



ORANGE COUNTY  
**COASTKEEPER®**

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October 27, 2022

State Water Resources Control Board  
Office of Chief Counsel  
Adrianna M. Crowl  
P.O. Box 100  
Sacramento, CA 95812-0100  
Via email [waterqualitypetitions@waterboards.ca.gov](mailto:waterqualitypetitions@waterboards.ca.gov)

For Petitioner Orange County Coastkeeper

**BEFORE THE STATE WATER QUALITY CONTROL BOARD**

In the Matter of Lower Newport Bay Confined Aquatic Disposal Construction Project Reg. Meas. ID: 445141 SARWQCB WDID # 302021-09. Clean Water Act (CWA) section 401 Water Quality Certification action and Order (Order) for the Lower Newport Bay Confined Aquatic Disposal Construction Project (Project)

**PETITION REQUESTING REVIEW OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD CLEAN Water Act (CWA) SECTION 401 WATER QUALITY CERTIFICATION ACTION AND ORDER (ORDER) FOR THE LOWER NEWPORT BAY CONFINED AQUATIC**

**1. NAME, ADDRESS, TELEPHONE AND EMAIL ADDRESS OF THE PETITIONER:**

Orange County Coastkeeper  
3151 Airway Ave. Suite F-110  
Costa Mesa, CA 92626  
Email: [garry@coastkeeper.org](mailto:garry@coastkeeper.org)  
Attention: Garry Brown, Founder and President

**2. THE ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF THE ORDER BEING PETITIONED:**

Petitioner seeks review of the Regional Board's Clean Water Act (CWA) section 401 Water Quality Certification action and Order (Order) for the Lower Newport Bay Confined Aquatic Disposal Construction Project (Project). A copy of the certification is attached.

**3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR WAS REQUESTED TO ACT:**

The Regional Board acted on the Newport Bay Confined Aquatic Disposal Project 401 Certification on September 30, 2022.

#### **4. A STATEMENT OF THE REASONS THE ACTION OR INACTION WAS INAPPROPRIATE OR IMPROPER:**

The Regional Board issued a 401 Water Quality Certification for the City of Newport Beach's proposed construction of a Confined Aquatic Disposal (CAD) facility, which will be an underwater repository for sediment deemed unsuitable for open ocean disposal due to elevated levels of contaminants including mercury and PCBs. Crucially, the certification improperly assumed the interim 1.0' thick clean sand cap layer would only be in place for six months, not two years as stated in the Final EIR. This is of the upmost importance because: (i) the 1.0' interim cap layer will be exclusively responsible for physically isolating the unsuitable material from the marine ecosystem for its term and (ii) the benthic infauna community "is expected to recolonize within approximately two years," thus underscoring bioturbation concerns. The Regional Board "shares the concern over the proposed thickness of the interim cap, and the potential resuspension of contaminated sediment materials due to burrowing," but failed to issue the 401 with a full, accurate understanding of the project timeline.

On page two, comment 1 of our attached September 16, 2022 comment letter on the draft 401 certification for the project, Coastkeeper stated "Thus, Coastkeeper is concerned about the potential for reintroduction of materials into the already-impaired marine environment via one or a combination of: burrowing, propeller disturbance, anchor incidents, or uneven layering, particularly during the two-year, interim 1' cap period".

In the attached Regional Board response to comments page 3, comment OCK-2.1 the Regional Board's response was:

"The commenter is incorrect about the interim cap layer period. Approximately two (2) years following the completion of the dredging of the CAD facility, the placement of material from the Federal Channels in the CAD, and the installation of an interim cap, there would be one 6-month period for the Permittee and its residents to place up to 50,000 cubic yards (CY) of dredged material from outside of the Federal Channels. If the 50,000 CYs of material is not achieved within the 6-month time period, the Permittee would close the CAD facility. There would only be 6 months between the placement of the interim cap and final cap layers".

This is clearly in error as the Final EIR<sup>1</sup> for the project states on page 30 "Approximately 2 years following completion of construction of the CAD facility and placement of an interim cover containment layer, there will be a second opportunity during a 6-month period for the City and its residents to place material determined unsuitable for open ocean disposal in the CAD facility." This time period has remained unchanged.

In a follow up conversation with Regional Board staff to discuss this error, staff recognized they used the wrong timeline for the interim cap in analyzing the project but have refused to correct the deficient 401 certification.

#### **5. HOW THE PETITIONER IS AGGRIEVED:**

Petitioner Orange County Coastkeeper is a California non-profit public benefit corporation ("OCK") with its office at 3151 Airway Avenue, Suite F-110, and Costa Mesa, California. Founded in 1999 as the 27th "Keeper" program to be licensed in the United States, OCK's mission is to protect and promote sustainable water resources that are swimmable, drinkable, and fishable for present and future generations. OCK is dedicated to the preservation, protection, and defense of the environment, and the natural resources of Orange County's watersheds and surface waters. OCK works to protect the health of local

<sup>1</sup>[https://www.newportbeachca.gov/pln/CEQA\\_REVIEW/Newport%20Harbor%20Dredging%20and%20Confined%20Aquatic%20Disposal%20Construction/2021-05-20%20Lower%20Bay%20Final%20EIR.pdf](https://www.newportbeachca.gov/pln/CEQA_REVIEW/Newport%20Harbor%20Dredging%20and%20Confined%20Aquatic%20Disposal%20Construction/2021-05-20%20Lower%20Bay%20Final%20EIR.pdf)

water bodies and communities. To further its goals, OCCK actively seeks Federal and State agency implementation of Federal and State environmental laws and policies, and where necessary, directly initiates administrative challenges and enforcement actions on behalf of itself and its members. OCCK also advocates before state and local decision-makers on significant issues and programs. OCCK represents thousands of members, including Orange County residents and strong supporters of environmental quality and public health. OCCK members live and/or recreate in and around Newport Bay, and the surrounding waters. OCCK's members use the waterways to participate in a variety of water sports and other activities, including, but not limited to, swimming, boating, kayaking, bird watching, wildlife viewing, hiking, biking, fishing, wading, standup paddle boarding, walking, and running. Additionally, members of OCCK use the waters to engage in scientific studies including monitoring and restoration activities. The deficient analysis of the potential for release of material from the confined aquatic disposal facility during the two-year period the interim cap is in place puts the Newport Bay ecosystem and public at risk.

## **6. THE ACTION THE PETITIONER REQUESTS THE STATE WATER BOARD TO TAKE:**

The petitioner urges the State Board to require the Regional Board to rescind the 401 certification for the Newport Bay Confined Aquatic Disposal Project and complete a full analysis of the impacts considering the two-year interim cap period. We believe this appropriate analysis will result in additional monitoring requirements for the interim cap that will protect the environment and public from potential releases of material from the site.

## **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:**

### **I. There is no scientific basis for the interim cap analysis in the 401 certification.**

There is currently no scientific basis for the interim cap analysis used in the final 401 certification. The Newport Bay Confined Aquatic Disposal Project Final EIR states that the interim cap will be in place for two years. The Regional Board 401 Certification was drafted under an incorrect assumption that it would be in place for six months. The Regional Board must use the facts of the project in their analysis for certification of the project.

### **II. The Regional Board staff admits they got the timeline for the interim cap wrong.**

Regional Board staff acknowledges that they used the wrong timeframe for their analysis of the interim cap. Yet they have not taken the necessary steps to rescind the current 401 certification and complete the necessary analysis to determine if additional monitoring or other steps are needed for the two year time period the interim cap is in place.

## **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD:**

This petition has been sent to The Santa Ana Regional Water Quality Control Board via email to [santaana@waterboards.ca.gov](mailto:santaana@waterboards.ca.gov). It was also sent via email directly to the Executive Officer Jayne Joy and Senior Environmental Scientist Claudia Tenorio.

## **9. A STATEMENT THAT THE ISSUES RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD ACTED:**

<sup>1</sup>[https://www.newportbeachca.gov/pln/CEQA\\_REVIEW/Newport%20Harbor%20Dredging%20and%20Confined%20Aquatic%20Disposal%20Construction/2021-05-20%20Lower%20Bay%20Final%20EIR.pdf](https://www.newportbeachca.gov/pln/CEQA_REVIEW/Newport%20Harbor%20Dredging%20and%20Confined%20Aquatic%20Disposal%20Construction/2021-05-20%20Lower%20Bay%20Final%20EIR.pdf)

Petitioner raised the issues discussed in the petition before the Regional Board in written comments during the public comment period and during a later meeting on this matter.

If you have any questions regarding this petition, please feel free to contact us directly at (714) 850-1965.

Respectfully Submitted,

A handwritten signature in black ink that reads "Garry Brown". The signature is written in a cursive style with a large, looping initial "G".

Garry Brown  
Founder and President  
Orange County Coastkeeper