State Water Resources Control Board
June 7, 2022
P.O. Box 100
Sacramento, CA 95812-0100

Subject: California Water Code 13320 -Petition for Review of State Board for Regional Board Action

1) Petitioner: Mike Beanan, for Laguna Bluebelt Coalition
31952 Sunset Avenue, Laguna Beach, CA 92651
949.887.7911 mike@lagunabluebelt.org

2) Specific Action for Review: On May 11 at 9 AM during regular Public Comment before the SDRWQCB, on behalf of our community, I requested a review of "Investigative Order R9-2020-2065 Aliso Beach and Breaching of the Sand Berm at the Mouth of Aliso Creek" and was denied any review in seeking enforcement.


3) Date SDRWQCB Refused to Act: May 11, 2022

4) Failure to Act was Inappropriate and Improper: During Covid restrictions, the SDRWQCB cancelled monthly meetings and eliminated hybrid formats to deny timely public comment on Investigative Order R9-2020-2065. The SDRWQCB's failure to review the Investigative Order denies the public an opportunity to challenge the Board's comparative analysis methodology and faulty conclusion that unpermitted breaching by unauthorized individuals of the naturally occurring Aliso Beach Sand Berm to discharge an estimated 2,500,000 gallons of urban runoff from a designated CWA 303(d) Impaired Waterbody directly onto Aliso Beach and State Marine Protected Areas (MPAs) is allowed as "Recreational Breaching". Recreational Breaching is a manufactured term and is not among approved activities listed in the Porter Cologne Act. Recreational Breaching sets a State precedent to damage any coastal sand berm, anytime, by unauthorized individuals and destroy rare coastal wetlands. Specifically, the Board incorrectly compared Aliso Beach with Monarch Beach and Poche Beach as justification for allowing unpermitted destruction of the beach sand berm - a MS4 (Municipal Separate Storm and Sewer System) flood control outlet. Aliso Beach is a heavily used destination for thousands of daily visitors, many from regional Disadvantaged Communities, whereas Monarch Beach is essentially a remote private beach and Poche Beach access is very limited and has been closed off and on for years. The Investigative Order refuses to comply with the Porter Cologne Act protection of safe public access to all beach areas and regulated coastal receiving waters. Discharges from dry weather urban runoff to
coastal waters is a known contribution to coastal eutrophication and Harmful Algae Blooms. As a precedent, the Investigative Order violates the conditions of the Orange County Co-permittee MS4 Permit requiring water quality testing and lifeguard presence during any breaching of the sand berm. The SDRWQCB decision to allow "Recreational Breaching" establishes a dangerous precedence to encourage unauthorized individuals to discharge urban runoff threatening the health and welfare of the public while subjecting Marine Protected Areas to multiple Contaminates of Emerging Concern (CECs) found commonly in urban runoff. "Recreational Breaching" is a term invented by SDRWQCB and Orange County Parks staff and is not a recognized use by the State Water Resources Board. Surfrider Foundation, California Coastal Commission, Orange County Coastkeeper and numerous community organizations have filed letters protesting the unpermitted breaching of the Aliso Beach Sand Berm and release of known contaminants in urban runoff to State Marine Protected Areas (MPAs).

5) Manner in which the Petitioner is Aggrieved: The daily breaching of the Aliso Beach Sand Berm to release the sudden discharge of 2.5 million gallons of urban runoff equivalent to 4 Olympic swimming pools makes it dangerous and impossible to safely access northern beach areas. No water quality testing occurs when unauthorized individuals breach the sand berm to determine the level of CECs. Known health threats associated with swimming near urban runoff outlets preclude my safe access to swim, surf or free-dive reefs adjacent to Aliso Beach. I and others cannot safely access northern beaches or swim at Aliso Beach due to known health threats associated with urban runoff discharges. Unpermitted breaching of the Aliso Beach Sand Berm has been challenged as illegal in correspondence to the SDRWQCB by Surfrider Foundation, South Laguna Civic Association, Laguna Canyon Conservancy, Laguna Bluebelt Coalition and others aggrieved and denied safe access to regulated coastal receiving waters.

6) Specific Action Requested by State Board: The Petition seeks to revise Investigative Order R9-2020-2065 to require Orange County to enforce the Porter Cologne Act and OCCO 3-8-25 & 3-9-35 prohibiting unauthorized discharges of urban runoff from the MS4 flood control outlet at the mouth of Aliso Creek, removing sand from a flood control outlet and riding a flotation device in a flood control outlet. The May 11, 2022 refusal by the SDRWQCB to review requests for enforcement violates Article 2 allowing for Reconsideration and Amendment of Decisions and Orders.

7) Points and Authorities/Related Documents:

November 2, 2021

San Diego Regional Water Quality Control Board
David Gibson
Executive Director

Subject: Investigative Order R9-2020-2035, Aliso Beach and Breaching of the Sand Berm at the Mouth of Aliso Creek

Board members & Staff,

The recent Investigative Order Report represents an important opportunity to understand Laguna Beach’s unique regulated coastal receiving waters at Aliso Beach discharging to the State Marine
Conservation Area (SMCA) and waters within the Gulf of Santa Catalina. Issues raised in the Investigative Order relate to jurisdiction over unpermitted discharges, water quality standards for Marine Protected Areas (MPAs) as Essential Fish Habitats and safe public access.

A Continuance of the Investigative Order is requested to incorporate Public Comment and Recommendations in determining a safe, equitable and environmentally sustainable Revised Investigative Order with reliable, enforceable timetables.

The Investigative Order’s conclusions and recommended actions are contrary to achieving long-established projects and investments by the community and agencies to restore the Aliso Beach Estuary and protect safe, public access to all beach areas. In avoiding enforcement, the Investigative Order’s de facto position is to legalize unpermitted berm breaching and unauthorized discharge of sediment, recently defined by Orange County Parks Department, as “Recreational Breaching”.

(Exhibit A – Revised Aliso Beach Zoning Map for Recreational Breaching)

Background

The combined efforts of the Laguna Bluebelt Coalition, OC Coastkeeper, Surfrider and others collaborating with OC Supervisor Lisa Bartlett, OC Public Works, Moulton Niguel Water District and surrounding cities have reduced dry weather flows to Aliso Creek by 47% over previous records as a necessary precursor for restoration of Aliso Beach Estuary and Federally-listed Tidewater goby habitat.

(Exhibit B – LOF: Aliso Estuary Project)

Additionally, the California Coastal Conservancy, Laguna Ocean Foundation, SCCWRP, City of Laguna Beach, California Department of Fish & Game, South Laguna Civic Association, South Coast Water District, The Ranch among others have invested over $1 million in contributions, grants and staff resources to restore the Aliso Beach Estuary and Federally-listed Tidewater goby habitat. A seasonal, dry weather beach sand berm and restoring natural creek flows are essential components for successful restoration of coastal wetlands. The seasonal beach sand berm, in turn, protects regulated coastal receiving water quality within the adjacent State Marine Conservation Area (SMCA) requiring healthy saltwater for protected marine life to thrive.

SDRWQCB Regulatory Authority

Regulatory authority rests with responsible State agencies for SMCAs, similar to the San Diego Regional Water Quality Control Board’s authority for water quality in Areas of Special Biological Significance (ASBS) and Essential Fish Habitats (EFH). Unfortunately, County officials continue a history of neglect for the health & safety at the Aliso Beach Sand Berm and short term as well as long term impacts to coastal water quality, protected marine life and safe public access.

Additional State and Federal agencies with regulatory authority at Aliso Beach include the California Coastal Commission, California Department of Fish and Wildlife, US Fish and Wildlife and Army Corp of Engineers as well as Orange County and the City of Laguna Beach. The Coastal Commission is required to protect natural coastal land forms and safe public access to all State beaches.

Given the significance of Aliso Beach with overlapping, competing jurisdictions and policies, State regulatory authority through the SDRWQCB is appropriate and necessary. Aliso Beach is a State Marine Conservation Area – an essential coastal habitat ecosystem within California’s network of Marine Protected Areas. Water quality standards as applied to Areas of Special Biological Significance (ASBS) are necessary for protecting and restoring Marine Protected Areas (MPAs).
The NPDES and MS4 Permit identifies areas similar to the Aliso Beach SMCA as:

Environmentally sensitive area ("ESA") means an area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would be easily disturbed or degraded by human activities and developments (California Public Resources Code § 30107.5). Areas subject to storm water mitigation requirements are areas designated as Significant Ecological Areas and designated as a Significant Natural Area by the California Department of Fish and Game's Significant Natural Areas Program, provided that area has been field verified by the Department of Fish and Game; an area listed in the basin plan as supporting the rare, threatened, or endangered species (RARE) beneficial use.

Urban runoff in Aliso Creek includes those pollutants defined in Section 502(6) of the Federal Clean Water Act (33 U.S.C. Section 1362(6)), or incorporated into California Water Code Section 13373. Examples of pollutants measured in Aliso Creek include but are not limited to the following:

1. Commercial and industrial waste (such as fuels, solvents, detergents, plastic pellets, hazardous substances, fertilizers, pesticides, slag, ash, and sludge);
2. Metals such as cadmium, lead, zinc, copper, silver, nickel, chromium; and non-metals such as phosphorus and arsenic;
3. Petroleum hydrocarbons (such as fuels, lubricants, surfactants, waste oils, solvents, coolants and grease);
4. Excessive eroded soils, sediment and particulate materials in amounts which may adversely affect the beneficial use of the receiving waters, flora or fauna of the State;
5. Animal wastes (such as discharge from confinement facilities, kennels, pens, recreational facilities, stables, and show facilities); and
6. Substances having characteristics such as pH less than six (6) or greater than nine (9), or unusual coloration or turbidity, or excessive levels of fecal coliform, or fecal streptococcus, or enterococcus.

"Significant ecological area" ("SEA") means an area that is determined to possess an example of biotic resources that cumulatively represent biological diversity, for the purposes of protecting biotic diversity.

Areas like Aliso Beach are designated as SEAs, if they possess one (1) or more of the following criteria:

1. The habitat of rare, endangered, and threatened plant and animal species;
2. Biotic communities, vegetative associations, and habitat of plant and animal species that are either one (1) of a kind, or are restricted in distribution on a regional basis;
3. Biotic communities, vegetative associations, and habitat of plant and animal species that are either one (1) of a kind or are restricted in distribution;
4. Habitat that at some point in the life cycle of a species or group of species, serves as a concentrated breeding, feeding, resting, migrating grounds and is limited in availability regionally;
5. Biotic resources that are of scientific interest because they are either an extreme in physical/geographical limitations, or represent an unusual variation in a population or community;
6. Areas important as game species habitat or as fisheries;
7. Areas that would provide for the preservation of relatively undisturbed examples of natural biotic communities.

The State Water Resources Control Board defines regulated receiving waters at Aliso Beach as:

“Coastal Waters - Waters of the Pacific Ocean outside of enclosed bays and estuaries which are within the territorial limits of California and Estuaries and Coastal Lagoons - Waters at the mouths of streams which serve as mixing zones for fresh and ocean water during a major portion of the year. **Mouths of streams which are temporarily separated from the ocean by sandbars shall be considered as estuaries.** Estuarine waters will generally be considered to extend from a bay or the open ocean to the upstream limit of tidal action but may be considered to extend seaward if significant mixing of fresh and saltwater occurs in the open coastal waters.”

SMCA’s have Planktonic Organism - Phytoplankton, zooplankton and the larvae and eggs of worms, molluscs, and arthropods, and the eggs and larval forms of fishes with restrictions on the temperature, location, or volume of a discharge, or restrictions on the temperature of receiving water.

The breaching of the naturally occurring, seasonal Aliso Beach Sand Berm by unauthorized members of the public to release more than 2,500,000 million gallons of warm, “freshwater” urban runoff during each event without an MS4 permit and safety provisions represents an “unreasonable method of diversion” jeopardizing “the public welfare” to be prevented according to the Porter Cologne Act. As noted above, the State Water Resources Control Board takes into consideration the volume of millions of gallons of water from serial, unpermitted discharges as it impacts nearshore marine life and estuaries along with the significant mixing of freshwater and saltwater in the open coastal waters immediately at the mouth of Aliso Creek.

Within Coastal Waters, elevated temperature discharges must comply with limitations necessary to assure protection of the beneficial uses and areas of special biological significance in the Aliso SMCA. Elevated temperature wastes must be discharged a sufficient distance from areas of special biological significance to assure the maintenance of natural temperature in these areas. The discharge of elevated temperature wastes shall not result in increases in the natural water temperature exceeding 4°F at (a) the shoreline, (b) the surface of any ocean substrate.

Individual members of the public breaching the berm, as proposed dischargers of elevated temperatures in urban runoff constituting “water waste”, may be required by the Regional Board to submit such studies prior to the establishment of waste discharge requirements. The Regional Board shall include in its requirements appropriate post discharge studies by the discharger. The scope of any necessary studies shall be as outlined by the Regional Board and shall be designed to include the following as applicable to an individual discharge:

A. Existing conditions in the aquatic environment.
B. Effects of the existing discharge on beneficial uses.
C. Predicted conditions in the aquatic environment with waste discharge facilities designed and operated in compliance with the provisions of this plan.
D. Predicted effects of the proposed discharge on beneficial uses.
E. An analysis of costs and benefits of various design alternatives.
F. The extent to which intake and outfall structures are located and designed so that the intake of planktonic organisms is at a minimum, waste plumes are prevented from touching the ocean substrate or shorelines, and the waste is dispersed into an area of pronounced along-shore or offshore currents.
The Porter Cologne Act states:

CHAPTER 1. GENERAL STATE POLICY [100. - 113.] (Chapter 1 enacted by Stats. 1943, Ch. 368.) § 100.

“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.”

“§ 104. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.”

“Article 3. Proceedings to Prevent Waste or Unreasonable Use [275. - 275.] (Article 3 enacted by Stats. 1943, Ch. 368.) § 275. The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”

“§ 1052. (a) The diversion or use of water subject to this division other than as authorized in this division is a trespass.”

“(b) The Attorney General, upon request of the board, shall institute in the superior court in and for any county where the diversion or use is threatened, is occurring, or has occurred an action for the issuance of injunctive relief as may be warranted by way of temporary restraining order, preliminary injunction, or permanent injunction.”

By State statutes, the Board retains jurisdiction for any unauthorized diversion of water to be prosecuted as a trespass. Additionally, unauthorized members of the public engaged in breaching the beach sand berm are subject to:

“§ 1055.3. In determining the amount of civil liability, the board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator. “

An "Illicit discharge" means any discharge to the storm drain system that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. OCCO 3-8-25 & 3-9-35 explicitly prohibits removal of sand in the MS4 designated Aliso Creek Ocean Outlet Maintenance Permit within the mapped Orange County Flood Control District.

The Investigative Order concludes with recommendations unlikely to be implemented by Orange County. Decades of Public Education and millions spent on alerting the community about the health risks of urban runoff are being vigorously thwarted by the County’s Response. For instance, a last minute alteration of maps previously indicating the mouth of Aliso Creek as a zoned Flood Control Outlet for MS4 permits has been re-zoned, without review, to a “Recreational Zone” and a newly manufactured term of
“Recreational Breaching” lacking a definition or standing with the SDRWQCB (Exhibit C).

Recent indications are the County has no intention of adding a water quality monitoring station at the mouth of Aliso Creek and has previously chosen not to partner with SCCWRP’s Southern California Bight Study Program for a long term monitoring station to evaluate changes in sediment quality or water quality impacts to State Marine Protected Areas. Likewise, the County has demonstrated no interest in protecting the natural Aliso Beach Sand Berm as a fundamental prerequisite for re-introduction of federally listed Tidewater goby and restoration of the Aliso Creek Estuary Restoration Project advanced by the Laguna Ocean Foundation with $250,000 in funding from the Coastal Conservancy and others.

The Investigative Order’s recommendations lack any timetable and are unenforceable leaving the public at the mercy of County officials with a history of neglecting impacts to public health and safety and associated pollution to marine habitats from eutrophication.

California Coastal Commission

March 9, 2022

Tom Starnes
Director, OC Parks
13042 Old Myford Road
Irvine, CA 92602

Subject: Protection of water quality and lagoon habitat at Aliso Creek

Dear Mr. Starnes:

Commission staff have reviewed the lengthy history and information, including communications from County to Commission staff, related to the matter of breaching of Aliso Creek lagoon by private individuals without County of Orange or Coastal Commission authorization, and in this letter, we provide some input with respect to regulation of this activity under the Coastal Act. Commission staff understands that the poor water quality of Aliso Creek lagoon has been a long-standing and complicated issue, but the issue of whether private individuals breaching the lagoon is authorized by the Commission is not complicated. This activity is not authorized by the Commission1. Such authorization is required since breaching of the lagoon involves grading, and thus, constitutes development under the Coastal Act for which a coastal development permit is required. We recognize that addressing this activity presents some challenges and we are providing some suggestions in this letter for the County to consider and adopt to prevent this unpermitted activity.

1 The Commission retains permit jurisdiction over all development within the bed of Aliso Creek. Portions of the activity at issue may also be subject to the permitting requirements of the City of Laguna Beach pursuant to its Commission-certified Local Coastal Program.

Breaching of the Lagoon is Development

Pursuant to the definition of “development” in Section 30106 of the Coastal Act, “grading…”
constitutes development. Breaching of the berm involves movement of sand that the Commission traditionally has considered to be grading, and, consequently, the Commission has required the County to obtain a coastal development permit to undertake limited breaching at this location. Moreover, in addition to being development, this activity is of concern due to the contaminated nature of this water and the exposure to humans brought about by these activities. The Commission has also previously noted that the lagoon water in this area has become contaminated. For instance, in Coastal Development Permit 5-97-316-A4, the Commission cited a March 4, 1997 letter to the San Diego Regional Water Quality Control Board from the Orange County Health Care Agency, which noted that the mouth of Aliso Creek "... is regarded as chronically contaminated and is therefore permanently posted with ... signs stating, 'Keep Out', 'Contaminated Water'."

The Commission also found in CDP 5-97-316-A4, with regard to ponding of water on Aliso Beach, that “[i]n the past, County beach staff attempted to fix the problem by breaching the berm to allow the ponded water to drain into the ocean. However, this method simply released the contaminated water into the surfzone where more people were exposed to contaminated water.”

The Breaching by Private Individuals is not Authorized

As you know, the Commission has authorized the County to breach the lagoon in certain circumstances through CDP 5-84-426. Pursuant to the County’s Stream Course Management Plan authorized by CDP 5-84-426, “Environmental Management Agency (EMA) Public Works/Operations Division shall remove the accumulated sand restricting normal stream flows to the shoreline.” This authorization does not extend to the breaching of the lagoon by private individuals.

Environmental Justice Concerns

As noted above, the Commission has found, based upon the evidence provided to it, that breaching of the lagoon discharges contaminated waters into the surfzone. For this reason, authorization for the County to breach the berm is limited to during the rainy season, when the contribution to poor water quality from breaching is less pronounced then if the breaching were to occur during the summer. The Commission made findings in CDP 5-84-426 regarding the increased negative effects of breaching in the summer; the Commission found that “[l]ow flows mean that the concentration of pollution in the water is higher. This contrast with heavy winter flows in which the pollution is diluted because of the high volume water from heavy rainfall.”

We are concerned that the unauthorized breaching of the lagoon is putting the health of beachgoers at risk during breaching events, and this might disproportionately effect beachgoers from at-risk and disadvantaged communities. As you are no doubt aware, Aliso Beach Park is characterized by its abundance of public parking, wide beach, visibility and access from Coast Highway, and facilities such as concessions and restrooms, all of which makes it an attractive destination for visitors from neighboring communities of all economic sectors.

A key objective of the Commission’s Environmental Justice Policy is to ensure that
disadvantaged and at-risk communities have access to a healthy environment. That objective is described in the following excerpt from the policy document:
Understanding that public health and the health of natural ecosystems are inextricably intertwined, ecological impacts are felt first by disadvantaged and at-risk communities, and that there is no environmental justice without a healthy environment, the Commission will continue to prioritize the protection of coastal resources. This includes sensitive habitats, watersheds, water quality, marine biodiversity, and biological productivity.

The continued discharge of contaminated water into the surfzone at Aliso Beach Park during unauthorized breaching events is not consistent with the objective of ensuring at-risk and disadvantaged communities have access to clean ocean water.

**Habitat Impacts of Breaching**

We also note the deleterious impacts to habitat, particularly, habitat for the tidewater goby, that potentially occur as a result of unauthorized breaching. As you probably know, the lower reach of Aliso Creek was designated as Critical Habitat for the federally endangered tidewater goby on December 20, 2000. Habitats for protected wildlife species are generally considered by the Commission to be Environmentally Sensitive Habitat Areas (“ESHA”).

ESHA is defined in Coastal Act Section 30107.5 as “any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.”

ESHA is afforded special protection under the Coastal Act; for instance, Section 30240 of the Coastal Act states that ESHA “shall be protected against any significant disruption of habitat values…”.

The Recovery Plan for the Tidewater Goby prepared by the USFWS explains that breaching of a lagoon is significantly disruptive of the habitat value of the lagoon; Aliso Creek is specifically identified by the USFWS in the Recovery Plan as a goby habitat area that is negatively affected by artificial breaching. Also, more generally, the recovery plan identifies breaching during the summer as a reason for the decline of the goby. For instance, the recovery plan says the following:

Potential threats to the tidewater goby include discharge of agricultural and sewage effluents, increased sedimentation due to cattle grazing and feral pig activity, summer breaching of lagoons, upstream alteration of sediment flows into the lagoon areas, introduction of exotic* gobies (e.g., yellowfin and shimofuri gobies) and rainwater killifish (Lucina parva), habitat damage, and watercourse contamination resulting from vehicular activity in the vicinity of lagoons.

The Aliso Creek Estuary Conceptual Restoration Plan, prepared for the Laguna Ocean Foundation, with funding from the Coastal Conservancy, also discusses the impacts of artificial breaching at Aliso Creek. The plan notes:

The mouth of the Aliso Creek is also now regularly breached and opened illegally during dry weather by people using the beach for recreation and less frequently by the County of Orange as permitted for public safety. These impacts to estuary wetlands, creek inflow, and natural mouth closure have resulted in the loss of estuary habitat, function, and wildlife,
degrading the estuary ecosystem. Sensitive species such as the tidewater goby (an endangered fish endemic to this type of estuary) have been lost from the ecosystem.

Due to the effects of artificial breaching of lagoons, one of the management strategies for areas with extant goby populations, such as Aliso Creek, is to limit breaching, as stated in 1.2.6 of the Recovery Program section of the Recovery Plan:

1.2.6. Develop and implement strategies for minimizing anthropogenic breaching of lagoons.

To state it broadly, we suggest that the County seek to limit unauthorized breaching of the lagoon in order to avoid impacts to ESHA and Critical Habitat for the tidewater goby.

Resolution

Although the purpose of this letter is to reach out and offer assistance and coordination, we should also point out that there are legal provisions that apply as well. The potential for unpermitted activity resulting in impacts to ESHA creates potential liability (under the Coastal Act at a minimum) for the County, as the property owner, even for actions it may not actually perform. Regardless of who performs unpermitted development, such as breaching of the lagoon that discharges polluted water, the persistence of the breach and resultant discharge of pollutants, constitutes a continuing violation of the Coastal Act and continuing public nuisance that a property owner is liable for correcting. The Coastal Act represents a legislative declaration that acts injurious to the state’s natural resources constitute a public nuisance. (Leslie Salt Co. v. San Francisco Bay Conservation etc. Com. (1984) 153 Cal. App.3d 605, 618; CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306, 318.) In Leslie Salt (p. 622), the court held that:

“…liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner’s active responsibility for [that] condition of his land…or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question.”

See also Lent v. California Coastal Com. [2021] 62 Cal.App.5th 812 (Property owners are strictly liable for unpermitted development on their property.).) Since a property owner is responsible, along with the party that undertook unpermitted development, for unpermitted development that has occurred on the property owner’s property, it is in the interest of the property owner to consider measures to prevent and address such unpermitted development. For that reason, we recommend that the County consider measures that will help ensure that unpermitted breaching does not occur, impacts to habitat at the County beach are avoided, and, at the same time, the County’s potential exposure to liability for such damage is reduced.

We think the immediate approach to this issue can be twofold, educational and regulatory (we understand that a long-term solution to this problem is reduction of pollutants and nuisance flows into Aliso Creek, which is beyond the scope of the County to achieve unilaterally). Through the planning documents and permits for the hotel, the Commission
requires a similar twofold approach to protection of coastal resources at the Montage Resort, which is just upcoast of the Aliso Beach; we have seen positive results from the measures taken at the resort. There, components of the marine resource protection mandated by the Commission include “signage which will be posted at access points to the Reserve which describes the importance of the marine resources and underscores the penalties of violating the law; educational brochures describing the area’s biological and geological resource, as well as showing graphics of key plants and animals will be provided to the Resort guests; active, year-round enforcement of the area by educational docents, and secondly, by public safety enforcement officers.”

Implementation of all of these measures, e.g. installation of signage, distribution of brochures, outreach by docents, and enforcement by officers, could help stop the unauthorized breaching activity. We understand that the County has undertaken some of these measures, but has not attempted to enforce County code provisions that prohibit breaching of the lagoon. We note that signage at Aliso Beach Park references County Code Section 3-8-25, which reads as follows:

It shall be and is hereby declared unlawful for any person, other than the owner or lessee of the hereinafter designated land or lands, to cut, hack, injure, destroy, move or remove any cane, reeds, sticks, grass, bamboo, trees, lumber, brush, weeds or vegetation of any kind or nature or printed, painted or written signs, or to dig, move or remove any sand, gravel, rocks, dirt, soil, debris or other material or substance, or to start, build or maintain fires of any nature whatsoever in or on creeks, canals, channels or rivers or the banks, beds, levees, dikes or embankments of said creeks, canals, channels or rivers or other land or lands of another located in the unincorporated area of the County of Orange, State of California, without the written consent of the owner or lessee of said creeks, canals, channels or rivers, or the banks, beds, levees, dikes or embankments of said creeks, canals, channels or rivers or other land or lands, or except in the lawful performance of an official duty.

Digging out sand at the mouth of Aliso Creek for the purpose of breaching the lagoon appears to fall within the group of activities that are prohibited by this section, since the activity involves digging sand from the creek. Therefore, we encourage the County to initiate enforcement of this section, in conjunction with the educational measures referenced above, in order to stop the continued, unauthorized breaching of the lagoon and its accessory impacts to water quality and sensitive habitat.

Thank you for your continued attention to the issue of protecting water quality and tidewater goby habitat at Aliso Beach Park. I appreciate the time you have taken to communicate regarding this issue in the past; we’re looking forward to collaborating with the County to ensure protection of coastal resources. If you have any questions about this letter or would like to further discuss options to address this situation, please do not hesitate to contact me. In light of the staff’s limited access to Commission offices due to measures in place to prevent the spread of the coronavirus, please email me at Andrew.Willis@coastal.ca.gov.

Sincerely,

Andrew Willis
Enforcement Manager
Water Quality Data Analysis

While the efforts of Staff are appreciated, unfortunately, the Investigative Order presents an inaccurate assumption that all beaches and coastal waters are equal in comparing Aliso Beach to Monarch Beach and Poche Beach. The Aliso Watershed is a 34 square miles urbanized area with a population of 144,000 and millions of visitors annually. By contrast, the watersheds for Poche and Monarch beaches are closer to 6 square miles. Dry weather flows in Aliso Creek average 2.5 cfs (1,650,000 gallons per day) while Poche and Monarch Beaches receive less than 0.5 cfs (325,000 gpd). Neither Monarch Beach nor Poche Beach are State designated Marine Protected Areas (MPAs) with readily available Public Access. Entry to Poche Beach is permanently blocked. (See Exhibit D – Aerial Map: Aliso/Monarch/Poche)

Using primarily Fecal Indicator Bacteria (FIB) to determine water quality, the report overlooks other impairments. Indicator Bacteria are simply a cheap, first step, diagnostic tool and cannot capture impacts for other contaminates with short and long term impacts to human and marine life health. By analogy, FIB tests are similar to taking a person’s temperature and will not detect a more serious condition like a broken arm.

Aliso Creek flows are evenly divided between natural freshwater and urban runoff. Urban runoff is often a byproduct of recycled water with latent contaminates including microplastics, microfibers, phosphorous, “nutrients” and other pollutants. ‘The discharge of pollutants into the MS4s may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in (creek and coastal) receiving waters. Federal regulations, 40 CFR 122.26(d)(2)(i), require the permittees to control the discharge of pollutants into the MS4s…”’

“Within the outlet maintenance project at the mouth of Aliso Creek, Orange County Parks collected three rounds of water samples (with a total of six samples) from the brackish water at the mouth of Aliso Creek. Samples were analyzed for fecal indicator bacteria, including enterococci. Slight to moderately elevated enterococci concentrations (140 to 420 cfu/100 ml) were observed in four of the six water samples.” – SDRWQCB Staff Report

The Investigative Order has concluded there is inadequate evidence to support the conclusion that water flows from Aliso Creek mouth to the Pacific Ocean resulting from the public’s berm breaching cause a condition of pollution that unreasonably affects the water quality for the protection of water contact recreation (REC-1) and marine habitat (MAR) beneficial uses at the mouth of Aliso Creek. This conclusion stands in stark contrast to decades of education and funding about the health risks and environmental impacts of urban runoff pollution to coastal waters.

Safe Public Access

Unpermitted breaching of the sand berm effectively prohibits safe public access to all beach areas. Serial, often daily breaching represents an unauthorized discharge of sediment (sand) to MPAs. Breaching also inhibits lifeguard’s rapid response for rescue missions. By splitting the beach, visitors are forced to cluster along the southern beach and cannot practice safe distancing during the prolonged COVID pandemic.

Recommended Actions & Mitigation Measures
The persistent absence of data renders “sloppy science” in understanding the dynamics of creek and coastal receiving waters regulated by the SDRWQCB. Mapping and monitoring through regular surveys can develop baselines for sustainable mitigation measures with a foundation of sound science.

Among proposed mitigation to enhance enforcement are:

1. Full funding of the Aliso Berm Buddy Monitoring Program to develop data
   (Exhibit E – City of Laguna Beach/OC Coastkeeper/Bluebelt Aliso Berm Buddy Program)

2. Special Study: Map & Monitor Aliso Creek, Aliso Estuary and Aliso Runoff Plume to improve ocean water quality. (Exhibit E – Map of Watershed & MPAs: Scripps/SCCWRP/UCI)

3. Staff In-service Training to further develop ocean ecological literacy in advising SDRWQCB

4. Rotate meetings of SDRWQCB (or zoom remote) to gain improved familiarization of the diversity of ecologies with Region 9 boundaries. Schedule survey swims to field assess & verify ocean water quality data.

5. Co-host Annual Region 9 Coastal Waters Symposium at local universities to educate and motivate initiatives to improve ocean water quality to protect the public, marine life and mitigate sea temperature rise influence on sea level rise and climate change.
   (Exhibit F- UC Irvine Newkirk Center for Science & Society)

6. Approve Supplemental Environmental Program funds for kelp forest restoration in the Aliso SMCA and Aliso Creek Urban Runoff Zone of Initial Dilution.

The opportunity to regulate a chronic source of urban runoff to a popular family and recreational beach with suspected Constituents of Emerging Concern and latent “forever chemicals” suggests a Continuance of the Investigative Order to incorporate Public Comment and Recommendations in determining a safe, equitable and environmentally sustainable Revised Investigative Order with reliable, enforceable timetables.

Thank you for your dedication to protecting and restoring California’s most precious resource – the ocean.

Mike Beanan
Laguna Bluebelt Coalition

References:

DIVISION 7. WATER QUALITY [13000. - 16104.]

(Division 7 repealed and added by Stats. 1969, Ch. 482.)

[INTERMEDIATE “PART” LEVEL OMITTED BY LEGISLATURE]

CHAPTER 1. POLICY [13000. - 13002.]

(Chapter 1 added by Stats. 1969, Ch. 482.)
§ 13000.[Legislative findings]
The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.
The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.

8) A copy of Petiton has been sent to SDRWCB, OC Parks and Lisa Bartlett, OC Board of Supervisors

9) The SDRWQCB has been notified in writing, emails and Public Comment on multiple occasions regarding substantive issues and objections against the serial unpermitted breaching of the Aliso Beach Sand Berm by unauthorized individuals. The public was required to wait until correspondence with Orange County authorities were complete and rendered inadequate to achieve enforcement.
Cancellation of the March monthly SDRWQCB meeting and elimination of hybrid meeting opportunities in April made it impossible to raise substantive issues and objections in a timely manner.