which the OPC is supposed to be an expert.

As to the final point, we agree that better communication is generally agreeable. However, given the well-known lines of authority on this and other substantive policy issues, it again should have been relatively clear that the OPC cannot mandate the State Water Board to take a particular action pursuant to the State Water Board's delegated Clean Water Act authority. Moreover, during the period from the April 2006 OTC resolution and the May 2010 adoption of the final OTC Policy by the State Water Board, there was not only an extensive public process but also a comprehensive agency coordination process, one of the most comprehensive on a particular issue in our many years of experience. We therefore would be curious as to the specifics of the assertion that "[t]he OPC could have done a better job of communicating with the SWRCB as to how it could, and should, support the SWRCB's OTC efforts."

¹⁷ See, e.g., California Energy Commission, "Issues and Environmental Impacts Associated with Once-Through Cooling at California's Coastal Power Plants," pp. 35-36 (CEC-700-2005-013, June 2005), available at: <http://www.cacoastkeeper.org/document/issues-and-environmental-impacts-of-otc.pdf>.

¹⁸ The OPC's own funded studies supported the feasibility of this goal, as discussed in detail in the State Water Board's Substitute Environmental Document.

¹⁹ *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007).

²⁰ *Entergy Corp. v. Riverkeeper, Inc. et. al.*, 129 S.Ct. 1498 (April 2009).

Finally, we agree that the OPC was not initially clear with stakeholders as to as to “how involved the OPC would be (or would not be) in SWRCB regulatory development.” It quickly became evident, however, that the OPC members and staff would not in fact be publicly involved in the development of regulations, despite the fact that numerous other agencies (particularly the California Energy Commission) did publicly comment in hearings and workshops based on their professional assessment of OTC regulatory options. We would recommend, then, not *increased communication about* OPC’s involvement, but instead *increased OPC involvement*. There is no statutory or other reason that the OPC cannot provide public comment on its scientific, technical or other assessment of a particular ocean issue. We thus urge that the White Paper be revised to address this gap and encourage the OPC to be more publicly active in agency proceedings, consistent with the OPC’s mandates and expertise.

THE WHITE PAPER INAPPROPRIATELY RECOMMENDS DIRECT CORPORATE FUNDING OF OPC ACTIVITIES

Finally, we have significant concerns with the White Paper’s suggestion that the OPC seek funding from corporations (specifically non-foundation corporations) to “support ocean management and research.”²¹ The White Paper itself articulates our chief issue with this proposal, which is that the OPC would dedicate staff to “readily identify and match funding opportunities that are aligned with a funder’s particular focus.”²²

The OPC is accountable first and foremost to the people of California. Ocean management and research projects and priorities should be chosen based on science and policy concerns of greatest interest and relevance to the public and environment, and must be completely independent of corporate donor desires.

If the OPC requires funding from regulated entities (as one would expect donor corporations to be), then the OPC instead should seek authority to levy user fees that isolate a payer’s “particular focus” from the strategic goals and work plans of the Council. Another way to leverage and use existing funds more effectively is through development of joint agency Budget Change Proposals. While the White Paper claims that such BCPs can be “difficult to get approved,” there is in fact precedent that the OPC can and should draw from,²³ to be able to reap the benefits of jointly-funded staff and projects that enhance collaboration.

Given the White Paper’s language rolling back on the OPC’s leadership mandates (see discussion above), an enhanced focus on corporate funding could set the stage for potential management projects and decisions that do not necessarily benefit ecosystems or the general public. We accordingly urge that the above-described recommendations with respect to seeking non-foundation corporate funding in the White Paper be deleted.

²¹ White Paper, p. 3.8.

²² *Id.*

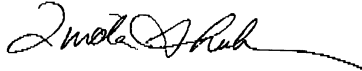
²³ For example, prior to July 1, 2006 the California Bay-Delta Authority coordinated 24 state and federal agencies to implement a long-term comprehensive plan to restore ecological health and improve water supply reliability in the San Francisco Bay/Sacramento-San Joaquin Delta system. Its most recent (2005-2006) budget can be found here: <http://2007-08.archives.ebudget.ca.gov/StateAgencyBudgets/3000/3870/department.html#printable>. Further detail of the BDAT budget was provided to the OPC in September 5, 2005 comments by the California Coastkeeper Alliance *et al* (available upon request).

* * *

As NOAA Administrator Dr. Jane Lubchenco has articulated, our “ocean-based and land-based activities together are . . . literally changing the chemistry, the physical structure and the biology of our oceans in unprecedented ways . . . [a]nd we are suffering the consequences.”²⁴ The Council has an enormous opportunity to learn from its initial five years and initiate a much-needed “rapid development phase” that will “result[] in . . . a very dramatic change in collective awareness and action” on the oceans.²⁵ We urge that the White Paper be revised to address the clear need for swift, decisive action and leadership to protect and enhance the health of California’s ocean home.

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to contact us.

Sincerely,



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Executive Director

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²⁴ Dr. Jane Lubchenco, Testimony before the U.S. Commission Ocean Policy (Wash. D.C., Nov. 13, 2001).

²⁵ *Id.*