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THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

January 24, 2005

Via Facsimile, Electronic Mail, and U.S. Mail

Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401
Facsimile: (805) 788-3517

Re: *Comments Regarding Proposed Cease and Desist Orders Nos. R3-2005-0008, R3-2005-0020, R3-2005-0021, and R3-2005-0022.*

Dear Chairman Young and Members of the Board:

On behalf of the Natural Resources Defense Council, The Ocean Conservancy, California Coastkeeper Alliance, Divers' Environmental Conservation Organization, Southern California Watershed Alliance, San Diego Baykeeper, and our more than 125,000 California members, we submit the following comments regarding four identical Cease and Desist Orders ("CDOs") 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 and Pacific Grove Marine Gardens Fish Refuge and Hopkins Marine Life Refuge, designated Areas of Special Biological Significance ("ASBS"). We thank you for the opportunity to review and provide comments on the CDOs.

As an initial matter, we join in and support the Comments Regarding Proposed CDOs submitted separately by The Ocean Conservancy. As such, these comments are an addendum to those of The Ocean Conservancy, focusing in turn on several additional legal deficiencies of the CDOs that must be addressed.

General Comments

While we appreciate the Central Coast Regional Water Quality Control Board's ("Regional Board") efforts to enforce the California Ocean Plan's prohibition of discharges into the ASBS in the Central Coast Region, we believe the CDOs, in their current form, are inadequate to protect the ASBS at issue and are illegal in many respects.

The 2001 California Ocean Plan ("Ocean Plan") defines the ASBS as "those areas designated by the [State Water Resources Control Board] as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable." (Ocean Plan at Appendix I.) The State Water Resources Control Board ("State Board") has designated thirty-four (34) ASBS in California, into which "[w]aste shall not be discharged."[1] (Ocean Plan at III. E. 1.)

Despite this clear directive, the first-ever study of discharges into ASBS in July 2003 demonstrated that the areas are not being protected at all. In fact, the study found 1,658 direct discharges into the ASBS statewide.[2] (SCCWRP, "Final Report: Discharges into State Water Quality Protection Areas" (2003), at 7-8.) The study identified that thirty six percent (36%) of these discharges are into the two ASBSs addressed in the CDOs at issue here. (*See Id.* at 7.) It is clear, then, that the objectives laid out by the Ocean Plan to protect, preserve, and enhance the ASBS are not being met, in considerable part due to the Dischargers here.

Cease and desist orders are an invaluable tool to remedy this widespread regulatory failure. Yet cease and desist orders must do exactly that; they must ensure that those engaged in the illegal activity immediately cease doing so, and that they desist from acting in such a manner that would constitute a further violation. Ironically, the CDOs currently proposed by the Regional Board do little to require the Dischargers to actually *cease and desist* the illegal discharging into the ASBS. While both the Porter-Cologne Water Quality Control Act ("Water Code") and the California Code of Regulations ("CCR") explicitly state that cease and desist orders should result in the *earliest possible* cessation of the illegal activity, and the *immediate* installation of corrective measures, the CDOs require the Dischargers to do neither. Indeed, the CDOs provide the Dischargers with such an unreasonably long timeframe in which to cease discharging into the ASBS (if ever), that they essentially serve as discharge permits rather than cease and desist orders. What is worse, the CDOs contain an exemption from the prohibitions within the CDOs themselves that would allow the Dischargers to delay compliance for years, while nothing is done to correct the Dischargers' current violations of law.

We therefore respectfully recommend that the Regional Board revise the CDOs such that (1) the Dischargers are required to comply with the regulations at the earliest possible date through immediate corrective measures, (2) the Dischargers are not entitled to an additional two-year delay in compliance simply by applying for an exception to the regulations, and (3) specific interim measures are established to address the additional discharges of waste that will result until the Dischargers fully cease and desist all their illegal discharges into these protected areas.

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[1] Since 1983, the Ocean Plan has listed the preservation and enhancement of the ASBS as a "beneficial use" of such waters designated as ASBS. (Ocean Plan at I. A.)

[2] The report subdivided these discharges into wastewater point sources (31 statewide), municipal/industrial storm drains (391 statewide), small storm drains (1012 statewide), and nonpoint sources (226 statewide). (SCCWRP at 8.)

Specific Comments

Board action is reversible if, among other things, it is unlawful, relies solely on conclusory assertions, constitutes an abuse of discretion or is arbitrary or capricious. Abuse of discretion is established if "the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code of Civil Procedure ("CCP") § 1094.5(b).) As the State Board has noted, "any findings made by an administrative agency in support of an action must be based on substantial evidence in the record." (*In the Matter of the Petition of Exxon*, WQ Order 85-7 at 15 (Aug. 22, 1985).)

1. The CDOs Are Illegal Because They Do Not Require Compliance At the Earliest Possible Date

The CDOs are illegal because they contain an inexplicably generous, and factually unsupported, time schedule. Water Code Section 13301 and CCR Section 2243 provide that CDOs must require compliance "*as soon as is reasonably possible,*" and at "*the earliest possible date.*" (Water Code § 13301; CCR § 2243(a), (b) (emphasis added).) Despite this legal authority, the CDOs propose a time schedule that would have the Dischargers either (1) file for an exception to the ASBS-discharge prohibition by March 1, 2005, or (2) cease all dry weather discharges to the ASBS no later than January 1, 2007, and cease all wet weather discharges no later than January 1, 2008. (*See, e.g.,* CDO No. R3-2005-0022 ("CDOs") at 5.) Tellingly, the CDOs contain no explanation, and cite to no evidence, in support of the notion that this is "as soon as is reasonably possible" and "the earliest possible date" that compliance can be required. It is simply implausible that the "earliest possible date" the Dischargers can be made to stop the illegal discharging into the ASBS is two to three years from now, especially given that these regulations have been in place for over twenty years.

What's worse, the CDOs actually contain a provision by which the Discharges can have even more time to delay their compliance with the ASBS-discharging prohibitions: if the Dischargers apply for an exception by March 1, 2005, and the State Board does not grant the exception by January 1, 2008, the Dischargers have *two more years*, until January 1, 2010, to stop discharging into the ASBS. (*Id.*) As discussed herein, the Dischargers will almost certainly take advantage of this additional time to continue violating the prohibitions, as the CDOs give them no reason not to, and in fact, encourage them to do so.

The CDOs are, therefore, illegal in many respects: in their lack of evidence supporting the specified time schedule, in their clear violation of the Ocean Plan and Section 2243, and in their weakening of the CDOs to the point of making them meaningless. The CDOs must be amended to more accurately reflect a time frame based on substantial evidence of the earliest possible date in which the Dischargers can cease their illegal discharging into the ASBS.

2. The CDOs Are Illegal Because They Do Not Require the Dischargers to Create and Implement Immediate Corrective Measures

The CDOs are self-diluting and unlawful in their current form for the additional reason that they do not require the Dischargers to take immediate corrective measures in accordance with the ASBS-waste discharge prohibitions. CCR Section 2245 states that "[e]ach discharger *should be expected to construct emergency facilities or modify existing plant operation to achieve rapid compliance.*" (CCR § 2245(a) (emphasis added).) The current CDOs fail to ensure "rapid compliance," and they fail to require the construction of any new emergency facilities or the modification of any existing ones. Instead, the CDOs state that the Dischargers can "redesign or redirect the storm drain system so that no runoff enters in or near" the ASBS, or "apply for an exception to the ASBS discharge prohibition." (CDOs at ¶ 14.) Thus, absent any specific, non-contingent requirement to adopt emergency measures, the CDOs in essence do nothing more than encourage the Dischargers to ignore the very regulations the CDOs are designed to enforce. Moreover, the CDOs are illegal because there is no evidentiary basis demonstrating that the schedule of actions meets CCR § 2245(a). (CCP § 1094.5(b).)

It is clear that the CDOs could require the Dischargers to take a wide array of corrective steps to address their illegal discharging. For instance, low-flow diversion plans are now widespread in California, re-routing residual dry weather flows from storm drains to wastewater treatment plants where bacteria and other pollutants are removed.[3] Moreover, CCR Section 2245(b) notes that examples of "emergency facilities which should be constructed immediately include chemical treatment, additional disinfection, ponding with or without aeration, receiving water mixing, aeration, and *any other steps* which can be immediately implemented." (CCR § 2245(b) (emphasis added).) The Regional Board's refusal to require any corrective measures of the Dischargers renders the CDOs illegal, as does the Regional Board's total lack of evidentiary support for its failure to do so.

3. The CDOs Are Illegal Because They Rely On Economic Considerations As Justification For Delays in Compliance

The CDOs are also unlawful for considering the cost associated with immediate corrective measures, and using such costs as justification for allowing the Dischargers to do nothing of substance to correct their violations. In this respect, the CDOs are unlawful for two reasons.

First, and most important, CCR Section 2245(c) provides that "*[e]xtra cost of such* [emergency] *facilities is not a reasonable excuse for failure to construct them.*" (CCR § 2245(c) (emphasis added); *see also* CCR § 2244.1(b) ("Economic loss to a community as a whole or to any public agency or private person within the community" is not grounds for an exclusion to discharge prohibitions, "because *such loss is the rule rather than the exception and cannot*

[3] *See, e.g.,* County of Los Angeles, Department of Public Works, Watershed Management Division, "Water Quality Biennial Report 2002-2004," at 42.

outweigh the need to prevent an increase in water quality impairment which is the basic reason for the prohibition) (emphasis added).) Despite this plain language, the time schedules in the CDOs are expressly predicated on the belief that the implementation of these statewide regulations would require the Dischargers to "expend financial and human resources." (CDOs at ¶ 18.) The CDOs go on to note, almost defensively, that this economic "impact" on the municipal budgets was considered in preparing the CDOs, as "the time line and requirements" in each CDO provide a "balance between the need to protect water quality, the need to meet the ASBS-discharge prohibition, and the public interest." (*Id.*) These considerations are expressly improper, as is staff's invitation to the Regional Board to rely on such costs to excuse compliance.

Second, even if, *arguendo,* cost were an appropriate consideration in setting a compliance schedule, there is absolutely no evidence of the nature of the costs at issue, what "balance" is being struck," and how that "balance" is a justifiable exercise of any discretion the Regional Board may possess. If the mere expenditure of resources could justify delayed compliance (or a failure to comply) with lawful regulations, no discharger would ever have to meet California's water quality laws and regulations. At a minimum, therefore, the CDOs violate the law because compliance is being delayed by claims of economic impact that are conclusory and entirely unsupported by the record.

4. The CDOs Are Illegal Because They Allow Additional Discharges While a Cease and Desist Order Is In Place

The CDOs are additionally unlawful for failing to put an end to the illegal discharges that will continue while the Dischargers contemplate which form of action they wish to take under the orders. Numerous sections of the CCR deal exclusively with prohibiting *additional* illegal discharges once a cease and desist order has issued. For instance, CCR Section 2244(a) states:

> (a) The purpose of prohibitions or restrictions on additional discharges is to prevent an increase in violation or likelihood of violation of waste discharge requirements *during a period of violation* or threatened violation of requirements and thereby prevent an increase in unreasonable impairment of water quality or an increase in nuisance.

(CCR § 2244(a) (emphasis added).) Conceding the direct violation 2244(a), the CDOs expressly acknowledge that "[w]hile this CDO is in effect, and during the application for an exception, the [Dischargers] will continue to discharge storm water, and for a limited time, non-storm water, to the ASBS." (CDOs at ¶ 19.)

Moreover, the CDOs admit that "*any* runoff from the [Dischargers] which discharges to the ASBS, whether the runoff is within the storm drain system (gutters, pipes, etc.) or not, violates the ASBS-discharge prohibition." (CDOs at ¶ 15 (emphasis added).) Yet the CDOs contain no prohibitions or restrictions on additional discharges, in direct violation of CCR Section 2244(b), which states that "*[p]rohibitions or appropriate restrictions on additional*

discharges should be included in a cease and desist order if the further addition...of waste...would cause an increase in violation of waste discharge requirements or increase the likelihood of violation of requirements." (CCR § 2244(b) (emphasis added).) Instead, the CDOs offer the vague and conclusory assertion that "through application of the requirements of this CDO, the quality of the discharges will be controlled and potential impacts will be minimized." (CDOs at ¶ 19.) Such an assertion is unpersuasive and is in violation of the substantial evidence requirement of CCP § 1094.5(b). Indeed, California courts have held that "in order to satisfy the substantial evidence test...[one] cannot rely solely upon conclusory statements." (*Farrow v. Montgomery Ward Long Term Disability Plan*, 176 Cal. App. 3d 648, 663 (1986); *see also, Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 885 (1996) (contrasting substantial evidence with conclusory statements).) The CDOs, therefore, must be revised to include specific measures designed to prohibit and restrict discharges of waste into the ASBS while the CDOs are in place. Allowing the illegal waste discharging to continue unfettered into the ASBS for a period of five years, or even two to three years, is simply insufficient and unlawful.

5. The CDOs Are Illegal Because They Contain An Unlawful Exception and An Unlawful Procedure For Obtaining It

The CDOs are illegal for the further reason that they effectively include a Regional Board-issued exemption to the Ocean Plan's ASBS-discharge prohibition. Specifically, the CDOs allow for an additional two-year delay in compliance—to as late as 2010—if the Dischargers merely apply to the State Board for an exception to the Ocean Plan. In practical terms, merely by *applying* for an exemption from the State Board, the Dischargers *gain* the exemption from the Regional Board's already lax timeframe. The Regional Board has no power to change the Ocean Plan or to permit exceptions from its terms, through a CDO or otherwise, and this aspect of the CDO is consequently patently illegal and is otherwise a gross abuse of discretion.[4]

Further in this vein, the record in this matter does not remotely suggest that the Dischargers will be able to obtain any variance from the Ocean Plan, once they apply to the State Board. The Ocean Plan states that an exception can be given only if the "exception will not compromise protection of the ocean waters for beneficial uses," and if the public interest will be served. (Ocean Plan at III.I.) There is no indication here that the significant pollution discharges inherent in large volumes of urban runoff are consistent with this standard. Hence, even if the Regional Board possessed any power to effectively stay the ASBS prohibition based upon the probability that the Dischargers were entitled to an exception, it would be an abuse of discretion to do it on this record. Moreover, the fact that the CDOs list a number of "conditions" that must

[4] Indeed, the State Board itself has refused to delay a schedule in a CDO based on the speculative prospect that the discharger will obtain an exception to the ASBS discharge prohibition and has, in any case, clearly separated the duty to comply with existing law from the exercise of any other rights to seek an exemption from that law. (*See In the Matter of the Petition of California Dept. of Transportation*, 2001 WL 689517 (Cal. St. Wat. Res. Bd.) (April 26, 2001) at * 5.)

be met during the exemption granted upon application to the State Board is irrelevant because these "conditions" merely allow more delay and are less stringent than the requirements that must be met when a discharger wishes to avoid a prohibition on the discharge of additional waste while correcting its violations. (CCR § 2243.3(a).) Hence, even if the Regional Board could stay the Ocean Plan for an additional two years merely upon the application of the Dischargers for an exception, it could only do so based on a detailed record demonstrating, among other things, that during the period at issue all interim steps were being taken to minimize impacts. This record does not exist here. [5]

6. The CDOs Are Illegal Because They Violate Anti-Degradation Policy

State anti-degradation policy, which incorporates federal anti-degradation policy, provides an additional, and entirely distinct, basis for more rigorous protection of the ASBS in the CDOs. (*See* State Board Resolution No. 68-16; 40 C.F.R. § 131.12.) This policy requires that California "maintain existing Beneficial Uses of navigable waters, preventing their further degradation." (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 705 (1994); *see also* State Board Resolution No. 68-16; 40 C.F.R. § 131.12.) As noted above, the preservation and enhancement of the ASBS is one such designated beneficial use. (*See* Ocean Plan at I. A.) Indeed, the state's anti-degradation policy mandates that water quality within the ASBS must be maintained and protected. (*See* 40 C.F.R. § 131.12 (requiring that "high quality waters," which are described as "waters of National and State Parks and wildlife refuges and waters of exceptional recreational or ecological significance" – of which the ASBS at issue here are clearly a part, not be degraded).)

However, there is no finding or analysis presented in the CDOs or the accompanying Fact Sheet that demonstrates the CDOs will preserve and enhance the ASBS or protect their high quality waters. Under California's anti-degradation policy, the state must make an "anti-degradation finding" if water quality is reduced as a consequence of *any* action taken by the State Board. (*See* Memorandum from William Attwater, State Board Chief Counsel, to Regional Board Executive Officers 5 (Oct. 7, 1987) ("anti-degradation policy is triggered by a lowering of surface water quality"); Memorandum from James W. Baetge, Executive Director, State Board, *Anti-degradation Administrative Procedure Update*, at 4 (July 2, 1990).) Indeed, an anti-

[5] The CDOs also make the bald assertion that the ASBS-discharge exception granted by the State Board to the University of California Scripps Institution of Oceanography (Scripps) "may be considered to be a model" for the Dischargers here. (CDOs at ¶ 16; *see also* State Board, Resolution No. 2004-0052 Approving An Exception to the California 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).) As discussed in the Comments submitted by The Ocean Conservancy on this issue, however, the Scripps exception is significantly more stringent than the one proposed by the CDOs, not least because the Scripps exception ensures that "natural water quality conditions, seaward of the surf zone, must not be altered as a result of the discharge." (*Id.* at ¶ 3.a.)

degradation analysis must be conducted and anti-degradation effects must be considered whenever there is even the *potential* for an increase in the emissions of a pollutant, "even if there is no other indication that the receiving waters are polluted." (Anti-degradation APU at 4; *see also In re Rimmon C. Fay*, State Board WQO 86-17 at 21 (Nov. 20, 1986).) Given that under the CDOs continued discharges into the ASBS will be allowed, the CDOs have, at the very least, the potential for increasing pollutants into the ASBS. The CDOs are therefore subject to anti-degradation analysis and consideration, and the lack of any finding or other analysis violates state law. (*See Topanga Assn. for a Scenic Community v. Los Angeles,* 11 Cal.3d 506 (1974).) Furthermore, it is unlikely that such a finding could even be made regarding the CDOs given that the Regional Board freely admits that waste discharging into the ASBS will continue under the orders, negatively impacting water quality in the ASBS. (CDOs at ¶¶ 15, 19.) As such, the current CDOs violate California's anti-degradation policy and must be revised.

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The ASBS are the most pristine coastal waters in the state, and their protection has been an express goal of the Ocean Plan for over twenty years. A recent study of the ASBS shows, however, that a great deal more must be done to protect and preserve these special areas. To that end, a cease and desist order is an important step in the right direction. The current version of the CDOs, however, forfeits a significant opportunity to stop the illegal discharge of waste into these areas as soon as possible. We therefore recommend that the Regional Board revise the CDOs to ensure that (1) in accordance with CCR Sections 2243 and 2245, the Dischargers are required to comply with the regulations at the earliest possible date through immediate corrective measures, (2) the Dischargers cannot receive an additional two-year delay in compliance simply by applying for an exception to the regulations, and (3) specific interim measures are established to address the additional discharges of waste into the ASBS that will continue until the Dischargers fully cease and desist all their illegal discharges into these protected areas

Thank you for the opportunity to review and provide comments on the CDOs. Please feel free to contact us if you have any questions.

Sincerely,

David S. Beckman, Senior Attorney
Natural Resources Defense Council