

6/26/07 Scoping Mtg.
CA Ocean Plan Amend.
Deadline: 7/27/07 Noon

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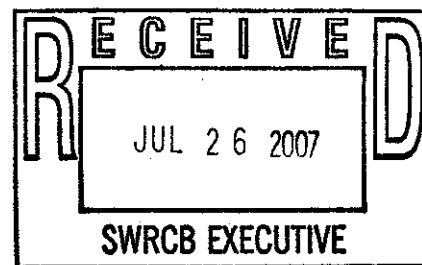
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July 26, 2007

California State Water Resources Control Board
Executive Office
Attn: Song Her, Clerk to the Board
P.O. Box 100
Sacramento, CA 95812-0100

California State Water Resources Control Board
Office of Research, Planning and Performance
Attn: Jeff Barnickol and Zori Lozano-Friedrich
P.O. Box 100
Sacramento, CA 95812-0100



Re: Comment Letter – California Ocean Plan Triennial Review and Five-Year Strategic Plan

Dear Ms. Her, Mr. Barnickol and Ms. Lozano-Friedrich:

The State Water Resources Control Board ("State Board") is requesting public comments on proposed amendments to the California Ocean Plan contained in a June 2007 scoping document entitled "Amendment of The Water Quality Control Plan: Ocean Waters of California" ("Scoping Document"). Pursuant to the public comment process for this matter, we submit this letter on behalf of the Pebble Beach Company, requesting that the Ocean Plan be amended to include a reasonable, comprehensive, and cooperative approach for the regulation of discharges of storm water and other runoff into Areas of Special Biological Significance ("ASBS"), an issue of substantial statewide importance.¹

¹ Additionally, the California Water Boards have begun an effort to update the Five Year Strategic Plan. As detailed above, developing a process for addressing storm water discharge to ASBS is a critical issue of statewide significance, and therefore falls within the purview of the Strategic Plan. The current Strategic Plan already seeks to address storm water and nonpoint source pollution, and ensure that "stakeholders . . . understand their role in contributing to water quality." 2001 Strategic Plan at 7, 8, 18, 24. To facilitate the accomplishment of those goals, we request that the Strategic Plan be revised to include the development of a programmatic approach to storm water discharge to ASBS.

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The creation of a program for regulating storm water discharge to ASBS was a significant issue for commenters in 2004, during the preparation of the 2005-2008 "California Ocean Plan Triennial Review and Workplan" ("Workplan"); however, these comments have not been addressed in the current proposed amendments. For example, according to the Workplan, commenters (i) "oppose[d] the interpretation of the Ocean Plan's prohibition on discharges to ASBS/SWQPAs as now applicable to storm water runoff," (ii) contended that "the Ocean Plan should not be applied to storm water discharges . . . because it would be a further step in the piecemeal development of policy that is in need of clarity"; and (iii) "stated that a statewide storm water policy should supersede the Ocean Plan in terms of setting standards for storm water discharge." State Water Resources Control Board, California Ocean Plan Triennial Review and Workplan 2005-2008 at 33. However, a comprehensive, permit-based program has not been developed.

The ongoing amendment process provides an appropriate vehicle for the State Board to address the significant need for a practical program governing storm water discharge to ASBS. Otherwise, consideration of this important statewide issue will be handled through an enforcement mechanism using exceptions, which do not provide the stability and predictability needed for a program of this nature.

The State Water Resources Control Board Already Has Recognized that the Stewardship of Areas of Special Biological Significance Is an Important Mission

In the mid-1970s, thirty-four ASBS along the California coast were designated as special biological communities requiring protection by the State Board. These ASBS occupy approximately one-third of the California coastline and nearby islands, including developed areas, such as La Jolla, Malibu and Laguna Beach, and relatively undeveloped areas, such as Redwoods National Park and Kings Range National Conservation Area.

The stewardship of ASBS is an important mission for the State Board, the various regional water boards, and the neighbors of these valuable coastal waters. Accordingly, in 2003, the State Board funded a statewide survey to assess storm water and non-point source discharges to ASBS, and subsequently held various workshops to collect input from stakeholders concerning appropriate mechanisms for regulating storm water discharges to ASBS. The State Board already has cited storm water and non-point source runoff as priority issues in the Workplan, and under Issue #17 of the Scoping Document. For the reasons described below, it is important to amend the Ocean Plan to address storm water discharge to ASBS in a comprehensive, programmatic fashion.

A Reasonable, Comprehensive and Cooperative Program Will Promote the Effective Regulation of Storm Water Discharge to ASBS

Definition of "Waste" – ASBS are regulated under statutes in the Porter-Cologne Water Quality Control Act ("Porter-Cologne") and the California Public Resources Code ("PRC"), and a single sentence from the California Ocean Plan ("Ocean Plan") that does not even mention storm water. The statutory standards require that ASBS be protected from harmful concentrations of pollutants that cause undesirable alterations to natural water quality, and

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prohibit discharges of waste absent the imposition of Special Conditions. However, the Ocean Plan does not have a section incorporating these statutory standards, and the single sentence that has been the regulatory focus has been interpreted by some in a manner not apparently consistent with these standards. Importantly, a second sentence in the Ocean Plan that also generically addresses discharges to ASBSs has been treated as a legal anachronism, even though it would appear to be more relevant to storm water discharges (i.e., "Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.").

Although the ASBS program began as a cooperative process between governing agencies and stakeholders in coastal California, it has been converted into an enforcement threat against many of those supportive entities. While the ASBS must be protected and preserved, we do not believe that an interpretation that the Ocean Plan prohibits the discharge of all storm water to ASBS from areas with any level of human activity is productive. Such an interpretation would regulate storm water as *per se* waste, placing it in the same category as sewage, and is inconsistent with the State Board's precedent in the San Diego MS4 matter, where the State Board rejected a Regional Board finding that urban runoff is a *per se* waste.

A "detection-based" approach is not consistent with Porter-Cologne and the PRC, which focus on controlling ASBS discharges that could harm the receiving ASBS, and authorize the imposition of reasonable "special conditions". Accordingly, the Ocean Plan should differentiate which storm water discharges to ASBS constitute waste, and which do not, based on whether the storm water contains harmful quantities of pollutants or would result in an undesirable alteration of natural water quality.

Process – The State Board previously considered regulating storm water discharges to ASBS via an amendment to the Ocean Plan, but subsequently resorted to the exceptions. We think that reconsidering the amendment approach is warranted, and timely in light of the ongoing proceedings to amend the Ocean Plan as part of the triennial review.

Regulating storm water discharge to ASBS via an Ocean Plan amendment would provide a predictable framework for dischargers to follow, thereby eliminating preemptive enforcement actions that presume dischargers to be in violation regardless of their impact on the receiving ASBS or ability to control the discharge. Storm water dischargers are entitled to know what is expected of them in advance, and should have the opportunity to achieve compliance – reasonable expectations that an Ocean Plan amendment would provide.

Ocean Plan History – The prior history of the Ocean Plan and its ASBS provisions support the amendment of the Ocean Plan to establish a comprehensive program for the regulation of storm water discharges to ASBS. Historically, there has not been an ASBS program for storm water, as the State Board did not recognize the need to regulate storm water discharges to ASBS until after the ASBS inventory was completed in 2003. As a result, storm water has not been subject to the kind of administrative review that should precede the application of the Ocean Plan to storm water. For example, it does not appear that an attainability analysis has been performed to support the regulation of storm water discharge to

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ASBS. Consequently, amending the Ocean Plan to include a regulatory framework for storm water discharges to ASBS presents an opportunity to conduct such a review in context.

Recommendations

Considering the significance accorded to the issue by the State Board, the substantial interest among stakeholders, the need for, and benefits of, a cooperative programmatic approach, and the apparent lack of a prior attainability analysis, a review of the regulation of storm water discharge to ASBS is overdue and should be addressed at this time. The State Board already has deemed the discharge of storm water to ASBS to be a priority, and Ocean Plan amendments are currently being considered as part of the triennial review process. We request the inclusion of this issue on the triennial review priority list, and in the current Scoping Document.

We look forward to working with the agency on this important matter, promoting ASBS protection through attainable water quality programs. Please do not hesitate to call me should you have any questions whatsoever, or if we can be of any further assistance.

Respectfully submitted,



Kelly E. Richardson
of LATHAM & WATKINS LLP