



NATURAL RESOURCES DEFENSE COUNCIL

January 10, 2005

*Via Facsimile, Electronic Mail, and U.S. Mail*

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Re: Monterey Regional Storm Water Management Program

Dear Mr. Fujimoto, Ms. Bitting and Ms. Dunaway,

On behalf of the Natural Resources Defense Council (NRDC) and its more than 100,000 California members, we submit the following comments regarding the second draft of the Monterey Regional Storm Water Management Program (MRSWMP). NRDC thanks you for the opportunity to review and provide comments on the second draft of the MRSWMP.

As an initial matter, it seems that this draft of the MRSWMP primarily modifies the list of best management practices (“BMPs”) and measurable goals from the previous draft in some areas as well as adds a “BMP Intent” for each program. However, despite these modifications, the MRSWMP is nearly a reformatted replica of the previous MRSWMP. We are greatly disappointed with the draft because the MRSWMP programs still fail to meet the federally mandated maximum extent practicable (“MEP”) standard as well as assure compliance with water quality standards. Critically, the MRSWMP is illegal in several aspects (as discussed further in this letter, our April 16,

2004 letter, and the two letters submitted by Dr. Richard Horner)<sup>1</sup>, including the following matters:

- The MRSWMP fails to assure that the programs are “designed to reduce the discharge of pollutants . . . to the Maximum Extent Practicable (MEP) and protect water quality.” (33 U.S.C. § 1342; 40 C.F.R. § 122.34.) The majority of BMPs illegally remain “a program to create a program.” The MRSWMP utterly fails to adequately describe what the programs will do in any definitive sense to effectively control polluted urban stormwater runoff. The program descriptions are impermissibly vague.
- The MRSWMP fails to explain—in any manner—why its programs are not designed to meet the MEP standard given the uniform approach and proven BMPs that satisfy the MEP standard as utilized by other cities of a similar size as well as recommended in numerous federal and state model documents available for designing an effective storm water management program. In California, the State and Regional Boards are part of a unified water quality regulatory program and, in part for this reason, the programs actually being implemented in comparable circumstances in other cities define the minimum acceptable for the Monterey region. This is especially true here, where there is no explanation of why those programs are not consistent with MEP and other standards for the Monterey region.
- Because the MRSWMP is incomplete and vague, it fails to allow for adequate and transparent public review as required by *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832, 857-858. Thus, the public is foreclosed from any meaningful review to determine if the MRSWMP will be effective.
- The MRSWMP’s approach to Attachment 4 requirements—Receiving Water Limitations and Design Standards—is arbitrary and capricious and otherwise inconsistent with law. The MRSWMP does not adequately explain how the requirements of Attachment 4 (“Design Standards”) will be implemented. Nor does it explain exactly which municipalities will implement the Attachment 4 requirements or the basis for not applying the requirements to certain

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<sup>1</sup> In addition to these four letters, we have submitted numerous documents in support of our letters to the Regional Board. Our letters also reference several manuals, guidance materials, policy documents. These documents are referenced (instead of attached for submission) because these documents are widely available to the public, permittees, and the Regional Board. All of these documents are submitted and referenced for inclusion in the administrative record in this matter.

municipalities. All cities covered by this application must implement structural BMPs as required by Attachment 4.

- The MRSWMP's approach to Areas of Special Biological Significance (ASBS) is illegal. A storm water management program must be designed to implement permit requirements to effectively control storm water runoff. It is illegal to have permittees fail to include programs to comply with the ASBS requirements of state law.

Based on these illegalities, it is difficult to comprehend how the Central Coast Regional Water Quality Control Board (Regional Board) could approve of the MRSWMP in its current form. Therefore, the Regional Board cannot approve the MRSWMP because doing so would be arbitrary and capricious, an abuse of discretion, and otherwise contrary to law. In this connection, it has long been recognized in California that conclusory statements such as those that dominate the MRSWMP do not amount to substantial evidence on which a regulatory agency may rely in making decisions. See, e.g., *Mountain Lion Coalition v. Fish and Game Commission* (1989) 214 Cal. App. 3d 1043.

In this connection, we respectfully request that the Regional Board consider either changing the February 11, 2005 hearing to a workshop to discuss the deficiencies in the MRSWMP or rescheduling the hearing. Regardless of whether the Regional Board requires further modifications and/or resets the hearing, we request that the Regional Board prepare and distribute "Response to Comments" as required by state and federal regulations at least ten days prior to any hearing or workshop.

### **General Comments**

#### *The MRSWMP Fails to Meet the MEP Standard and Compliance with Water Quality Standards.*

Although the program generally indicates an intention in the future to satisfy the MEP standard and protect water quality, the MRSWMP fails to meet this purpose. The shortcomings in this draft are rooted in the same shortcomings of the original draft: the MRSWMP continues to be impermissibly vague and general. Thus, the current draft of the MRSWMP fails to meet the legal requirements under the General Permit and the Clean Water Act.

To this point, the majority of BMPs remain "a program to create a program." The MRSWMP consistently frames BMPs and implementation plans as "develop" or "create" nearly the entire program. (See, e.g., SWMP Table 4.1 at 1, 15, 19, 22, 26, 28, 29, 34.) The BMP implementation plan often states "The intention is to develop" versus clearly describing the specific obligation the BMP creates. (MRSWMP Table 4.1 at 18.) This lack of an actual program is blatantly obvious throughout the programs and especially in three central programs: Construction Site Runoff, Post Construction Runoff, and Municipal Maintenance BMPs.

Without specific details on all programs it is impossible to determine if they will effectively control polluted urban storm water runoff—the number one source of pollution to California’s coastal waters. (See General Permit, Finding 1.)

The General Permit defines MEP as:

MEP is the technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve. MEP is generally a result of emphasizing pollution prevention and source control BMPs as the first lines of defense in combination with structural and treatment methods where appropriate serving as additional lines of defense. The MEP approach is an ever evolving, flexible, and advancing concept, which considers *technical and economic feasibility*. As knowledge about controlling urban runoff continues to evolve, so does that which constitutes MEP. The individual and collective activities elucidated in the MS4’s SWMP become its proposal for reducing or eliminating pollutants in storm water to the MEP.

(General Permit at 8-9 (emphasis added).) Hence, the MEP standard focuses on “technical and economic feasibility.” However, the BMPs in the MRSWMP are not based on what is technically or economically feasible. In fact, the BMPs do not even come close to what is maximally practicable. Equally important, the permittees have failed to present any evidence to show that BMPs now used throughout California, as set forth in documents listed below are not consistent with MEP.

*The MRSWMP Must Satisfy the Well-Established MEP Standard in California and Focus on Attaining Water Quality Standards.*

What constitutes MEP is well-established and well-defined in California through the development of municipal stormwater permits for larger municipal stormwater systems—which include numerous smaller cities. In particular, the Los Angeles and San Diego County storm water permits and accompanying documents—established in 2001—provide several BMPs and programs that satisfy the MEP standard.<sup>2</sup> Importantly, the California Court of Appeal recently

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<sup>2</sup> California Regional Water Quality Control Board San Diego Region, Order No. 2001-01, NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, and the San Diego Unified Port District (San Diego Municipal Storm Water Permit); California Regional Water Quality Control Board Los Angeles Region, Order No. 01-182, NPDES No. CAS004001, Waste Discharge Requirements for Municipal Storm Water Runoff Discharges within the County of Los Angeles (December 13, 2001) (Los Angeles Municipal Stormwater Permit); California Regional Water

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upheld the 2001 San Diego Permit in *Building Industry Association v. State Water Resources Control Board* (Dec. 7, 2004.) – Cal. App. 4th – . A copy of the appellate court decision is attached to this letter. The San Diego Permit with its detailed programs and BMPs—regulating smaller cities within San Diego County—is a clear marker of what, at a minimum, constitutes MEP. In this connection, the *Building Industry Association* decision also explains that the MEP standard is not the sole standard that applies to municipal storm water permits. The decision states:

This legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act.

(*Id.* at 24.) Hence, the focus of the Clean Water Act for municipal storm water permits is on attaining water quality standards, regardless of whether the municipality is a Phase I entity or a Phase II entity. This focus is demonstrated in the General Permit through its requirements to protect water quality, discharge prohibitions, and receiving water limitations provisions requiring compliance with water quality standards. Despite these clear directives, the MRSWMP fails to design its BMPs and programs to either ensure the protection of water quality or meet the MEP standard.

In comparison, many smaller cities operating under Phase I permits throughout California are implementing BMPs that have been proven to be effective and feasible, as discussed in detail in our April 16, 2004 letter, for example: Alameda (Region 2), Camarillo (Region 4), Banning (Region 7), Beaumont (Region 8), and Lynwood (Region 9).<sup>3</sup> The fact that these areas have

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Quality Control Board Santa Ana Region, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements, NPDES No. CAS618036, Order No. R8-2002-0012, for the San Bernardino County Flood Control District, the County of San Bernardino, and the Incorporated Cities of San Bernardino County within the Santa Ana Region, Area-Wide Urban Storm Water Runoff (San Bernardino County Municipal NPDES Storm Water Permit).

<sup>3</sup> Compare Monterey County population 401,762, City of Monterey population 29,674, Pacific Grove population 15,522, Marina population 25,101, Seaside population 31,696 to Camarillo population 57,077, Banning population 23,562, Beaumont population 11,384.  
[http://factfinder.census.gov/servlet/SAFFacts?\\_event=Search&geo\\_id=01000US&geoContext=&street=&county=monterey&cityTown=&state=&zip=&lang=en&sse=on;](http://factfinder.census.gov/servlet/SAFFacts?_event=Search&geo_id=01000US&geoContext=&street=&county=monterey&cityTown=&state=&zip=&lang=en&sse=on;)  
[http://factfinder.census.gov/servlet/SAFFacts?\\_event=ChangeGeoContext&geo\\_id=16000US0648872&geoContext=01000US%7C04000US06%7C05000US06053&street=&county=&cityTown=monterey&state=04000US06&zip=&lang=en&sse=on;](http://factfinder.census.gov/servlet/SAFFacts?_event=ChangeGeoContext&geo_id=16000US0648872&geoContext=01000US%7C04000US06%7C05000US06053&street=&county=&cityTown=monterey&state=04000US06&zip=&lang=en&sse=on;)

been operating under Phase I permitting rules demonstrates that small cities are no less able to implement strong programs. There is no logical or legal reason why Beaumont, a Phase I city with a population of just over 11,000, should be held to a stricter standard than the participating entities, several of which have populations twice or three times its size. Additionally, the Monterey Region has a projected 20.7 percent growth rate in this decade, which is similar to Phase I cities.<sup>4</sup> In this connection, the economies of the Monterey Region parallel or surpass the economies of some Phase I cities.<sup>5</sup> Notably, the rapidly growing tourist industry for the Monterey Region is the eleventh largest in the State.<sup>6</sup> These comparable population and

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[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=Search&geo\\_id=16000US0648872&\\_geoContext=01000US%7C04000US06%7C16000US0648872&\\_street=&\\_county=&\\_cityTown=pacific+grove&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0648872&_geoContext=01000US%7C04000US06%7C16000US0648872&_street=&_county=&_cityTown=pacific+grove&_state=04000US06&_zip=&_lang=en&_sse=on);

[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=ChangeGeoContext&geo\\_id=16000US0645778&\\_geoContext=01000US%7C04000US06%7C16000US0654848&\\_street=&\\_county=&\\_cityTown=marina&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=ChangeGeoContext&geo_id=16000US0645778&_geoContext=01000US%7C04000US06%7C16000US0654848&_street=&_county=&_cityTown=marina&_state=04000US06&_zip=&_lang=en&_sse=on);

[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=Search&geo\\_id=16000US0645778&\\_geoContext=01000US%7C04000US06%7C16000US0645778&\\_street=&\\_county=&\\_cityTown=seaside&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0645778&_geoContext=01000US%7C04000US06%7C16000US0645778&_street=&_county=&_cityTown=seaside&_state=04000US06&_zip=&_lang=en&_sse=on);

[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=Search&geo\\_id=16000US0670742&\\_geoContext=01000US%7C04000US06%7C16000US0670742&\\_street=&\\_county=&\\_cityTown=camarillo&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0670742&_geoContext=01000US%7C04000US06%7C16000US0670742&_street=&_county=&_cityTown=camarillo&_state=04000US06&_zip=&_lang=en&_sse=on);

[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=Search&geo\\_id=16000US0610046&\\_geoContext=01000US%7C04000US06%7C16000US0610046&\\_street=&\\_county=&\\_cityTown=beaumont&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0610046&_geoContext=01000US%7C04000US06%7C16000US0610046&_street=&_county=&_cityTown=beaumont&_state=04000US06&_zip=&_lang=en&_sse=on);

[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=Search&geo\\_id=16000US0603820&\\_geoContext=01000US%7C04000US06%7C16000US0603820&\\_street=&\\_county=&\\_cityTown=beaumont&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0603820&_geoContext=01000US%7C04000US06%7C16000US0603820&_street=&_county=&_cityTown=beaumont&_state=04000US06&_zip=&_lang=en&_sse=on);

[http://factfinder.census.gov/servlet/SAFFFacts?\\_event=Search&geo\\_id=01000US&\\_geoContext=&\\_street=&\\_county=&\\_cityTown=beaumont&\\_state=04000US06&\\_zip=&\\_lang=en&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=01000US&_geoContext=&_street=&_county=&_cityTown=beaumont&_state=04000US06&_zip=&_lang=en&_sse=on).

<sup>4</sup> California Institute of Governments Projected Growth Rate for Monterey County. [http://www.cicg.org/publications/profiles/monterey\\_county.pdf](http://www.cicg.org/publications/profiles/monterey_county.pdf).

<sup>5</sup> Compare Monterey County 2002-2003 budget of \$572,148,911, City of Monterey 2003-2004 budget of \$41,919,878, Seaside 2003-2004 budget of \$25,825,128 to City of Alameda 2003 budget of \$35,540,000, Camarillo 2003 budget of \$36,339,495. <http://www.co.monterey.ca.us/budget.htm>; <http://www.monterey.org/budget/gfrev.html>; <http://www.ci.seaside.ca.us/budget/budget03-04.pdf>; <http://www.ci.alameda.ca.us/gov/pdf/cafr2003.pdf>; <http://www.ci.camarillo.ca.us/pdfdocs/CAFR.pdf>.

<sup>6</sup> Monterey County Convention & Visitors Bureau, <http://media.monterey.wego.net/?p=8464>.

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economic statistics support the need for stronger stormwater controls and measures in the MRSWMP.

In addition to these permits, other model documents have long existed that describe the effectiveness of BMPs for each minimum control measure. As discussed in our April 15, 2004 letter and submitted along with that letter, such documents are:

- United States Environmental Protection Agency, Environmental Management System, *available at* [www.epa.gov/performancetrack/program/ems.htm](http://www.epa.gov/performancetrack/program/ems.htm).
- United States Environmental Protection Agency, National Menu of Best Management Practices for Stormwater Phase II.
- United States Environmental Protection Agency, Storm Water Phase II Final Rule: Public Education and Outreach Minimum Control Measure, EPA Publication No. 833-F00-005 (January 2000), *available at* <http://www.epa.gov/npdes/pubs/fact2-3.pdf>.
- United States Environmental Protection Agency, Measurable Goals Guidance for Phase II Small MS4s (*available at* [www.epa.gov/npdes/pubs/measurablegoals.pdf](http://www.epa.gov/npdes/pubs/measurablegoals.pdf))

In addition to these EPA documents, the following reference materials exist for BMPs and programs for each control measure:

- City of Monterey, et al., Model Urban Runoff Program: A How-To Guide for Developing Urban Runoff Programs for Small Municipalities (Feb. 2002), <http://www.swrcb.ca.gov/stormwtr/murp.html>.
- California Handbooks (<http://www.cabmphandbooks.com/>)  
*Stormwater Best Management Practice (BMP) Handbooks*  
The California Stormwater Best Management Practice Handbooks have provided excellent guidance to the stormwater community since their publication by the Stormwater Quality Task Force (SWQTF) in 1993. The SWQTF became the California Stormwater Quality Association (CASQA) in 2002 and in 2003 CASQA published an updated and expanded set of four BMP Handbooks. These Handbooks reflect the current practices, standards, and significant amount of knowledge gained since the early 90s about the effectiveness of BMPs. These specific manuals focus on: New Development and Redevelopment; Construction; Industrial and Commercial; Municipal Programs
- Los Angeles County ([http://ladpw.org/wmd/NPDES/table\\_contents.cfm](http://ladpw.org/wmd/NPDES/table_contents.cfm))  
*Development Planning for Storm Water Management*

A Manual for the Standard Urban Stormwater Mitigation Plan (SUSMP) September 2002  
Revision

- Los Angeles County ([http://ladpw.org/wmd/NPDES/planning\\_TC.cfm](http://ladpw.org/wmd/NPDES/planning_TC.cfm))  
*Development Planning for Storm Water Management*  
This document focuses on: Development Planning; Developer Information Program; Recommended BMPs for Site Planning, Post-Construction, and Redevelopment/Infill; BMP Selection Criteria; Standard Urban Storm Water Mitigation Plan; Guidelines for General Plan Modification; Storm Water Quality Management Program, Developer Information for Project; Developer Information for Project Planning and Design; Developer Information for Project Construction
- Washington State  
*Stormwater Management Manual for Western Washington* (revised 2001)  
(<http://www.ecy.wa.gov/programs/wq/stormwater/manual.html>)
- State of New Jersey ([http://www.njstormwater.org/bmp\\_manual2.htm](http://www.njstormwater.org/bmp_manual2.htm))
  - *New Jersey Stormwater Best Management Practices Manual (BMP manual)*  
The BMP manual is developed to provide guidance to address the standards in the proposed Stormwater Management Rules, N.J.A.C. 7:8. The BMP manual provides examples of ways to meet the standards contained in the rule.
  - Technical information regarding updates of the New Jersey Stormwater Best Management Practices Manual will be available at [www.njstormwater.org](http://www.njstormwater.org).
  - These documents focus on: Impacts of Development on Runoff discusses the impact of development on the quality and quantity of stormwater runoff; Low Impact Development Techniques provides information how to use structural and nonstructural to provide lower impact development; Regional and Municipal Stormwater Management Plans presents guidance on the development of regional and municipal stormwater management plans; Stormwater Pollutant Removal Criteria provides guidance on how to meet the water quality performance standards; Computing Stormwater Runoff Rates and Volumes presents the mathematical methods for the stormwater runoff rates, volumes, and the stormwater quality and quantity design storms; Groundwater Recharge discusses the groundwater recharge methodology, the groundwater recharge design storm, and the details of the New Jersey Groundwater Recharge Spreadsheet (NJGRS); Landscaping provides information on vegetation and landscaping for stormwater management measures; Maintenance and Retrofit of Stormwater Management Measures provides information to be included and considered in a maintenance plan, and discusses retrofit of stormwater management facilities; Structural Stormwater Management Measures



- Prince Georges County, MD Low Impact Development Manual (<http://www.epa.gov/owow/nps/lid/lidnatl.pdf>).  
*Low-Impact Development Design Strategies: An Integrated Design Approach* (1999)
- Puget Sound Action Team Low Impact Development Manual ([http://www.psat.wa.gov/Publications/LID\\_tech\\_manual05/lid\\_index.htm](http://www.psat.wa.gov/Publications/LID_tech_manual05/lid_index.htm))  
*Low Impact Development Technical Guidance Manual for Puget Sound* January 2005

Since these proven BMPs exist there is no reason for the Monterey Region to “recreate the wheel” or fail to meet the unified water quality regulatory program in California. “The Porter-Cologne Water Quality Control Act (Wat.Code § 13000 et seq.; hereafter the Porter-Cologne Act) establishes a coordinated state-wide program of water quality control overseen by the State Board and administered by nine regional boards.” *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 964. “The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state.” Water Code 13001.

In this connection, these proven BMPs are used throughout California and the country as well as recommended by EPA as evidenced in the several attachments to our April 16, 2004 letter and above referenced documents. The MRSWMP could easily adapt any of these series of BMPs in the programs. Yet given the existence of these proven BMPs, it is unclear why the BMPs in the MRSWMP are impermissibly vague and remain “a program to create a program.” The MRSWMP seems to ignore the existence of these model programs and existing permits entirely by proposing programs that are incomplete, poorly defined, and accomplish little toward the stated goal of effectively controlling polluted storm water runoff.

For example in the Post-Construction Program, a key BMP merely states “Develop post-construction BMP policies and procedure guidance document.” (MRSWMP Table 4.1 at 25.) Why is the BMP so broadly framed, instead of specifically listing detailed program requirements? Moreover, why do the deadlines for BMPs that are “a program to create a program” extend over a year or longer when model programs and proven BMPs already exist? Because the BMPs are not defined or substantive, they cannot meet the MEP standard. Equally important, it is impossible to assess if the MRSWMP will meet its fundamental purpose of protecting water quality. Therefore, the Regional Board cannot approve the MRSWMP because doing so would be arbitrary and capricious, an abuse of discretion, and otherwise contrary to law.

#### *The Measurable Goals Are Inadequate.*

The measurable goals remain inadequate because they are one-dimensional in that they only provide a target date for completion of the BMP, rather than a meaningful method of

assessing the progress of program implementation and performance of BMPs. As discussed in our April 16, 2004 letter, according to EPA's Measurable Goals Guidance:

Measurable goals are described in the Phase II rule as BMP design objectives or goals that quantify the progress of program implementation and the performance of your BMPs. They are objective markers or milestones that you (and the permitting authority) will use to track the progress and effectiveness of your BMPs in reducing pollutants to the MEP. EPA recommends that you develop a program with a variety of short- and long-term goals. At a minimum, your measurable goals should contain descriptions of actions you will take to implement each BMP, what you anticipate to be achieved by each goal, and the frequency and dates for such actions to be taken.<sup>7</sup>

The measurable goals are in keeping with the overall ineffective and illegal approach of the MRSWMP: the participating entities appear to view the General Permit requirements as a list of things to do and the MRSWMP as a promise to do them. Instead, the storm water management program requirement mandates require participating entities to develop a program that is specific to them—not just a plan to create the program. In this regard, the measurable goals must be specific and detailed milestones toward completion of the goals of the program and of each minimum control measure. Without these, it is impossible to determine whether the program will succeed.

In addition to these inadequacies, we note that the measurable goals have been made less specific. The current draft has entirely eliminated the few specific monthly deadlines that existed for the BMPs—even though those BMPs are vague. Thus, in addition to modifying the BMPs to be specific target dates must be added to the MRSWMP.

*The Implementation of MRSWMP Is Unclear.*

The list of BMPs indicates that the “Implementers” of the programs are the “MRSWMP Group” or “MS4 administration”. (MRSWMP Table 4-1 at 16.) However, it is unclear who these implementers and what their responsibilities are in implementing the MRSWMP. Equally important, if the concept of these groups is that they represent all permittees, then how will compliance be measured for each permittee? What assurance is there that each entity will properly implement the programs given the generality and vagueness of the programs? The Clean Water Act as well as the General Permit require that “*The Permittee shall maintain, implement, and enforce an effective SWMP.*” (General Permit at 8 (emphasis added).) Thus, each permittee under the MRSWMP must meet this obligation.

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<sup>7</sup> United States Environmental Protection Agency, Measurable Goals Guidance for Phase II Small MS4s (available at [www.epa.gov/npdes/pubs/measurablegoals.pdf](http://www.epa.gov/npdes/pubs/measurablegoals.pdf)) at 8.

As a result of the lack of specificity in each program requirement, the implementation as well as the target dates will vary widely. For instance, under the Illicit Discharge & Detection program, the MRSWMP lists “Adopt an ordinance with standards for storm water pollution prevention” with the corresponding implementation plan as “The intention to develop a single template ordinance.” However, what is the assurance that the permittees will actually adopt the template ordinance? What is the assurance that the template ordinances will not be significantly modified prior to adoption in such a manner that they are ultimately ineffective? In addition, given that the target dates are actually target years, the permittees will implement the BMPs at different times during the year. This could result in an unworkable situation and ultimately lead to delays in implementation of the MRSWMP. Having the permittees work together to implement the MRSWMP can be an efficient and effective method to control polluted storm water runoff. However, the general nature of the BMPs defeats this efficiency and effectiveness. As with many aspects of the MRSWMP, this element precludes any reasonable conclusion that this storm water management program will be consistent with the General Permit and related authorities.

*Attachment 4 – Receiving Water Limitations and Design Standards—Applies to all Permittees.*

The requirements of Attachment 4—Receiving Water Limitations and Design Standards—must apply equally to all municipalities regulated by the MRSWMP, as stated in our April 16, 2004 letter. With respect to the Receiving Water Limitations provision, the main section of the General Permit requires that for the SWMP:

The Permittee shall maintain, implement, and enforce an effective SWMP, and develop adequate legal authority to implement and enforce the SWMP, designed to reduce the discharge of pollutants from the permitted MS4 to MEP and *to protect water quality.*”

(General Permit at 8 (emphasis added).) In Attachment 4, the General Permit sets forth the specific Receiving Water Limitations language and corresponding iterative process:

Discharges shall not cause or contribute to an exceedance of *water quality standards* contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable RWQCB Basin Plan.

(General Permit, Attachment 4 at 1 (emphasis added).) Given the focus on protecting water quality as indicated in the General Permit and as supported by the California Court of Appeal in the *Building Industry Association* case which specifically supports the State Board’s determination that that Phase II MS4 program will attain applicable water quality standards, there is no significant distinction in SWMP implementation for those entities identified under Attachment 4 and those that are not. In either case, there is no consideration in the MRSWMP whatsoever regarding how the program, when implemented, will assure that discharges do not

cause or contribute to a violation of an applicable water quality standard. Critically, if the Receiving Water Limitations provision does not apply all permittees, including the iterative process, then how does the Regional Board plan to correct exceedances of water quality standards, *i.e.* when BMP implementation does not protect water quality?

With respect to Design Standards, it is entirely unclear how the MRSWMP addresses the Design Standards requirements. Attachment 4 is referenced in Table 4-1 under the Construction Site Storm Water Runoff Control programs by vaguely stating “For MS4 urban areas meeting the Phase II Permit Attachment 4 criteria, their final adopted ordinance will have to meet subject criteria.” (MRSWMP Table 4.1 at 18.) There is no other reference to Attachment 4 under the Post-Construction Storm Water Management Program. In fact, as currently stated it seems that the permittees have implicitly accepted that the Design Standards requirements in Attachment 4 apply to all permittees. The MRSWMP states “Develop post-construction BMP policies and procedures guidance document” and lists “the MRSWMP Group” as the “Implementers.” Putting aside that these terms are vague, it seems to accept that all permittees will implement the post-construction BMPs, including those in Attachment 4. We support this approach and request that the MRSWMP clarify that Attachment 4’s Design Standards requirements applies to all permittees.

However, if the alternative is true, we reassert our position that Attachment 4’s Design Standards requirement must apply to all permittees as stated in our April 16, 2004 letter. The very existence of a Monterey Regional Water Pollution Control Agency demonstrates that the relevant MS4 (the “system of conveyances”) that transports storm water in the area is unitary and serves more than 50,000 people. Moreover, from a policy perspective, if the participating entities wish to take advantage of the convenience of the exercising the joint application option, and to capitalize of the existence of resources of co-permittees in this process—as they admit throughout the MRSWMP—they must be prepared to fulfill, in the aggregate, the requirements of a single permittee in their position. In this connection, it makes no sense to have different development requirements in a single region given the relatively uniform land use practices—as admitted in the MRSWMP—and identical storm water impacts.

Importantly, the recently issued proposed cease and desist orders for Pacific Grove, Monterey, Pebble Beach, Carmel by the Sea, and the County of Monterey requires the development of a Design Standards Plan in conjunction with the MRSWMP.<sup>8</sup> In addition, the Regional Board’s July 21, 2004 letter clarifies that Prunedale, Castroville and Sand City are subject to the Attachment 4 requirements. That leaves Marina as the only municipality exempt from the Design Standards Requirement. However, it is unclear how the Design Standards Plan,

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<sup>8</sup> Reference to the cease and desist orders does not connote approval of these orders. As discussed below, we object to the exception to the ASBS discharge prohibition as proposed in the cease and desist orders. We only reference the orders’ proposal to require design standards implementation in discussing the MRSWMP approach to design standards.

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also known as Standard Urban Stormwater Management Plans (SUSMPs), will be developed. How will the directives in the cease and desist orders be integrated with the MRSWMP? Will the municipalities under the cease and desist order prepare a separate plan from the three municipalities identified in the July 21, 2004 letter? Will Marina remain the sole city in the group exempt from the Design Standards requirements?

Finally in this connection, these Design Standards requirements have been proven to satisfy the MEP standard, as determined by courts, the State Board, and regional boards. The recent cease and desist orders underscore the fact the these Design Standards requirement constitute MEP for Phase II entities in the Monterey Region by requiring them and discussing State Board Order WQ 2000-11. (Proposed Cease and Desist Orders issued Dec. 22, 2004.) In fact, these Design Standards Plans already exist for regions in California, such as Los Angeles and San Diego (attached to NRDC April 16, 2004 letter.) Hence, there is no reason that the MRSWMP does not include such a plan considering that already existing plans could be modified easily.

*The MRSWMP's Approach to Areas of Special Biological Significance Is Unacceptable.*

With respect to discharges to Areas of Special Biological Significant (ASBS), the MRSWMP vaguely states that "The Permittees that have discharges into ASBS will work with the SWRCB and RWQCB 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." (MRSWMP at 3.5.) This approach to ASBS discharge prohibition is unacceptable. It is illegal to have the MRSWMP implement an exception to such an important statewide prohibition when the purpose of the storm water management program is to effectively control storm water runoff through implementation of the General Permit, as stated in the General Permit. Extraordinary exceptions of this type cannot be proposed in storm water management program unless they are explicitly authorized under the issuing permit. The General Permit contains no such exception.<sup>9</sup>

The MRSWMP must fully address this issue, by, *inter alia*, discussing which exact ASBS they are discharging into. Critically, we object further to the exception because the permittees have not even explained why an extraordinary exception of this kind should be granted to them. Further, the permittees have not even discussed any parameters for the exception in the MRSWMP—which is integral for their NPDES permit application. For example, do the permittees expect the exception to apply into perpetuity considering that they have not identified a duration period? In addition, what do the permittees propose in the interim? Such a

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<sup>9</sup> We note that cease and desist orders have been issued for some of the cities discharging into ASBS by the Regional Board. We object to the proposed exception in the cease and desist orders because they are unjustified and fail to meet requirements for allowing such extraordinary exceptions.

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lackadaisical approach to a 1983 state-wide prohibition contravenes the purpose and intent of having the prohibition and fundamentally has no place in the MRSWMP. In sum, *the MRSWMP must assure compliance with the discharge prohibition.*

### **Comments on Six Minimum Control Measures**

We incorporate our detailed comments in our April 16, 2004 letter as well as those of Dr. Richard Horner for each control measure. We do not take on the duty of the permittees of proposing full programs that are adequately designed to effectively control polluted storm water runoff. Instead, we refer to several permits and guidance documents identified above, and specifically refer to the San Diego and Los Angeles municipal storm permits as examples of complete programs. We also address each program below.

#### *The Public Education and Outreach Program Fails to Meet the MEP Standard.*

While the Public Education and Outreach program addresses some of our earlier comments by expanding the single BMP, the program fails to meet the majority of our comments and still fails to be sufficient to meet the MEP standard. The single BMP remains too vague and general. Although the program contemplates the development of plans, the plans are not actualized and do not include meaningful target dates for assessment. In addition, the audience range remains too broad. Further, although some pollutants of concern are now identified, bacterial and pathogen sources are not adequately accounted for, such as septic tanks. The number of media exposures, radio, TV, advertisements and number of people reached remains undefined and unclear. Finally, although some educational materials have been identified, the details on how it will be effectively distributed are unclear. As stated in our previous letter, these are only some ways for improving the MRSWMP and these comments do not function as an exhaustive list of assuring that the MRSWMP will be effective or satisfy the MEP standard.

#### *The Public Participation Program Fails to Meet the MEP Standard.*

First, the BMP intent for the Public Participation program is too narrow. The BMP intent focuses on “what constitutes poor stewardship.” A Public Participation program does more than “increase public awareness on what constitutes poor stewardship of storm water as a resources.” (MRSWMP Table 4-1 at 4.) The Public Participation program must also focus on improving water quality with public participation and informing the public of what it can do to improve and protect water quality, instead of simply telling them what they should not do to worsen water quality.

Second, as discussed in our April 16, 2004 letter, the description of the various programs, such as stream clean up, monitoring, adopt a stream, etc., is helpful for identifying which programs exist, however, the details as to which programs will actually be implemented is vague. For instance, how many storm drains will be marked and by what date? Is there dry weather

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monitoring in addition to wet weather (first flush) monitoring? Further, the program with respect to the meetings with communities of concern is unclear. Which communities are targeted? The details for the chart in Appendix F-6 are missing this key information. These comments respond to the modification made to the MRSWMP and again are only some examples for improving the program, not a finite list for ensuring an adequate program.

*The Illicit Discharge, Detection and Elimination Program Fails to Meet the MEP Standard.*

The modification creating a hotline, determining mapping, and authorizing inspections are an improvement to the previous draft of the MRSWMP. However, the details for the inspection guidance, for example, are missing. Which businesses will be inspected and when? Further, why will it take two years to put together an inspection guidance when inspections have been a long standing requirement for storm water management programs? Additionally, while the focus of pollutants from RVs is good, the MRSWMP fails to address inspections of other sources. In addition, the MRSWMP proposes to “create a unified place for public to call in potential illicit discharges.” However, there is no indication of a proper or uniform response to these calls.

The program also fails to address any of our earlier comments as stated in our April 16, 2004 letter with respect to code modifications to septic tanks, plumber reporting requirements, specifics on clean up of illicit discharges, specifics advertising goals, and a comprehensive education program. Even though the MRSWMP states that details about illicit discharges and the education program are provided at 1-1 of Appendix E. Appendix E contains no such details on illicit discharges.

*The Construction Runoff, Post-Construction Runoff, and Pollution Prevention/Good Housekeeping for Municipal Operations Programs Are Impermissibly Vague.*

The Construction Runoff, Post-Construction Runoff, and Pollution Prevention/Good housekeeping for Municipal Operations programs are no more than a blatant “plan to create a plan.” These programs fall significantly short of the MEP standard as well as fail to provide any assurance that water quality standards will be met to protect water quality. As such, we specifically incorporate by reference our April 16, 2004 comments and Dr. Richard Horner’s comments on these programs. Again, it is difficult to understand how the Regional Board can excuse the MRSWMP’s failure to propose any actual program for three critical programs for effective storm water management, especially when dozens of model programs already exist.

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By failing to create specific BMPs, programs, and measurable goals, the participating entities fail to comply with the federally-mandated MEP standard. In addition, they have forfeited an opportunity to develop a well-tailored storm water management program that will ensure the efficient reduction of storm water pollution in these communities in a manner consistent with applicable discharge prohibitions and receiving water limitations. The MRSWMP cannot be approved in its current form and must be modified to contain specific program elements that meet with the requirements of the General Permit and federal law.

Thank you for the opportunity to review and provide comments on the MRSWMP. Please feel free to contact us if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. Beckman".

David S. Beckman, Senior Attorney  
Anjali I. Jaiswal, Project Attorney