



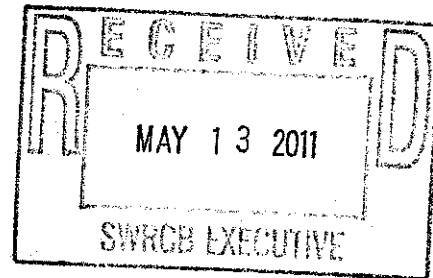
ORANGE COUNTY
COASTKEEPER

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May 12, 2011

Sent via Electronic Mail: csanderson@waterboards.ca.gov

State Water Resources Control Board
ATIN: Constance Anderson
Division of Water Quality, Ocean Unit
P.O. Box 100
Sacramento, CA 95812-0100



RE: General Exception to the California Ocean Plan Waste Discharge Prohibition for Discharges into ASBS

Dear Ms. Anderson:

Orange County Coastkeeper (Coastkeeper) is an environmental organization with the mission to preserve, protect, and restore the watersheds and coastal environment of Orange County. After careful review of the Draft Environmental Impact Report (DEIR) for the Exception to the California Ocean Plan for Areas of Special Biological Significance Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections, Coastkeeper has concluded the adoption of the proposed statewide General Exception will threaten the water quality of California's thirty-four (34) Areas of Special Biological Significance (ASBS).

As a founder and member of the California Coastkeeper Alliance (Alliance), we incorporate by reference the comment letter submitted by the Alliance and the Natural Resources Defense Council on the specific legal opposition to the DEIR. Since its inception, the decades-old California Ocean Plan's discharge prohibition has languished in enforcement limbo, promising to protect examples of California's most pristine coastal areas without actually prohibiting the continued unpermitted and unlawful discharge of pollution. As stewards of our natural marine environment, the State Water Resources Control Board (State Board) must fully enforce each requirement and prohibition of the California Ocean Plan in order to protect the natural condition of our coastal waters and the people who use and enjoy them.

The intent of this comment letter is to discuss the policy under consideration and its impact on Orange County's three (3) ASBS's: Irvine Coast Marine Life Refuge, Heisler Park Ecological Reserve and the Robert E. Badham State Marine Park. Each local ASBS is a unique marine destination for the people of Orange County and deserving of the protections garnered decades ago.

Unlike many ASBSs in northern California, Orange County's ASBSs are surrounded by densely populated cities, such as Newport Beach and Laguna Beach. As a result, our three ASBSs rank second, fourth, and

sixth out of thirty-two for the percentage of impervious surfaces adjacent to ASBSs.¹ Impervious surfaces increase surface flow during rain and non-rain events, contributing to pollutant loading in ASBSs. For example, the Heisler Park ASBS in the city of Laguna Beach receives discharges almost exclusively from urban surfaces, such as “hardscape, street, and storm drains.”² The proximity of heavily urbanized neighborhoods to Orange County’s ASBSs leads to regular discharges of non-stormwater pollution from excessive residential irrigation turning previously ephemeral streams into regularly flowing pollutant sources. Some of Orange County’s best marine locales are imperiled by unpermitted discharges adversely impacting natural water quality and endangering the very characteristics that caused these locations to be set aside as ASBSs decades ago.

General Exceptions to the California Ocean Plan Waste Discharge Prohibition Should Reflect the Importance of Areas of Special Biological Significance

The Ocean Plan defines ASBSs as “those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable.”³ In order to protect “natural” – i.e., non-anthropogenically altered – water quality, the Ocean Plan, “[W]aste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.”⁴ In other words, the Ocean Plan recognizes that pollution discharges into ASBSs alter natural water quality and impact the sensitive communities and species that are the basis for the ASBS designation. Therefore, the Ocean Plan bans pollution discharges unless the State Board complies with the narrow exception provisions under Section III.J. Moreover, even under those circumstances the allowance of such discharges *must* be reviewed at least every three years.⁵

Since 1974, the State Board has only designated thirty-four (34) ASBSs, ranging from Redwood National Park in Del Norte County to La Jolla in San Diego County. These unique coastal areas comprise only about 16% of California’s coastline⁶. This relatively small section of California is biologically unique having been afforded “special protection” from an “undesirable alteration in natural water quality” in order for future generations to visit and appreciate them.

When established, California’s ASBSs were pristine areas deemed deserving of special discharge protections. The intent of each designated ASBS must not be diminished by rewarding thirty (30) years of unlawful discharges into these waters as both permissible and in compliance with the laws regulating ASBSs. The State Board must recognize the importance of California’s ASBSs by establishing a path for dischargers to comply with state law by issuing enforcement orders in the form of cease and desist orders (CDOs) or cleanup and abatement orders (CAOs), providing for compliance schedules that include interim milestones and a final deadline.

¹ Table 5.4.1., ASBS Program Draft Environmental Report, Page 112 of 331, January 18, 2011

² ASBS Program Draft Environmental Report, Page 123 of 331, January 18, 2011

³ Ocean Plan, Appendix I, at 24.

⁴ Ocean Plan, Sec. III.E.1., at 20.

⁵ Ocean Plan, Sec. III.L.2., at 23.

⁶ Program Draft Environmental Impact Report, January 2011.

Coastkeeper's Legacy of ASBS Enforcement

Coastkeeper maintains a lengthy and bold legacy of involvement and defense of Orange County's ASBSs. In the fall of 2000, Coastkeeper advocated for the prosecution of illegal discharges into the Irvine Coast ASBS, co-located with the Crystal Cove State Park. In November of that year, the Santa Ana Regional Board issued a cease-and-desist order (CDO), Order No 00-87, to The Irvine Company, the California Department of Parks and Recreation, the Laguna Beach Unified School District, and the California Department of Transportation requiring each to comply with the waste discharge prohibition into the Irvine Coast ASBS (Crystal Cove).

The decision prompted the State Board to fund a statewide survey by the Southern California Coastal Water Research Project (SCCWRP) on each of the thirty-four ASBSs to assess the type, number and volume of these illegal discharges. This survey discovered at least 1,658 discharges to be potentially in violation of the discharge prohibition. Despite its size, Irvine Coast was impacted by thirty-two (32) drainages, sixteen (16) discharges and sixteen (16) natural outlets. These drainages were discharging hexavalent chromium, fecal coliform bacteria, and metals, including copper, zinc, cadmium, lead, arsenic and nickel.

In October 2004, the State Water Board issued letters notifying high threat ASBS dischargers that they must cease discharging or apply for an exception to the Ocean Plan. As a result, water quality in the Irvine Coast ASBS has been identified as a priority and the fragile coastal biological communities living in Crystal Cove. Decades after the fact, the attention of regulators has finally shined on the 34 coastal treasures dotting the beautiful California coast.

To date, the action brought by the Regional Board at Coastkeeper's urging has been the sole enforcement action of ASBS discharge prohibitions brought in California. Our action helped to create a path for enforcement of critically important environmental regulation to be applied equally to parties discharging into California's most precious and sensitive marine environments.

Current State of Orange County's ASBS

In July 2003, as mandated by the State Board, SCCWRP issued its analysis on discharges into ASBSs entitled "Final Report: Discharges into State Water Quality Protection Areas" (SCCWRP Report). Despite the prohibition of waste discharge, the SCCWRP Report identified 1,658 illegal discharges into ASBSs. These illegal discharges are unacceptable and directly conflict with the objective of protecting ASBS.

Of the over sixteen hundred illegal discharges, less than ten were point sources, with the remaining being non-point source discharges. According to a SCCWRP status report, the vast majority of these outfalls are storm drains with the real potential to discharge urban and agricultural pollution from upstream development directly into ASBSs.⁷ Few of these outfalls existed when the ASBSs were created in the 1970's.⁸

These outfalls contribute to water degradation in southern California's ASBSs, especially the Irvine Coast and Robert E. Badham ASBSs. According to the most recent SCCWRP status report, the Irvine Coast ASBS had the "greatest number of target analytes (six) sampled post-storm that exceeded Water Quality

⁷ Southern California Coastal Water Research Project, *Status of California's Marine Water Quality Protected Areas*, (Sept. 2010)

⁸*Id.*, at 2.

Standards (WQS) and had concentrations that increased from pre- to post-storm.”⁹ The report continued by identifying Robert E. Badham ASBS second with four target analytes sampled post-storm that exceeded WQS.¹⁰ No other ASBS in California exceeded more than three target analytes.¹¹

State Board staff acknowledges illegal discharges into ASBSs have a direct negative impact on ASBSs and exceed the threshold of significance.¹² The DEIR states that “existing ocean water quality conditions within ASBS have had measured concentrations of constituents which exceed the Table B water quality objectives of the Ocean Plan,” and that “exceedances of the Table B Ocean Plan water quality objectives were also found in the storm water runoff of some of the applicants.”¹³

Coastkeeper is highly concerned the most significant exceedances of WQS in California’s thirty-four ASBSs occur in Orange County. The consequences of the granting of any General Exception to specific ASBSs must be considered prior to granting any General Exception if the protection of natural water quality and the public interest are to be safeguarded by the State Board.

The Proposed General Exception Compromises the Protection of Orange County’s ASBSs

Proposed General Exceptions to the ASBS discharge prohibition in the California Ocean Plan (Ocean Plan) should be rare and reserved only for those discharges that do not contribute to the 303d listing of an ASBS or the impairment of water quality. Section III(I)(1) of the 2005 Ocean Plan provides for limited exceptions to the ASBS discharge prohibition, in compliance with the California Environmental Quality Act and in concurrence with the U.S. Environmental Protection Agency, and after the State Board determines the exception “will not compromise protection of ocean water for beneficial uses, and, [t]he public interest will be served.” Appendix II of the Ocean Plan designates the preservation and enhancement of ASBSs as a beneficial use of ocean waters. The State Board’s staff recommendation of General Exceptions for 27 applicants to the discharge prohibition in ASBSs runs contrary to the beneficial uses of the nearly all ASBSs and the public interest.

The State Board’s DEIR recommends four alternatives: (1) Enforce the prohibition of waste discharge; (2) Allow existing dischargers to continue under special conditions; (3) Implement individual exceptions for each discharger; or (4) Implement a general exception for selected dischargers. Rather than enforce the prohibition of waste discharge, as would be prudent nearly thirty-five years late, the staff recommends the adoption of general exceptions for selected dischargers. The adoption of this alternative would render the promise ASBSs provided at their creation moot.

State Board staff incorrectly argues that enforcement of the Ocean Plan’s prohibition of waste discharge into ASBSs is infeasible. As Coastkeeper and the Santa Ana Regional Board successfully demonstrated nearly a decade ago, the enforcement of discharge prohibitions in conformity with state law is a feasible option for regulatory agencies that can yield positive results, while not overburdening those regulated entities. Although not perfect, the Irvine Coast ASBS is more secure now than if The Irvine Company had been permitted to construct a residential community adjacent to the ASBS which discharged storm water into the ASBS unabated. Case-by-case analyses of ASBSs and the specific issues impacting water quality is

⁹ *Id.*, at 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² DEIR, pg. 310

¹³ DEIR, pg. 310

a preferred solution to exceedances of WQS and the protection of natural water quality than the adoption of General Exceptions that will, in effect, swallow the prohibition of discharges into ASBS.

Conclusion

Coastkeeper has a unique distinction of being the impetus behind the Santa Ana Regional Water Quality Control Board's Irvine Coast ASBS enforcement action. We believed the effort to enforce a decades old state law would trigger a wave of action protecting water quality throughout the state. A decade later, illegal discharges into ASBSs are still common and the state's recommended course of action appears to reward illicit discharges with an air of legality by providing these polluters with ex post facto exceptions.

In recognition of the severity of the discharges contributing to the impairment of natural water quality conditions in ASBSs, Coastkeeper requests the State Board abandon this overly broad exception process. In its place, the State Board should either: (1) develop discharge/applicant/ASBS-specific exceptions as intended by the Ocean Plan, along with Time Schedule Orders for compliance that include interim milestones and a final deadline consistent with the review called for in the Ocean Plan; or (2) issue enforcement orders in the form of CDOs or CAOs providing for compliance schedules. Under the guidance provided by the Ocean Plan and experience in the Irvine Coast ASBS enforcement action, such a statewide policy would return California's 34 ASBSs to a path to natural water quality.

The State Board should not approve a General Exception to the Ocean Plan ASBS Discharge Prohibition, due to its detrimental effect on California's water and coastal environmental policy. The quality of our state's waters, especially those designated ASBSs, is of critical importance to Coastkeeper and must be protected. We look forward to continued involvement with the State Board on this matter.

Thank you for your consideration,



Garry Brown
Executive Director
Orange County Coastkeeper