

Central Coast Regional Water Quality Control Board  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401



January 10, 2005

Re: Comments Regarding Revised Draft Monterey Regional Stormwater Management Program.

Dear Chairman Young and Members of the Board:

On behalf of The Ocean Conservancy and its more than 25,000 California members, I submit the following comments on the revised draft Monterey Regional Stormwater Management Program (MRSWMP). The Ocean Conservancy thanks you for the opportunity to review and provide comments on the draft MRSWMP.

1. The MRSWMP is inconsistent with both the MEP standard and the more stringent standard established in *Building Industry Association v. SWRCB*.

In general, the MRSWMP is unacceptably vague and will fail to fulfill the fundamental federal requirement to reduce stormwater pollution to the maximum extent practicable. The majority of the BMPs included in the MRSWMP are merely reiterations of the general permit's basic requirements, and promises to develop the mandated plans at some time in the future. Astonishingly, this draft is even less specific than the previous draft, which at least specified measurable goals in terms of months and years (the current draft expresses milestones in terms of years only). In sum, the MRSWMP is currently not specific enough to permit the Regional Board to approve or deny it based on a determination of whether or not it will meet the MEP standard. It is also not specific enough to permit transparent and meaningful review by the public, as required by *Environmental Defense Center v. EPA*.<sup>1</sup> We echo the comments of the Natural Resources Defense Council (January 10, 2005) in this regard, and advise the Board to decline adoption of the MRSWMP until it can reasonably make such a determination.

The MRSWMP also fails to meet the alternative, more stringent, standard set forth in the 2001 San Diego permit, recently upheld by the California Court of Appeal in *Building Industry Association v. State Water Resources Control Board*.<sup>2</sup> In that case, the Court found that it was permissible to require a permittee to go beyond the MEP standard and to prohibit discharge that would cause or contribute to

<sup>1</sup> 344 F.3d 832, 857-858 (9th Cir. 2003).

<sup>2</sup> Super. Ct. No. GIC 780263 (December 7, 2004).

exceedences of receiving water quality objectives. Recent reports from the Pew Oceans Commission and the United States Commission on Ocean Policy highlight the crisis in ocean health, and particularly the contribution of land-based pollutants to degraded ocean water quality.<sup>3</sup> In light of such new information, it is incumbent upon this Board, and all the Regional Boards, to hold dischargers of stormwater into the oceans to the highest possible standards. Accordingly, we request that the MRSWMP be revised to be consistent with the standard set forth in Building Industry Association.

2. The MRSWMP cannot be approved until the Permittees have either ceased discharging into Areas of Special Biological Significance or acquired exceptions to the Ocean Plan.

The MRSWMP defers dealing with the issue of illegal discharges into Areas of Special Biological Significance (ASBSs). Specifically, the document states:

The Permittees that have storm water discharges into ASBS will work with SWRCB and RWQCB staff to determine whether or not these discharges can continue through issuance by the SWRCB of an exception to the ASBS discharge prohibition in the 2001 Ocean Plan. If an exception is granted, it is expected that there will be requirements issued with the exception, which the affected Permittees will incorporate into their Storm Water Management Programs. If an exception is not granted, then those Permittees will take other steps to comply with the applicable regulations pertaining to discharges into ASBS.<sup>4</sup>

It is true that the ASBS issue must be handled outside the context of the MRSWMP. Neither of the two options available to the Permittees – immediate compliance, or acquisition of an Ocean Plan exception – can be properly implemented in this context.

However, the Regional Board may not approve the MRSWMP until one of these options has been implemented. The General Permit's section entitled 'Prohibitions' states: "[t]his General Permit also incorporates discharge prohibitions contained in Statewide Water Quality Control Plans and Regional Water Quality Control Plans (Basin Plans)."<sup>5</sup> In this connection, the California Ocean Plan contains a clear prohibition against discharges into Areas of Special Biological Significance (ASBS). This prohibition states: "[w]aste shall not be discharged to areas designated as being of special biological significance."<sup>6</sup> The State Water Resources Control Board has held that this prohibition extends to stormwater discharges.<sup>7</sup> Accordingly, approval of the MRSWMP is clearly inconsistent with the ASBS discharge prohibition in the Ocean Plan, and consequently inconsistent with the requirements of the General Permit in this regard. Furthermore, even if the dischargers were able to obtain an exception from the Ocean Plan's discharge prohibition, the prohibition would remain a requirement of the General Permit. In sum, it is not enough for the dischargers to blithely assert that they will deal with this later; the MRSWMP cannot be approved until illegal discharges into ASBSs have been eliminated.

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<sup>3</sup> Pew Oceans Commission, *America's Living Oceans: Charting a Course for Sea Change* (May 2003); United States Commission on Ocean Policy, *An Ocean Blueprint for the 21<sup>st</sup> Century* (September 20, 2004).

<sup>4</sup> Monterey Regional Storm Water Management Program (December 10, 2004) at 3-4.

<sup>5</sup> State Water Resources Control Board (SWRCB), Water Quality Order No. 2003-0005-DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000004, Waste Discharge Requirements (WDRS) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (General Permit) at 5.

<sup>6</sup> Ocean Plan at III.E.1. This prohibition applies to both point and nonpoint sources of waste, and the only explicit exception is for certified limited-term activities.

<sup>7</sup> State Water Resources Control Board, Order WQ-2001-08, In the Matter of California Department of Transportation For Review of Cease and Desist Order No. 00-87 for Crystal Cove Issued by the California Regional Water Quality Control Board, Santa Ana Region SWRCB/OCC File A-1350.

On June 8, 2004, the Regional Board conducted a meeting between the Monterey Regional Storm Water Management Group, Monterey Regional Storm Water Program commenters, and the general public. At this meeting, commenters objected to the MRSWMPs failure to address the issue of discharges into ASBSs. In a letter clarifying decisions from the June 8, 2004 meeting, staff played down the importance of dealing with the ASBS problem, cavalierly stating: “[p]recipitation and storm water runoff will continue and will inadvertently carry pollutants to ASBSs despite prohibitions for discharge of pollutants.”<sup>8</sup> The letter quotes extensively from an informational document that accompanied proposed amendments to the Ocean Plan’s discharge prohibition, stating that the conditions contained in the proposed amendments “indicate the type of controls that are appropriate for ASBS discharges.”<sup>9</sup> These amendments most certainly do not represent the types of controls that are appropriate for ASBS discharges, and for this reason the State Water Resources Control Board roundly rejected them in January 2004.

Furthermore, the letter quotes State Board staff as stating that “storm water runoff is a natural event, and therefore storm water will continue to occur into ASBSs.”<sup>10</sup> Stormwater runoff not rainwater; it is anything but natural, and is the largest source of water pollution in California and in the United States.<sup>11</sup> 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. Silt and sediment carried by runoff can destroy coastal habitats and impair the feeding of some aquatic species. Nutrients carried by stormwater runoff can cause algal blooms and hypoxic conditions leading to fish kills. Human pathogens carried by stormwater into the surf zone of local beaches degrade water quality to such an extent that it is often unsafe for human contact.<sup>12</sup> In sum, it is disingenuous to assert that stormwater is natural or safe. The Clean Water Act acknowledges that stormwater is non-natural discharge and regulates it as a point source. The State Board even recognized stormwater as discharge that was fully subject to the ASBS discharge prohibition in the Ocean Plan.

It is disheartening to hear Regional Board staff suggest that the Board should patently decline to enforce an unambiguous legal requirement under its jurisdiction. The illegal discharge of stormwater into ASBSs is a problem that must be addressed before the MRSWMP can be approved. It is our understanding that the Permittees affected by the discharge prohibition have communicated their intent to apply for an exception to the State Board.

3. The Cease and Desist Orders issued to the Permittees do not solve the ASBS discharge problem.

The series of Cease and Desist Orders (CDOs) prepared by RWQCB staff to address the ASBS issue do not remedy the problem. We have submitted separate comments on the CDOs, and a copy of these is attached hereto and incorporated by reference. In short, the CDOs are not an adequate substitute

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<sup>8</sup> Letter from Roger Briggs, Executive Officer, Central Coast Regional Water Quality Control Board, to Monterey Regional Storm Water Permit Management Group (July 21, 2004) at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., EPA’s National Urban Runoff Program (US EPA, 1983); 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).

<sup>12</sup> 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).

for immediate measures to comply with the discharge prohibition. Accordingly, we reiterate our request that the MRSWMP be revised to include such measures.

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Once again, thank you for the opportunity to review and comment on the MRSWMP. Please feel free to call me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah G. Newkirk".

Sarah G. Newkirk  
California Water Quality Programs Manager

Cc: Donette Dunaway, Central Coast Regional Water Quality Control Board  
Dominic Gregorio, State Water Resources Control Board