CALIFORNIA'S BAN ON POINT AND NON-POINT DISCHARGES OF WASTE INTO AREAS OF SPECIAL BIOLOGICAL SIGNIFICANCE

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There are 1,658 waste water discharges into 34 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 non-point 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 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, 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. Lastly, it notes that the holding of a California Supreme Court case, The City of Burbank v. State Water Resources Control Board, 2005 Cal. Lexis 3486 (Cal. April 4, 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, the federal Clean Water Act ("CWA"), Section 303(a) (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 1972 (the "Ocean Plan"). Since its adoption the Ocean Plan has been amended eight times. The state board is responsible for reviewing the Ocean Plan water quality standards on a tri-annual basis 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 1974,33 ASBSs were designated, and one more was added to the list in 1975. For a list and map of all 34 ASBSs, see *www.swrcb.ca.gov plnspols/oplans/asbs.html*.

Initially, the Ocean Plan's ASBS discharge restriction was limited to point source discharges from power plants and to sewage or industrial facilities that could "alter natural water quality conditions." However, when the state board amended the Ocean Plan in 1978, stormwater, whether it was classified as a point source or a non-point source, became subject to the ASBS restriction.

In 1983, the state board further amended the Ocean Plan by prohibiting all waste discharges to ASBSs. Henceforth, all

discharges into ASBSs were subject to strict liability; and issues of harm, impact, or cost did not change the prohibition. In contrast to the 1972 requirement that "waste shall be discharged a sufficient distance from" ASBSs, the 1983 language directed that "[W]aste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas." (Ocean Plan III.E.1.). Since 1983, the only relevant change in the Ocean Plan prohibition has been to authorize regional boards to allow temporary discharges into ASBSs for limited term activities such as maintenance or repair of existing boat facilities, restoration of sea walls, or repairs to bridges. (Ocean Plan III.E.2.).

THE OCEAN PLAN EXCEPTION

Notwithstanding the ASBS discharge prohibition, the Ocean Plan has always allowed the state board to grant an exception to any Ocean Plan requirement, including the ASBS waste discharge prohibition, provided certain conditions were met. (Ocean Plan III.I). These conditions are both procedural and substantive. The state board must provide public notice and hold a hearing before acting on a request for an exception.

The state board must comply with the California Environmental Quality Act ("CEQA"), Ca. Public Resources Code, Section 2100, et. seq., a requirement that does not apply to the issuance of an NPDES permit. Cal. Water Code Section 13389. Before granting an exception, the state board must make the following two findings: (1) that the exception will not compromise the protection of ocean waters for beneficial uses, and (2) that the public interest will be served. (Ocean Plan, III.I.). The United States Environmental Protection Agency ("EPA") must concur with the decision, and any conditions which the state board imposes in granting the exception must be incorporated by the regional board into the NPDES/WDR permit. Finally, any exception which the state board grants is subject to review and revocation at any time, and all exceptions automatically sunset within five years and a new application must be timely filed. Thus, for discharges into an ASBS to be in compliance with the law, the discharger must have both an approved exception from the state board and an NPDES/WDR permit or waiver from the regional board.

Notwithstanding the Ocean Plan prohibition, compliance with the ASBS requirement has been limited. Between 1977 and 1984, the state board granted three exceptions to the discharge prohibition to sewage treatment facilities. (State Board Resolutions Nos. 77-11, 83-81, and 84-78.) The state board also granted an exception in 1990 to the U.S. Navy for the discharge of brine from its desalination facility on San Nicolas Island, (State Board Resolution No. 90-105), and in 2004 granted a fifth exception to Scripps for its discharges of return seawater and stormwater into the San Diego Marine Life Refuge (now called the San Diego-Scripps) ASBS. (State Board Resolution No. 2004-0052). See, *www.waterboards.ca.gov*.

Through June 2005, only one enforcement action for illegal discharges into an ASBS had been prosecuted. On November 16, 2000, the Santa Ana Regional Board issued a cease and desist order ("CDO") to The Irvine Company, the California Department of Parks and Recreations, and the California Department of Transportation ("Caltrans"). (S anta Ana Regional Board Order No. 00- 87). The CDO contained findings that the discharges were violating or threatening to violate the ASBS discharge prohibition. Each of the parties was given a period of time to come into compliance. Ultimately, all three entities stopped their discharges, although Caltrans timely petitioned the regional board's CDO decision to the state board. (In the Matter of the Petition of California Department of Transportation for Review of Cease and Desist Order No. 00-87 for Crystal Cove, State Board Order WQ 2001-08). In April of 2001, the state board found that Caltrans was in violation of the Ocean Plan ASBS discharge prohibition, and concluded that: (1) waste was being discharged through stormwater drains from the Pacific Coast Highway; (2) discharges on the beach above the high tide line constituted discharges to the ASBS; (3) the Ocean Plan regulates the discharge of waste through stormwater conveyances; and (4) coverage under Caltrans' statewide NPDES stormwater permit did not relieve Caltrans from complying with the Ocean Plan prohibition on discharges into the ASBS.

In response to Caltrans' concerns about the technical feasibility of preventing all discharges, the possible adverse environmental impacts from diversion and concentration of pollutants at a new location, and the costs to achieve compliance (Caltrans later indicated that it spent $3.5 million on this project), the state board noted that the Ocean Plan contains a provision allowing the state board, under specified conditions, to grant exceptions to all aspects of the Ocean Plan, including the discharge prohibition. (Order WQ2001-08 at pp 5-12). Because of the state board's concern about the technical feasibility and possible environmental effects of efforts to prevent the discharges to the ASBS, it extended Caltrans' date for compliance with the discharge prohibition by one year. (Id. at 13).

In 2001, the state board commissioned a study by the Southern California Coastal Water Research Project ("SCCWRP") to determine the number and nature of point and non-point discharges into the 34 ASBSs. In July 2003, the "Final Report: Discharges Into State Water Quality Protection Areas" ("SCCWRP Report") was issued. The report refers to State Water Quality Protection Areas ("SWQPAs") because under state law ASBSs are a subset of SWQPAs. The SCCWRP Report divided ASBS drainages into "outlets" or "discharges." Outlets were defined as a naturally occurring water body (including streams, naturally occurring gullies in coastal bluffs, and springs or seeps in wild areas) that drain into or immediately adjacent to an ASBS. Outlets are not subject to the prohibition. The SCCWRP Report identified 637 outlets. "Discharges" were defined as anthropogenic sources of a discernable volume of water that flows or is released directly into or

immediately adjacent to an ASBS. The SCCWRP Report identified 1,658 direct discharges into ASBSs/SWQPAs. These discharges were classified into 31 wastewater discharge points, 391 municipal/industrial storm drains, 1,012 small storm drains (e.g., from individual properties), and 224 non-point sources.

The 31 wastewater ASBS discharge points are controlled by 13 dischargers. At the time of the SCCWRP Report, only four of these dischargers had permits and exceptions, and of the remaining nine, three had permits but no exception, and six were lacking both exceptions and permits. Clearly this was a compliance and enforcement gap that needed to be addressed. On the compliance side, the issue of zero discharge to ASBSs is a barrier to NPDES/WDR permit issuance because prior to issuing a permit, the regional boards are required to make a finding that the discharger is in compliance with the water quality laws, and to achieve such compliance, all ASBS discharges must have an exception. Thus, the permit renewal process is, in part, pushing the ASBS issue.

Currently, no Phase I MS4 or Phase II MS4 ASBS stormwater discharger has obtained an exception. Caltrans still discharges wet and dry weather runoff to several ASBSs without an exception under a statewide stormwater permit covering both municipal and construction-related discharges. Further, numerous public and private entities, including federal and state agencies, discharge into ASBSs under stormwater permits, all without an Ocean Plan exception. Statewide, the only discharger of stormwater runoff into an ASBS with both an NPDES permit and an exception is Scripps.

CALIFORNIA RECLASSIFIES ITS PROTECTED MARINE RESOURCES PROGRAMS.

At the same time that the ASBS issues were starting to crystallize in 2000, the California Legislature passed The Marine Managed Areas Improvement Act. (Cal. Pub. Res. Code ("PRC") § 36601 et seq.). That Act was designed to address the fragmented nature of marine resource regulation in California. An important element of the Act was the directive that Marine Managed Areas ("MMAs"), which existed under 18 classifications and subclassifications, should be reclassified to include only the following six classifications: state marine reserves, state marine parks, state marine conservation areas, state marine cultural preservation areas, state marine recreational management areas, and SWQPAs. (PRC § 36601(a) (4)) . This reclassification was made effective January 1, 2003. (PRC § 36750). SWQPAs are defined as "a non-terrestrial marine or estuarine area designated to protect marine species or biological communities from an undesirable alteration in natural water quality, including, but not limited to, areas of special biological significance that have been designated by the State Water Resources Control Board through its water quality control planning process." (PRC § 36700(f)).

In 2004, the California Legislature amended PRC § 36700(f) and added the following language to that subsection: "Areas of special biological significance are a subset of state water quality protection areas, and require special protection as determined by the State Water Resources Control Board pursuant to the California Ocean Plan . . . ." This change was important to the environmental community who felt that the SWQPA discharge protection provided by the state statute was not as stringent as the Ocean Plan ASBS prohibition. They were concerned that the 2003 re-classification would trump the stronger Ocean Plan protections. The root of this concern is found in the language that provides that in SWQPAs "waste discharges shall be prohibited or limited by the imposition of special conditions ..." (PRC § 36710(f) (emphasis added)). However, the Ocean Plan exception provision already provided for the application of "special conditions" for discharges into ASBSs.

In December 2003, the state board staff issued an informational document to support the proposed 2004 Ocean Plan amendments. ("Informational Document Public Scoping Meeting for the Proposed Amendment of the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan," December 2003, ("Ocean Plan Informational Document 2003") (www.waterboards.ca.gov.). Included in the Ocean Plan Informational Document was a proposal that would re-classify ASBSs to SWQPAs and establish provisions for discharges into SWQPAs. These proposed changes provided a template of the "special conditions" that dischargers to ASBSs/SWQPAs must satisfy. It also provided that non-point sources were to be controlled "to the extent practicable." (Id. at p. 21).

Implementation of this prohibition was to be within three years of the effective date of the proposed amendment to the Ocean Plan. Dischargers would be required to specifically address the prohibition of non-stormwater discharges into the ASBSs in their stormwater management plans. Stormwater dischargers would not be permitted to cause or contribute to an exceedance of the Ocean Plan water quality objectives, and such discharges would be subject to an accelerated best management practices ("BMP") schedule to ensure that they were implemented as soon as possible. If the monitoring data indicated that a discharge was causing or contributing to an exceedance of applicable water quality objectives additional monitoring would be required. So long as the discharger complied with the procedures described in the revised stormwater management plan, the discharger would not have to repeat the same procedures for continuing or recurring exceedances of the water quality objectives unless directed by the regional board to take additional actions. (Id at p. 33).

The state board staff noted that little or no data had been developed to determine what "natural water quality" was in these ASBSs, nor had data been developed to determine what was required for protection of species or the biological communities. In effect, the state could not define natural water quality nor determine when, or if, an alteration of natural water quality had occurred. Recognizing the need for the data, the staff sought to develop common monitoring requirements to provide meaningful information about the status of the water quality and the marine life in the vicinity of

the discharge. Minimum effluent monitoring would include flow measurements and analysis for all 83 Ocean Plan Table B constituents during both wet and dry weather events. Monitoring to detect bioaccumulative toxins in the discharge zone, as determined by chemical analysis of mussel tissues and monitoring of the intertidal and sub-tidal benthic communities, would be required. Sediment quality monitoring and receiving water indicator bacteria analysis would be required. These minimum monitoring requirements would not preclude the regional board from imposing additional monitoring obligations in the permit. Finally, regional monitoring could be substituted for individual monitoring if found acceptable to the regional board.

The state board was motivated by its recognition of the absolute nature of the ASBS discharge prohibition and by the practical limitations on a complete ban of wet weather discharges into ASBSs, as well as the limitation on its own staff resources. The staff was trying to help the regulated community by proposing a framework and general criteria for discharges into ASBSs, and to avoid a case-by-case approach for authorizing such discharges.

The staff's effort was criticized by both the regulated community and by the environmental community. The dischargers agreed that it was important to have a predictable statewide approach to authorizing discharges to these protected areas; however, they felt that the current NPDES/WDR permit process was adequate for this purpose. (Caltrans January, 2004 comment letter on the state board December, 2003 Information Document; also see, Caltrans December 2, 2004, letter to state board regarding discharges to ASBSs.) This argument ignores the Ocean Plan ASBS discharge prohibition and the requirement to obtain an exception. Most NPDES/ WDR monitoring would not address the need for enhanced monitoring in an AS B S. Furthermore, the argument that an NPDES/WDR obviates the need for an Ocean Plan exception was rejected by the state board in the Crystal Cove case.

The dischargers argued that since ASBSs were originally designated in the 1970s when stormwater was considered to be a non-point source to be controlled "to the extent practicable," the state board's change in its regulatory approach to stormwater allegedly did not comply with procedural requirements for establishing water quality control plans, and thus resulted in oversights and legal flaws in the Ocean Plan. (Id. at pp. 4-5). This argument faces serious problems as to its timeliness, although the dischargers may be able to avoid the statute problem by raising these concerns during the Ocean Plan Triennial review.

Some were concerned that discharges to the land, even though relatively far from the ocean, would be considered discharges to the ASBS, when in fact it was virtually impossible for any measurable pollutant to enter the surface waters and interfere with the beneficial uses. Caltrans was particularly concerned that their existing roadway infiltration program would no longer be able to be used to address runoff in these areas. This situation would result in the requirement to physically divert all discharges outside the ASBSs. Such an interpretation would require construction of many miles of conveyance systems insensitive coastal areas. Transporting runoff through miles of pipelines could lead to beach scouring and erosion at the new discharge point, resulting in substantial construction and maintenance costs, and such a discharge could create detrimental effects in areas outside the ASBS. These arguments address the "public interest" finding that the state board must take into account when a request for an exception is submitted; however, absent a change in the ASBS discharge prohibition these facts do not obviate the need for an exception.

Because ocean currents outside an ASBS can affect the ASBS, the dischargers were concerned that the burden of proof is improperly shifted to the discharger, requiring the dischargers to develop fate and transport models to show that their discharge did not cause an exceedance. Scripps is working on near shore fate and transport models and it is employing the Southern California Coastal Ocean Observing System ("SCCOOS") to provide real time assessment of ocean currents, ocean temperatures, and water quality. Scripps is assessing the overlaps between inland, coastal and open ocean events in a way that allows for the observation, analysis, and forecast of natural and human-induced changes in the ASBS. These efforts will provide guidance that may be helpful for ASBS discharger source identification, data management, and in determining "natural water quality."

The cost of wet weather treatment systems and the fact that these systems will physically be incapable of handling most wet weather events is a major concern. The dischargers believe that the ASBS prohibition is being applied as a whole new and additional regulatory program without any evidence that these discharges, as currently managed, are causing water quality problems in the ASBSs. (Id. at p. 6). Thus, before the state embarks on a major and costly new regulatory program, it should investigate the scope of the problem. There is an immediate need to develop and assess data so that both the state and dischargers can be better informed. Yet there is a debate about who should pay for all this data development.

While asserting that there is no evidence of harm, the dischargers acknowledged that wet weather discharges often contain bacteria levels which exceed numeric Ocean Plan standards. Such pollutant concentrations may result from natural sources such as birds and mammals in the watershed; nevertheless, such discharges could result in non-compliance. If the discharger can demonstrate that the exceedances result from natural causes, then the prohibition would not be violated, underscoring the need for sophisticated and consistent monitoring tools and systems.

The dischargers also argued that if they are required to obtain an exception, then a mixing zone should be considered for these discharges. Alternative compliance approaches should be allowed using end-of-pipe discharges as "triggers" to

initiate subsequent management actions. Under this approach, an exceedance would not be a violation unless an actual risk existed or the discharger failed to take required action to reduce the risk. It was also suggested that a de minimis provision be added to the Ocean Plan, so that minor discharge exceedances would not be subject to the regulation. (Id. at p. 9).

While the state board was being criticized by the regulated community for its proposed modifications to the Ocean Plan, it was also being criticized by environmental groups for what they believed was an attempt to relax the Ocean Plan ASBS prohibition. The environmental community was concerned that the state board's proposed Ocean Plan amendments were based on an erroneous assumption that the Marine Managed Areas Improvement Act had the effect of changing the substance of the preexisting Ocean Plan ASBS prohibition. (The Ocean Conservancy January 4, 2004, comment letter on the state board's December, 2003 Informational Document). The Ocean Conservancy opposes the amendments because the preservation and enhancement of any ASBS is a beneficial use that the Legislature did not eliminate when it established the SWQPAs. They believe that both programs should legally co-exist while preserving the ban on discharges into ASBSs. They felt that the regional and state boards must enforce the standards necessary to protect "natural water quality" and the sensitive biological communities that inhabit the ASBSs. The state board's proposed amendments would potentially legalize many existing illegal discharges and would reward those who have avoided the discharge prohibition in the past with a set of standards that would permit additional discharges, inevitably resulting in an increased impact on the natural water quality in these areas.

The environmentalists noted that stormwater runoff is listed as the number one source of pollutants to California coastal waters ("Natural Water Quality Inventory, 1998 Report to Congress" (EPA 841-R-00-0001) at 282-283), and the 1,403 existing stormwater discharges into ASBSs should not be approved by general "limiting conditions" which mostly just accelerate the time schedule for what are otherwise already required stormwater permit obligations. Also, they were concerned that there was no requirement that the dischargers achieve a quantitative reduction in what might be causing or contributing to the exceedance of natural water quality.

The proposed amendment would require the discharger to submit a report only once even if an exceedance continued. Prohibiting non-stormwater discharges through stormwater conveyance is already required under existing laws. (See 40 CFR § 122.34). Requiring additional monitoring is commendable, but it does not prohibit stormwater discharges, or even limit them, with truly meaningful special conditions. The only possible assurance that natural water quality will be protected is to prohibit discharges into ASBSs. Thus, the most pressing issue is enforcement against dischargers who have not obtained an exception. The fact that the discharge prohibition has been in place for more than 20 years makes inexplicable the offer of three additional years to achieve compliance.

The environmental community also argued that the proposed amendments were an illegal attempt to de-designate a beneficial use. The state may only remove a designated use after notice and an opportunity for a public hearing. 40 CFR § 131.10(e). In addition, the state may only remove designated uses that are not being obtained where it is demonstrated that obtaining the designated use is not feasible. Id. at § 131.10(g). Significant procedural and substantive requirements associated with de-designation of a beneficial use allegedly were not followed by the state board. Thus, the state cannot make the required showing that the prohibition on discharges into these 34 ASBSs is not economically feasible, particularly in light of the availability of voter approved bond money that had been made available in California to assist in achieving this goal.

The environmentalists further argued that the proposed amendments were an attempt to change legally established water quality standards. A water quality standard consists of a use, and the criteria necessary to protect the use, as well as an antidegradation component. The Ocean Plan provides for the preservation and enhancement of ASBSs and for the maintenance of natural water quality conditions through the prohibition of discharges into ASBSs. Taken together, these elements clearly comprise a water quality standard. Under CWA § 303(c), as implemented by 40 CFR § 131.20, a state is required to conduct public hearings for the purpose of modifying a water quality standard. To make this modification, a substantive showing regarding the attainability of the standard and the proposed modification must be submitted to the EPA for approval. The state board may not circumvent these requirements by classifying the standard modification as an administrative change to the Ocean Plan. (In the City of Burbank case, the court was not convinced that state water quality plans, when approved by the EPA, become federal water quality standards. Supra at p. 14.)

Finally, the environmental community asserted that the proposed amendments would violate federal and state anti-degradation policies. See 40 CFR § 131.13, and state board Resolution No. 068-16 (October 28, 1968), (Anti-degradation Policy). If changes to the quality of the ASBSs are permissible at all, they may only be accomplished after a complete antidegradation analysis and an affirmative showing that meets the requirements of the policies. The state board had not performed any such analysis, and therefore it could not adopt the proposed amendments.

In 2004, the state board withdrew most of its proposed Ocean Plan ASBS amendments. In the watch-what-you wish-for world, the dischargers now had no template or guidance, and they were required to apply on a case-by-case basis for an exception. In 2005, many of those same stormwater dischargers are now pushing for general ASBS stormwater exception conditions.

MANAGING AN ASBS DISCHARGE

The initial proposal for a general stormwater exception process was taking place at about the same time that Scripps (an industrial point source and stormwater discharger) was applying for an exception and that other ASBS dischargers were threatened with enforcement orders. It is instructive to consider how each of these parties managed their way through the exception, the NPDES permit renewal process, or the enforcement process.

THE CENTRAL COAST REGIONAL BOARD DRAFT ENFORCEMENT ORDER

The Central Coast Regional Water Quality Control Board published a draft cease and desist order ("CDO") on December 23, 2004. The timing of this draft CDO was driven by a soon to be issued Monterey Bay MS4 Phase II stormwater permit. The City of Pacific Grove, the City of Monterey, the Pebble Beach Company, and the City of Carmel-by-the-Sea, all within Monterey County, were each issued a draft CDO for stormwater runoff. The draft CDO alleged that each entity either directly or indirectly discharged to either the Carmel Bay ASBS or to the Pacific Grove ASBS.

The draft CDO noted that since 1983, the Ocean Plan has prohibited waste discharges into ASBSs, and that on October 18, 2004, the state board issued ASBS waste discharge prohibition letters to 29 entities statewide including the City of Pacific Grove, the Pebble Beach Company, and the City of Carmel-by-the Sea. The City of Monterey was not issued a prohibition letter but was joined by the regional board in the CDO process because of its indirect discharge through the City of Pacific Grove's storm drain to an ASBS. The state board letter explained that the stormwater discharges from each entity violated the ASBS discharge prohibition in Section III.E.1 of the Ocean Plan. That letter asked the discharger to notify the state board by January 1, 2005, as to whether the discharger intended to apply for an exception to the ASBS prohibition. The CDO noted that the regional board cannot grant an exception to the ASBS discharge. If a municipality chooses to apply for an exception, and it is granted, the requirements for the exception will prevail over conflicting provisions of the CDO. Under the holding of the City of Burbank case, the state must consider economic factors when establishing more stringent state effluent limits (the ASBS discharge prohibition is arguably a zero effluent limit). However, it is not clear that this requirement to consider economic impacts applies when the state board grants an exception to the ASBS discharge prohibition. And, because the regional board has to incorporate the conditions imposed on the exception by the state board, it cannot consider economic factors when issuing the discharge permit.

Some dischargers have dug in to fight against the issuance of the CDO by filing litigation-like motions to modify the administrative proceedings, intending to subpoena witnesses, voir dire and cross examine the regional board staff regarding the CDO, call expert witnesses to testify about the lack of impact of their discharge and to prove that there is no need for the proposed limitations required in the Ocean Plan or the CDO. A party's right to a full and fair hearing and the opportunity to prepare and put on a defense, to offer their own witness and cross examine agency personnel are important but must be carefully applied in the context of an administrative proceeding. A transfer of litigation practices to an agency forum can be a recipe for disaster. Legalistic arguments, whether right or wrong, tend to marginalize the petitioner and leave institutional memories that can damage the discharger-agency relationship for a long time. Indeed, the only valid legal arguments against needing an exception are to cease the discharge, to show that there is no waste in the discharge, or to prove that the discharge is from a natural drainage.

THE SCRIPPS APPROACH

Scripps is an internationally recognized oceanographic and earth observation institution which has operated at its current location in La Jolla, California since 1910. The Scripps' facilities include the Stephen Birch Aquarium which has over 400,000 visitors a year, the National Marine Fisheries laboratory which leases buildings and aquaria on campus, and numerous research aquaria and laboratory facilities that all rely on a continuous flow and discharge of up to a million gallons of fresh seawater daily.

Scripps first received a waste discharge permit from the state in 1969. In the original, and all permit renewals, the regional board made a specific finding that the Scripps sea water discharge was not harming the receiving waters. In 2002, the regional board told Scripps that it had to develop data to show it was not altering natural water quality in the ASBS. Scripps was presented with the option to either apply for an exception from the Ocean Plan for both its sea water and stormwater discharges, or to cease the discharges.

Scripps had a bit of an Elisabeth Kübler Ross near-death experience where it went through emotions ranging from denial, anger, bargaining, depression and acceptance. To Scripps' credit, it reoriented its internal dialogue toward developing a strategy for data development and compliance. As a premier scientific and earth observation institution it recognized that this was a call for stewardship and an obligation it had to serve the public trust. Its response required recognition that the prohibition is the manifestation of a long developing concern for protecting the health of sensitive coastal resources. In part, it was through Scripps own efforts some 30 years earlier that these ASBSs were proposed and designated.

Scripps recognized that the state board's desire to protect ASBSs was not happening in a vacuum. It understood the critical function that near shore habitat has in sustainable ecosystem management programs, it appreciated the biological

significance of these areas as nurseries for much of the sea life in the Pacific, and it acknowledged that human impacts generated by coastal development, such as urban runoff, has the potential to affect coastal habitat and ecosystem functions. It also appreciated the importance and need to develop science-based monitoring data and to establish an information management system to interpret this data.

Scripps recognized that there is often a huge chasm between what is required and what is actually achievable and affordable in these programs. Scripps worked collaboratively with the state board, the regional board, and the environmental community to define the methodologies for establishing the scope and purpose of the conditions that would apply to the exception. Scripps reserved the right to return to the regional board at any time to request changes to the permit based on data development and assessment. Scripps' approach is not the only way, and each discharger's factual situation will vary, but Scripps is a good example of collaborative negotiation with all parties involved. On July 22, 2004, almost two years after it was asked to apply, the state board granted Scripps an exception that includes 19 conditions. These conditions were then incorporated into the Scripps NPDES/WDR permit renewal by the San Diego Regional Board on February 9, 2005.

CONCLUSION

In the case of point source industrial discharges to an ASBS, the example that Scripps set of recognition, cooperative negotiation and meaningful participation of all parties and the right to modify permit conditions as data is developed is a good example for a discharger on how to manage its organization through the Ocean Plan exception and the NPDES/WDR permit renewal processes. In the long run, such an approach will best serve both the dischargers and the ASBS resources. In the case of stormwater only dischargers, it is appropriate to meet with the regulators and to propose and comment on general conditions that should apply to these ASBS discharges. All parties should closely review and utilize the monitoring data that will be developed as part of the conditions of the exception from the Ocean Plan prohibition. Finally, based on this data, informed decisions should be made about the need for, the economic impact of, and the scope of the ban.

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