



February 17, 2012

DEPARTMENT OF PUBLIC WORKS

Jeanine Townsend, Clerk to the Board
Chair Hoppin
Executive Director Thomas Howard
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Electronic delivery to commentletters@waterboards.ca.gov

Subject: Clarification to Comment Letter –ASBS Special Protections

Dear Ms. Townsend:

Please accept this letter as a clarification to the letter dated February 15, 2012 with the title "Comment Letter – ASBS Special Protections", signed by Mayor Della Sala.

Reading the above-referenced letter may lead the reader to believe that we are retracting our comments to the proposed ASBS Special Protections that were dated May 19, 2011. That is not the case. The comments contained in the letter dated February 15, 2012 are additive to those previously made.

I regret any misunderstanding that may have resulted. Given the very short amount of time allowed to prepare comments did not provide us with adequate time to review the letter and make this point clearer.

Sincerely,

A handwritten signature in blue ink that reads "Tom Reeves".

Tom Reeves, P.E., L.S.
City Engineer

Cc: Senator Rodwick Wright
Senator Sam Blakeslee
Assemblymember Bill Monning
Matt Rodriguez, Secretary of Environmental Protection
John Laird, Secretary of Natural Resources



February 15, 2012

Clerk to the Board Townsend,
Chair Hoppin, and,
Executive Director Thomas Howard
State Water Resource Control Board
Division of Water Quality, Ocean Unit
1001 I Street, 24th Floor
Sacramento, CA 95814



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Subject: Comment Letter – ASBS Special Protections

Dear Clerk to the Board Townsend, Chair Hoppin, and Executive Director Howard:

Thank you for notification of the approaching State Water Resources Control Board (SWRCB) agenda item for March 6, 2012 regarding the Areas of Special Biological Significance (ASBS) General Exception Special Protections project and associated Program Environmental Impact Report (PEIR). The City of Monterey received the public notice via email on Thursday, February 9, 2012. The notice stated that revised Special Protections and EIR were available for public review.

This comment letter brings forth concerns related to the following:

- Less than adequate public notice for review and comment;
- California Environmental Quality Act (CEQA) disclosure/public process concerns, and,
- Specific comments on the ASBS Special Protections (dated 02/03/12).

Accordingly, the City of Monterey requests the SWRCB table this item at its March 6, 2012 hearing until a good-faith effort has been made by SWRCB staff to develop a complete and adequate Response to Comments and associated revisions to the project and supporting PEIR.

Less than Adequate Public Notice for Review and Written Comment

Upon closer examination, we realized that a revised Response to Comments was not available for public review on February 9, 2012, which as a part of the PEIR, would have required a revised PEIR to be posted for public review. At the October 18, 2011 SWRCB hearing, the Board directed their staff to revise the Response to Comments to adequately address the public comments received. A Response to Comments is a necessary part of a Final EIR, which would dictate that a revised PEIR be generated for public review.

On Monday, February 13, both Dominic Gregorio and Constance Anderson were alerted by the City that a revised Response to Comments and revised EIR were not posted on the SWRCB

web site for public review. Mr. Gregorio replied to the City stating that those documents would be coming out "...by the end of this week" (week of February 13).

The Public Notice states that written comments must be received prior to February 21, 2012 at 12 noon. As of the writing of this letter (Thursday, February 16, 2011), the revised Response to Comments and thus, revised PEIR have not been posted for public review.

If the documents are not disclosed to the public until Friday, February 17, 2011, the timing of their release will only leave the public less than four (4) hours to review all revised documentation and respond in writing before the 12 noon project review deadline on Tuesday, February 21, 2011. Of note, Monday, February 20, 2012 is a federally recognized holiday.

This is the second time that documents for this project have not been made available with sufficient advance notice for review and comment prior to a deadline. Minimal review and comment periods such as these appear to indicate that SWRCB staff is not interested in conducting a transparent and fair public review process.

CEQA Disclosure/Public Process Concerns

Based upon the timeline for considering the adoption of the Special Protections (March 6, 2012 SWRCB meeting), it is clear the SWRCB does not plan to recirculate a revised PEIR prior to certification of the ASBS Special Protections project. From this, we're able to draw the conclusion that the SWRCB determined that no significant new information was added to the PEIR to warrant recirculation as that would require at least 45 days for the public to review the revised PEIR.

This fact concerns us greatly since the City and others around California provided extensive written and verbal public comments raising significant environmental issues with the ASBS Special Protections project, its associated PEIR and Response to Comments (dated 10/07/11). In fact, the City and others believed the PEIR to be fundamentally and basically inadequate and conclusory in nature, which in itself would require recirculation of a revised PEIR (per CEQA Section 15088.5 *Recirculation of an EIR Prior to Certification*). Lacking significant revisions to the project and its supporting documentation (PEIR and Response to Comments), the SWRCB's public review process is precluding meaningful public review and comment on the project.

At the October 18, 2011 hearing, the SWRCB acknowledged that the October 2011 version of the Response to Comments was not adequate, acknowledging that it did not address many public comments provided, nor did it provide a good faith effort toward addressing environmental issues raised. As a result, the SWRCB directed its staff to more adequately and completely address the public comments received for the project and its associated PEIR, and to revise the project documentation accordingly..

CEQA Section 15088 *Evaluation of and Response to Comments* requires the lead agency to evaluate comments on environmental issues and prepare written responses to the public at large and public agencies. The written Response to Comments shall describe the significant environmental issues raised and address in detail reasons why specific comments and suggestions were not accepted. We don't believe we've received this minimum consideration as a local/public agency. CEQA requires that a good faith, reasoned analysis must be provided in the Response to Comments and that conclusory statements in response that are unsupported by factual information will not suffice. Additionally, courts look for adequacy, completeness, and

a good-faith effort at full disclosure through an EIR (CEQA Section 15151, *Standards for Adequacy of an EIR*). We don't believe this project can pass this test. Due to the lack of consideration given to public comments provided on this project and the inadequacy of the associated PEIR and Response to Comments produced to date, we're lead to believe the public has not been afforded a meaningful opportunity to comment on substantial adverse environmental effects of the project or a feasible way to mitigate or avoid such an effects.

Per CEQA Section 15132 *Contents of Final EIR*, a Final EIR should contain among other items responses by the Lead Agency to significant environmental points raised in the public review. We believe the City, as well as other parties, provided significant new information to the SWRCB through written and verbal public comment that is not being considered or addressed in the Response to Comments that is part of a Final EIR.

Specific Comments on the Special Protections (dated 02/03/12)

With regard to the February 3, 2012 version of the Special Protections, we have the following comments:

1. No changes were made to the policy to scale the requirements based on characteristics of watersheds draining to ASBS. For example, the policy does not scale requirements based on population size, density or land use and it continues to employ a one-size-fits-all urban oriented approach.
2. No changes were made to the policy to address the scientific issues associated with determining and complying with the undefined standard known as "natural water quality". The Special Protections policy will require the dischargers to characterize natural water quality, pre- and post-storm, in ocean reference areas and compare results to samples collected in the receiving water near certain discharge locations. A meaningful comparison of 'reference' and discharge sites is impossible due to the statistical invalidity of simply comparing one reference site, which will probably be located many miles away from the ASBS in question and with different oceanographic characteristics, and the high degree of natural variability in the ecosystem than those of the discharge sites. In Monterey Bay, we can expect episodic but perhaps significant influences from nearby rivers such as the Salinas, Pajaro and Carmel Rivers. Per our Alternative Approach, which we submitted to you in our May 2011 letter on this matter, we recommend that a state-funded panel be convened to define natural water quality in each ASBS and to provide guidance and protocols for determining whether a stormwater runoff is causing and contributing to degraded receiving water quality prior to the release of the Special Protections policy.
3. The Compliance Plans in parts A.2 and B.3 use the effective date of the Special Protections as the beginning point to measure deadlines. This does not take into account the time taken to form regional monitoring partnerships or develop an understanding of what constitutes "natural water quality". We recommend that the time zero should be after "natural water quality" characteristics are determined.
4. I.A.1.e(2)(vi): This definition is vague. Are "non-anthropogenic" flows from those sources described in (ii) through (v) above this definition? If so, this new category might just lead to further confusion.
5. Section I.A.2.f of the revised policy includes the following new language "to control storm water runoff discharges (at the end-of-pipe) during a design storm, permittees must first consider using LID practices to infiltrate, use, or evapotranspire storm water runoff on-site." It should be acknowledged that infiltration on steep bluffs in many of our coastal areas could lead to an increased risk for slope instability and bluff erosion, which could

in turn lead to a myriad of problems including increased sediment inputs to the ASBS. This also introduces an ambiguity as to whether the increased groundwater seepage that will occur as a result of implementing LID practices in many areas will be considered an anthropogenic source of water.

6. I.A.2.h(i): This paragraph, which has been deleted, provided a modest amount of flexibility for unforeseen circumstances and it should be retained. Related to this is the new section A.3.f. The intent of this new section is to provide structure to what will be deemed an unforeseen circumstance.
7. I.A.3.f: The definition of a physical impossibility which is given in the glossary is very limiting and it doesn't include such factors as it being physical impossible for reasons such as geology, topography or negative environmental impacts. The definition of what constitutes an economic hardship (lack of funding) which is given in section 1 is very limited and unrealistic. The median income of a community has nothing to do with the ability or inability for a jurisdiction to raise revenues to pay for this program. The real challenges lie in state legislation which limits the ability for local jurisdictions to charge fees or raise taxes.
8. I.B.1.e(2)(vi): See comment pertaining to I.A.1.e(2)(vi) above.
9. I.B.1.f and .g: What is the scientific basis for allowing bombing of these two islands and the inevitable degradation of runoff quality? This seems extremely preferential in light of the onerous requirements placed upon MS4s.
10. I.B.2.d: See comment pertaining to I.A.2.h(i) above.
11. I.B.3.f: See comment pertaining to I.A.3.f above.
12. I.B.3.f.1 and .2: These two conditions do not appear under I.A.3.f. Was this intentional?
13. III.E: See comments pertaining to I.A.3.f and I.B.3.f above.
14. Section IV.A.1: This section includes the following new language "Runoff samples shall be collected when post-storm receiving water is sampled". Please add language to this section in the final policy that clarifies the length of time that is allowed between sample collection of receiving water and stormwater outfall runoff. We recommend that at least 12 hours are allowed between sample collection times to minimize the logistical challenge of coordinating separate sample collection teams.
15. Sections IV.A.3.a.(1) and IV.A.3.b.(1): We suggest that these sections be revised to state "samples of storm water runoff shall be ~~analyzed- collected~~ during the same storm as receiving water samples annually and analyzed for oil and grease...".
16. Section IV.B.2, Regional Integrated Monitoring Program, contains substantial revisions that will increase cost monitoring costs (annual toxicity testing for runoff samples as opposed to once every five years, pre- and post-storm monitoring three times per year for Regional Monitoring Programs). It is not clear if the increased costs associated with the revised monitoring requirements were incorporated into the CEQA Economic Analysis. If the Special Protections policy is adopted on March 6, 2012, as planned, the impacted communities will need time to assess the full cost of the monitoring program. We recommend that water quality monitoring is not required until the 2013-2014 rainy season to allow time to assess and budget for the cost of compliance once the policy is adopted. The monitoring results are critical to BMP design; therefore, we also request that the Compliance Plan and BMP Implementation Schedule be adjusted accordingly.
17. IV.B.2.a: This states that a minimum of three ocean reference samples are to be collected, but it doesn't specify over what period of time.
18. IV.B.2.c: This specifies sampling over two storm seasons, but without the term of the Special protections being known, it isn't clear over what period this is to be done.
19. Section IV.A.3.b.(3) of the policy was revised to require stormwater runoff toxicity testing annually as opposed to once every five (5) years. This will increase monitoring costs and

may not be necessary. If the results show no toxicity after one year of sampling we recommend that the sampling frequency is reduced to once every five years.

We believe the revisions to the project - the revised Special Protections (dated 02/03/12) - should be included in a revised PEIR project description and analyzed in the environmental analyses for transparency and environmental review purposes. Also, it should be noted in revised PEIR which revisions, if any were a result of public comment.

Recommendation to Table Project

In closing, we are disappointed that most comments submitted by the City of Monterey as well as many other public agencies are not being taken into consideration or adequately addressed. We're also concerned with the multiple short deadlines provided on this project for document review prior to written public comment deadlines. This practice does not appear to support the intent of CEQA. Also, in an earlier letter sent by the City dated May 19, 2011 we proposed a credible and potentially environmentally superior alternative to the Special Protections. The alternative received no response to our comment and it deserves a fair and unbiased review and analysis as an alternative to the designated project.

For these reasons and many others stated within our written and verbal communications to the SWRCB on this project, we don't believe the SWRCB should approve the project due to the fact that the final PEIR certification, if adopted, was not completed in compliance with CEQA, which is necessary per CEQA Section 15090.

Accordingly, we request that this project matter be tabled by the SWRCB until the SWRCB staff can adequately respond to public comments, as well as comply with necessary public processes, documentation, and disclosure requirements afforded per CEQA.

If you have any questions on this matter, please contact me or Tom Reeves, City Engineer, at 831-646-3448.

Sincerely,



Chuck Della Sala
Mayor

Cc: Senator Rodwick Wright
Senator Sam Blakeslee
Assemblymember Bill Monning
Matt Rodriguez, Secretary of Environmental Protection
John Laird, Secretary of Natural Resources

Ec: Monterey Regional Stormwater Management Program, Heidi Niggemeyer