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The Ocean
Conservancy

January 10, 2005

Re: Comments Regarding Proposed Cease and Desist Orders No. R3-2005-0008, R3-005-0020, R3-2005-0021, and R3-2005-0022.

Dear Chairman Young and Members of the Board:

On behalf of The Ocean Conservancy and its over 25,000 California members, I submit the following comments on the four identical Cease and Desist Orders issued to the Pebble Beach Company, and the cities of Carmel by the Sea, Pacific Grove, and Monterey (the dischargers) for discharges to the Carmel Bay, Pacific Grove Marine Gardens Fish Refuge, and Hopkins Marine Life Refuge Areas of Special Biological Significance (ASBSs).

First, we thank the Board for beginning to take action to enforce the Ocean Plan's prohibition against discharges into ASBSs in the Central Coast Region. Despite the more than 20-year-long existence of the discharge prohibition, all of the ASBSs in our Region have illegal discharges of waste into them. The issuance of Cease and Desist Orders to these dischargers will not only start the process of cleaning up these specific ASBSs, it will send a strong message to entities discharging waste into ASBSs regionwide: that the time has come to comply with the law.

Unfortunately, however, these Cease and Desist Orders (CDOs), as currently written, are inadequate to protect the ASBSs at issue. They provide for an unconscionable delay in taking any real action, and the provisions relating to Ocean Plan exceptions are illegal and do not meet the standard for such exceptions established by State Water Resources Control Board (SWRCB) in the exception issued to the Scripps Institution of Oceanography. These objections are discussed in more detail below. We recommend that the Board revise and improve the CDOs in accordance with these comments.

1. Areas of Special Biological Significance Are Unique Waters Requiring Special Water Quality Protection.

Areas of Special Biological Significance are among the most valuable coastal waters in the state of California. The Ocean Plan defines "ASBSs" as "those areas designated by the SWRCB as requiring protection of species or biological communities to the extent that alteration of natural water quality is

undesirable.”¹ Protecting these areas is so critical to the people of California that “preservation and enhancement” of any ASBS is a beneficial use explicitly listed in the Ocean Plan,² as well as in all of the coastal regional basin plans.³ Protection of this beneficial use and prevention of alteration of natural water quality is accomplished in the only conceivable way, given the definition of “ASBS” – through an outright prohibition on discharge of waste. This provision of the Ocean Plan is abundantly clear: “Waste shall not be discharged to areas designated as being of special biological significance.”⁴

This discharge prohibition applies to both point and nonpoint sources of pollution, and unequivocally applies to stormwater. In the Matter of the Petition of California Department of Transportation For Review of Cease and Desist Order No. 00-87 for Crystal Cove,⁵ the California Department of Transportation (CalTrans) challenged a CDO issued by the Santa Ana Regional Water Quality Control Board regarding its discharges into the Irvine Coast ASBS. CalTrans contended, *inter alia*, that the discharge prohibition in the Ocean Plan does not apply to stormwater. On April 26, 2001, the SWRCB issued its ruling in the case. In response to this contention, the State Board found that: “[t]he plain meaning of the discharge prohibition in the current Ocean Plan applies to storm water discharges.”⁶

In July of 2003, the Southern California Coastal Water Research Project (SCCWRP) released the results of a survey of discharges⁷ into all 34 ASBSs in California. The report, entitled “Discharges into State Water Quality Protection Areas,” stated that there are 1,658 direct discharges into ASBSs statewide.⁸ These discharges were subdivided into wastewater discharge points (31 statewide), municipal/industrial storm drains (391 statewide), small storm drains (1012 statewide), and nonpoint sources (224 statewide). 935 of these discharges are into ASBSs in the Central Coast Region.

The Board has two options for dealing with these illegal discharges. First, for the vast majority of existing discharges, it should issue cease-and-desist orders, requiring dischargers to immediately reroute their discharge away from the ASBSs or seek some other engineered solution. Second, in very limited circumstances, the discharger may seek an exception from the Ocean Plan. Such exceptions may be granted only where the standard for such exceptions, discussed below, is met. However, the standard for exceptions should be strictly applied – an exception should not be used as a “quick fix” to legalize illicit discharges.

SWRCB may grant an exception to the ASBS discharge prohibition if, after a public hearing, it determines that the exception “will not compromise protection of ocean waters for beneficial uses,” and “the public interest will be served.”⁹ In the case of ASBSs, the relevant beneficial use is “preservation

¹ State Water Resources Control Board, “Water Quality Control Plan – Ocean Waters of California” (2001) at Appendix I (Ocean Plan).

² Ocean Plan at I.A.

³ See, e.g. http://www.swrcb.ca.gov/rwqcb3/BasinPlan/BP_text/Chapter2.htm.

⁴ Ocean Plan at III.E.1. This prohibition applies to both point and nonpoint sources of waste, and the only explicit exception is for certified limited-term activities.

⁵ State Water Resources Control Board Order WQ 2001-08, SWRCB/OCC File A-1350 (April 26, 2001).

⁶ *Id.* at 8.

⁷ Discharges were defined as non-natural sources. The total number of discharges reported above does not include outlets, which are defined as naturally occurring sources. Southern California Coastal Water Research Project, “Final Report: Discharges into State Water Quality Protection Areas” (July 2003), at 7-8 (SCCWRP Report).

⁸ *Id.* at 7. Four of these discharges are covered by an exception to the Ocean Plan’s discharge prohibition. Consequently, there are 1,654 illegal discharges into ASBSs statewide.

⁹ Ocean Plan at III.I.

and enhancement of designated Areas of Special Biological Significance.”¹⁰ This beneficial use is implemented by the discharge prohibition, and the maintenance of “natural water quality conditions.”

Consequently, a discharger may seek – and SWRCB may grant – an Ocean Plan exception for an existing discharge into an ASBS only under the following circumstances:

- All exceptions must be conditional, and crafted to ensure that permitted discharges are consistent with **natural** water quality, not Table A or B Ocean Plan water quality objectives. Discharges should be consistent with the Ocean Plan’s Table C Background Seawater Concentrations.¹¹ These conditions should apply equally to point source discharges, as well as stormwater and non-stormwater discharges.
- All exceptions must be accompanied by a rigorous monitoring and reporting program. Such a program must include monitoring requirements adequate to demonstrate that discharge is consistent with natural water quality and applicable permit requirements. Monitoring should include, at a minimum, biological, water quality, and sediment quality monitoring. If monitoring results indicate that the conditions of the exception are not being met, the exception should be void.
- All exceptions must be contingent upon compliance with all applicable permits, waste discharge requirements or waivers. If monitoring results demonstrate that the discharger is out of compliance with any permit requirement, the exception should be void.
- No exception should be granted in the absence of a public hearing.
- All exceptions must be in the public interest.

These are the minimum criteria that must be met in order to ensure that an exception is consistent with the Ocean Plan’s ASBS beneficial use and exception standard. As noted above, exceptions should be granted only in an extreme minority of cases –the exception must not become the rule.

On Thursday, July 22, 2004, the State Water Quality Control Board (SWRCB) adopted, in the context of a conditional exception to the Ocean Plan, a set of controls regulating discharge from the Scripps Institution of Oceanography into the La Jolla Ecological Reserve ASBS (Scripps exception). The controls, if implemented properly, will result in the elimination of most of the wastes in the discharge, and the treatment of any remaining wastes in order to protect natural water quality in the ASBS. Under the Scripps exception, dry-weather nonpoint discharges will be eliminated by January 1, 2007, and the use of copper in the laboratory and aquarium wastewater will be essentially eliminated. Scripps will develop an advanced stormwater management plan to manage wet-weather flows. This plan will require Scripps to adopt best management practices to control the discharges on an accelerated implementation schedule. Finally, Scripps will carry out one of the most comprehensive monitoring programs of any discharger of its size in the State.

2. The CDOs Provide For Unreasonable Delay In Cleaning Up the Discharges.

The CDOs provide the dischargers with two options: they must either apply for an exception to the ASBS discharge prohibition by March 1, 2005, or cease all dry-weather discharges by January 1,

¹⁰ *Id.* at I.A.

¹¹ The Ocean Plan lists specific background concentrations for arsenic, copper, mercury, silver and zinc, but sets the background concentration of all other Table B parameters at 0.

2007 and all wet-weather discharges by January 1, 2008.¹² The March 1, 2005 deadline for applying for the exception is a reasonable timeframe. However, it is both illogical and unreasonable to allow a discharger 2-3 years to come into compliance with a regulation that has been in existence for over 20 years. If the dischargers do not choose to seek an exception, they should be expected to comply immediately.

Furthermore, the CDOs provide an additional level of unwarranted delay: if the discharger applies for an exception – which it must do by March 1, 2005 – and the State Board does not grant the exception by January 1, 2008, the discharger is given until January 1, 2010 to cease discharging. This provision creates the possibility of five years of additional discharge into protected marine areas for the price of an application to the Board that should have been made long ago. Under this scenario, if a discharger makes an application by March 1, 2005 and the State Board denies it by January 1, 2006, the discharger nevertheless has four additional years to come into compliance. This delay is unreasonable.

On October 18, 2004, the State Board sent letters to 29 entities that discharge waste into ASBS – including the dischargers. The letter required that these dischargers either apply for an ocean plan exception or cease discharging into ASBS. The letter states:

Because you do not already have an exception issued by the State Board for discharges to the ASBS, you are required to cease discharging. You may, however, request an exception to the prohibition if you believe your discharge will not compromise protection of ocean waters for beneficial uses, and the public interest will be served.¹³

The State Board letter gave the dischargers until January 1, 2005 to notify the Board of whether the dischargers intended to apply for exceptions. If they do not apply for an exception, the dischargers must cease discharging. The letter does not provide for any additional time to cease discharging. The CDOs issued by this Board should be consistent with the State Board letter.

It is reasonable to allow regulated entities time to come into compliance with new legal requirements. However, the ASBS discharge prohibition in the Ocean Plan is far from new. The Board should not treat the dischargers as though they have been assailed by some onerous new legal obligation without notice and without compliance options. This is not the case. If they do not choose to apply for an exception, or if their application for an exception is rejected, the dischargers should be required to comply immediately.

3. The CDOs are Not Consistent With The Scripps Exception.

The Staff Report accompanying the CDOs states that the conditions of the CDOs are based on the requirements of the Scripps Institution of Oceanography ASBS-discharge exception (Scripps exception).¹⁴ Consistency with the Scripps exception is an excellent objective; the Scripps exception was developed in an open, collaborative process, and is consistent with the law and the criteria for these

¹² See, e.g., Regional Water Quality Control Board – Central Coast Region, Draft Cease and Desist Order No. R3-2005-0008 (December 23, 2004).

¹³ Letter from Celeste Cantu, Executive Director, State Water Resources Control Board, to Jim Cullen, Carmel by the Sea Public Works (October 18, 2004). Identical letters were sent to the Pebble Beach Company and the City of Pacific Grove.

¹⁴ State Water Resources Control Board, Resolution No. 2004-0052 Approving An Exception to the California Ocean Plan (Ocean Plan) for the University of California Scripps Institution of Oceanography Discharge Into the San Diego Marine Life Refuge Area of Special Biological Significance and Adopting a Mitigated Negative Declaration (July 22, 2004).

exceptions, as outlined above. However, the CDOs, in fact, fall far short of the standard established in the Scripps exception in a number of regards:

(a) The CDOs would permit certain categories of non-stormwater discharge to continue.

The CDOs require the dischargers to cease all non-stormwater discharges except those allowed in the NPDES permit on or before January 1, 2007. The CDOs purport to permit certain types of non-stormwater discharges, including landscape and other irrigation water, if it is demonstrated that they are not significant contributors of pollutants to ASBSs. There is no basis for this exception in either the law or the Scripps exception. All discharges into ASBSs are prohibited by the Ocean Plan, without regard to type. The Scripps exception required the elimination, by January 1, 2007, of all non-stormwater urban runoff discharges, with emergency fire-fighting as the only exception. The Board should revise the CDOs to provide for elimination of all non-stormwater non-firefighting urban runoff discharges. No exceptions.

(b) The CDOs lack adequate provisions for the elimination of stormwater discharge.

The CDOs require the dischargers to revise their SWMPs to ensure an improvement in ASBS receiving water each year due to elimination or treatment of stormwater. This appears to be the only provision dealing with stormwater discharges into the ASBSs at all. The Scripps exception contains a similar condition, but with one critical difference: the overarching requirement that "natural water quality conditions, seaward of the surf zone, must not be altered as a result of the discharge."¹⁵ It is this overarching requirement that renders the stormwater provisions of the Scripps exception consistent with the law and the criteria above. The CDOs should be revised to contain the same overarching requirement protecting natural water quality.

(c) The CDOs fail to provide clear standards for water quality in the ASBSs and consequences for exceeding those standards.

The CDOs require the development of a monitoring and reporting plan for stormwater runoff water quality sampling. Stormwater samples are to be compared with Tables A and C water quality objectives in the Ocean Plan. If monitoring shows exceedences of water quality objectives, the discharger will be required to take all reasonable steps to identify the source and implement BMPs to eliminate it.

First, the values in Table A are inappropriate for this purpose. Table A provides effluent limitations for publicly owned treatment works and industrial discharges for which Effluent Limitations Guidelines have not been established pursuant to Sections 301, 302, 304, or 306 of the Federal Clean Water Act.¹⁶ These levels are clearly inappropriate for water bodies requiring particularly high water quality, like ASBSs. Table C represents Natural Background Seawater Conditions; this is a far more appropriate standard for comparison than effluent limits applied to treatment works. Alternatively, the Scripps exception provides for the formation of an advisory committee to determine what constituent levels represent natural water quality for the relevant ASBSs. A similar procedure could be employed for these ASBSs.

¹⁵ *Id.* at ¶ 3.a.

¹⁶ *Id.* at 11.

Second, the consequences of deviating from natural water quality conditions should be made clear. The staff report states: "It is not staff's intention for the values to be used as a numeric limit" The Scripps exception contains no such off-ramp. If natural water quality is being altered by the discharge, as determined by evaluation of monitoring results by the advisory committee, Scripps is in breach of one of the conditions of the exception and requirements for additional BMPs are triggered. Staff should avoid giving the impression that the requirements triggered by exceedences of water quality objectives under these CDOs are any less rigorous.

(d) The CDOs understate the purpose of monitoring, and provide an unreasonable pretext for not monitoring.

The staff report states:

The purpose of the monitoring and reporting plan, and the marine life survey are to gather background information on the effluent water quality as compared to receiving water quality, and benthic marine life. If background data exists, the Discharger may propose to utilize this data in full or as a portion of the monitoring and reporting plan.¹⁷

Providing background data is but one of the purposes of a monitoring and reporting plan. Other significant – and perhaps more important – purposes are to confirm that the discharger is complying with the terms of the exception, and to confirm that natural water quality in the ASBS is being protected by the measures in the exception. These other purposes cannot be met using existing background data. The dischargers should not be permitted to substitute pre-existing data for data to be collected pursuant to the monitoring and reporting plan.

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In conclusion, The Ocean Conservancy appreciates the Board taking steps toward bringing dischargers into compliance with the ASBS provisions of the Ocean Plan. However, the CDOs – as currently written – contain serious flaws that should be remedied before they are issued. The changes we have recommended above will make the orders both more protective of the ASBSs and more legally defensible.

Thank you for the opportunity to make these comments. Please feel free to call me if you have any questions.

Sincerely,



Sarah G. Newkirk
California Water Quality Programs Manager

Cc: Donnette Dunaway, Central Coast Regional Water Quality Control Board
Dominic Gregorio, State Water Resources Control Board

¹⁷ California Regional Water Quality Control Board, Central Coast Region, Staff Report for Regular Meeting of February 11, 2005 for Cease and Desist Orders No. R3-2005-0008 (City of Pacific Grove), R3-2005-0020 (City of Monterey), R3-2005-0021 (The Pebble Beach Company), and R3-2005-0022 (City of Carmel By The Sea) (December 21, 2004) at I.9.h.