

**Monterey Regional Storm Water Management Program
Response to Comments from Pebble Beach Company July 26, 2006 Letter**

1. General Permit Attachment 4 contains the "supplementation provision for larger and fast growing regulated small MS4s," (Permit, Fact Sheet at 9-10) and contains a program applicable to new development and significant redevelopment that largely replicates programs in effect in large urban areas like Los Angeles, Orange County, and San Diego. It took years for these large urban regions to develop and put in place the municipal resources and person-power to support these programs, which were not in effect until years after the MS4 permits first applied in these areas. Our primary concern is that accelerating those programs in the Monterey region is not practicable, and may have negative, unintended consequences for the region, its economy, and its business community. We also are concerned that this unprecedented acceleration of programs intended for large urban areas has not been noticed properly by the Central Coast Regional Water Quality Control Board and effectively constitutes the issuance of a new or substantially amended permit, with associated procedural and due process implications. (p 2, paragraph 1.)

Response: The Monterey Regional Storm Water Management Program (MRSWMP) was publicly noticed on June 22, 2006, for 30-days. Revisions to the MRSWMP were posted on July 28, 2006, for 30-days. The Monterey Regional Group is proposing that General Permit Attachment 4 design standards be a part of MRSWMP. The Water Board has no reason to believe that the Monterey Regional Group will not have the resources available to properly administer the proposed MRSWMP.

2. To throw all of the small MS4 programs of the Monterey region into this complex regulatory program as a part of their first permit term is not only against the plain language of the permit, but also is unreasonable and unrealistic. Phase I communities such as Orange County only managed to develop and implement such a program during their third permit term. Resources may not be available for all of the small communities in the Monterey Area. Without a substantial foundation documenting why such acceleration is warranted and feasible, it would be arbitrary and capricious for the Regional Board to accelerate the Attachment 4 programs in the Monterey area at this time. (p 3, paragraph 2.)

Response: The General Permit requires that Sand City and the unincorporated areas of Castroville and Prunedale comply with Attachment 4 due to their high growth rates. It is reasonable to assume that if these communities are expected to comply with the Attachment 4 requirements, the remaining cities and unincorporated County areas should be able to comply. The Monterey Regional Group has proposed implementing MRSWMP with Attachment 4 requirements. As discussed in prior Staff Reports, the nature of receiving waters and the density of surrounding development requires more stringent BMPs in the Monterey Region than in more isolated communities subject to the Phase II requirements.

3. It appears that the Permittees acquiescence in applying the Attachment 4 design standards for the entire region is an accommodation to third-party pressures to avoid potential legal challenges by improperly accelerating the application of these programs without foundation. Third party pressure is an inappropriate foundation and does not appropriately justify expansion of the Attachment 4 programs in the MRSWMP beyond the terms of the Small MS4 Permit. For the Regional Board to impose the design standards program on the whole of the Permittees would be arbitrary and capricious. (p 4, paragraph 2.)

Response: The Monterey Regional Group is proposing that the Attachment 4 design standards apply to the entire group. Water Board staff must rely on the Monterey Regional Group to provide a SWMP that accurately represents the program they are capable of implementing. The MRSWMP includes proposed BMPs that will reduce pollutants to the maximum extent practicable (MEP) and protect water quality. The MEP standard requires Permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs are not technically feasible, or the cost is prohibitive. The Monterey Group has provided no information to indicate that the Attachment 4 design standards are not technically feasible or are cost prohibitive. By including the Attachment 4 design standards, the Permittees concede that it is feasible to achieve them.

4. The Regional Board should distinguish between Permittees' acquiescence including the Attachment 4 design standards in the MRSWMP from the potential impacts of that program on the Real Parties at Interest; it is the business community that would be required to implement the required BMPs through their respective municipalities that may be overloaded by the administrative burden of overseeing such a complex program. For example, if small municipalities cannot effectively process new development or redevelopment projects due to a lack of technical capabilities, a lack of sufficient staffing, or a lack of resources, it is the business community that will suffer as projects languish in the administrative process. The Regional Board has not yet presented any findings which would demonstrate that the small MS4 Permittees have the administrative resources capable of effectively managing the Attachment 4 design standard program, that would justify the imposition of such a complicated program up all of the Permittees, or that would support the water quality-based need for such a program throughout the Monterey region. Prior to approving the MRSWMP the Regional Board must consider the abilities of the Permittees to manage their program, and the effects on the business community. (p 4, paragraph 3.)

Response: Members of the business community are not "Real Parties at [sic] Interest" and have not objected to these requirements. There is no requirement for the Water Board to demonstrate that any permittee is capable of implementing a program the permittee proposes. Speculation about the Permittees' possible inability to implement these requirements is not supported by any evidence in the record. Also, see response to comment 3 above.

5. By incorporating Attachment 4 design standards the General Permit is being rewritten. Specifically General Permit provisions (Section E) that mandate application of Attachment 4 only to the largest and fastest growing small MS4 systems are being rewritten and expanded to include all of the Monterey region Permittees – including small MS4s never contemplated to be governed by Attachment 4. Through this rewrite, the Regional Board is going beyond the scope of the Permit and beyond the federal National Pollutant Discharge Elimination System program implementation by the Permit. (p 5, first full paragraph.)

Response: The SWMP is a requirement set forth in the General Permit. The SWMP is being changed, not the General Permit. With respect to the Attachment 4 design standards, the MRSWMP does include areas that are not specifically required to apply the design standards by the General Permit. However, the MEP standard requires Permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs are not technically feasible, or the cost is prohibitive. The Monterey Group has provided no information to indicate that the Attachment 4 design standards are not technically feasible or are cost prohibitive. Including the Attachment 4 design standards is one aspect of the Monterey Regional Group's proposal for meeting the MEP standard. See also, Findings 20-21 of the proposed Resolution.

6. By exceeding the Permit requirements, the Regional Board is not simply processing Notices of Intent for coverage under the Permit; rather, the Regional Board is rewriting the Permit terms. This Permit revision requires specific public notice and other procedural protections, which, to date have not been carried out by the Regional Board. (p 5, paragraph 2.)

Response: Regarding re-writing the permit terms, see above. Regarding public noticing, the MRSWMP and revisions to MRSWMP were publicly noticed and posted for public comment on June 22, 2006, and July 28, 2006 respectively. The inclusion of the Attachment 4 requirements have also been part of the staff recommendation and proposed resolution for the May 2005 and February 2006 Board Hearings. The commenter has had at least 16 months to comment on this issue.

7. Before it can exceed the scope of the Permit to apply the Attachment 4 design standards to all of the Permittees and, further, to the business community who would be required to implement BMPs required of the design standards, the Regional Board must consider the factors contained in sections 13241 and 13242 of the California Water Code, including economic impacts and the impacts of the proposal on the housing needs of the region. (p 6, paragraph 1.)

Response: The MRSWMP does not exceed the scope of the General Permit by applying Attachment 4 design standards. The Monterey Group has proposed a program that will meet the MEP standard. Section 13263 does not require a consideration of Section 13241 factors unless the requirements exceed federal requirements. These provisions are necessary to meet the requirements of Clean

Water Act Section 402(p). Even if those requirements did apply, there is no evidence of adverse economic or housing impacts. Board staff reviewed budget information submitted by four of the seven Monterey Regional Group communities and compared the annual per household cost to the State Water Board's January 2005 NPDES Stormwater Cost Survey (Survey). The annual cost per household for the Monterey Regional Group ranged from \$20 to \$610, as compared to a range of \$18 to \$46 for the communities evaluated in the Survey. Three of the four Monterey Regional Group members that submitted budget information will spend more than \$100 per household, well above the Survey range. Section 13242 applies to basin planning, not permitting actions.

8. Because the "rewritten" provisions of the proposed Permit go beyond the federal program the original Permit implemented, the Regional Board would need to undertake an environmental impacts review pursuant to the California Environmental Quality Act (CEQA) prior to approving any revised Permit terms. This CEQA analysis is necessary to fully assess the significant implications to the regulated community – both the Permittees who must expend valuable resources to administer the program and to the business community who will have to implement the BMPs imposed by the municipalities. (p 6, paragraph 1.)

Response: CEQA compliance is not required for NPDES permitting actions. (Ca. Water Code § 13389.)

9. We understand that the Regional Board may be considering incorporating the receiving water limitations language from Section 4 of Attachment 4 of the Permit into MRSWMP either broadly or related to areas associated with Areas of Special Biological Significance (ASBS). If such changes are indeed being considered, these changes would represent a dramatic and significant proposal for MRSWMP. (p 6, paragraph 3.)

Response: Water Board staff will recommend that the City of Pacific Grove and the areas of the City of Monterey that drain to an ASBS be required to comply with all Attachment 4 receiving water limitations and design standards. Due to the nature of the receiving waters and the provisions of the California Ocean Plan, these requirements are necessary to protect water quality.

10. The Regional Board should not expand the Attachment 4 receiving water limitations to ASBS watersheds in the Monterey region on the misapprehension that all storm water flows to ASBS are per se violations of the California Ocean Plan, and must be prohibited or otherwise regulated by the Regional Board through Permit. This is not the case. The California Ocean Plan's prohibitions on "waste" discharges into ASBS do not prohibit storm water flows per se. If the Regional Board is contemplating regulation of ASBS through the Permit as an accommodation to a mistaken assumption that one molecule renders storm water a "waste," the agency should understand that such an accommodation is not appropriate (given that it would rewrite the Permit), not required (by California law or the Permit terms), and would

be inappropriate (given the State Board's ongoing governance of ASBSs). (p 7, first full paragraph.)

Response: The Attachment 4 receiving water limitations require discharges not cause or contribute to an exceedance of water quality standards. The Attachment 4 receiving water limitations do not prohibit the discharge of storm water, but do require an iterative process designed to obtain compliance with water quality standards contained in the Ocean Plan, the California Toxics Rule, and the Central Coast Basin Plan. The Attachment 4 receiving water limitations are appropriate to control pollutants and therefore required by CWA Section 402(p). These limitations are consistent with Prohibition B.1 of the General Permit, which prohibits discharges in violation of the Ocean Plan ASBS prohibition unless the discharger obtains a State Water Board exception. In order to obtain an exception, the discharge must not interfere with beneficial uses (Ocean Plan, § III.I). In addition, Section 36710(f) of the Public Resources Code requires that waste discharges in ASBS be prohibited or limited by the imposition of special conditions. The Water Board does not assume that stormwater runoff to the ASBS contains only one molecule of pollutants. The presence of large amounts of pollutants in urban stormwater runoff is documented by general stormwater literature and site-specific information in the record (First Flush and Snapshot Day monitoring data). Consequently, Water Board staff recommend that MS4s discharging directly to an ASBS water body comply with Attachment 4 standards, including the receiving water limitations.

11. We understand from the Errata Sheet (circulated by the Permittees but not yet publicly noticed by the Regional Board) that provisions are being proposed for the MRSWMP that would place ten new burdens upon all construction projects in the Monterey Region, including substantial restrictions on grading. With specific regard to the grading restrictions, the Errata Sheet proposes modifications to the construction program required to be implemented by Permittees (MRSWMP page E-128) that would severely restrict wet season grading unless BMPs were employed consistent with the "draft Monterey Proposal and General Permit [the small MS4 Permit] to meet MEP." It is unclear from where this proposal has originated, as it is not contemplated as a BMP required by the Permit, has never been contained in any prior iteration of the MRSWMP, and is not even included in the "more stringent" provisions of Attachment 4. The proposed revisions have not been demonstrated to meet either the technology standards governing sites – the BAT and BCT standards – or the Permit's MEP standard. The Regional Board is obligated to assess economic and other environmental factors per the Water and Public Resources Codes prior to allowing their inclusion in the MRSWMP. (p 8, paragraph 2.)

Response: The Errata Sheets were publicly noticed on July 28, 2006. The requirements on page E-128 are standard construction BMPs found in the General Permit for Storm Water Discharges Associated with Construction Activity Order 99-08-DWQ and the Regional Water Quality Control Board Erosion and Sediment Control Field Manual (2002). The commenter does not make clear which of these requirements are above and beyond standard practice.

12. The statewide general permit for construction site discharges is currently undergoing reissuance proceedings through the State Board. The proposed new BMPs contained in the Errata Sheet appear to be adding to the BMP program contained in the statewide permit. The Regional Board should not preempt State Board proceedings on the general construction permit by adding new BMPs to the program through the present Permit proceeding. (p 8, paragraph 2.)

Response: The Monterey Regional group proposed the changes to the MRSWMP. The statewide construction permit does not specify BMPs. Construction permittees will have to comply with any more stringent requirements of the revised statewide permit, so there is no preemption issue.

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