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6/26/07 Scoping Mtg
CA Ocean Plan Amend.
Deadline: 7/27/07 Noon

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July 26, 2007

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State Water Resources Control Board
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Via E-Mail, Facsimile and Regular Mail

RE: Comments to Scoping Document - Amendments to the Water Quality Control Plan, Ocean Waters of California, June 2007

Dear Ms. Her:

Thank you for this opportunity to submit comments to the above referenced Scoping Document for the proposed amendments to the Ocean Plan (hereinafter "Proposed Amendments") on behalf of clients of this firm.

A. The Proposed Amendments to the Ocean Plan Invalidly Expand the Scope of the Ocean Plan Expressly Formulated by the State Legislature.

The Ocean Plan is specifically discussed in Section 13170.2 of the California Water Code. Section 13170.2(c) states the following: "In formulating the plan, the state board shall develop bioassay protocols to evaluate the effect of municipal and industrial waste discharges on the marine environment." Expressly stated, the Ocean Plan's focus must be on the effect of municipal and industrial waste discharges and not on any other land uses or nonpoint source discharges. Had the legislature intended the Ocean Plan to monitor other land uses, other than municipal and industrial uses, it could easily have included such language.

Section 13172.2(d) requires the State Water Resources Control Board (hereinafter the "SWRCB") to adopt "bioassay protocols and complementary chemical testing methods for complex effluent ocean discharges by entities discharging 100 million gallons per day or more by January 1, 1991". (*Emphasis Added.*) By referencing 100 million gallons per day, the legislature's intent is to grant authority to the SWRCB to regulate large discharges/dischargers to the ocean through the implementation of the Ocean Plan.

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The federal Clean Water Act defines “effluent” as “quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean”. 33 USCS § 1362 (11).¹ Moreover, the term “discharges” only apply to point source discharges. *Oregon Natural Desert Ass’n v. Dombeck* (1998) 172 F.3d 1092. In following these definitions, the SWRCB’s authority to establish effluent limits to the ocean applies to point source discharges only. The point source discharge to ocean waters is regulated by the SWRCB primarily through the inclusion of effluent limitations in waste discharge requirements, which implement the water quality objectives in Table B of the Ocean Plan. *In the Matter of the Petitions of FRIENDS OF THE SEA OTTER AND DEPARTMENT OF FISH AND GAME For Review of Orders Nos. 88-09 and 88-183 of the California Regional Water Quality Control Board, Central Coast Region* (1990), NPDES Permit No. CA0049280.

In conclusion, the legislative intent of the Ocean Plan is to monitor large municipal and industrial point source waste discharges into the ocean. The Proposed Amendments invalidly expand the scope of the Ocean Plan expressly formulated by the state legislature. To be consistent with the legislature’s scope, we recommend the Proposed Amendments be revised to limit the monitoring requirements of the Ocean Plan to large municipal and industrial point source waste discharges pending any further legislative developments.

B. Congress Did Not Intend Effluent Limitations to Apply to Nonpoint Sources.

Under the federal Clean Water Act, Congress did not intend effluent limitations to apply to nonpoint sources. *Oregon Natural Desert Ass’n v. Dombeck* (1998) 172 F.3d 1092. Instead, nonpoint source releases are addressed through each state’s Nonpoint Source Pollution Control Program.² *CA Wat Code §13369; 33 USCS §1329*. Under California’s Nonpoint Source Program Five Year Implementation Plan (July 2003 through June 2008) (hereinafter “NSP Implementation Plan”), the focus is on management practices and not on effluent limitations/objectives. Moreover, neither the reporting of waste discharge nor the waiver of its requirement apply to pasture lands, irrigated or not, under the NSP Implementation Plan. Instead, the NSP Implementation Plan references voluntary/cooperative programs for grazing lands such as the California Rangeland Water

¹“Effluent limitation” means “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 USCS § 1362 (11); *Emphasis Added*.

Note: The terms “effluent” and “discharges” are not specifically defined in Division 7 of the California Water Code.

²Nonpoint source releases may also be regulated under other programs such as the total maximum daily load (TMDL) program for impaired water bodies, which is a separate and distinct program and is not directly applicable to the Ocean Plan.

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Quality Management Plan. *Section IE, Appendix II, Nonpoint Source Program Five Year Implementation Plan (July 2003 through June 2008).*

C. If Nonpoint Sources Are Regulated, the Definition of "Irrigated Lands" Should Be Consistent with an Existing Conditional Waiver Program.

While the regulation of nonpoint sources is not prescribed by the state legislature for the Ocean Plan, there are other existing programs that regulate nonpoint sources. If the SWRCB elects to invalidly broaden the authority granted by the state legislature, then the terms in the Proposed Amendments should be consistent with an existing conditional waiver program of the Central Coast Regional Water Quality Control Board (RWQCB) to prevent confusion and inconsistencies in enforcement.

In particular, the definition for the term "irrigated lands", as defined in Section 3.3 of Appendix III of the Proposed Amendments, should be revised to match the following definition in the RWQCB Order No. R3-2004-0117, which enacted the Conditional Waiver of Waste Discharge Requirements for Irrigated Lands: "Irrigated lands are lands where water is applied for producing commercial crops and, for the purpose of this program, include, but are not limited to land planted to row, vineyard, field and tree crops as well as commercial nurseries, nursery stock production and greenhouse operations with soil floors that are not currently operating under Waste Discharge Requirement (WDR)." *SWRCB Order No. R3-2004-0117; Emphasis Added.* Grazing land does not fall within this definition.

Moreover, expressly stated in Section 3.3, Appendix III of the Proposed Amendments, the intent of the Proposed Amendments is to apply the nonpoint source monitoring requirements to two specific land use categories: "(a) Agriculture" and "(g) Golf Courses not covered under an NPDES Permit." The Section specifically excludes "(b) Grazing" land use from the nonpoint source monitoring requirements. The exclusion should apply to all grazing lands, irrigated or not.

In conclusion, we recommend that the definition of "irrigated lands" be revised to be consistent with the RWQCB's existing conditional waiver program and the express intent of the Proposed Amendments to monitor agriculture and golf course nonpoint source discharges only.

We appreciate this opportunity to comment on the Scoping Document.

Respectfully submitted,



Pamela H. Silkwood

cc: Damien Schiff, Esq., Pacific Legal Foundation