



Expect more.™ Intelligent Legal Solutions.®

Keeping a Black Forest Green.

*Maná*



# California's Ocean Plan Ban on Waste Discharges into Areas of Special Biological Significance (ASBS)

## 2005 Headwater to Oceans (H2O) Conference

**John J. Lormon**

Procopio, Cory, Hargreaves & Savitch, LLP  
530 B Street, Suite 2100  
San Diego, CA 92101-4469  
(619) 515-3217  
jjl@procopio.com

## ASBS

- ASBS defined
- Legal authority
- ASBS requirements
  - Exception
  - Crystal Cove case



## Definition

- OP Appendix 1
  - ASBS are areas designated by SWRCB
  - ASBS require protection of species or biological communities
  - Alteration of NWQ is undesirable
  
- 34 ASBS





## State Water Quality Protection Areas





# ASBS Locations

## ➤ Orange County ASBS:

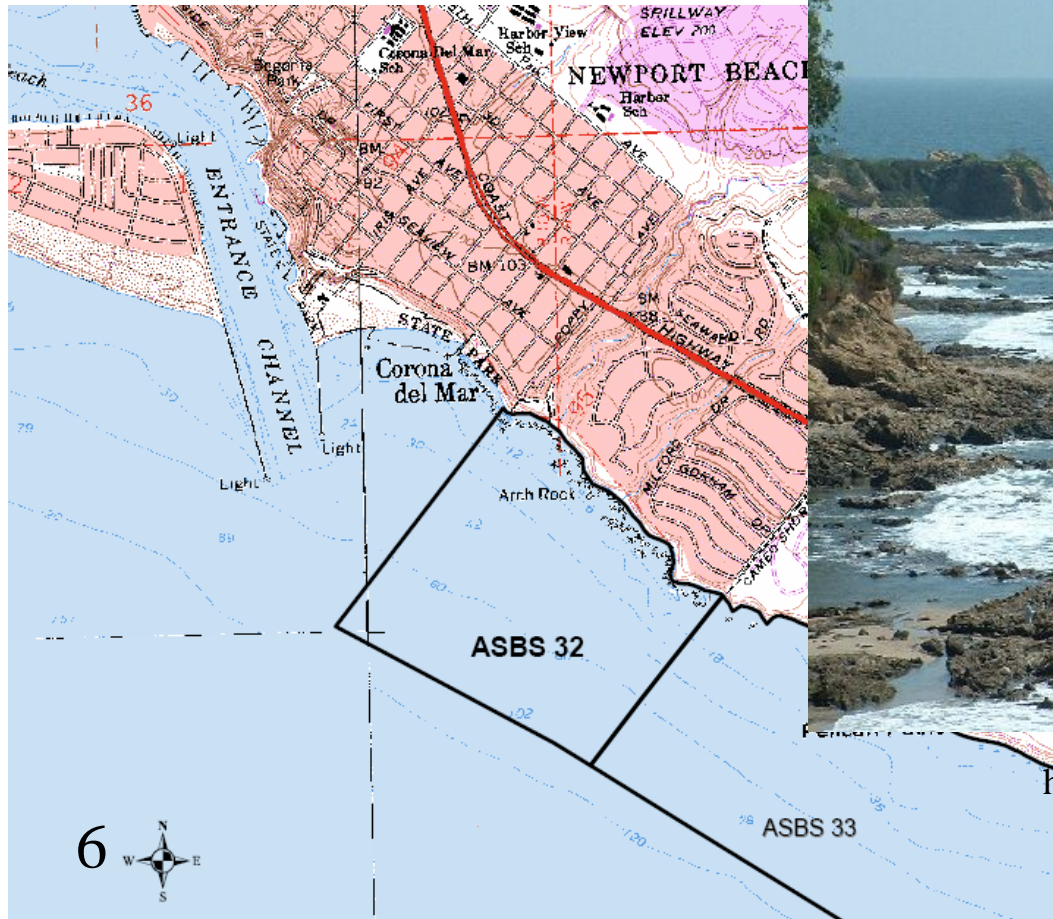
- 32 - Newport Beach Marine Life Refuge
- 33 - Irvine Coast Marine Life Refuge
- 30 - Heisler Park Ecological Reserve

## ➤ San Diego County

- 31 - San Diego Marine Life Refuge
- 29 - San Diego-La Jolla Ecological Reserve



# Newport Beach Marine Life Refuge



<http://www.waterboards.ca.gov/plnspols/oplans/asbs.html>



## Federal Authority

➤ 303(a):

States must designate:

- Beneficial uses
- Water quality objectives to protect the uses

= WQS

## State Authority

- California Water Code – regulates the discharge of “waste”
- 1972 – CA (“Ocean Plan”)
  - Sufficient distance
  - Preserve NWQ
- 1974-75 – 34 ASBS designated



## ASBS Requirements

### ➤ Ocean Plan

- 1972 – point sources from power plants and sewage or industrial facilities
- 1978 – stormwater added
- 1983 – prohibition of all discharges of waste
- 2000 – exception of limited term activities

## Exception

- OP<sub>III.d.</sub> – SWRCB can grant exception from any OP requirement
- Conditions:
  - Procedural
    - CEQA (vs. WDR)
    - Public hearing
    - U.S. EPA Concurrence
  - Substantive:
    - Cannot compromise beneficial uses
    - Public interest must be served

## Exception History

- 1977-2004 – 5 granted
- 2000 – the only enforcement action
  - Crystal Cove CDO
- 2001 – SWRCB order

## Crystal Cove Holding

- Beach discharge subject to ASBS
- Stormwater covered
- NPDES permit not sufficient



## SCCWRP Report

- 2003 review point & non-point discharges into SWQPA (ASBS are subset of SWQPA)
- Classifications
  - Outlets – 367 natural
  - Discharges – 1658
    - 222 non-point
    - 31 industrial
    - 391 municipal
    - 1012 small storm drains



## Regulatory Status

### ➤ 2005

- Stormwater
  - One exception - Scripps
  - No MS4 with an exception
- 13 Industrial
  - 4 have permits and exceptions
  - 3 permits but no exception
  - 6 no permit and no exception

## Issues

- Lack of NWQ data
- MEP = safe harbor for SW discharges
- Diversion outside the ASBS
  - Burden to show no impact to NWQ
  - Contribution of natural sources
- Wet weather flows



## Costs

- Monitoring
  - Only rain in the drain
  - Eco-systems based
  - Background chemicals
  - Detection limits
- Engineering & Management Plans
- Implementation
  - Treatment
  - Diversion



# Policy Issues

## Exception v. Permit

- Industrial
  - Individual exception & permit
  
- Stormwater / MS4
  - General exception
  - Stewardship program



## Conclusion

### ➤ OP Ban

- Industrial
- Stormwater

### ➤ Practical Issues

- SW
  - Dry weather
  - Wet weather
- Diversion not the answer

- Remove the anthropogenic waste
- Problems of proof
- Costs

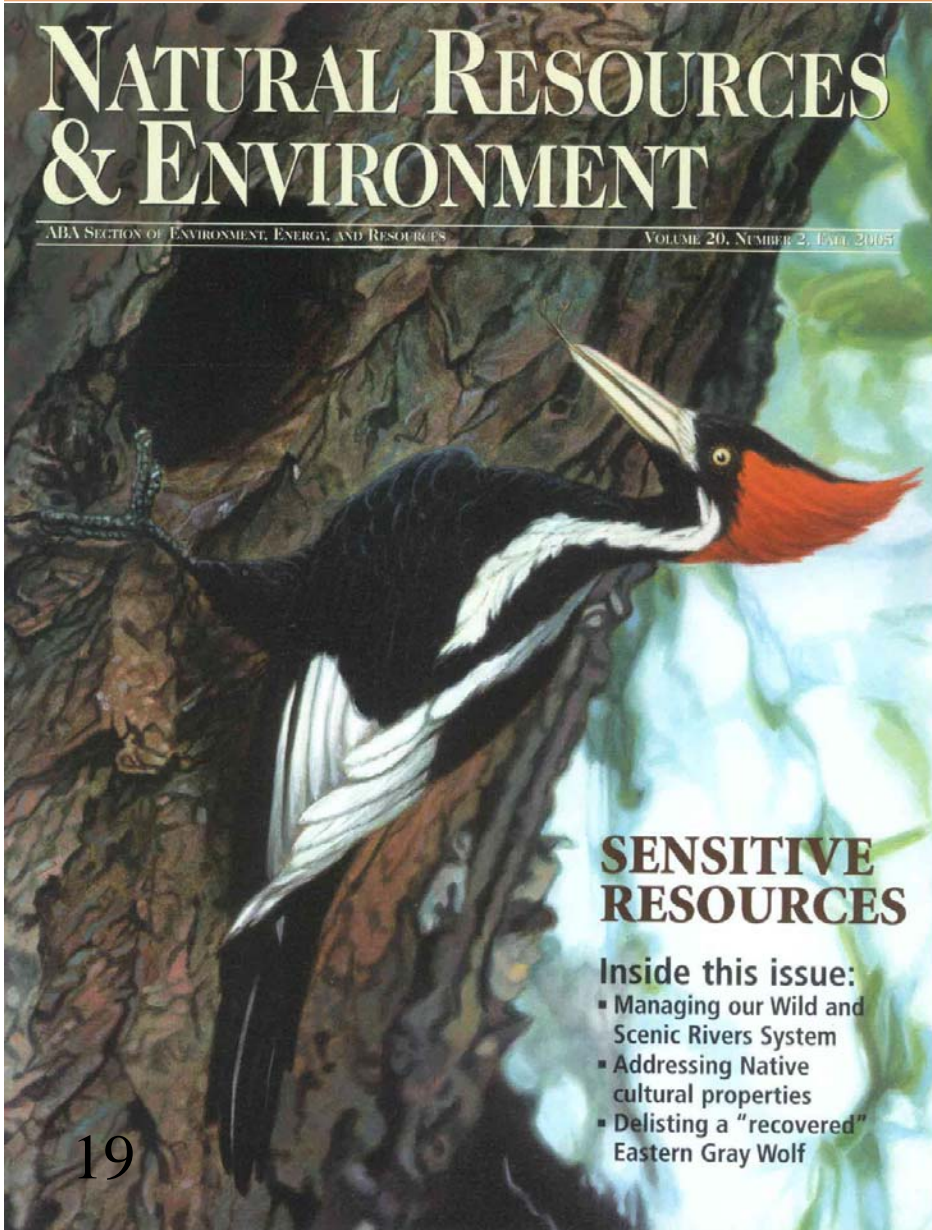
### ➤ Next steps

- Policy
- Legal

# NATURAL RESOURCES & ENVIRONMENT

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

VOLUME 20, NUMBER 2, FALL 2005



## SENSITIVE RESOURCES

### Inside this issue:

- Managing our Wild and Scenic Rivers System
- Addressing Native cultural properties
- Delisting a "recovered" Eastern Gray Wolf

## California's Ban on Waste Discharges into Areas of Biological Significance

John J. Lormon

There are 1,658 waste water discharges into thirty-four coastal areas designated by the California State Water Resources Control Board (state board) as areas of special biological significance (ASBSs). Waste discharges into ASBSs, even with a valid National Pollutant Discharge Elimination System (NPDES) permit or Waste Discharge Requirements (WDRs) issued by the state, are prohibited by California law, unless an exception is granted by the state board. Consequently, dischargers into ASBSs have three options: cease the discharge, obtain an exception to the prohibition, or change the law.

The prohibition on discharges into an ASBS has been in existence for more than two decades. Yet only five dischargers have obtained the exception necessary to discharge into an ASBS. This means that every other non-natural discharge to an ASBS is in violation of the state water quality laws. This situation would seem to provide a tremendous lever for regulators and the environmental community to seek and obtain enforcement. But only one enforcement action has been prosecuted. In a state as environmentally progressive as California, this is a surprising situation.

The state board is now addressing this situation by requiring dischargers to either apply for an exception or to cease the discharge. In addition, the six California Regional Water Quality Control Boards (regional boards) that oversee the 1,100 miles of California coastline have begun to focus on regulating both point and nonpoint discharges into ASBSs. This change has raised concern in the regulated community regarding the methods and costs of achieving compliance, especially with regard to wet-weather discharges. The environmental community also is actively involved and does not want to see a weakening of the prohibition.

This article reviews the development of the ASBS program, why it remained in the regulatory background, and the circumstances that recently brought this program into prominence. It reviews legislative efforts to coordinate marine resources regulations in California. It examines the state board's efforts in 2003 and 2004 to develop a practicable and predictable statewide process to manage this

program and how those efforts failed, and it explains why development of general exception conditions will likely be revisited in 2005 for stormwater discharges. It examines how one point source discharger, Scripps Institution of Oceanography at the University of California San Diego (Scripps), responded when faced in 2002 with a request to apply for and obtain an exception to discharge into the ASBS adjacent to its campus. It also looks at responses by other members of the regulated community who earlier this year were threatened with a cease-and-desist order (CDO). And, it notes that on a statewide basis, site-specific and regional monitoring information necessary for program management is missing, that the costs for monitoring and compliance will be substantial, and that the regulated community needs to develop a well-thought-out monitoring, compliance and funding strategy as the prohibition is not likely to go away. Finally, it notes that the holding of a California Supreme Court case, *The City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005), arguably creates a conflict between the ASBS provisions and the California Water Code regarding the state's duty to consider economic factors when imposing effluent limits on a waste discharge.

Since the 1970s, Section 303(a) of the federal Clean Water Act (CWA), 33 U.S.C. § 1313(a), has required that states adopt water quality standards applicable to interstate waters. These water quality standards require that states designate beneficial uses for these waters and establish water quality criteria for their protection. In response, California adopted the Water Quality Control Plan Ocean Waters of California (Ocean Plan). Since its adoption in 1972 the Ocean Plan has been amended eight times. The state board is responsible for reviewing the Ocean Plan water quality standards thrice annually in accordance with CWA § 303(c)(1). Consequently, the Ocean Plan is a constant work in progress.

The state board's approach to regulating discharges to ASBSs in the Ocean Plan has evolved over time. In 1972, the Ocean Plan stated: "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." At that time, no ASBS had been designated. In 1974, thirty-three ASBSs were designated, and one more was added to the list in 1975. For a list and map of all thirty-four ASBSs, see [www.swrcb.ca.gov/plns/pols/oplans/asbs.html](http://www.swrcb.ca.gov/plns/pols/oplans/asbs.html).

*Mr. Lormon is a partner at Procopio Cory Hargreaves & Satch LLP in San Diego and chair of its Environmental and Land Use Practice. He may be reached at [jjl@procopio.com](mailto:jjl@procopio.com).*