



THE IRVINE COMPANY

Sat Tamaribuchi
Vice President
Environmental Affairs

Stan Martinson, Division Chief, Division of Water Quality
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

December 28, 2005

Subject: Irvine Coast Marine Life Refuge Area of Special Biological Significance

Dear Mr. Martinson:

We are writing to confirm our understanding of agency staff's reasons for classifying The Irvine Company as a discharger into the Irvine Coast Marine Life Refuge – an Area of Special Biological Significance (ASBS) regulated under the State Board's Ocean Plan – as well as to comment on the implications of this classification, if applied generally to other similarly situated dischargers throughout the State.

Background

A letter from Tom Howard of the State Water Resources Control Board (State Board) to The Irvine Company (TIC), dated October 18, 2004, stated that we were discharging into the ASBS. In April 2005 we were informed that we would not need to secure an exception but would need to cooperate with State Parks and the Pelican Point Homeowner's Association on their request for exception. However, recent inclusion of TIC as a discharger on the State Board's draft list of ASBS priorities indicates that the State Board again plans to regulate TIC as a discharger into the ASBS. During our meeting on November 3, 2005, Dominic Gregorio commented that TIC would be regulated as a discharger.

Staff's New Position on "Discharger" Issue

We want to understand the agency staff's apparent position that TIC is a discharger so that we can appropriately respond to it. My understanding is that staff have two theories upon which they suggest that TIC is discharging into the Irvine Coast ASBS.

One theory is that reclaimed water used to irrigate our Pelican Hill Golf Course (Golf Course) is entering groundwater, causing the groundwater table to rise and groundwater (including the irrigation water, and potentially pollutants carried in it) to seep into an existing drainage course that then flows over a coastal bluff to the ASBS. The Golf Course is located on the inland side of Pacific Coast Highway, which runs generally parallel to Irvine Coast. Crystal Cove State Park

occupies the coastal side of Pacific Coast Highway. Although the drainage course is pre-existing, we understand that State Park staff believe that the flow did not exist prior to construction of the Golf Course, and the agency staff believe that the increased flow is due to the Golf Course's irrigation water.

The other theory is that stormwater from the Golf Course that enters the drainage course via a culvert proximate to Pacific Coast Highway is equivalent to a direct discharge into the ASBS. The drainage channel at this location is above the seep, and ephemeral. Staff have indicated that it is the ephemeral nature of the drainage course that renders stormwater entering it a direct discharge to the ASBS. In other words, if the drainage course were perennial, staff would recognize the stormwater as discharging to the channel – not the ASBS.

Potential Implications

We see several troublesome implications of characterizing TIC, as well as other similarly situated entities, as dischargers. If State Board staff consider us to be a discharger under the first theory, then every entity that applies water – not just reclaimed water – to the ground also could be characterized as a discharger, as it is likely that at least some of the applied water will eventually enter groundwater and flow with other groundwater to the ASBS. Entry to the ASBS may occur either when groundwater enters a surface drainage that flows to the ASBS or when the groundwater, remaining underground, hydraulically connects to the ASBS. Either would constitute a discharge under the staff's theories.

This is an extremely broad policy; many entities could be encompassed in its reach, including individual homeowners who water their landscaping. All such entities would be required to obtain Waste Discharge Requirements, which would be an unprecedented initiative, and a burdensome task for the Regional Water Quality Control Boards (Regional Boards) who issue such requirements. Also, as these dischargers could not reasonably anticipate such a circuitous and attenuated application of the Waste Discharge Requirements program, any such application raises serious due process concerns, leaving numerous unsuspecting persons and entities out of compliance.

Any State Board policy labeling entities such as TIC dischargers also may lead to enforcement problems. It will be difficult, if not impossible, to distinguish water applied to the ground by one entity from water applied to the ground by another, and then to trace that water back to the entity that applied it.

Staff's surface water theories similarly are problematic. Staff's rationale ignores the fact that Regional Boards recognize ephemeral drains as inland surface waters to which discharges can occur. Thus, staff's theory is inconsistent with Regional Board policy, and creates two discharges for the same stormwater – first into the ephemeral drain (under Regional Board policy), and second to the ASBS (under staff's theory). Staff's nascent theory thus creates an inconsistency with long-held policy to recognize and regulate ephemeral drainages as water bodies to which discharges can occur.

Also, staff appear to be proposing to regulate TIC because its overland flow (referred to by the agency as "run-on") happens to enter an ephemeral drain before the ASBS. Would not staff's theory require it to regulate all overland flow and other discharges into rivers and creeks that flow into the ASBS? Does not this create the specter of walling off the ASBS from the adjoining

land mass – as CalTrans and others have argued is the logical extension of the agency's direction?

Obviously, subjecting all overland flow, and all runoff which eventually reaches the ASBS, to discharger requirements would effect a further sweeping expansion, with no reasonable notice, of the ASBS program.

Additional problems are associated with staff's underlying apparent premise – that all water entering ASBSs either directly or indirectly from the land, unless from perfectly pristine areas, must be subject to an absolute prohibition. Since ASBSs cover about one-third of the California coastline, this approach is very aggressive. Since there is no evidence that ASBSs are generally at risk from such water, the benefits of any such expansive regulation are very suspect, and certainly not apparent.

Finally, this one-molecule approach is so stringent that it could turn almost all water to waste, a result clearly not intended under Porter-Cologne where reasonable tolerance for unharmed pollutant quantities is contemplated, as we understand it. This one-molecule approach undermines the Best Management Practices approach to runoff, since BMPs do not eliminate all molecules, and discourages water reclamation and reuse.

These implications are inherent in staff's policy direction, and should be considered now, as the State Board develops its regulatory approach to discharges into ASBSs.

Conclusions

Please confirm whether we have accurately stated the bases of staff's theories for suggesting that we are discharging waste into the Irvine Coast ASBS; or, if our bases are not accurate, please assist us in understanding your position. Also, please explain staff's perceived legal basis for taking this position, as our understanding of the law does not suggest such a basis.

I look forward to your response and to working with the State Board to understand its compliance approach and to ensure continued compliance with the law.

Sincerely,



Sat Tamaribuchi

cc: Dominic Gregorio
Michael Adackapara
Gerald Thibeault
Garry Brown
Dave Kiff