

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001 - 08

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In the Matter of the Petition of  
**CALIFORNIA DEPARTMENT OF TRANSPORTATION**  
For Review of Cease and Desist Order No. 00-87 for Crystal Cove  
Issued by the  
California Regional Water Quality Control Board,  
Santa Ana Region

*SWRCB/OCC FILE A-1350*

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BY THE BOARD:

On November 16, 2000, the Santa Ana Regional Water Quality Control Board (Regional Water Board) issued a cease and desist order in Order No. 00-87 (CDO) to the Irvine Company, the California Department of Transportation (Caltrans), and the California Department of Parks and Recreation. The CDO contains findings that the dischargers are violating or threatening to violate a discharge prohibition contained in the Water Quality Control Plan for Ocean Waters of California (Ocean Plan) against discharges to areas designated as being of special biological significance. The CDO also includes time schedules for compliance with the prohibition.

On December 15, 2000, the State Water Resources Control Board (State Water Board or Board) received a petition for review of the CDO from Caltrans.<sup>1</sup> The Regional Water Board and several interested persons submitted responses to the petition.<sup>2</sup>

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<sup>1</sup> Orange CoastKeeper, Santa Monica BayKeeper, San Diego BayKeeper, and California CoastKeeper also filed a petition, but then withdrew the petition.

<sup>2</sup> Three responses were received after the deadline for responses, and are not being considered. These responses are from San Diego BayKeeper, Santa Barbara ChannelKeeper, and California CoastKeeper.

## I. BACKGROUND

The Regional Water Board CDO includes findings that the named dischargers are violating or threatening to violate a discharge prohibition contained in the statewide Ocean Plan. The details of the prohibition are discussed below, but in general the Ocean Plan prohibits discharges of waste to areas of special biological significance (ASBS). Regarding Caltrans, the CDO finds that Caltrans maintains the Pacific Coast Highway (PCH), which parallels the Irvine Coast ASBS, and is responsible for drainage facilities that transport storm water and non-storm water flows from the highway to various pipes that discharge to bluffs above the ASBS, to a creek immediately above the ASBS, and to the beach abutting the ASBS. These discharges were found to be "to the Irvine Coast ASBS," and to constitute a threatened violation of the Ocean Plan discharge prohibition. Water Code section 13301 authorizes the issuance of a CDO where a discharge of waste violates or threatens to violate a discharge prohibition prescribed by a Regional Water Board or the State Water Board.

In 1972, the State Board issued the Ocean Plan. The Ocean Plan was amended and reissued in 1978, 1983, 1988, 1990, and 1997. This Board most recently adopted a revised Ocean Plan in 2000, but it has not yet been approved by the Office of Administrative Law or the U.S. Environmental Protection Agency, and the 1997 version is therefore still in effect at this time.

The first version of the Ocean Plan included the following statement in the Discharge Prohibitions chapter: "Waste shall be discharged a sufficient distance from areas designated as being of special biological significance to assure maintenance of natural water quality conditions in these areas." (July 6, 1972 Ocean Plan, page 6.) But no ASBS had been designated in 1972.

The State Water Board first designated ASBS in 1974. (State Water Board Resolution No. 74-28, adopted March 21, 1974.) The State Water Board created the list with the intent that it:

“...will be used to identify for planning purposes, those areas where the regional water quality control boards will prohibit waste discharges from all sources controlled within the authority of the Temperature Control Plan [now called the Thermal Plan], recognizing that the Ocean Plan is not applicable to vessel wastes, the control of dredging, or the disposal of dredging spoil.”  
Resolution No. 74-28, Finding 6.<sup>3</sup>

In a separate resolution dated April 28, 1974, the State Board added the Irvine Coast Marine Life Refuge to the ASBS list. At the same time that Resolution No. 74-28 was adopted, the State Water Board also adopted Resolution No. 74-27, authorizing the Executive Director to issue procedures for designation of ASBS. The document issued by the Executive Director, entitled “Revised Procedures for the Designation of Areas of Special Biological Significance,” indicates that discharges of “discrete, point source sewage or industrial process wastes in a manner that would alter water quality conditions from those occurring naturally” are to be prohibited, while discharges of “waste from nonpoint sources, including but not limited to storm water runoff, silt and urban runoff, will be controlled to the extent practicable.”<sup>4</sup>

The 1978 version of the Ocean Plan did not change the language in the Discharge Prohibitions as it related to ASBS. It did, however, add language clarifying the applicability of various provisions of the Ocean Plan. (See 1978 Ocean Plan, footnote 1.) The 1978 Ocean Plan stated that it was applicable in its entirety to point source discharges to the ocean. It further

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<sup>3</sup> The exclusion of vessel wastes, dredging, and disposal of dredging spoil was consistent with the Ocean Plan. (See 1972 Ocean Plan, footnote 1.)

<sup>4</sup> There is some confusion in the record as to the version of the procedures that was issued by the Executive Director. It appears that the above-quoted language is from the correct version.

stated that nonpoint sources of waste discharges were subject only to specified chapters, which included Chapter V, Discharge Prohibitions.

In 1983, the prohibition language was revised to create a clearer prohibition. The earlier versions referred only to the distance of discharges from ASBS. The 1983 version added a first sentence that creates an unambiguous prohibition:

“Waste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.” (Chapter V, Discharge Prohibitions, at page 9.)

The 1983 version retained the language specifying the application of prohibitions to both point source discharges and nonpoint source discharges, except that this language was moved from a footnote to the Introduction section. (1983 Ocean Plan, page 1.) These provisions were not changed in the 1988 Ocean Plan, the 1990 Ocean Plan, or the 1997 Ocean Plan. The 1997 Ocean Plan is the version in effect when the CDO was adopted.

On November 16, 2000, this Board amended the Ocean Plan, but those amendments have not yet been approved by the Office of Administrative Law or the U.S. Environmental Protection Agency, and therefore are not yet in effect. The effective Ocean Plan is the 1997 version. The 2000 version would amend the Discharge Prohibition regarding ASBS to allow limited-term activities in ASBS, generally limited to maintenance, repair, and restoration of existing facilities.

## II. CONTENTIONS AND FINDINGS<sup>5</sup>

**Contention:** Caltrans contends that there is no evidence that it discharges waste or threatens to discharge waste.

**Finding:** The CDO includes a finding that discharges from the PCH, for which Caltrans is responsible, to the Irvine Coast ASBS “may contain waste, and as such threaten to violate or violate the [ASBS] discharge prohibition in the Ocean Plan.” (CDO, finding 6.) Caltrans claims that there is no evidence in the record that shows that storm water discharges from the highway contain waste.

We find this claim to be without merit. This Board has adopted several Orders discussing the effects of storm water discharges on receiving waters. (See, e.g., Water Quality Order 2000-11.) One of these orders specifically addresses discharges from Caltrans facilities, including state highways, and determined that a permit was required for such discharges. (Water Quality Order 95-2.) Moreover, this Board has issued a statewide permit regulating discharges of pollutants from highways and other Caltrans facilities. (Order No. 99-06-DWQ.) Clearly there are waste discharges from the PCH, and there is no requirement for the Regional Water Board to provide specific evidence of such discharge in each individual action it takes.

**Contention:** Caltrans contends that there is no evidence that it discharges storm water to the Irvine Coast ASBS.

**Finding:** Caltrans argues that because its storm water pipes discharge directly above the high tide line, that the discharges are not “into” the ASBS. In fact, the findings in the

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<sup>5</sup> This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158, [239 Cal.Rptr. 349], Cal. Code Regs., tit. 3, § 052.)

CDO and the discharge prohibition in the Ocean Plan refer to discharges “to” ASBS, and not discharges “into” ASBS. The Regional Water Board responds that the discharges, which terminate on bluffs above the beach, are in fact “to” the ASBS. We find that this interpretation of the discharge prohibition is reasonable. Indeed, if it were not upheld, the only discharges that would be prohibited would be ocean outfalls from major facilities. As discussed below, the plain meaning of the discharge prohibition applies to storm water runoff and nonpoint source discharges, and Caltrans’ interpretation of the word “to” would be inconsistent with this plain meaning.

Caltrans contends only the second sentence of the discharge prohibition could apply to its discharge because there is no discharge “into” the ASBS, and that the Regional Water Board did not make findings regarding this provision. The second sentence requires the placement of discharges a sufficient distance from ASBS “to assure maintenance of natural water quality conditions in these areas.” Caltrans argues that under this provision, the Regional Water Board must make a determination that its discharges would adversely affect natural water quality conditions, and that its failure to do so resulted in an arbitrary action by the Regional Water Board. As discussed above, the second sentence was originally the entire prohibition. It essentially prohibits discharges unless they are a sufficient distance from the ASBS “to assure maintenance of natural water quality conditions in these areas.” The first sentence was added to amplify and clarify that there shall be no discharges “to” the ASBS. In this case, the discharges fall onto the beach abutting the ASBS, with no treatment or dilution prior to entering the ocean. The Regional Water Board acted appropriately in finding that the discharges are “to” the ASBS. In any event, discharges were clearly not a “sufficient distance” from the ASBS in light of the prohibition. No further evidentiary findings were necessary.

**Contention:** Caltrans contends that the Ocean Plan does not regulate the discharge of storm water.

**Finding:** This contention on its face is without merit. The Ocean Plan plainly states that it is applicable to both point source discharges and to nonpoint source discharges to the ocean. (1997 Ocean Plan, Introduction, page 1.)<sup>6</sup> Despite this clear statement of applicability, Caltrans points to the 1974 guidance document, discussed above, which states that discharges of “discrete, point source sewage or industrial process wastes in a manner that would alter water quality conditions from those occurring naturally” are to be prohibited, while discharges of “waste from nonpoint sources, including but not limited to storm water runoff, silt and urban runoff, will be controlled to the extent practicable.” Caltrans would use this 1974 guidance document to overrule the plain language of the Ocean Plan.

The discharge prohibition in the original 1972 Ocean Plan was not as clear as the language that has appeared in the prohibition since 1983. Prior to 1983, while termed a prohibition, the language only stated that waste must be discharged “a sufficient distance” from ASBS to maintain natural water quality conditions. In 1983, the sentence creating a clear prohibition was added: “Waste shall not be discharged to areas designated as being of special biological significance.” Another change since the earliest version of the Ocean Plan is that beginning in 1978, the Ocean Plan has contained language clarifying which portions of the plan apply to point source discharges and which portions apply to nonpoint sources. The discharge

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<sup>6</sup> Some portions of the Ocean Plan, not relevant to this matter, do not apply to nonpoint discharges. In any event, storm water runoff from highways constitutes point source discharges. (See, e.g., Caltrans statewide permit, Order No. 99-06-DWQ.) We do note that the numeric effluent limitations in Chapter IV, Table A, apply only to publicly owned treatment works and certain industrial discharges. (1997 Ocean Plan, page 6.) As explained in the statewide permit, numeric effluent limitations are not applied to most storm water discharges.

prohibitions apply to both point sources and nonpoint sources.<sup>7</sup> The plain meaning of the discharge prohibition in the current Ocean Plan applies to storm water discharges. The fact that the State Board may not have intended to prohibit all storm water runoff and nonpoint discharges to ASBS in 1974 does not affect our interpretation of the plain meaning of the Ocean Plan.<sup>8</sup>

**Contention:** Caltrans contends that its statewide NPDES permit for storm water discharges governs all of its discharges, and that the Regional Water Board has no authority to prohibit discharges from the PCH to the Irvine Coast ASBS.

**Finding:** This Board issued a statewide permit to Caltrans, regulating discharges of storm water from its roadways and construction projects. (Order No. 99-06-DWQ.) Caltrans claims that because there is no specific provision in the permit prohibiting discharges to ASBS, and that the Regional Water Board did not allege any violation of the permit, issuance of the CDO was improper. Water Code section 13301 authorizes issuance of a CDO for violation or threatened violation of a discharge prohibition in a water quality control plan. There is no requirement that a permit must also be violated. As explained above, Caltrans' discharges are an appropriate basis for issuance of a CDO for violation or threatened violation of the Ocean Plan discharge prohibition. Therefore, the Regional Water Board was authorized to issue the CDO.

The statewide permit clearly states that it does not authorize violation of any federal, state, or local law or regulation.<sup>9</sup> There is therefore no contradiction between the CDO

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<sup>7</sup> Storm water runoff from highways is a point source discharge, but prior to the 1987 amendments to the Clean Water Act, it was often referred to as "nonpoint," thus leading to confusion in some older State Water Board documents. Since 1987, however, there is no question that it is a point source discharge, and the Ocean Plan has been readopted since then.

<sup>8</sup> We are concerned, however, about the technical feasibility of preventing all discharges, and possible environmental effects of actions necessary to prevent discharges, to ASBS throughout the state.

<sup>9</sup> Provision M.3 of the permit states: "The NPDES Permit does not authorize violation of any federal, State, or local law or regulation."



and the statewide permit. In fact, Receiving Water Limitation C-1-2 prohibits discharges in violation of water quality standards. The Ocean Plan discharge prohibition is a water quality standard.<sup>10</sup>

**Contention:** Caltrans contends that the Regional Water Board improperly failed to consider the feasibility and cost of complying with the CDO.

**Finding:** Caltrans claims that Water Code section 13241 requires the Regional Water Board to consider compliance costs in establishing water quality objective in water quality control plans. The Regional Water Board issued a CDO; it did not establish a water quality objective. Section 13241 does not apply. Water Code section 13301, the section authorizing the CDO, does authorize the issuance of time schedule for compliance with discharge prohibitions. In establishing a time schedule, it is appropriate for a regional board to consider the technical feasibility of compliance. In this case, Caltrans was granted a time schedule. For roadways where construction began on or before November 16, 1996 (including the PCH), the dischargers were granted two years to cease the discharges, until November 16, 2002. Caltrans was required to submit plans by May 16, 2001, for eliminating the discharges.

Caltrans points to costs it will incur, and to possible adverse environmental impacts from construction to prohibit all discharges from the PCH to the Irvine Coast ASBS. The Ocean Plan does contain a provision allowing the State Water Board, under specified conditions, to grant exceptions to all aspects of the Ocean Plan, including the discharge prohibitions. (1997 Ocean Plan, Chapter VI, F, at page 17.) Caltrans could request the State

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<sup>10</sup> Water quality standards are provisions of state and federal law consisting of designated uses for waters and water quality criteria for these waters. (40 Code of Federal Regulations (C.F.R.) § 131.3(i).) Criteria are constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. (40 C.F.R. § 131.3(b).) Discharge prohibitions in water quality control plans, including the Ocean Plan, are criteria established to protect beneficial uses.

Water Board to grant an exception, in which it presents these arguments. If it chooses to do so, it must comply with the California Environmental Quality Act, and request a hearing. Because of our concerns regarding the technical feasibility of complying with the prohibition at Crystal Cove, we will extend the date for compliance with the discharge prohibition until November 16, 2003.

### III. CONCLUSIONS

Based on the discussion above, the Board concludes that the Santa Ana Regional Water Quality Control Board acted properly in issuing a cease and desist order to the Department of Transportation for violations or threatened violations of the Ocean Plan discharge prohibition against discharges to areas of special biological significance. The order will be revised to extend the time schedule for compliance until November 16, 2003.

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IV. ORDER

IT IS HEREBY ORDERED that the Cease and Desist Order No. 00-87 is amended to require that discharges to the Irvine Coast ASBS from areas (including roadways) where construction began on or before November 16, 1996, shall cease by November 16, 2003. The requirement to submit a plan for eliminating these discharges is revised to require submission of the plan on May 16, 2002. In all other respects the petition is dismissed.

CERTIFICATION

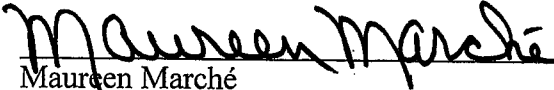
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 26, 2001.

AYE: Arthur G. Baggett, Jr.  
Peter S. Silva  
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

  
Maureen Marché  
Clerk to the Board