

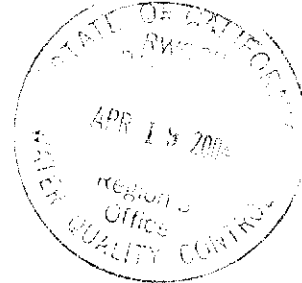


NATURAL RESOURCES DEFENSE COUNCIL

April 16, 2004

Via Federal Express

Bruce Fujimoto
Jarma Bennett
Division of Water Quality
State Water Resources Control Board
PO Box 1977
Sacramento, CA 95812-1977



Jennifer Bitting
Central Coast Regional Water Quality Control Board
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Re: Monterey Regional Storm Water Management Program

Dear Mr. Fujimoto, Ms. Bennett, and Ms. Bitting,

On behalf of the Natural Resources Defense Council (NRDC) and its more than 100,000 California members, we submit the following comments regarding the Monterey Regional Storm Water Management Program (MRSWMP). NRDC thanks you for the opportunity to review and provide comments on the MRSWMP.

In accordance with procedures provided under the General Waste Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (General Permit) and by the State Water Resources Control Board (SWRCB) electronic notification, NRDC hereby requests that a public hearing be conducted by the Central Coast Regional Water Quality Control Board ("Regional Board") regarding the adequacy of the MRSWMP.¹ As discussed in this letter, its supporting documents, and the companion letter submitted by Dr. Richard Horner, Ph.D. under separate cover,² the

¹ State Water Resources Control Board (SWRCB) Water Quality Order No. 2003-0005 – DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS00000X, Waste Discharge Requirements for Storm Water Discharges From Small Municipal Separate Storm Sewer Systems (MS4s) (General Permit) at 5; Electronic Letter from Jarma Bennett, Staff, SWRCB (Feb. 19, 2003).

² NRDC reserves the right to submit additional comments and information pending the Regional Board's public hearing and further review of the MRSWMP.

primary reason that we are requesting a hearing is because the proposed MRSWMP fails to comply with the federally-mandated maximum extent practicable (MEP) standard, and thus the MRSWMP, in its current form, will be ineffective in adequately addressing urban runoff—"the leading cause of pollution throughout California."³

Background

As you know, the impacts of urban stormwater runoff are many and varied. Pathogens and toxic substances can be borne by runoff into our waters causing disease and economic losses from beach closures, as well as contamination of shellfish beds and fish tissue.⁴ Silt and sediment carried by runoff can destroy coastal habitats and impair the feeding of some aquatic species.⁵ Nutrients carried by stormwater runoff can cause algal blooms and hypoxic conditions leading to fish kills.⁶ Stormwater discharges from Phase II municipalities significantly contribute to the impairment of California's surface and coastal waters.⁷ In fact, stormwater runoff is the largest source of water pollution in California and in the United States.⁸

Perhaps the most significant impact of storm water pollution is its impact on one of the major recreational beneficial uses of coastal waters: swimming.⁹ The documented presence of human pathogens in the surf zone of local beaches degrades water quality to such an extent that it is often unsafe for human contact. These unhealthy conditions, which are not limited to times when beaches are officially closed, have been traced directly to urban runoff.¹⁰ A 1995

³ General Permit at 1.

⁴ General Permit at 1; United States Environmental Protection Agency, *Report to Congress on the Phase II Storm Water Regulations* (Oct. 1999), I.3-I.6.

⁵ General Permit at 1; EPA, *Report to Congress on the Phase II Storm Water Regulations* at I.3-I.6.

⁶ General Permit at 1; EPA, *Report to Congress on the Phase II Storm Water Regulations* at I.3-I.6.

⁷ See 40 C.F.R. § 123.35(b).

⁸ See, e.g., EPA's National Urban Runoff Program (US EPA, 1983), Chapter 7; Gersberg, R.M., *Impact of Urban Runoff in Santa Monica Bay and Surrounding Ocean Waters* (1995); *State of the Bay 1998, Executive Summary* (Santa Monica Bay Restoration Project, Mar. 17, 1998).

⁹ *State of the Bay 1998, Executive Summary* (Santa Monica Bay Restoration Project, Mar. 17, 1998) at 2; Haile, R. et al., *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay* at 6 (Santa Monica: Santa Monica Bay Restoration Project, 1996).

¹⁰ Official Department of Health advisories to avoid ocean contact for 72 hours following a storm are often issued. See *Testing the Waters 2002: A Guide to Water Quality at Vacation Beaches* at 30-45, 50-53 (NRDC, 2002).

epidemiological study conducted by University of Southern California researchers examined the health effects of swimming near storm drain outfalls in Santa Monica Bay.¹¹ The study found that people who swam directly in front of these storm drains experienced substantially more fevers, chills, ear discharge, vomiting, and similar maladies than those who swam 100 or 400 yards away from the outlets.

Until we are able to successfully control pathogenic pollution from storm water, swimmers and surfers will continue to get sick at California's beaches.¹² Moreover, polluted storm water does not just make people sick. A growing number of studies indicate that storm water discharge is acutely toxic to marine organisms.¹³

The stormwater runoff that the MRSWMP seeks to address is particularly offensive in that it pollutes waters that are important to California and Californians. Monterey County is home to five Areas of Special Biological Significance: the Pacific Grove Marine Gardens Fish Refuge and Hopkins Marine Life Refuge ASBS, the Carmel Bay ASBS, Point Lobos Ecological Reserve ASBS, Julia Pfeiffer Burns Underwater Park ASBS, and the Ocean Area Surrounding the Mouth of Salmon Creek ASBS. ASBS are especially rich but fragile marine ecosystems that have been specially designated because of their need for extraordinary protection. Accordingly, under the Ocean Plan, all discharges into Areas of Special Biological Significance are expressly prohibited.¹⁴ Nevertheless, a recent report by the Southern California Coastal Water Research Project documented 765 drainages into the five Monterey County ASBS (2498 statewide), many of which "flow from the urban watershed and roads when it is raining."¹⁵ Consequently, stormwater runoff poses a major threat to California's most pristine ocean waters, including those in Monterey County.

Monterey County boasts other special areas as well: the California Sea Otter Game Refuge, the Big Creek Marine Resources Protection Act Ecological Reserve, and – last but not least – the Monterey Bay National Marine Sanctuary. These areas are protected, in part, for the unique marine life they contain. However, the state also has an interest in protecting these areas

¹¹ Haile, R. et al., *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay* at 6 (Santa Monica: Santa Monica Bay Restoration Project, 1996).

¹² See General Permit at 1; Haile, R. et al., *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay* at 6 (Santa Monica: Santa Monica Bay Restoration Project, 1996).

¹³ See, e.g., Gersberg, R.M., *Impact of Urban Runoff in Santa Monica Bay and Surrounding Ocean Waters* (1995); *State of the Bay 1998, Executive Summary* (Santa Monica Bay Restoration Project, Mar. 17, 1998); EPA, *Report to Congress on the Phase II Storm Water Regulations* at I.3-I.6.

¹⁴ Ocean Plan at III.E.1.

¹⁵ Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003) at 13-14.

for the enjoyment of visitors, and the coastal areas of Monterey County have an especially powerful draw for tourists. The Monterey Bay Aquarium, which highlights the abundance and diversity of life in the coastal waters of the area is among the most visited sites in California. Tourism in Monterey County is a \$1.8 billion industry, with many people coming to admire and observe the magnificent marine environment.¹⁶

Because of the serious threats imposed by stormwater runoff, Congress amended the Clean Water Act in 1987 with a phased schedule for developing stormwater permitting regulations.¹⁷ As part of "Phase I" of the stormwater permitting program, Congress required municipalities which operate a "separate storm sewer system" serving a community of over 100,000 persons to apply for a discharge permit. "Phase II" requires stormwater plans for smaller communities, as well as construction and industrial sources.

In 2003, the SWRCB developed California's General Permit. To obtain coverage under the General Permit, the operator of a regulated small MS4 must submit a Notice of Intent to comply with the terms of the General Permit, a Storm Water Management Program, and a fee. The substantive requirements of the General Permit for Storm Water Management Programs closely mirror the requirements established by the federal regulations.¹⁸

Of these, the fundamental requirement for these programs is that they shall be "designed to reduce the discharge of pollutants . . . to the Maximum Extent Practicable (MEP) and to protect water quality;" shall assure that discharge prohibitions are met, including the requirement to effectively prohibit non-stormwater discharges; and shall further assure compliance with receiving water limitations (once plans are implemented).¹⁹ Consequently, the question of whether the MRSWMP should be approved revolves around whether the elements of the program will cumulatively reduce pollutants to the maximum extent practicable; will effectively comply with discharge prohibitions; and will result in compliance with receiving water limits.

In furtherance of the MEP standard, and so as to attain these other requirements, the program must address Six Minimum Control Measures: (1) Public Education and Outreach on Storm Water Impacts; (2) Public Involvement/Participation; (3) Illicit Discharge Detection and Elimination; (4) Construction Site Storm Water Runoff Control; (5) Post-construction Storm

¹⁶ Monterey County Convention & Visitors Bureau, at <http://media.monterey.wego.net/?p=8464>.

¹⁷ 33 U.S.C. § 1342.

¹⁸ 40 C.F.R. 122.34.

¹⁹ *Id.* at 122.34(a); *see also* State Water Resources Control Board (SWRCB) Water Quality Order No. 2003-0005 – DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS00000X, Waste Discharge Requirements for Storm Water Discharges From Small Municipal Separate Storm Sewer Systems (MS4s), Application Requirements at D.1.

Water Management in New Development and Redevelopment; and (6) Pollution Prevention/Good Housekeeping for Municipal Operations.²⁰ The program must contain Best Management Practices (BMPs) that will address these measures. In addition, the General Permit contains supplemental requirements for “[t]hose regulated traditional and non-traditional Small MS4s serving a population over 50,000 or that are subject to high growth (at least 25 percent over ten years)”²¹ For reasons that will be discussed in detail below, we believe that the supplemental requirements are applicable to the participating entities.

The MRSWMP has been submitted by the City of Pacific Grove, the City of Monterey, the City of Seaside, the City of Sand City, the City of Del Rey Oaks, the City of Marina, the City of Carmel-by-the-Sea, the County of Monterey, and the Pebble Beach Company (participating entities or applicants). The MRSWMP is a component of the participating entities’ application for coverage under the General Permit. As such, the MRSWMP fails to meet the requirements of the General Permit and the federal regulations for storm water management programs. Specifically, the MRSWMP will not reduce discharge of pollutants to the maximum extent practicable, and will not fully implement the Six Minimum Control Measures, as required by 40 C.F.R. § 122.34.²² This letter will discuss these shortcomings, both generally and with respect to five of the Six Minimum Control Measures, below.

General Comments

In general, the document that the participating entities have produced to address these requirements is impermissibly vague, and violates the MEP standard. The BMPs selected to address the Six Minimum Control Measures are often a reiteration of, and a promise to comply with, the requirements of the General Permit itself. Where the participating entities have gone beyond simply restating the requirements, the BMPs and measurable goals are nevertheless far from being specific enough to determine whether they could be expected to be effective. The participating entities have approached this requirement as a ministerial chore, and the result is a stormwater management program that simply cannot ensure that stormwater pollution will be reduced. The law requires that they do more.

The Monterey Region cannot afford to downplay the requirements of the General Permit. While not a major metropolis, the Monterey Region is a substantial population center with the associated serious stormwater management problems. Accordingly, the MRSWMP should not be reviewed as though the stormwater discharges from the participating entities are not a threat; they are, and the program should be scrutinized closely. Furthermore, rigorous stormwater measures are not only necessary for municipalities of the participating entities’ sizes, they are feasible as well. Many smaller cities throughout California have been operating under Phase I

²⁰ *Id.* at D.2.

²¹ *Id.* at E.

²² In addition, the program does not effectively prohibit non-stormwater or the other applicable discharge prohibitions nor will it lead to attainment of water quality standards.

permits, including: Alameda (Region 2), Camarillo (Region 4), Banning (Region 7), Beaumont (Region 8), and Lynwood (Region 9).²³ The fact that these areas have been operating under Phase I permitting rules demonstrates that small cities are no less able to implement strong programs. There is no logical or legal reason why Beaumont, a Phase I city with a population of just over 11,000, should be held to a stricter standard than the participating entities, several of which have populations twice or three times its size. Additionally, the Monterey Region has a projected 20.7 percent growth rate in this decade, which is similar to Phase I cities.²⁴ In this connection, the economies of the Monterey Region parallel or surpass the economies of some Phase I cities.²⁵ Notably, the rapidly growing tourist industry for the Monterey Region is the

²³ Compare Monterey County population 401,762, City of Monterey population 29,674, Pacific Grove population 15,522, Marina population 25,101, Seaside population 31,696 to Camarillo population 57,077, Banning population 23,562, Beaumont population 11,384.
http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=01000US&geoContext=&street=&county=monterey&cityTown=&state=&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=ChangeGeoContext&geo_id=16000US0648872&geoContext=01000US%7C04000US06%7C05000US06053&street=&county=&cityTown=monterey&state=04000US06&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0648872&geoContext=01000US%7C04000US06%7C16000US0648872&street=&county=&cityTown=pacific+grove&state=04000US06&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=ChangeGeoContext&geo_id=16000US0645778&geoContext=01000US%7C04000US06%7C16000US0654848&street=&county=&cityTown=marina&state=04000US06&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0645778&geoContext=01000US%7C04000US06%7C16000US0645778&street=&county=&cityTown=seaside&state=04000US06&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0670742&geoContext=01000US%7C04000US06%7C16000US0670742&street=&county=&cityTown=camarillo&state=04000US06&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0610046&geoContext=01000US%7C04000US06%7C16000US0610046&street=&county=&cityTown=banning&state=04000US06&zip=&lang=en&sse=on;
http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0603820&geoContext=01000US%7C04000US06%7C16000US0603820&street=&county=&cityTown=beaumont&state=04000US06&zip=&lang=en&sse=on;
[http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=01000US&geoContext=&street=&county=&cityTown=beaumont&state=04000US06&zip=&lang=en&sse=on.](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=01000US&geoContext=&street=&county=&cityTown=beaumont&state=04000US06&zip=&lang=en&sse=on;)

²⁴ California Institute of Governments Projected Growth Rate for Monterey County.
http://www.cicg.org/publications/profiles/monterey_county.pdf.

²⁵ Compare Monterey County 2002-2003 budget of \$572,148,911, City of Monterey 2003-2004 budget of \$41,919,878, Seaside 2003-2004 budget of \$25,825,128 to City of Alameda 2003

eleventh largest in the State.²⁶ These comparable population and economic statistics support the need for stronger stormwater controls and measures in the MRSWMP.

A Central Requirement of the MRSWMP Should Be the Reduction of Stormwater Discharges to MEP.

The MRSWMP asserts: “[t]he purpose of the Monterey Regional Storm Water Management Program (MRSWMP) is to implement a series of management practices, referred to herein as ‘Best Management Practices’ (BMPs).”²⁷ While it is true, as stated above, that the program must use BMPs to address the six minimum control measures, the more fundamental purpose of a storm water management program is to “reduce the discharge of pollutants from the permitted MS4 to MEP to protect water quality” and to comply with related prohibitions and restrictions, as discussed above.

The EPA model permit sets forth the specific requirements that permittees must follow to satisfy the MEP standard. Furthermore, the definition of MEP from other MS4 permits illustrates the relationship between MEP and BMPs:

MEP means the standards for implementation of storm water management programs to reduce pollutants in storm water. CWA section 402(p)(3)(B)(iii) requires that municipal permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” Specifically, municipalities must choose effective BMPs, and reject applicable BMPs only where other effective BMPs will serve the same purpose.²⁸

budget of \$35,540,000, Camarillo 2003 budget of \$36,339,495.

<http://www.co.monterey.ca.us/budget.htm>; <http://www.monterey.org/budget/gfrev.html>;

<http://www.ci.seaside.ca.us/budget/budget03-04.pdf>;

<http://www.ci.alameda.ca.us/gov/pdf/cafr2003.pdf>;

<http://www.ci.camarillo.ca.us/pdfdocs/CAFR.pdf>.

²⁶ Monterey County Convention & Visitors Bureau, <http://media.monterey.wego.net/?p=8464>.

²⁷ Monterey Regional Storm Water Management Program at 1-1.

²⁸ California Regional Water Quality Control Board Santa Ana Region, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements, NPDES No. CAS618036, Order No. R8-2002-0012, for the San Bernardino County Flood Control District, the County of San Bernardino, and the Incorporated Cities of San Bernardino County within the Santa Ana Region, Area-Wide Urban Storm Water Runoff (San Bernardino County Municipal NPDES Storm Water Permit); California Regional Water Quality Control Board San Diego Region, Order No. 2001-01, NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego

The MRSWMP's assertion that its purpose is to implement BMPs is telling: the program fails in every respect to fulfill its obligation to reduce stormwater pollution. Overall, the program lacks substance, and the majority of the "BMPs" it adopts are merely reiterations of the general permit's basic requirements. In part due to the lack of substance, it is impossible to tell from the MRSWMP whether the set of BMPs adopted will actually result in reduction of stormwater pollution to MEP. In other words, it is impossible to say whether this program will achieve its fundamental purpose.

This generality is not only undesirable it is unlawful. The Regional Board is required to assess whether the MRSWMP is consistent with the terms of the General Permit.²⁹ A plan that largely parrots permit terms and contains few measurable, specific programs (or even elements of programs) provides no factual basis for the Regional Board to conclude that the MRSWMP complies with the General Permit of the Clean Water Act. Standing in the shoes of EPA, the Regional Board "is still required to ensure that the individual programs adopted are consistent with law." *Id.* at 856. "[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduce the discharge of pollutants to the maximum extent practicable." *Id.* In this connection, it has long been recognized in California that conclusory statements such as those that dominate the MRSWMP do not amount to substantial evidence on which a regulatory agency may rely in making decisions. *See, e.g., Mountain Lion Coalition v. Fish and Game Commission* (1989) (214 Cal. App. 3d 1043).

The MRSWMP Lacks True Measurable Goals.

According to EPA's Measurable Goals Guidance:

Measurable goals are described in the Phase II rule as BMP design objectives or goals that quantify the progress of program implementation and the performance of your BMPs. They are objective markers or milestones that you (and the permitting authority) will use to track the progress and effectiveness of your BMPs in reducing pollutants to the MEP. EPA recommends that you develop a program with a variety of short- and long-term goals. At a minimum, your measurable goals should contain descriptions of actions you will take to implement each BMP, what you anticipate to be achieved by each goal, and the frequency and dates for such actions to be taken.³⁰

County, and the San Diego Unified Port District (San Diego Municipal Storm Water Permit); California Regional Water Quality Control Board Los Angeles Region, Order No. 01-182, NPDES No. CAS004001, Waste Discharge Requirements for Municipal Storm Water Runoff Discharges within the County of Los Angeles (December 13, 2001) (Los Angeles Municipal Stormwater Permit).

²⁹ *Environmental Defense Center v. EPA*, 344 F.3d 832, 857-858 (9th Cir. 2003).

³⁰ United States Environmental Protection Agency, Measurable Goals Guidance for Phase II Small MS4s (*available at www.epa.gov/npdes/pubs/measurablegoals.pdf*) at 8.

In sum, measurable goals should be designed to determine the effectiveness of BMPs at reducing stormwater pollution and addressing the six minimum control measures. In this respect, the general goals and approaches of an environmental management plan include well-defined and detailed procedures, quantifiable goals and requirements, measurable objectives, active documented programs, and management review and reporting.³¹

The MRSWMP's measurable goals, in general, are wholly inadequate for this purpose. The measurable goals for each minimum control measure will be discussed in more detail below, but in general these goals merely restate the BMPs – or elements of them – and set a target date for their completion. This is in keeping with the overall ministerial approach of the MRSWMP: the participating entities appear to view the General Permit requirements as a list of things to do and the MRSWMP as a promise to do them. Instead, the storm water management program requirement should be viewed as an opportunity for the participating entities to exercise flexibility and creativity in developing a program that is specific to them. In this regard, the measurable goals should be specific and detailed milestones toward completion of the goals of the program and of each minimum control measure. Without these, it is impossible to determine whether the program will succeed.

The MRSWMP Contravenes Public Notification and Review Procedures.

The Clean Water Act requires that “[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public.”³² In *Environmental Defense Center v. EPA*,³³ the Ninth Circuit emphasized that a storm water management plan, which “contain[s] the substantive information about how the operator of a small MS4 will reduce discharges to the maximum extent practicable”, is an inherent part of the stormwater permit. Accordingly, the MRSWMP is subject to the full suite of public participation requirements of permitting under the Clean Water Act.

Contrary to express requirements for stormwater management plans, the MRSWMP utterly fails to describe “how the operator of [this MS4] will reduce discharges to the maximum extent practicable.”³⁴ Accordingly, this plan cannot be said to be truly “available to the public.” The purpose of public notification and review is to provide the public with enough information that it can comment on the appropriateness and likely effectiveness of the program. Here, the BMPs offered by the MRSWMP are so vague – often providing no more specific information than the general permit – that the public, in most cases, cannot even tell what the participating entities are proposing to do. Consequently, unless the MRSWMP is substantially revised and re-

³¹ See United States Environmental Protection Agency, Environmental Management System, available at www.epa.gov/performance/track/program/ems.htm.

³² 33 U.S.C. § 1342(j).

³³ *Environmental Defense Center v. EPA*, 344 F.3d 832, 857-858 (9th Cir. 2003).

³⁴ *Id.*

opened for public review, the program violates the Clean Water Act's public notice and review requirements.

Comments on the Six Minimum Control Measures

The Public Education/Outreach Program is Incomplete and Lacks Specificity.

In order to obtain coverage under the General Permit, the participating entities must:

implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps the public can take to reduce pollutants in storm water runoff.³⁵

The federal regulations' guidance provides additional detail on how this requirement should be met: "EPA recommends that the public education program be tailored, using a mix of locally appropriate strategies, to target specific audiences and communities."³⁶

In furtherance of this obligation, the MRSWMP selects a single BMP, which is merely a parroting of the General Permit's requirement, and provides two "measurable goals": (1) the participating entities will "develop a permitwide regional public education and outreach program containing measurable goals by June 30 of the indicated year;" and (2) the participating entities will implement that program in each of the subsequent years. No program has been developed yet, and few additional details are available regarding what the program might contain.

These provisions do not meet the MEP standard nor are they likely to contribute to attainment of discharge prohibitions or receiving water limitations. As noted above, "municipalities must choose effective BMPs, and reject applicable BMPs only where other effective BMPs will serve the same purpose." Here, as a result of the MRSWMPs lack of detail, it is impossible to determine whether this BMP will result in reduction of stormwater discharge at all, much less to the MEP.

In addition, by providing for the development of the educational program as a step separate from the approval of the MRSWMP, the participating entities foreclose public comment on the program. The BMP asserts that it will "educate the audience" about stormwater issues, but the audience is exceptionally broad, including "residents, homeowners, businesses, minority and disadvantaged communities, and children." Accordingly, the BMP forgoes the opportunity to target specific audiences, and ignores the EPA's recommendations in this regard. Furthermore, the program completely disregards certain pollutants of concern. Notably, the program leaves out pollutants for which public education might be expected to be particularly

³⁵ General Permit at D.2.a; *see also* 40 C.F.R. § 122.34(b)(1)(i).

³⁶ 40 C.F.R. § 122.32(b)(1)(ii).

helpful, including nutrients and fertilizer from lawn and garden maintenance, and bacteria from malfunctioning septic systems.

The MRSWMP must be revised to include additional education/outreach program details before it may be approved. EPA's menu of BMPs provides examples of possible specific program expectations including the number of media exposures, number of radio and television advertisements, and number of members of the public reached.³⁷ Through its fact sheet on the Public Education and Outreach Minimum Control Measure, EPA also provides examples of measurable goals: brochures developed after year one, school curricula developed after year two, and a specified percentage of restaurants no longer dumping grease into the sewer after year three.³⁸ Furthermore, the Los Angeles Municipal Stormwater Permit and the Standard Urban Stormwater Mitigation Plan for Los Angeles County and Cities in Los Angeles County (LA SUSMP) also provide examples of measures that could be implemented as part of an educational program. For example, they provide for: (1) a Committee composed of environmental groups, permittees, regulators, and experts to meet at least once per year to provide input in meeting the goals and objectives of the public education campaign; (2) a county-wide hotline to report dumping; (3) specific advertising and media activities targeting specific communities; and (4) pollutant-specific outreach programs.³⁹ The MRSWMP does not even approach this level of detail.

By supplying the above examples of what an educational program could contain, we do not mean to imply that the MRSWMP should contain only these specific provisions. Instead, we seek to illustrate the level of specificity that EPA expects and other communities have demonstrated is feasible. Indeed, the participating entities should tailor their programs to fit their individual stormwater needs and target their own communities, as envisioned by the General Permit and the Phase II stormwater regulations. However, whatever contours the program takes, the MRSWMP must be specific about its substance and about how it will contribute to the reduction of stormwater pollution into the MS4. We respectfully urge the participating entities to revise the MRSWMP accordingly.

The Public Participation/Involvement Program Should Do More to Engage the Public.

The General Permit's requirements for Public Participation and Involvement are minimal: applicants for coverage under the General Permit must comply with state and local public notice requirements.⁴⁰ These provisions mirror the federal regulations.⁴¹ The EPA's Menu of BMPs,

³⁷ United States Environmental Protection Agency, National Menu of Best Management Practices for Stormwater Phase II.

³⁸ United States Environmental Protection Agency, Storm Water Phase II Final Rule: Public Education and Outreach Minimum Control Measure, EPA Publication No. 833-F00-005 (January 2000), available at <http://www.epa.gov/npdes/pubs/fact2-3.pdf>.

³⁹ Los Angeles Municipal Stormwater Permit at 23-51; Los Angeles SUSMP 6-15.

⁴⁰ General Permit at D.2.b.

however, provides more detail on the suggested implementation of these provisions. The Menu's detailed list of recommended activities includes: storm drain marking, stream cleanup and monitoring, volunteer monitoring, reforestation programs, wetland plantings, Adopt-A-Stream programs, watershed organization, stakeholder meetings, attitude surveys, and community hotlines.

In stark contrast to these detailed recommendations, the MRSWMP selects only two vaguely stated BMPs to fulfill the public participation/involvement requirements: the participating entities will (1) encourage the public to participate in identifying stormwater management problems, and (2) encourage public participation in awareness program, cleanup events, and the like. As measurable goals, the MRSWMP provides for two annual "public involvement workshops" and at least one "public involvement activity."

These provisions are among the few components of the MRSWMP that are quantitatively specific, and we appreciate the fact that – at least in this sense – the measurable goals are, in fact, measurable. However, we believe that these requirements are both qualitatively and quantitatively inadequate. First, the MRSWMP should outline what state and local public notice requirements are and specify how the participating entities will ensure that these are complied with. Second, in light of the tremendous potential for improved awareness and compliance arising from public involvement, surely the participating entities should invest more time and resources in selecting public involvement activities that will further these goals.

The Model Urban Runoff Program (MURP), prepared by – among others – the City of Monterey, illustrates the level of specificity that should be expected.⁴² The MURP recommends public meetings targeting particular problems and specific industries and/or neighborhoods, and mechanisms for involvement of stakeholder groups at both the program planning and program implementation stages. The MRSWMP should be revised to provide for BMPs that are at least as specific as these recommended options.

The Illicit Discharge Detection and Elimination Program Lacks Public Education Components, and the Overall Program Lacks Specificity.

The General Permit and federal regulations require that a storm water management program: (1) develop a program to detect and eliminate illicit discharges into regulated MS4s; (2) develop a storm sewer map; (3) develop and enforce ordinances or other regulations to prohibit nonstormwater discharges into MS4s; (4) develop a program to detect and eliminate

⁴¹ 40 C.F.R. § 122.34(b)(2)(i),

⁴² City of Monterey, et al., Model Urban Runoff Program: A How-To Guide for Developing Urban Runoff Programs for Small Municipalities (Feb. 2002), <http://www.swrcb.ca.gov/stormwtr/murp.html>.

nonstormwater discharges into MS4s; and (5) educate the public about hazards associated with discharges.⁴³

The MRSWMP undertakes a variety of BMPs in response to these requirements. These include, but are not limited to, such explicit requirements as storm sewer mapping, ordinances outlawing illicit connections and nonstormwater discharges, with inspections for enforcement purposes, and ordinances outlawing illegal disposal activities.

Other BMPs proposed by the MRSWMP are substantially less specific. For instance, the program would establish code modifications for septic systems, but it is not clear what septic system conditions would trigger what actions. Likewise, the MRSWMP would require plumbers to notify the Department of Public Works of something, but it is unclear what they are to report and when. Similarly, the MRSWMP requires the creation of a system of public reporting, but the specifics of how and what the public is to report are left out. Further, although the plan requires the implementation of a program to cleanup illicit discharges, it is unclear how and to what degree such cleanups will occur. Finally, it is impossible to determine whether the combination of these requirements will actually result in the elimination (or even the reduction) of non-stormwater and illicit discharges to MS4s, as required by the General Permit requirements and the federal regulations. The MRSWMP should be revised to be more specific regarding these BMPs and the measurable goals toward their implementation. In particular, where a specific ordinance is required, the plan should include a model ordinance, which would ensure consistency and an adherence to a high standard for reduction of discharges.

In addition to this general lack of specificity, there is a complete absence of any public education measures from the MRSWMP. The MRSWMP indicates that the reporting system will help comply with the public education requirement, but it is unclear how. Moreover, the public reporting system cannot be expected to function properly in the absence of public education efforts. In this regard, the EPA's Measurable Goals Guidance recommends the inclusion of specific advertising goals to promote education of the community with respect to the public reporting system, and other problems associated with illicit discharge. The MRSWMP should include a public education program that provides for comprehensive education of the community on the dangers of illicit discharge, as required by the General Permit and the federal regulations.

The Program for Construction Site Runoff Control Merely Parrots the Requirements of the General Permit.

The General Permit requires applicants for coverage to develop a program to reduce pollutants in stormwater runoff from construction activities. The Program must, at a minimum: (1) include an ordinance or other regulatory mechanism to require sediment controls; (2) develop requirements for construction site operators to implement sediment controls; (3) develop

⁴³ General Permit at D.2.c.

requirements for construction site operators to control other waste such as discarded building materials, chemicals, and litter; (4) include a procedure for site plan review including water quality considerations; (5) include procedures for receipt of information from the public; and (6) include procedures for site inspection and enforcement of control measures.⁴⁴

However, the program for construction site runoff control simply parrots the General Permit requirements. In fact, the BMPs echo, in some cases word-for-word, the requirements of the General Permit. If applying for coverage under the General Permit required nothing more than parroting the requirements and promising to fulfill them at some later date, there would be no point to this application process.

There is nothing in the MRSWMP that would even begin to demonstrate the effectiveness of this "program," and consequently it is inconsistent with the MEP standard. As noted above, "municipalities must choose effective BMPs, and reject applicable BMPs only where other effective BMPs will serve the same purpose." The MRSWMP offers purpose only, and includes no hint as to how any BMP will achieve that purpose.

EPA's guidance for the development of this program provides a great deal more specificity than the MRSWMP does. The guidance provides examples of sanctions to ensure compliance, including nonmonetary penalties, fines, bonding requirements, and the threat of permit denial in the case of noncompliance. It also provides examples of procedures for site plan review and site inspection and enforcement control measures. The Los Angeles County Municipal Stormwater Permit and SUSMP provides an additional model for a comprehensive construction site program, including a specific policy statement,⁴⁵ inspection frequencies, formal planning requirements for larger construction sites, and explicit design review and approval criteria.

The MRSWMP does none of these things. Nor does it provide any detail on what guidelines and standards it would create, what erosion and sediment control BMPs it would require, and how the overall program would reduce pollutants in stormwater runoff at construction sites. The measurable goals for this program provide no milestones or measurable indicia of progress. In most cases, the measurable goal merely provides a date for completion of a BMP. As discussed above, the purpose of a measurable goal is to "evaluate the effectiveness of individual control measures and the storm water management program as a whole."⁴⁶ Measurable goals should be objective markers or milestones, usable to track the progress toward completion of a BMP.⁴⁷ Where, as here, the measurable goal is simply the completion of the BMP by some date, it is not possible to gauge progress toward completion of the BMP or the

⁴⁴ General Permit at D.2.d.

⁴⁵ Los Angeles Municipal Stormwater Permit at 42-43; Los Angeles County SUSMP at 11.

⁴⁶ Measurable Goals Guidance at 8-9.

⁴⁷ *Id.*

effectiveness of the program in reducing pollutants to the maximum extent practicable. Consequently, the MRSWMP should be revised to provide for more explicit BMPs and measurable goals.

The Post Construction Runoff Control Provisions Lack Necessary Elements, Including Provisions to Comply with the Supplemental Requirements.

The General Permit and federal regulations require that applicants: (1) develop and enforce a program to address storm water runoff from new development and redevelopment projects, ensuring that controls are in place that would prevent or minimize storm water impacts; (2) develop and implement strategies, including a combination of structural and nonstructural BMPs appropriate for the community; (3) implement an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects; and (4) ensure adequate long-term operation and maintenance of BMPs. In order to comply with these requirements, the participating entities propose two BMPs. First, they will develop ordinances with guidelines for design, operation and maintenance of post-construction stormwater pollution prevention systems in new development and redevelopment, addressing pollutants such as sediments, chemicals, oil and grease, metals and nutrients. Second, they will develop and implement procedures for review of construction plans and post construction site inspection and enforcement of stormwater pollution control systems.

Certain required elements are conspicuously lacking from the program proposed by the participating entities. First, although the General Permit explicitly requires both structural and nonstructural BMPs, the MRSWMP has provided for only two BMPs which are clearly programmatic, rather than structural, in nature. Second, although the General Permit requires a commitment to long-term operation and maintenance of BMPs, the MRSWMP contains nothing that would meet this requirement. Third, the General Permit requires that the development and redevelopment runoff control program ensure that controls are in place that would minimize storm water impacts. Incredibly, the MRSWMP pays lip service to stormwater mitigation, but only provides for planning and inspection and does nothing to ensure that controls are in place.

The State Board has held that the installation of structural BMPs (SUSMP provisions) constitute MEP for new and redevelopment, and that all new municipal stormwater permits must be consistent with SUSMP principles. Specifically, the Chief Counsel of the State Board notified all Regional Board executive officers that:

[M]unicipal storm water permits must be consistent with the provisions set forth in [the Order]. The Order finds that the provisions of the SUSMPs as revised in the Order, constitute MEP.⁴⁸

⁴⁸ Memorandum from Craig M. Wilson, Chief Counsel, to RWQCB Executive Officers (December 26, 2000).

Accordingly, the SWMP must require that a SUSMP program equivalent to, or more stringent than, that approved by the State Board be implemented. The MRSWMP does nothing to establish this requirement.

As with the other minimum control measures, in developing the post construction runoff control program, the participating entities have ignored a host of guidances that have been provided to assist them. The Model Urban Runoff Program recommends that entities adopt ordinances specifically related to impervious surface area reduction, pollutant source control, and treatment controls. The ordinances required under the MRSWMP will provide only guidelines, and none specifically related to any particular problem area, such as impervious surfaces. The MURP also recommends providing outreach and information for the development community. The MRSWMP does not propose any of this. EPA's Measurable Goals Guidance provides additional examples of acceptable BMPs – including training programs for grounds maintenance and spill prevention and control plans – all of which are far more specific than those selected by the participating entities.

Inexplicably, the MRSWMP makes no provision for how the participating entities intend to comply with the supplemental provisions for larger and fast growing regulated small MS4s. Although not listed in Attachment 5 of the General Permit, several of the applicants – most notably the County of Monterey – are legally obligated to comply with these requirements viewed individually.⁴⁹ Moreover, in combination, the participating entities are well beyond the 50,000 population level that triggers the applicability of these provisions; the Monterey Regional Water Pollution Control Agency, which serves most of the participating entities, purports to serve a population of over 250,000.⁵⁰ The very existence of a Monterey Regional Water Pollution Control Agency demonstrates that the relevant MS4 (the “system of conveyances”) that transports stormwater in the area is unitary and serves more than 50,000 people.⁵¹ Moreover, from a policy perspective, if the participating entities wish to take advantage of the convenience of the exercising the joint application option, and to capitalize of the existence of resources of co-permittees in this process, they should be prepared to fulfill, in the aggregate, the requirements of a single permittee in their position.

Because the participating entities qualify for these provisions, the MRSWMP must contain design standards applicable to hillside residences, commercial developments, automotive repair shops, retail gasoline outlets, restaurants, housing subdivisions and large parking lots. The MRSWMP does not even mention these requirements, much less provide for a strategy to meet them. Consequently the MRSWMP cannot be approved in its current form.

⁴⁹ According to the 2001 population estimate by the U.S. Census Bureau, Monterey County had a population of 407,629. See <http://www.quickfacts.census.gov>.

⁵⁰ See <http://www.mrwpc.org/index.html>.

⁵¹ Furthermore, these participating entities should be considered a single entity for the purposes of the supplemental requirements because they discharge into a single watershed and their water quality impacts will be cumulative.

Receiving Water Limitations Applies to the MRSWMP.

For the reasons set forth immediately above, the General Permit's Attachment 4 Receiving Water Limitations also applies to the MRSWMP. However, there is no consideration whatsoever regarding how the program, when implemented, will assure that discharges do not cause or contribute to a violation of an applicable water quality standard.

Areas of Special Biological Significance—Discharge Prohibition Applies to the MRSWMP.

As noted above, Monterey County is home to five Areas of Special Biological Significance: the Pacific Grove Marine Gardens Fish Refuge and Hopkins Marine Life Refuge ASBS, the Carmel Bay ASBS, Point Lobos Ecological Reserve ASBS, Julia Pfeiffer Burns Underwater Park ASBS, and the Ocean Area Surrounding the Mouth of Salmon Creek ASBS. ASBS are especially rich but fragile marine ecosystems that have been specially designated because of their need for extraordinary protection. Accordingly, under the Ocean Plan, all discharges into Areas of Special Biological Significance are expressly prohibited.⁵² The General Permit specifically states that “[d]ischarges of waste that are prohibited by the Statewide Water Quality Control Plans or applicable Regional Water Quality Control Plans (Basin Plans) are prohibited. General Permit at § B(1). Consequently, stormwater discharges into ASBS or sufficiently proximate to affect natural water quality in ASBSs must be discontinued. The MRSWMP fails to address this important issue.

Municipal Maintenance BMPs Are Missing From the MRSWMP.

It is axiomatic that “if you want something done right, do it yourself.” Accordingly, many storm water management programs in California advance the objective of reducing stormwater discharge by regulating municipal activities.⁵³ Such regulations can be effectively and efficiently developed and implemented, with a minimum expense of time and resources. The MRSWMP should include a program of municipal maintenance requirements that contains, as a minimum:

- A model program to reduce the impact of public agency activities on storm water, including a discussion of the feasibility of dry weather diversion of flows from the MS4 to wastewater treatment facilities;
- A requirement that each permittee develop a program based on the Model program;
- A sewer operation program including provisions for preventing sewage spills from entering the MS4, procedures for identifying repair and upkeep needs in sanitary sewer, procedures

⁵² Ocean Plan at III.E.1.

⁵³ See, e.g. California Regional Water Quality Control Board Los Angeles Region, Order No. 01-182, NPDES No. CAS004001, Waste Discharge Requirements for Municipal Storm Water Runoff Discharges within the County of Los Angeles (December 13, 2001), Attachment A.

for responding to overflows, and procedures for notifying public health agencies when there is a public health threat.

- Design and implementation requirements for construction of public facilities;
- Requirements for public vehicle maintenance procedures and facilities;
- A program for landscape and recreational facilities management, including procedures for proper application of pesticides, procedures to prevent the disposal of landscaping materials into the MS4, procedures to schedule irrigation to minimize pesticide and fertilizer runoff, and BMPs to minimize trash and debris entering the MS4;
- A storm drain operation program, including scheduled inspections and cleanings;
- a street and road maintenance program, including sweeping at monthly intervals, and proper paving techniques;
- A public parking facilities management program; and
- A program for conducting emergency repairs of essential public facilities and services and responding to natural disasters.

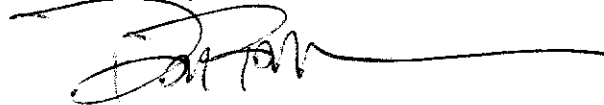
Each and every one of these program elements have been adopted and implemented by other municipalities in California, illustrating that they are feasible. Such a program would advance the objective of reducing stormwater runoff while setting a public example of careful attention to this critical water quality issue.

* * * *

By failing to create specific BMPs, programs, and measurable goals, the participating entities fail to comply with the federally-mandated MEP standard. In addition, they have forfeit an opportunity to develop a well-tailored storm water management program that will ensure the efficient reduction of stormwater pollution in these communities in a manner consistent with applicable discharge prohibitions and receiving water limitations. The MRSWMP cannot be approved in its current form and must be modified to contain specific program elements that meet with the requirements of the General Permit and federal law.

Thank you for the opportunity to review and provide comments on the MRSWMP. Please feel free to contact me if you have any questions.

Sincerely,



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