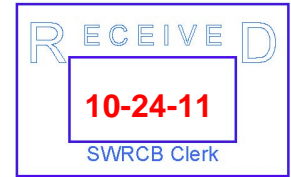


## MONTEREY REGIONAL STORM WATER PERMIT PARTICIPANTS GROUP



October 24, 2011

**Chairperson**

*Sydney Moe*

**Vice-Chairperson**

*Sarah Hardgrave*

**Member Entities**

*City of Pacific Grove*

*City of Monterey*

*City of Sand City*

*City of Seaside*

*City of Del Rey Oaks*

*City of Marina*

*County of Monterey*

*City of Carmel-by-the-Sea*

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-2000

**Subject: Comment Letter – Proposed Model Monitoring Amendment to the Ocean Plan**

Dear Members of the State Water Resources Control Board:

We are writing to express our growing concerns about the regulatory approach being taken by the State Water Resources Control Board (SWRCB) with respect to the proposed amendment to the Ocean Plan, particularly as it relates to Model Monitoring. Many of our concerns have been expressed previously by several public agencies and private entities through their comments concerning the draft Special Protections for ASBS discharges, specifically comments made by the Cities of Monterey, Pacific Grove and Carmel, as well as Monterey County and Pebble Beach Company.

First, we are concerned about the issue of equity. Coastal communities and other non-MS4 dischargers make up a small minority of the land area that drains into the Pacific Ocean. Yet these proposed new requirements would burden just the coastal communities with the responsibility and the cost of untangling a complex puzzle of potential issues associated with water quality in the ocean. There appears to be an ultimatum provided in the proposed amendments for dischargers to join in a regional monitoring effort, and we see there really isn't much of a choice to do so or not. At this stage, it isn't clear what "regional" means. Apparently, we are being asked to determine which dischargers, consisting of both public agencies and private entities, are subject to the new requirements and are to come up with an organization and an equitable distribution of the costs and responsibilities to perform ocean science beyond the scope of normal government activities. We believe the approach is fundamentally flawed.

It's understandable that to some extent, MS4s as well as non-MS4s should monitor their discharge water characteristics. However, it is neither reasonable nor equitable to burden only coastal dischargers with the responsibility of monitoring the condition of the receiving waters when the entire United States west of the continental divide drains to the Pacific Ocean. If the goal is to learn about the baseline environmental conditions of the ocean, which appears to be the case, then it would be more equitable to spread the cost of this research upon all of the state. This would also provide the state with a mechanism to fund a comprehensive and well coordinated approach.

**Other Participating  
Entities**

*Pebble Beach Company*

*Monterey Peninsula  
Unified School District*

*Carmel Unified School  
District*

*Pacific Grove Unified  
School District*

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Pursuant to the Water Code, however, the burden of monitoring must bear a reasonable relationship to the need for and the benefits of monitoring. §§ 13267(b), 13225(c); City of Burbank v. SWRCB (2005) 35 Cal.App.4<sup>th</sup> 613. To date, the SWRCB has not presented evidence indicating the need for or the benefits of the proposed monitoring in comparison to the cost imposed on public agencies and private entities in the midst of a recession. Per the Water Code Sections 13241, the State has not provided information regarding the water quality benefits that could reasonably be achieved through the new proposed monitoring. As currently written, public agencies and private entities will be required to spend hundreds of thousands on monitoring that has no proven environmental benefits.

Second, the cost associated with the monitoring required in the proposed amendment to the Ocean Plan, which is an unfunded State mandate, is well above the limited financial resources of current public agencies and private entities, which do not have a funding mechanism for increased monitoring due to Proposition 218. From the report provided by state staff, the City of Monterey, for example, can expect to spend at least an additional \$19,000 per year. This figure doesn't include the costs associated with getting a monitoring plan approved or the time and money taken to carry out the plan. We would expect the actual costs to exceed \$40,000 per year. And these estimates do not include the costs for "Special Studies" or for other similar analysis. Monterey, which is one the state's most fortunate communities, does not have any funds for carrying out additional obligations without having an impact on other services. Smaller coastal agencies do not have any excess funds for increased costly monitoring as proposed in the amendment. There are too many scientific unknowns to propose these stringent monitoring requirements for receiving water, sediments, benthic intertidal marine life, and bioaccumulation, unknowns associated with background pollutant levels, natural flux, ocean conditions, currents, and other variations due to habitat differences.

Because the proposed monitoring requirements constitute an unfunded mandate, the costs to perform the monitoring should either be reimbursed by the State or the State should conduct the monitoring itself. In order to ensure that this significant concern is adequately addressed, we request the SWRCB conduct a thorough unfunded mandates review of all amendments proposed to the Ocean Plan during its triennial review and then publish the findings and conclusions of that analysis for public review and comment. Again, it is the State's responsibility to determine where problem areas exist such that public agencies and private entities can then utilize their limited resources to address specific issues instead of simply paying for ocean research.

As you will see in the specific comments below, the scope of the monitoring isn't always clear. Depending upon how those points of confusion are clarified, the estimates for costs could go up (they won't go down because the estimates given in this letter are based upon a reasonable interpretation of the proposed amendments that did not include costs where Phase II communities are not addressed.

The following are additional specific comments and suggestions:

Page 32, Item 3.1.3: The third paragraph states that "low threat facilities or any facility in general, can be relieved on Appendix III monitoring after a reasonable potential analysis demonstrates that the discharge is not likely to cause an excursion of the specific water quality objective". Again, MS4s are being required to conduct monitoring to determine the health of the oceans and are technically being considered "guilty until proven innocent". It is the responsibility of the State to determine the health of the oceans and then, once problem areas are identified, regional monitoring by MS4s in those areas could be considered. Public agencies do not have the resources to "prove themselves innocent" through on-going monitoring that is not specific to unique pollutants of concern in the area.

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Page 34, item 3.1.6: The environmental impact analysis states that “reasonable foreseeable action that **may** result if the proposed amendments are adopted would be the collection of monitoring data for those permittees that are found to have *reasonable potential*.” According to this statement, it is clear that the purpose of the proposed monitoring is to collect data. The State has not conducted its own ocean monitoring to determine which permittees have “*reasonable potential*”. This requirement is simply imposing expensive monitoring requirements on all Phase I and Phase II agencies, as well as other private entities, to collect data from agencies and entities that have no resources to pay for this monitoring and are struggling themselves during these hard times.

Page 35, “Aesthetics” and Page 33, “Alternative 3 (staff recommendation): At the beginning of this section and throughout the staff report, it states that “the proposed amendments do not specify how each individual permittee must perform monitoring”, however, when one reviews the proposed Ocean Plan amendment, it specifically separates out individual types of dischargers and what monitoring they **shall** be required to perform. Therefore, the proposed amendment **does** indeed specify exactly how each individual permittee must perform monitoring. Additionally, Alternative 3 specifically refers to the proposed model monitoring procedures as “new monitoring **requirements**”. (Requirements are enforceable; guidance is not. The State is trying to bypass the CA Health and Safety Code, Section 57004 by using the word “guidance” instead of “regulations/requirements” to classify the proposed.)

Page 38, item 3.1.8: The staff report contends that the proposed amendment is to provide “guidance” to dischargers and “...do not involve adding or altering objectives to the Ocean Plan, nor do they constitute standards...” and therefore do not require a peer review. First, the proposed monitoring amendment is not for guidance; once adopted, the monitoring requirements will be a State mandate as they indicate monitoring agencies **shall** perform. Second, the Ocean Plan is the State’s regulatory document. According to the California Health and Safety Code, Section 57004(b), “the agency or board....shall....conduct an external scientific peer review of the scientific basis for any rule (regulation or policy adopted by the State...that has the effect of a regulation) proposed for adoption by the Board. Once the proposed monitoring amendment is adopted, the monitoring requirements become part of the State’s regulatory document. To date, there has been no scientific peer review of the proposed monitoring requirements.

The proposed monitoring requirements are predicated on the assumption that water quality problems associated with the storm water discharges already exist, and that the dischargers should therefore be required to perform monitoring and then pollution abatement if the monitoring confirms they are causing a water quality problem. A scientific peer review should be required prior to adoption of this amendment; there does not appear to be any scientific basis for assuming that there are existing, or even potential, water quality problems associated with the current storm water discharges. And most certainly any degradation of ocean water quality caused by storm water is localized and a state-wide assumption to the contrary has not been borne out by the facts to date.

Page 37, item 3.1.9: The staff report contends that the proposed amendment is not subject to the requirements of Water Code Section 13241 because it doesn’t propose the adoption of new water quality objectives. Economic impacts will result from the imposition of new monitoring requirements, which the staff report (in this same paragraph) states will provide them with information pertaining to compliance with water quality objectives. Since the proposed monitoring requirements are directly related to water quality objectives, they should be subject to an assessment of the economic impacts so that the potential benefit of the additional monitoring can be weighed against the costs associated with performing that additional monitoring.

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Page 38, “Storm Water Point Sources”, second paragraph: What is “dry-weather”? How long should it be “dry” to consider it dry weather? Wouldn’t the amount of rain precedent to a dry-weather period be germane? What is the definition of “...flow present during dry weather.” Does this mean that the flow needs to make its way all the way to the ocean? Often there are flows during the dry weather but often they do not make it to the ocean via surface flows. As with the ASBS Special Protections, the proposal lacks specificity and therefore it isn’t possible to know what we are being asked to comment on or how to calculate the costs.

This paragraph states in part that additional monitoring will be required if a discharge is located at an AB411 beach or if there is any flow present during dry weather. However, AB411 was adopted in 1997 and revised Health and Safety Code 115880 to define beaches where bacterial monitoring must be performed to be:

(A) A beach that is visited by more than 50,000 people annually, and

(B) The beach is located on an area adjacent to a storm drain that flows in the summer.

“Or” and “and” are highlighted here because in the actual proposed language revisions to the Ocean Plan on page 48 under Section 4.2, the term “and” is used rather than “or”. This could have a huge significance to dischargers that are able to eliminate dry weather flow. The language in the proposed amendment should be corrected to consistently use the word “and” rather than “or” in this context throughout.

Pages 38 and 39: The definitions of “Storm Water Point Sources” and “Non-Point Sources” are not clear. Is storm water that sheet flows into the ocean considered to be a “Non-Point Source”? This needs to be clarified prior to being able to analyze all of the impacts of the proposed amendments since these terms are used throughout. Our suspicion is that the answer is yes. And if this is true, it is not clear at all how one is suppose to collect samples from sheet flows especially from off-shore pieces of land.

Page 38, Item 3.1.10: This paragraph states in part that all MS4 dischargers must monitor for aquatic toxicity and chemical constituents once per year from a minimum of 10% of outfalls greater than 36” in diameter. This testing will be expensive, and appears intended to only apply to entities with numerous outfalls greater than 36”. Clarifying language should be added to this paragraph stating that the 10% figure is to be rounded to the nearest whole number and that if an entity has less than five outfalls greater than 36” in diameter, it will not be required to perform this additional monitoring.

Page 40, Item 3.1.11: The staff report refers to some of the Ocean Plan tables as Tables A and B, while the Ocean Plan itself appears to refer to these tables as Tables 1 and 2. The correct references to these tables should be used throughout.

Page 43, Introduction: The introduction states that the monitoring should be question driven and we agree completely with this statement. The first question should be, are storm water discharges harming the beneficial uses of the receiving waters? Currently, there is vague and spotty evidence that in some areas and under certain conditions the answer is yes. However, just because the answer is yes in certain areas and these are generally the more heavily urbanized areas, it shouldn’t be extrapolated that all storm drain discharges equate to harming the beneficial uses of the ocean. And this goes back to the point made above about equity. Perhaps a more equitable approach would be to categorize the watersheds by risk level and base the monitoring upon risk. Communities such as Monterey have no heavy industry and we are largely a tourist-based economy. In fact, it’s almost an oxymoron to expect industry to exist along the coast because of the value of coastal properties. Eureka may be one in northern California; however, their industry may discharge into inland waterways or is already being regulated through an NPDES permit. Santa Cruz has some limited industry as does Sand City, but these are small industries such as concrete batch plants and fabrication shops. Not until one goes south of San Luis Obispo do you start to see heavier industries such as

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oil refining and heavy manufacturing such as automobiles and aircraft. Yet there are numerous inland areas where heavy industries and the potential for pollution exist. The proposal does not include any participation by those parties even though they all eventually drain to the ocean.

We believe that the state should conduct its own monitoring in the ocean to find where the beneficial uses of the ocean are being degraded by storm drain discharges, and that only when a localized region or specific area is found to be exhibiting signs of distress, the local communities could be tasked with focused sampling aimed at the specific issue identified by the state (the term “Special Studies” is used in the report). And the question-based monitoring then would be less of a scientific research effort by the MS4s and more of an issue and question driven process. The Core and Regional monitoring is actually basic research as there is no demonstrated linkage in the Monterey area that storm water is harming the beneficial uses of the ocean.

Page 44, Item 3.1.11: This paragraph of the proposed amendment describes “Special Studies” to include “research questions” and states that special studies are to be carried out by monitoring that is to be performed in part by storm water dischargers. The SWRCB does not have the authority to require municipalities to conduct research on the State’s water quality issues, so this requirement should be removed.

Page 45, Item 3.3 and Page 46, Item 4.3: In Item 4.3, the term “non-point source” is defined. Item 3.3 states that “only agricultural and golf course related non-point source discharge monitoring is addressed in this Appendix, but the Regional Water Boards may issue MRPs for other non-point sources at their discretion.” However, item 4.3 of the amended plan states that “core monitoring of representative agricultural irrigation tail water and storm water runoff, at a minimum, will be conducted in receiving water (ankle depth, point zero) for indicator bacteria”. The statement in item 4.3 appears to contradict the statement in item 3.3 with regard to the types of non-point sources that are addressed in the model monitoring requirements. We strongly recommend that language be added to items 4.3 and 4.5 to clarify that only “storm water runoff” from agricultural and golf course land uses are subject to core “non-point source” monitoring.

Page 46, Item 4.2 Storm Water, question #6: This should be reworded to make it clearer. We believe what is meant is: *What is the relative load contribution of indicator bacteria to the receiving water from storm water runoff?*

There is a term “ankle depth, point zero” in this section. Presumably ankle depth refers to the depths at which the sample is to be taken, and point zero means directly opposite the point of discharge of the outfall, but these terms should be clarified to ensure this is the regulatory intent.

Page 46, Items 4.2.a and b: How is wet weather defined? As with the draft ASBS Special Protections, a clear definition of this term is vital to understanding what will be required. There are times when we have unusual rains in what is traditionally thought to be the dry season. And we also go through long spells without rain during the winter.

Part b of this section states that “When flowing during dry weather...” What does this mean? Is only one moment of flow during the entire season reason to monitor? This wouldn’t be reasonable or acceptable. Is there any requirement that the five samples be collected with some separation of time or can they all be collected minutes apart? Does the flow need to make its way all the way to the ocean which is often not the case for low flows? What happens if it isn’t safe to collect samples, which is often the case with the larger outfalls?

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Page 46, Item 4.3: The first question to be answered is one that the state should be answering rather than presuming guilt on the part of the MS4s. This is a much broader question than one related just to storm water since there are numerous sources of pollutants entering the oceans. Questions 4 and 5 are questions that are not appropriate for many small MS4s to research. Bacteria are common place in the oceans and in storm drains. The presence or absence is often not an indicator of a poorly operating storm drain system. In fact, it can be the sign that there is an abundance of wildlife in the area, as many sources of bacteria are natural such as sea lions, sea gulls, and other marine wildlife.

In the paragraph directly below the six questions is the first time that storm water is now brought in as a non-point source. This then begs the question of whether, throughout the proposed amendments, storm water sheet flow is to be included under all of the references to non-point sources? On page 39 under the definition of non-point sources, there is a somewhat confusing reference to "...urban not covered under an NPDES permit..." which we were presuming meant urban runoff not covered under an NPDES permit. If this is what is meant, then this is tantamount to saying that even if there aren't storm drains near an AB-411 beach, if there is sheet flow, which many beaches will have, they will also be subject to monitoring. If this is the intent of this amendment, it should be stated more overtly.

Page 47, Item 5.2: As with other sections of the proposed amendments the questions being asked here demonstrate that the State lacks the basic information to answer these questions. Question number 3 is especially illustrative of the "guilty before proven innocent" approach. It appears that the state is implying that there are problems in the receiving waters throughout the State, yet also implied is that the State doesn't know for sure or to what extent, so the MS4s are now being required to spend scarce resources trying to answer what are unanswerable questions on a micro-level. How would the MS4s even start to approach such an open-ended question? Certainly, chemical pollution exists and its sources are world-wide. These are questions that should be answered in a much broader context rather than by individual dischargers or regional monitoring efforts. These sorts of questions are very similar to questions about air pollution and the global climate. Research into global warming or air pollution isn't being done by hundreds of municipalities each striking out on their own.

Here is an example of the need for peer review requested in the comments pertaining to Page 37 of the draft staff report.

Page 48, Item 5.3: This section addresses non-point sources. As in Section 4.3, it appears that the definition of non-point sources includes storm water. If this is the case, how can one gather samples from sheet flows as required in this section? Spatially, how frequently will samples need to be taken? There is a reference to tailwater flows from agricultural areas. Tailwater is stream flow and not a non-point source. So is the idea to sample only where the sheet flow is concentrated into essentially a point source? It is not clear what we will be required to perform and therefore it is difficult to provide salient comments.

Page 48, Item 6.0: Although for the purposes of this particular section sediment monitoring does not appear to apply to storm water dischargers, the term "natural conditions" in item 1 should be described/defined, as it may ultimately have application to all of the discharges regulated under the proposed amendment.

Page 49, Item 7.2: Question 1 should be reworded to ask if the receiving water is not meeting Ocean Plan standards as a result of storm water discharges. Question 3 should also be reworded to ask: What is the relative contribution of storm water pollutants to the receiving water toxicity?

The water quality of the storm water runoff itself need not meet the receiving water standards because an initial dilution factor should be applied to those discharges, just as it is applied to wastewater treatment plant discharges. What is the basis for the State's assumption (implicit in the language of this question) that

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there is a receiving water toxicity problem (with regard to storm water discharges)? Further, if a receiving water toxicity problem were to be identified, it would be very costly to determine whether storm water discharges were significantly contributing to that problem. This illustrates another example of the need for peer review.

Page 51, Item 10: When addressing characteristics such as turbidity, it's important and relevant to ask: What would have been the level of turbidity if there was no development? Creeks located in pristine areas become muddy during high flows. How is this base level of temporary water quality deterioration taken into account?

Item 1 in this section mentions the "zone of initial dilution". This term should be defined in terms of its meaning and applicability to storm water discharges.

And finally, according to the California Health and Safety Code, Section 57004, all Cal/EPA organizations are required to submit for external scientific review the scientific basis and scientific portion of all proposed policies, plans, and regulations. The peer reviewer's responsibility is to determine whether the scientific findings, conclusions, and assumptions are based upon sound scientific knowledge, methods, and practices. The State and Regional Water Boards are Cal/EPA organizations.

Additionally, per the federal Clean Water Act, each state is required to have in place a "continuing planning process" (CPP) approved by the US EPA. According to the State Water Resources Control Board's 2001 CPP, "In adopting amendments to state-wide plans (Ocean Plan, Thermal Plan, etc) or basin plans, the state and regional boards comply with Cal/EPA's Policy and Guiding Principles for External Scientific Peer Review of March 13, 1998, and with the State Board's internal peer review guidelines. These guidance documents set out procedures to ensure compliance with California Health and Safety Code Section 57004. Peer review of scientifically-based regulatory measures, such as TMDLs, and staff response to any significant peer review comments, **must take place before their adoption as Plan amendments by the State or Regional Board.** Peer reviewers must have NOT been involved in any way with the development of the amendment.

A review of all historical documentation pertaining to the Ocean Plan and amendments has indicated that an external scientific peer review has not been done for the proposed Model Monitoring amendment. No Board can take any action to adopt the final version of a rule (regulation as per Section 11342.600 of the Govt. Code\*) unless the following conditions are met:

- The Board submits the scientific portions of the proposed "rule", along with a statement of the scientific findings, conclusions, and assumptions on which the scientific portions of the proposed rule are based and the supporting scientific data, studies and other appropriate materials to the external scientific peer review entity for its evaluation.
- If the Board disagrees with any aspect of the finding of the external peer review entity, it shall explain, and include as part of the rulemaking record, its basis for arriving at such a determination in the adoption of the final rule, including the reasons why it has determined the scientific portions of the proposed rule are based on sound scientific knowledge, methods, and practice.

\* Govt Code 11342.600. "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, or standards adopted by any state agency to implement, interpret, or make specific the law enforce or administered by it, or to govern its procedure.

In summary, for all the above reasons, and others, the Monterey Regional Stormwater Group believes the science simply has not been presented to support the need for such an extensive monitoring program as

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being proposed in the Model Monitoring amendment to the Ocean Plan. Therefore, Monterey Regional Storm Water Management Group respectfully requests that the proposed Model Monitoring amendment be withdrawn, and that the State Water Board convene an expert panel to review monitoring requirements statewide instead. We also recommend a coherent, integrated approach be developed to efficiently address the various needs for water quality monitoring in California.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "SMoe", is written over a horizontal line.

Sydney Moe, P.E.  
Chair, Monterey Regional Storm Water Management Program

cc: Charles R. Hoppin, Chair, State Water Resources Control Board  
Frances Spivy-Weber, Vice Chair, State Water Resources Control Board  
Tam M. Doduc, Member, State Water Resources Control Board  
Thomas Howard, Executive Director, State Water Resources Control Board  
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Constance Anderson, Ocean Unit, State Water Resources Control Board  
Assemblymember Bill Monning, 27th District  
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