



ASBS Special Protections
Deadline: 9/1/06 5pm

August 31, 2006

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Ms. Tam Doduc, Chair
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Subject: Comments on the Working Draft- Staff Proposal - Special Protections for ASBS

Dear Chairperson Doduc:

Thank you for holding the August 15, 2006 scoping session in Monterey to obtain public input on the scope and content of the environmental information which should be included in a proposed draft mitigated negative declaration for the proposed ASBS Special Protections (Proposal) to address storm water and nonpoint source discharges.

At the outset, we disagree with the suggestion that there will be no significant environmental impacts from the Proposal and that the functionally equivalent environmental document to support this action can be a negative declaration. Instead, the physical facilities and operational changes that could be required as a result of the Proposal will have substantial adverse effects on the environment, with minimal if any corresponding benefit, as discussed below. For that reason, a negative declaration is not the appropriate environmental document for the Proposal. The difference is important because there are several alternatives that should be considered that would avoid or reduce these significant effects as discussed below. Title 14, California Code of Regulations, Section 15252.

The process that the Board is currently following also is of substantial concern to the City. The August 15th meeting was noticed as a meeting to scope the environmental review yet staff used the meeting as a time to informally explain and answer questions regarding the Proposal. In that regard, your staff asserted that no rulemaking process will be required to implement the Proposal. As discussed below, we disagree with this assertion. However, since the substance of the Proposal was emphasized at the public meeting, and given the uncertainty and ambiguity in your intended process, the City will use this opportunity to comment on the broad issues raised by the Proposal, itself, in addition to those issues that should be addressed in the environmental document.

The Proposal establishes water quality standards, regulations for storm water run-off and monitoring requirements that are not found in the Ocean Plan, the Porter-Cologne Act or any other legally adopted policy, regulation, plan or guideline. The Board is required to adhere to formal rulemaking in adopting such a Proposal, and comply with the requirements for amending the Ocean Plan.

The City should not be put in the position of guessing at the procedure that you will follow and whether or not we will have an opportunity to comment further. Rather, the established formal rulemaking process should be followed so that all affected parties are on notice as to when they can comment and be heard, in accordance with their procedural and due process rights.

As you know, there is a long history to this controversy. At your meeting on April 21, 2005, the Board directed staff to hold a series of stakeholder meetings. The purpose of those meetings was to solicit comments and recommendations to improve upon the loosely defined "exception" process and to address legal concerns. Members of Monterey City staff attended the two ASBS workshops

that were held in response to the Board's direction. We were expecting the Board to receive a summary of the comments from the workshops and implement the rulemaking process to revise procedures or make amendments to the Ocean Plan. Instead, we received the Proposal, which suggest that there may be no opportunity to comment further. However, given the nature of the Proposal, the Board needs to follow through with its rulemaking obligations.

As Vice Chairperson Secundy stated at the August 15 meeting, this Proposal will have extreme financial implications. It will be costly for the State Board to implement such a program and it will be almost prohibitively expensive for the affected parties to comply. As discussed in our previous submissions, these costs have never been considered as required by Water Code Sections 13170, 13241 and 13263. Since the Proposal would impose requirements beyond those mandated by federal law, this cost-benefit balancing is required both in connection with the proposed adoption of the Proposal, as well as when it is implemented with respect to an individual discharger. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613. Furthermore, if this is indeed an unfunded state mandate, as we believe it is, the State will have to shoulder the entire cost for the program. Total program costs need to be estimated, and made available to the stakeholders for comment, as a part of CEQA review, as a requirement of the Porter Cologne Act and for budgetary purposes for the State. The cost associated with this Proposal alone is enough to warrant a formal rulemaking process.

We also object to the proposed retroactive application of the Proposal, by requiring an affected party to have signed up for the "Special Protections" by May 31, 2006 and then, well after, promulgating the rules to which the party must adhere. The City of Monterey has asked for an extension of time. It is unknown if the extension will be granted. Draconian penalties for noncompliance are set forth in the Proposal. This aspect of the Proposal is a transparent attempt to penalize entities such as the City that have objected to the wisdom and legality of the Board's approach to ASBS regulation. This attempt to ride roughshod over the City's legitimate objections is simply illegal and unfair.

It was clear from the August 15 meeting that the current Proposal was not well thought out or set forth completely on paper. Staff has not identified the "responsible parties," to whom this Proposal applies. The City would like to see a list. Staff admitted that the process and survey they used to identify the "responsible parties" was not formulated for this purpose and was imprecise. Then staff indicated that it would use its discretion or "best guess" to discern whether an alleged discharger was "large" and therefore required to adhere to this Proposal or "small" and not required to adhere to the Proposal. So, if Staff makes a best guess and determines that a discharger is "large" there will be millions of dollars of cost involved with compliance with the Proposal but if the discharger is "small" then they can discharge storm water without cost or adhering to the proposed program. There was no indication by Staff as to whether direct or indirect dischargers are treated the same under this Proposal. Also, Staff wouldn't identify whether the Proposal concerns discharges into the ASBS or near the ASBS. Again, this is why a formal rulemaking process is needed.

The Proposal also is ambiguous and confusing by appearing to redefine the established criteria for permissible "stormwater" discharges under the federal NPDES permitting program. The definition on page 3 describes permissible discharges as being "composed of natural precipitation runoff" which taken alone would be generally consistent with the federal definition of stormwater. However, this term is then modified by defining it to constitute a discharge that does not "cause a statistically significant increase in pollutant concentrations in the receiving water adjacent to the storm water runoff as compared to the reference stream." Later, the Proposal states that permissible discharges must "be comparable to background levels." This "no increase" criterion is completely different from the definition of permissible stormwater discharges in the federal NPDES regulations, and far more restrictive. The standard also does not appear in the current Ocean Plan, and represents a de facto amendment to that plan subject to Porter Cologne Act requirements. Furthermore, the critical determination of what would constitute a "reference stream" is nowhere elaborated in the Proposal other than being required to meet the vague criterion of having "minimal anthropogenic impacts". Also prohibited are discharges from "anthropogenic activities to an ASBS through seeps or springs..." Page 5. Just what this proposed prohibition encompasses is nowhere explained.

As a result of these ambiguities and a generally confusing approach, it is impossible to tell whether the Proposal, in effect, will result in an expansive ban on all stormwater discharges, with potentially severe environmental effects resulting from foreseeable efforts to either avoid or control the discharge, or whether it is intended to reflect a more reasonable regulation with far fewer environmental effects.

From the perspective of the California Environmental Quality Act (CEQA), the ambiguities and uncertainties in the current proposal reflect inadequacies in the description of the project to be analyzed in the environmental document. The project description must be accurate, stable and finite. As you know, these requirements apply to functionally equivalent documents under certified programs. Title 14, California Code of Regulations, Section 15252. The current project description as reflected in the Proposal meets none of these requirements.

Numerous speakers at past hearings including City staff have spoken to the serious problems associated with past proposals as well as the current Proposal. I will attempt to briefly summarize the flaws that Monterey finds the most significant with the Draft Staff Proposal:

First: There is no logical regulatory approach to address indirect dischargers. The answers that we've received to our questions and concerns have basically been a denial that any difference between direct and indirect dischargers exists. Yet we have annotated those differences in letters to the Board¹. Moreover, the differences are real and they are important. Specifically, the City cannot regulate discharges that occur from outfalls located outside of our jurisdiction. Therefore, there is no way for indirect dischargers to insure that the environmental improvements that one would hope will result from the ASBS restrictions using the process that has been presented to us. Yet significant costs will be incurred.

From a CEQA perspective, we request that an alternative be considered that does not place an impossible burden on municipalities by essentially requiring controls of pollution from sources that legally they cannot regulate.

Second: The proposed "Special Protections" and the associated "exception" process is cumbersome and unnecessary, since all of the affected municipalities are involved in the NPDES stormwater permitting process. An exception carries with it the legal, social, and political stigma that the community is violating the "one-molecule" prohibition. Moreover, the process will be administratively burdensome and duplicative of the established NPDES effort. Furthermore, both of these processes are based upon the term "waste". There has been much said about what constitutes a waste. Yet there is no clear definition of this term. We believe that there is a practicable definition of the term that lies somewhere between the "zero-molecule" standard used in some regions and allowing harmful quantities of pollutants entering the receiving waters. The reality is that the term waste as used in the Ocean Plan and the Porter-Cologne Act was never meant to address storm water. This definitional issue needs to be addressed. Not all storm water containing small amounts of pollutants can realistically be called "waste".

From a CEQA perspective, we request that an alternative be considered that would rely on the NPDES stormwater permitting process, rather than the proposed exception procedure.

Third: We believe that there is a need to take a radically different approach to the way that ASBSs are to be handled. The Board recently received a report entitled "The Feasibility of Numeric Effluent Limits Applicable to Storm Water Discharges" prepared by an impartial panel of experts known as the "Blue Ribbon Panel" (BRP). The BRP concluded that in most cases, numeric effluent limits for municipalities are infeasible. The BRP instead endorses a "Best Management Practices" (BMP) based approach. This would be based upon implementing proven BMPs and following up on the maintenance of those BMP's. We agree with the BRP and we believe their conclusions are just as applicable to ASBS as they are outside of them. The approach is also fully consistent Public Resources Code Section 36710, which provides that discharges to "state water quality protection areas" (defined to include ASBSs) are either to be prohibited "or limited by the imposition of special conditions...". Such special conditions could include the specification of BMPs in the established NPDES permitting process.

¹ Letter from Monterey City Mayor Dan Albert to Chairperson Tam M. Doduc dated May 25, 2006.

We recognize that the Proposal references BMPs on page 10, but like the redefinition of stormwater discussed above, the discussion of BMPs incorporates a requirement to achieve "natural water quality conditions" which in turn has been defined to incorporate a "no increase" requirement. This standard is completely different from the maximum extent practicable (MEP) standard established for BMPs under the federal NPDES stormwater regulations, and again far more restrictive than federal law requires.

The assertion in the Proposal that SB 512 established an absolute prohibition on ASBS discharges is completely at odds with the language of the statute which clearly allows an alternative of establishing "special conditions." Nowhere does SB 512 either state or imply that the exception approach is being mandated.

From a CEQA perspective, we request consideration of an alternative that relies on the MEP standard setting process for NPDES stormwater permits, rather than establishing a de-facto discharge ban.

Fourth: The proposal should build in flexibility where communities are able to divert flows from an ASBS and/or treat those flows in order to avoid a discharge of waste. Communities such as Monterey, Pacific Grove and Pebble Beach are seriously investigating this option. You should not require us to spend substantial sums of money to pursue an exception when there has not been enough time to analyze whether we will be able to treat and/or divert our flows. As long as communities are diligently pursuing alternatives to discharging, this too should be part of the process. Under CEQA, the environmental document should evaluate the alternative of delayed implementation in order to allow time for such potentially less damaging alternatives to be evaluated.

Fifth: The ASBS Concept goes beyond federal requirements and is therefore both subject to the economic analysis required by the Porter Cologne Act, and constitutes an unfunded State mandate. The State does not have sufficient dedicated funding to address ASBS in the manner set forth in the Proposal. From a CEQA perspective, this consideration is similar to the second and third items above, since it would lead to the development of an alternative based upon the federally established MEP standard, implemented through the NPDES stormwater permitting process.

Sixth: We object to being subjected to the full burden of the monitoring requirements, particularly in jurisdictions such as Monterey where indirect upstream dischargers are the primary contributors. It's unreasonable to require the communities along the coast to bear the responsibility of being sure that all of the upstream dischargers have been upholding the same water quality standards as imposed upon them. This responsibility is implicit in the requirement that the communities bordering an ASBS must carry the burden of conducting the science required by the State to test the health of the marine biota. If the State insists on moving ahead, then the following environmental impacts need to be analyzed:

The Proposal would appear to require the cessation of non-storm water discharges, which would not be possible without constructing extensive collection facilities such as berms at the edge of the sea and intercepting and treating all runoff including sheet flows. This is stated requirement of the proposed "Special Protections" on pages 2 and 5. The environmental document should evaluate the environmental impacts that would result from this proposal.

Moreover, in many locations such oceanside collection facilities will not be physically or legally feasible, in particular given potential conflicts with Coastal Act policies applicable to shoreline developments. This, in turn, could require upstream interception of flows, such as the diversion of a stream or river. The environmental impacts of such a diversion should also be considered. Environmental impacts from discharges to streams and rivers must be considered and cannot be shuffled off to a separate regulatory scheme as suggested on page 3. Would the coastal community have to divert the stream or river? What are the impacts of such a diversion?

The environmental document should also evaluate the environmental impacts that would result from having to cover large pieces of land with treatment facilities and detention basins; the energy used to build and operate these facilities including the impacts to our fragile electric grid; the air pollution that will result from the electricity needed to pump and treat this water; the construction and other impacts from potential re-routing of stormwater lines; and the impacts from the reduction of fresh water in some areas or the increase in other areas. Also, the environmental document should evaluate the impacts to our

sewage treatment plants if diversions are made to them, and the environmental impacts that would result if they were required to be expanded.

Furthermore, the environmental document should consider the environmental impacts that are being made to each of the ASBSs from storm and non-storm water discharges and whether the impacts of the proposed "cure" overshadow the benefits. Specifically, experts that we've spoken to at Hopkins Marine Station and the Monterey Bay Aquarium doubt that there have been any measurable deleterious effects from storm and non-storm water discharges to the Pacific Grove ASBS, and the environmental impacts that would result from the proposed control measures are therefore unnecessary and unwarranted.

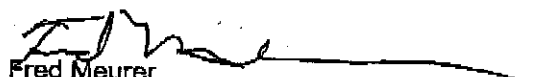
On page 4 of the draft "Special Protections", under nonpoint sources, there is a statement that no new nonpoint sources will be allowed. This would appear to run contrary to other state policies including encouragement of coastal access - a land use conflict that must be evaluated. What are the environmental implications of such a prohibition? The Monterey Bay Aquarium or the cities recreation trails could not have been built in their current location under these conditions because they would increase runoff and are a nonpoint source.

The cost and the ripple-through financial impacts on communities carrying the burden of implementing ASBS regulations is a significant factor and will have indirect environmental impacts. The costs for implementing the process as we understand it could run into millions of dollars. What are the environmental impacts from the parks that won't be maintained or the libraries hours that will need to be curtailed or the police officers that won't be on the street because the local communities can't afford these additional expenditures?

In sum, we urge the State Board to take a substantially different approach to regulating municipal stormwater discharges to ASBSs - one that relies on the well established MS4 NPDES process. If the Board decides to proceed with the Proposal, it will need to comply with Porter Cologne Act and rulemaking procedural requirements, most importantly the balancing of economic factors. The environmental impacts of foreseeable actions taken by dischargers in response to this expansive regulation need to be evaluated in the environmental document, together with alternative approaches that would reduce or eliminate those impacts.

We appreciate this opportunity to comment on the scope of the environmental document being prepared by the Board in connection with its Proposal, and look forward to further participation in the CEQA process.

Sincerely,


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City Manager

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